HOMOSEXUALITY AND DEATH: A LEGAL ANALYSIS OF UGANDA’S PROPOSED ANTI-HOMOSEXUALITY BILL

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Allowing gays and lesbians to be alive in our lifetime in Uganda will not happen. I would personally pray, that the law should allow certain people to apply to be hanged men.

—Otto Odonga1

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I. Introduction

Laws penalizing physical expressions of homosexuality\(^2\) have long existed in the customary law of nations.\(^3\) A cursory historical survey readily reveals that homosexual acts have generally been viewed with great disdain by societies.\(^4\) This disdain has almost ubiquitously been codified into anti-sodomy\(^5\) laws that expressly condemn and punish homosexual behavior.\(^6\) Barring a few notable exceptions, such as Ancient Rome and Greece,\(^7\) prohibitions on sexual relations between members of the same sex can be found in the laws of many civilizations.

\(^2\) The term “homosexuality” is relatively new in the European tradition. It was first coined in 1869 by Karl Maria Kertbeny in an open letter to the then German minister of justice, inquiring whether to retain the section of the Prussian criminal code which made sexual contact between males illegal. Karl was one of several writers during this epoch to develop the radically new concept of “sexual orientation,” or the idea that some individuals’ sexual attractions for persons of the same sex were an inherent and immutable aspect of their personality. See Francis Mondimore, A Natural History of Homosexuality 3-33 (John Hopkins University Press, 1996).

\(^3\) See generally, Peter Stearns, Sexuality in World History (Taylor & Francis, Routledge 2009).

\(^4\) Id.

\(^5\) The term “sodomy” derives from the name of one of the two cities destroyed by the God of the Old Testament, Sodom and Gomorrah. Early uses of the term “sodomy” included a plethora of sexual acts, and did not mean what is understood today as “homosexuality.” “Sodomy” in ancient writings referred to all sexual acts between heterosexuals that are non-procreative in nature (such as penile-oral contact and anal intercourse), all sexual acts between members of the same gender, masturbation, and intercourse with animals. Essentially, the term sodomy was used to portray any sexual behavior then viewed as “unnatural.” See A Natural History of Homosexuality, supra note 2, at 21-25.

\(^6\) Although the term sodomy, by its definition, includes certain sexual acts which heterosexuals and homosexuals alike can take part in, in recent times, the terms sodomy has come to be used in a more limited sense that includes only sexual acts between members of the same gender, and not identical acts between heterosexuals. In fact, sodomy is now colloquially synonymous with homosexual acts, and is most often intended to refer to male homosexual acts. This note uses the term sodomy in a restricted sense to refer only to private consensual homosexual acts between adult homosexual men or adult homosexual women.

\(^7\) Anti-sodomy laws in recent times are generally understood to proscribe all forms of sexual interaction between members of the same gender. Id.

\(^7\) Historians have identified the presence and acceptance of certain forms of sexual relationships between men in Ancient Rome and Greece. There is, however, some evidence of attempts to regulate same-sex sexual conduct. Most notably, in Ancient Rome, the Lex Scantinia law code prohibited sexual relationships among free-born men as well as among free-born women. Although some scholars view the Lex Scantinia as an attempt to suppress homosexuality, many historians view it as merely an attempt to prevent free-born individuals from engaging in the same-sex sexual practices that were only considered acceptable with slaves. Since this legal code only regulated sex among free-born males and females, many historians assume the view that these rules were more about codifying acceptable behavior within the free-born class than about the propriety of homosexuality itself. See Paul Veyne, Homosexuality in Ancient Rome, W. Sexuality: Practice and
over vast periods of time, including in the Ancient Laws of Moses (the Torah) and the Middle Assyrian Law Codes dating back to 1075 B.C. Moreover, anti-sodomy laws carried over to the English tradition beginning in 1533 when King Henry VIII codified contemporary church doctrine into a system of laws, which subsequently carried over to the colonies. As of this writing, anti-sodomy laws exist in seventy-six countries around the world.

Although anti-sodomy laws have been historically pervasive, modern times have brought about a shift in attitudes surrounding homosexuality. Many countries around the world have rethought, and subsequently eliminated, laws that proscribe homosexual acts between consenting adults. The Chinese Supreme Court, for instance, ruled in 1957 that consensual sexual relationships between same-gender adults cannot be criminalized. Moreover, a landmark U.S. Supreme Court decision, Lawrence v. Texas, expressly outlawed anti-sodomy laws by striking down a Texas state law that barred consenting adults from engaging in “deviant sexual intercourse” with members of the same sex. The Court held that such laws violate the privacy and liberty interests protected by the Fourteenth Amendment of the U.S. Constit-

\[\text{Precept in Past and Present Times, 25-35 (1985); see also A Natural History of Homosexuality, supra note 2, at 4-20.}\]

8. See Leviticus 18:22 (King James): “Thou shalt not lie with mankind, as with womankind: it is abomination.”; Leviticus 20:13 (King James): “If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death. Their blood shall be upon them.”; see also A Natural History of Homosexuality, supra note 2.


11. The change in attitudes toward homosexuality has led to the decriminalization of homosexual relations in many countries. However, a shift toward acceptance of homosexuality and subsequent removals of anti-sodomy laws has occurred mostly in the western world, with reform in European countries occurring earlier and more rapidly than in the United States. See Gilbert Herdt, From declassification to decriminalization: Where do we go from here? 1 Sexuality Res. & Soc. Pol'y 3, 78 (2004).

12. Although homosexual acts were not explicitly criminalized in China at the time of this ruling, the Chinese Supreme Court was clarifying its ruling in the previous year, in which it held that criminalization of nonconsensual homosexual acts is not unlawful. See Elaine Jeffreys, Sex and Sexuality in China 10-13 (2006).

13. 539 U.S. 558 (2003). Lawrence v. Texas overturned Bowers v Hardwick, 478 U.S. 186 (1986), a case that had 17 years earlier in which the U.S. Supreme Court held that anti-sodomy laws are permissible because the U.S. Constitution contains no explicit right to engage in homosexual sex.

stitution. Most recently, the High Court of Delhi in India struck down Section 377 of the Indian Penal Code, which criminalized consensual relations between same-sex adults. These salient examples suggest a cross-cultural move away from utilizing legal instruments to punish same-gender sex between consenting adults.

While many countries have set into motion counter-historical precedents by abolishing anti-sodomy laws, a small number of other countries have sought not only to solidify and defend existing anti-sodomy laws, but have endeavored to intensify sanctions for violations thereof. One recent and widely publicized example is the Republic of Uganda, one of the thirty-eight countries in Africa that currently maintains laws criminalizing consensual same-gender sex. On October 13, 2009, Ugandan Parliament Member David Bahati introduced a bill entitled the Anti-Homosexuality Bill of 2009, which seeks to intensify already-existing punishments for homosexual acts. Prior to the introduction of this bill, Ugandan law already forbade and imposed strict punishments for same-gender sex. Section 145 of the Uganda Penal


   A person commits the offence of homosexuality if –
   (a) he penetrates the anus or mouth of another person of the same sex with his penis or any other sexual contraption;
   (b) he or she uses any object or sexual contraption to penetrate or stimulate sexual organ of a person of the same sex;
   (c) he or she touches another person with the intention of committing the act of homosexuality.

   It is important to point out that this bill is uniquely different from the anti-sodomy laws that currently exist in Uganda. While existing anti-sodomy laws regulate a wide range of sexual behaviors, the Anti-Homosexuality Bill goes further by attempting to regulate sexual orientation. In other words, in addition to forbidding homosexual acts, the Anti-Homosexuality Bill seeks to suppress homosexuality itself. This distinction is elucidated by § 2(1)(c) of the bill, which criminalizes the mere intent to commit a homosexual act. Moreover, §13 of the Anti-Homosexuality Bill outlaws any attempt to disseminate information regarding homosexuality.

   Because the Anti-Homosexuality Bill assumes the novel approach of regulating sexual orientation in addition to sexual acts, it is perhaps more aptly described using the term anti-homosexuality law, as opposed to the more narrow term anti-sodomy law, which does not contemplate the regulation of sexual orientation. However, since this article focuses narrowly on the dimensions of the Anti-Homosexuality Bill that regulate sexual conduct, the categorical label anti-sodomy law is employed. Furthermore, legislative attempts to suppress homosexuality itself, and not merely homosexual conduct, are new and emerging occurrences in international law that is in need of further research and jurisprudential development.

18. Although Uganda currently maintains stern anti-sodomy laws, these laws are rarely enforced, if at all. This lack of enforcement leads many to believe that laws of this
Code Act assigns life imprisonment for anyone who “has carnal knowledge of any person against the order of nature.” Furthermore, Penal Code Sections 146 and 148 designates the commission of public or private acts of “gross indecency” as a felony, with a sentence of up to seven years imprisonment.

The proposed Anti-Homosexuality Bill of 2009, if passed, would resolve any ambiguities of the aforementioned Penal Code sections by using modern, unmistakable terms like “homosexuality” and “gay,” and would significantly increase penalties for homosexual acts. The bill would raise the penalty for consensual same-sex relations from seven years imprisonment to life imprisonment. Mostcontentously, the Anti-Homosexuality Bill prescribes the death penalty for a newly carved-out category of homosexual offense dubbed “aggravated homosexuality,” which includes, inter alia, “serial offender[s].” The Anti-

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nature are pursued for their symbolic significance, and exist primarily as a codification of the cultural denouncement of the practice of homosexuality. See Michael Hollander, Gay Rights in Uganda: Seeking to Overturn Uganda’s Anti-Sodomy Laws, 50 VA. J. INT’L L. 219, 222-224 (2009).

19. Penal Coce Act, (1998) ch. 120 § 145 (Uganda). Although the terms “sodomy” or “homosexuality” is not used in the language of this penal code, reference to acts “against the order of nature,” as discussed supra note 5, refers to sodomy. Moreover, in practice, these laws have been enforced almost exclusively against homosexuals since heterosexuals are presumed to not engage in acts defined as “sodomy.” See Lillian Tibatemwa-Ekirkubinza, Criminal Law in Uganda: Sexual Assaults and Offenses Against Morality 97-99 (2005).


21. Anti-Homosexuality Bill, supra note 17, § 2.1 states: “Defects in Existing Law: This proposed legislation is designed to fill the gaps in the provisions of other laws in Uganda e.g. the Penal Code Act Cap. 120. The Penal Code Act (Cap120) has no comprehensive provision catering for anti-homosexuality. It focuses on unnatural offences under section 145 and lacks provisions penalizing the procurement, promoting, disseminating literature and other pantographic materials concerning the offences of homosexuality. . .This legislation comes to complement and supplement the provisions of the Constitution of Uganda and the Penal Code Act Cap 120 by not only criminalizing same sex marriages but also same-sex sexual acts and other related acts.” See also id. § 1 (defining “homosexuality,” “gay,” “lesbian,” and “bisexual”).

22. Id. § 2(2).

23. Id. § 3 states:

(1) A person commits the offence of aggravated homosexuality where the –
(a) person against whom the offence is committed is below the age of 18 years;
(b) offender is a person living with HIV;
(c) offender is a parent or guardian of the person against whom the offence is committed;
(d) offender is a person in authority over the person against whom the offence is committed;
(e) victim of the offence is a person with disability;
(f) offender is a serial offender;
(g) offender applies, administers or causes to be used by any man or woman any drug, matter or thing with intent to stupefy or overpower him or her so as to
Homosexuality Bill defines a “serial offender” as “a person who has previous convictions of the offence of homosexuality or related offenses.”24 Although the bill’s definition of “aggravated homosexuality” includes the commission of homosexual acts in the context of pedophilia, incest, sexual coercion, HIV-positive status, and drug-assisted rape, this note focuses solely on the portion of the bill that classifies adults who repeatedly engage in consensual homosexual acts as “serial offender[s]” guilty of “aggravated homosexuality,” and thereby potentially subject to the death penalty.25 Addressing the disparate issues of pedophilia, incest, sexual coercion, engaging in sexual activity while HIV-positive, and drug-assisted rape is outside the scope of this note.

This essay endeavors to thoroughly analyze whether the Anti-Homosexuality Bill, in its present proposed form, can withstand legal scrutiny under Ugandan law and international and regional treaties to which Uganda is a signatory. The legality of the Anti-Homosexuality Bill is examined in two facets: as an anti-sodomy law that criminalizes consensual same-gender sex, and as a law that codifies the death penalty for the offense of aggravated homosexuality. First, the article considers whether the Ugandan Constitution permits the Anti-Homosexuality Bill’s prohibition of homosexual acts and prescription of the death penalty for violations thereof. Second, it examines whether the Anti-Homosexuality Bill can be deemed unlawful under applicable international and regional treaties if challenged on the basis of its status as an anti-sodomy law and its inclusion of the death penalty. The relevant provisions of the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR), the African Charter on Human and Peoples’ Rights (African Charter), and the African Charter on the Rights and Welfare of the Child (ACRWC) are considered to answer this inquiry.

II. HISTORY OF ANTI-SODOMY LAWS IN UGANDA

There exists some disagreement among historians over the origins of laws governing homosexual conduct in Uganda. Many scholars contend that the first Ugandan laws punishing homosexual acts were there by enable any person to have unlawful carnal connection with any person of the same sex.

(2) A person who commits the offence of aggravated homosexuality shall be liable on conviction to suffer death. (emphasis added) (alteration in original).

25. Supra note 23, § 3(1)(f) (alteration in original).
imposed by the British during their colonial rule of Uganda. In fact, adherents of this perspective posit that colonial legislators and jurists are to blame for the anti-sodomy laws of over half of the 76 countries world-wide that criminalize homosexuality.26

Colonial legislators and jurists introduced [laws regulating sexual conduct], with no debates or “cultural consultations,” to support colonial control. They believed laws could inculcate European morality into resistant masses. They brought in the legislation, in fact, because they thought “native” cultures did not punish “perverse” sex enough. The colonized needed compulsory re-education in sexual mores. Imperial rulers held that, as long as they sweltered through the promiscuous proximities of settler societies, “native” viciousness and “white” virtue had to be segregated: the latter praised and protected, the former policed and kept subjected.

[India’s colonial-imposed anti-sodomy law] was, and is, a model law in more ways than one. It was a colonial attempt to set standards of behavior, both to reform the colonized and to protect the colonizers against moral lapses. It was also the first colonial “sodomy law” integrated into a penal code—and it became a model anti-sodomy law for countries far beyond India, Malaysia, and Uganda. Its influence stretched across Asia, the Pacific islands, and Africa almost everywhere the British imperial flag flew.27

On the other hand, some maintain that anti-sodomy laws existed in Uganda in pre-colonial times. Oscar Kahike, the president of the Ugandan Law Society, has postulated that anti-sodomy laws have been around “for ages,” noting that homosexuality was punished by brutal penalties (including death by stoning or walking off a cliff) in many tribes before British colonial rule.28 Although disagreement remains over whether anti-sodomy laws in Uganda pre-date the colonial period, the facts that Britain infused its colonies with anti-sodomy laws and that British-imposed sodomy laws remain in Uganda’s Penal Code are uncontroverted.29

27. Id. (alteration in original).
29. Id.
III. Domestic Law

A. Ugandan Constitution

All laws passed in Uganda must comport with the provisions of the Ugandan Constitution. In terms of rhetoric, the Ugandan Constitution is robust in its protections of individual rights. It explicitly prohibits discrimination, provides for equal protection of the laws to every citizen, secures the freedom of expression and assembly, asserts a firm right to privacy, and protects against cruel or unusual punishment. What makes the Ugandan Constitution more textually progressive than most other nations is its literal incorporation of the relatively recent concept of human rights. Perhaps more astonishingly, Article 51 of the Ugandan Constitution established the Uganda Human Rights Commission (UHRC), an independent, quasi-judicial body whose sole directive is to monitor, promote, and report on human rights in Uganda. Despite these ostensibly strong constitutional protections of individual rights and the existence of a quasi-judicial human rights monitoring body, existing anti-sodomy laws have not been declared unconstitutional or violative of human rights by Uganda’s courts or the UHRC. Moreover, the proposed Anti-Homosexuality Bill of 2009 has not been directly addressed by the UHRC, although some media reports indicate that the UHRC is against the provision prescribing the death penalty for aggravated homosexuality, but supports the remainder of the proposed bill. Even if the UHRC eventually adopts a stance against the Anti-Homosexuality Bill in part or in whole, it is unlikely that the UHRC’s finding in this accord would be implemented, as noted by the United Nations (U.N.) Human Rights Committee.

30. Uganda Const. art. 2.
31. Id. arts. 21, 24, 29, 37.
33. See Uganda Const. art. 53 (outlining the quasi-judicial functions of the UHRC).
34. Id. art. 51.
36. See U.N. Human Rights Comm., Concluding Observations of the Human Rights Committee: Uganda, ¶ 2, U.N. Doc. CCPR/CO/80/UGA (May 4, 2004). The U.N. Human Rights Committee noted that, “while acknowledging the importance of the UHRC in the promotion and protection of human rights in Uganda, the Committee is concerned about recent attempts to undermine the independence of the [UHRC]. It is also concerned about the frequent lack of implementation by [Uganda] of the [UHRC’s] decisions concerning both [compensatory] awards [for] human rights violations and the prosecution of human rights
1. Anti-Sodomy Laws

As progressive as it is in its protection of individual rights, the Ugandan Constitution makes no express mention of homosexuality, or protections for gay, lesbian, bisexual, or transgendered (LGBT) individuals against discrimination. Article 21 provides the most acute and potent anti-discrimination language:

(1) All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.

(2) Without prejudice to clause (1) of this article, a person shall not be discriminated against on the ground of sex, race, color, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.

(3) For the purposes of this article, “discriminate” means to give different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, color, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.

This article is remarkable in that it codifies – in the highest law of the land - extensive protections against discrimination based on most classifications that have historically served as a basis for unequal treatment. For these expressly-protected groups, alleged discriminatory acts raise the question of whether the controverted acts qualify as “discrimination” as defined by Article 21(3), or fall within any exceptions enumerated in Articles 21(4)-(5). However, because sexual orientation is not explicitly written into the Anti-Discrimination

offenders in the limited number of cases in which the [UHRC] had recommended such prosecution.” Id. ¶ 7.

37. The acronym “LGBT” refers to lesbian, gay, bisexual, and transgendered individuals. It is commonly used mostly in western countries, and is often used in lieu of the terms ‘homosexual,’ ‘lesbian,’ and ‘gay’ due to the fact that the acronym is more inclusive and refers to the larger category of ‘sexual minorities.’

38. **Ugandan Const. Art. 21(1)-(3)**

39. **Ugandan Const. art. 21(4)-(5):**

(4) Nothing in this article shall prevent Parliament from enacting laws that are necessary for—

(a) implementing policies and programmes aimed at redressing social, economic, educational or other imbalance in society; or

(b) making such provision as is required or authorized to be made under this Constitution; or

(c) providing for any matter acceptable and demonstrably justified in a free and democratic society.

(5) Nothing shall be taken to be inconsistent with this article which is allowed to be done under any provision of this Constitution.
clause, the question for LGBT Ugandans instead becomes whether laws that allegedly discriminate on the basis of sexuality, like the Anti-Homosexuality Bill, are barred at all.

A recent case in Uganda provides some insight into the resolution of the latter question. In *Yvonne Oyoo and Juliet Mukasa v. the Attorney General*, the Uganda High Court held that a prominent lesbian activist’s right to privacy was violated by government officials’ unauthorized search of her home. In 2005, the home of Juliet Mukasa, president of an LGBT rights advocacy group called Sexual Minorities of Uganda (SMUG), was raided by government officials without a search warrant, allegedly because of her work promoting LGBT rights. The government officials seized numerous documents relating to SMUG’s advocacy operations. Mukasa subsequently filed a private civil suit against the Attorney General, contending that her right to privacy under Article 27 of the Ugandan Constitution was violated. The court held that the government officials’ actions did, in fact, constitute an invasion of privacy in contravention of Article 27 of the constitution, and ordered the government to pay damages to Mukasa. In reaching this decision, the court relied heavily on Article 1 of the Universal Declaration of Human Rights, which declares that “[a]ll human beings are born free and equal in dignity and rights.”

Assessing the effect of this ruling presents some difficulties. On one hand, it can be said that by applying the constitutional guarantee of privacy in a case brought by a high-profile lesbian and LGBT rights advocate, the court was in effect communicating that constitutional protections apply equally to individuals regardless of their sexual orientation. This is certainly the interpretation that has been disseminated by domestic human rights organizations. On the other hand, it can be said that the holding in this case is confined to the specific facts of the case, without broader implications, and merely represents an affirmation of the right to privacy under the Ugandan Constitution.

40. The term “sexual orientation” refers to one’s status as a heterosexual, homosexual, or bisexual individual. See supra note 2.
42. Id.
43. Id.
44. Id.
45. Id.
46. Id.

Even if the former interpretation of this holding is correct, collateral questions engendered by the application of this interpretation of the court’s ruling to anti-sodomy laws remain unaddressed. If Uganda’s constitutional protections apply equally to LGBT Ugandans, do anti-sodomy laws constitute an unconstitutional violation of Article 21’s anti-discrimination provisions or Article 29’s protection of freedom of conscience, expression, and association? Can anti-sodomy laws be adjudged violative of Article 27’s right to privacy? Would the Anti-Homosexuality Bill’s death penalty provision for aggravated homosexuality contravene Article 24’s protection against cruel and unusual punishment? Even assuming that this ruling stands for the principal that the Ugandan Constitution applies equally to LGBT Ugandans, it is still left up to speculation whether the acceptance of such a principal necessarily demands an invalidation of anti-sodomy laws like the Anti-Homosexuality Bill. Given these uncertainties, it cannot be affirmatively stated that the Anti-Homosexuality Bill would be deemed violative of the Ugandan Constitution if passed and subsequently challenged.

2. Death Penalty

The constitutionality of the death penalty in Uganda is worthy of appraisal at this point, since the Anti-Homosexuality Bill is distinct from the existing anti-sodomy laws in Uganda in that it would introduce the death penalty for the crime of aggregated homosexuality. The issue of whether or not the death penalty is constitutional in Uganda is a settled question, addressed directly by the Constitution itself and solidified by a subsequent Supreme Court decision upholding its constitutionality. Articles 22(1), 28(3)(e), and 121(5) of the Ugandan Constitution overtly provide for the death penalty, with some procedural safeguards.\(^{48}\) These provisions were recently challenged in the

\(^{48}\) **Uganda Const.** art. 22(1) states:

No person shall be deprived of life intentionally except in execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda and the conviction and sentence have been confirmed by the highest appellate court.

**Id.** art. 28(3)(e) states:

Every person who is charged with a criminal offence shall in the case of any offence which carries a sentence of death or imprisonment for life, be entitled to legal representation at the expense of the State

**Id.** art. 121(5) states:

Where a person is sentenced to death for an offence, a written report of the case from the trial judge or judges or person presiding over the court or tribunal, together with such other information derived from the record of the case or elsewhere as may be
Constitutional Court of Uganda as violations of Articles 24 and 44(a) of the Ugandan Constitution, which both provide for freedom from any form of “torture or cruel, inhumane or degrading treatment or punishment.” In Attorney General v. Susan Kigula and 417 Others (2009), the Uganda Supreme Court held – while recognizing the right to life as the most fundamental human right – that the death penalty does not violate any provision of the Ugandan Constitution or any applicable international treaties, and does not fall within the category of cruel and unusual punishment. As the Court pointedly concluded, “[Articles 22(1), 28(3)(e), and 121(5)] are deliberate provisions in the Constitution which can only point to the view that the framers of the Constitution purposefully provided for the death penalty.”

It is important to note that in the case above, the court was addressing a direct attack on the constitutional merits of the death penalty itself. The court did not decide when the death penalty was appropriate; it merely held, in the general sense, that the death sentence is permissible under the Ugandan Constitution. Although Uganda’s courts have not directly addressed the constitutionality of the death penalty as a punishment for acts of homosexuality, the general domestic affirmation of the death penalty negates the plausibility that the Anti-Homosexuality Bill could be challenged and subsequently struck down under the Ugandan Constitution on the grounds of its inclusion of the death penalty.


necessary, shall be submitted to the Advisory Committee on the Prerogative of Mercy.

49. Id. art. 24, 44(a).

50. Attorney General v. Susan Kigula and 417 Others, No. 03 of 2006, Uganda: Supreme Court, 21 January 2009, available at http://www.unhcr.org/reworld/docid/499a02c2.html (last visited Oct. 15, 2010). It is interesting to note that the Uganda Supreme Court relied, in part, on the U.S. Supreme Court’s holding in Gregg v. Georgia, 428 U.S. 153 (1976), that the death penalty is not per se cruel or unusual punishment as prohibited by the 8th Amendment of the U.S. Constitution, in justifying its identical conclusion that the death sentence does not violate the Ugandan Constitution’s prohibition of cruel or unusual punishment. Notwithstanding its ruling that the death penalty is constitutional, the Uganda Supreme Court held that the method of hanging is “cruel and unusual,” and therefore unconstitutional. The Court also held that mandatory death sentences – crimes for which the death penalty is automatically prescribed upon conviction – is violative of the Ugandan Constitution.

51. Id. at 25 (alteration in original).

IV. INTERNATIONAL LAW

Uganda is a party to numerous international and regional human rights treaties that provide a framework under which the legality of the proposed Anti-Homosexuality Bill can be assessed. Uganda ratified the U.N.’s International Covenant on Civil and Political Rights (ICCPR) in 1995 and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) in 1987, both of which went into effect in 1976.\(^{53}\) Furthermore, as a member of the African Union, Uganda is a signatory to the regional human rights treaty, the African Charter on Human and Peoples’ Rights (African Charter), which entered into force in 1986.\(^{54}\) All of these instruments seek to protect and advance human rights goals. Like the Ugandan Constitution, none of these treaties explicitly mention sexual orientation. Consequently, the question of whether the human rights protections contained within the aforementioned treaties apply to homosexuals does not yield an easily ascertainable answer. Nevertheless, decisions promulgated by the enforcement bodies of these treaties have provided some valuable insight into the resolution of this question. The following discussion examines the legality of the Anti-Homosexuality Bill under the most relevant provisions of each of the aforementioned treaties, first as applied to the bill as an anti-sodomy law, and then as applied to its prescription of the death penalty for aggravated homosexuality.

A. Anti-Sodomy Laws

1. International Covenant on Civil and Political Rights

The ICCPR is most germane to the discussion of the legality of the Anti-Homosexuality Bill under international legal frameworks, as it is the only treaty in which Uganda is a party that has been directly applied to sexual orientation. Two separate rulings by two U.N. human rights monitoring bodies – the U.N. Human Rights Committee and the U.N. Working Group on Arbitrary Detention – have found that discrimination against homosexuals constitutes a violation of the ICCPR’s provisions. The most relevant provisions of the ICCPR, and those


which were deemed applicable to sexual orientation by these U.N.
human rights monitoring bodies, are Articles 2(1), 17, and 26.

Article 2(1) sets forth the ICCPR’s policy of non-discrimination,
mandating that all rights conferred upon individuals by its terms be
applied “without distinction of any kind, such as race, color, sex,
language, religion, political or other opinion, national or social origin,
property, birth or other status.” Article 17 codifies the individual
right to privacy, guaranteeing the right to be free from “arbitrary or
unlawful interference[s] with [one’s] privacy, family, home or corre-
spondence.” Furthermore, Article 26 of the ICCPR guarantees “equal
and effective” protection of the laws to all persons, and reiterates the
prohibition of selective application of the ICCPR’s protections based on
any of the classifications delineated in Article 2(1). As is apparent
from the literal text of these provisions granting the right to be free of
discrimination, the right to privacy, and the right to equal protection of
the law, sexual orientation is not included among the enumeration of
protected classifications.

However, in the landmark case of Toonen v. Australia, the
U.N. Human Rights Committee (“Committee”) held that the term “sex”
in Article 2(1)’s anti-discrimination provision encompasses sexual ori-
entation. In this case, Nicholas Toonen, an Australian citizen

55. ICCPR, supra note 53, art. 2(1) states:
Each State Party to the present Covenant undertakes to respect and to ensure to all
individuals within its territory and subject to its jurisdiction the rights recognized in
the present Covenant, without distinction of any kind, such as race, color, sex,
language, religion, political or other opinion, national or social origin, property, birth
or other status.

56. Id. art. 17 states:
1. No one shall be subjected to arbitrary or unlawful interference with his privacy,
family, home or correspondence, nor to unlawful attacks on his honor and
reputation.
2. Everyone has the right to the protection of the law against such interference or
attacks.

57. Id. art. 26 states:
All persons are equal before the law and are entitled without any discrimination to
the equal protection of the law. In this respect, the law shall prohibit any
discrimination and guarantee to all persons equal and effective protection against
discrimination on any ground such as race, color, sex, language, religion, political or
other opinion, national or social origin, property, birth or other status.

58. See ICCPR, supra note 55.
59. See ICCPR, supra note 56 (alteration in original).
60. See ICCPR, supra note 53.
b8d2.html [hereinafter Toonen].
62. Id. ¶ 8.7.
residing in Tasmania and a prominent member of the Tasmanian Gay Law Reform Group, challenged sections 122(a), 122(c), and 123 of the Tasmanian Criminal Code, which criminalized private, consensual sexual interactions between males. Toonen averred that these anti-sodomy laws violate the right to privacy granted by Article 17 of the ICCPR, since they empower Tasmanian police officers to enter one’s household upon the mere suspicion that two adult men may be engaging in same-gender sexual acts. Toonen further contended that Tasmania’s anti-sodomy laws permit this violation of privacy on a discriminatory basis prohibited by Article 2(1)’s anti-discrimination provision and Article 26’s right to equal protection of the laws, since they distinguish between individuals on the basis of sexual orientation and (because they apply to homosexual males and not homosexual women) on the basis of gender.

In response to these contentions, the Tasmanian government argued that Article 17 of the ICCPR does not create an unfettered right to privacy, but merely protects against arbitrary interferences with privacy. These anti-sodomy laws, it contended, were not arbitrarily enforced. The government also claimed that because these laws were enacted pursuant to a democratic process, they should not be deemed unlawful. Moreover, the government asserted that these anti-sodomy provisions were a legitimate exercise of a State’s power to protect the

63. Section 122 of the Tasmanian Criminal Code provides:
   Any person who –
   (a) has sexual intercourse with any person against the order of nature;
   (b) has sexual intercourse with an animal; or
   (c) consents to a male person having sexual intercourse with him or her against
   the order of nature,
   is guilty of a crime.

Section 123 of the Tasmanian Criminal Code provides:
   Any male person who, whether in public or private, commits any indecent assault
   upon, or other act of gross indecency with, another male person, or procures another
   male person to commit any act of gross indecency with himself or any other male
   person, is guilty of a crime.

64. Id. ¶ 3.1.
65. Id.
66. Id. ¶ 6.2.
67. Id. This particular argument is closely linked to the concept of state sovereignty, which is of paramount importance in any discussion of international law. Sovereignty is widely viewed as an implicit characteristic of statehood, and connotes that a State has the authority to govern its territory and its people without interference from external actors. However, when a State ratifies an international treaty, it necessarily relinquishes some of its sovereignty. See generally, W. Michael Reisman, Sovereignty and Human Rights in Contemporary International Law, 84 AJIL 866, 866-876 (1990).
health (e.g., prevent the spread of HIV/AIDS) and morality of its public. 68

The Committee issued a staunch rejection of all of Tasmania’s claims, holding that Tasmania’s anti-sodomy laws (1) directly violated Article 17’s protection of privacy; (2) “cannot be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of HIV/AIDS,” and in fact may have the contrary effect of impeding public health programs by “driving underground many of the people at risk of infection”69; (3) are not permissible under the argument that moral concerns are exclusively within the power of the State, since such a determination would be over-inclusive and would exempt “a potentially large number of statutes interfering with privacy” from the Committee’s jurisdiction. 70

Paragraph 8.7 of the Committee’s decision deserves special attention, as it is perhaps the most progressive interpretation of an existing human rights treaty by a U.N. human rights body with regard to sexual orientation. In response to the question of whether sexual orientation is considered an “other status” as set forth in Articles 2(1) and 26 of the ICCPR, the Committee opted to make a more profound finding. Rather than address the proposed question of whether sexual orientation is subsumed under the nebulous category of “other status,” the Committee opted to find that the explicit reference to “sex” in Articles 2(1) and 26 “is to be taken as including sexual orientation.” 71 However, because judgments of the Committee are not legally binding, its finding that the status of sexual orientation is included in the expressly recognized category of sex does not conclusively resolve the question of whether homosexuals are a protected class under U.N. human rights treaties in the affirmative. Nevertheless, comments of the Committee are highly persuasive and, as is true in the following case, are often adhered to in subsequent decisions of U.N. human rights monitoring bodies. If the proposed Anti-Homosexuality Bill is examined under the same line of reasoning adopted by the Committee in this case, it appears that it would be deemed violative of the ICCPR.

The second and final ruling from a U.N. human rights monitoring body holding that the ICCPR protects individuals who are discriminated against on the basis of sexual orientation was issued by the U.N. Working Group on Arbitrary Detention (“Working Group”) in

68. Id. ¶ 6.5.
69. Id. ¶ 8.5.
70. Id. ¶ 8.6.
71. Id. ¶ 8.7.
2006. In François Ayissi et al. v. Cameroon,\textsuperscript{72} seventeen men were arrested on charges of violating anti-homosexuality laws in a police raid on a gay bar in the Republic of Cameroon. The Working Group, relying on Toonen, declared that detention on the basis of sexual orientation constitutes an arbitrary deprivation of liberty under Articles 17 and 26 of the ICCPR.\textsuperscript{73}

These two decisions embolden the argument that sexual orientation is a protected classification under the ICCPR. If the Anti-Homosexuality Bill were passed and challenged under the ICCPR, the U.N. Human Rights Committee would likely find that it violates articles 2(1), 17, and 26 of the ICCPR, in accordance with its reasoning in Toonen.

2. International Covenant on Economic, Social, and Cultural Rights

Another international treaty in which Uganda is a party is the ICESCR, which seeks to secure rights in the realm of economic, social, and cultural life. Most salient among the protections conferred by the ICESCR are: the right to self-determination; the right to freely determine one’s political status; the right to favorable working conditions; the right to fair and equal remuneration; the right to an education; and the right to take part in cultural life.\textsuperscript{74} Even more importantly, Article 2(2) establishes that the aforementioned protections should be exercised “without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”\textsuperscript{75} Like the ICCPR, the ICESCR does not make any express mention of sexual orientation in its anti-discrimination provision. However, the U.N. Committee on Economic, Social, and Cultural Rights (CESCR), which monitors the implementation of the ICESCR, has determined that Article 2(2) of the ICESCR protects against the deprival of rights guaranteed by the ICESCR based on sexual orientation on three separate occasions.\textsuperscript{76} It is also important to note that the ICESCR bears two major structural qualities that essen-


\textsuperscript{73} Id. ¶ 22.

\textsuperscript{74} See ICESCR, supra note 53, arts. 1, 5, 6, 7, 8, 11, 13, and 15.

\textsuperscript{75} Id. art. 2(2).

tially amount to weaknesses. In comparison to the ICCPR, the ICESCR is extremely broad in scope, leaving most of the development of human rights norms to occur through the CESCR on an ad hoc basis. Even more conspicuous is its weak rhetorical demand for compliance. Whereas the ICCPR unequivocally mandates that States “respect and ensure” all the rights it confers,\textsuperscript{77} the ICESCR merely requests that States “take steps . . . with a view to achieving progressively the full realization of the rights [recognized in the ICESCR].”\textsuperscript{78}

These ostensible weaknesses notwithstanding, Article 1(1) of the ICESCR may provide a basis for challenging the legality of the Anti-Homosexuality Bill. Article 1(1) states that “[a]ll peoples have the right of self-determination [and] [b]y virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”\textsuperscript{79} Although novel, it can be argued that laws banning consensual sex between same-sex adults violate the collective right of LGBT Ugandans to freely pursue their social and cultural development pursuant to the principle of self-determination.\textsuperscript{80} However, this argument is potentially undermined by the considerably broad and amorphous nature of Article 1(1).\textsuperscript{81} Moreover, the fact that the ICESCR does not contain any guarantees that speak directly to laws regulating sexual conduct, such as the ICCPR’s right to privacy, makes the aforementioned argument tenuous at best, and thus, likely to fail.

3. African Charter on Human and Peoples’ Rights

Uganda is also a party to the African Charter, a regional human rights instrument that represents a fusion of the aforementioned goals.

\textsuperscript{77} See ICCPR, supra note 53, art. 2(1).

\textsuperscript{78} See ICESCR, supra note 53, art. 2(1) (alteration in original).

\textsuperscript{79} ICESCR, supra note 53, art. 1(1). This exact language guaranteeing a people’s right to self-determination is also found in Article 1(1) of the ICCPR. Consequently, a people’s right to self-determination is arguably a \textit{jus cogens} norm, or a fundamental principal of international law that cannot be contracted out of by any state via the treaty-making process (alteration in original).

\textsuperscript{80} The right to self-determination guaranteed by Article 1(1) of the ICESCR is a collective right as opposed to the individual rights that have been discussed throughout this note. The exact meaning of this collective right, and of the term ‘peoples,’ has not been clearly defined by the CESCR. Neither has the U.N. Human Rights Committee, the enforcement body of the ICCPR, provided an adequate explanation of this collective right to self-determination. See Anna Batalla, The Right of Self-Determination – ICCPR and the Jurisprudence of the Human Rights Committee, Symposium on The Right to Self-Determination, UNPO (2006).

\textsuperscript{81} Id.
of the ICCPR and the ICESCR.\textsuperscript{82} Like the ICCPR, the African Charter promulgates the right to equality before the law, the right to equal protection of the law, the right to respect for human dignity, the right to liberty, and the right to be free from arbitrary detention.\textsuperscript{83} Furthermore, the African Charter mirrors the ICESCR’s language in granting the right to “economic, social, and cultural development.”\textsuperscript{84} Interestingly, the provisions of the African Charter that are relevant to the analysis of whether the Anti-Homosexuality Bill is unlawful are encapsulated, using nearly identical language, in the ICCPR. Nevertheless, the analysis of the Anti-Homosexuality Bill under the African Charter differs significantly from that under the ICCPR, as a result of two considerable variances. One significant variation lies in the African Charter’s conspicuous omission of a right to privacy, which is embodied in Article 17 of the ICCPR. Moreover, another difference rests in the African Charter’s use of language not present in the ICCPR that curtails its substantive rights; namely, Article 27(2)’s limitation of the African Charter’s rights and freedoms to circumstances that do not infringe on “the rights of others, collective security, morality and common interest.”\textsuperscript{85}

The provisions of the African Charter most relevant to the analysis of the legality of the Anti-Homosexuality Bill are Articles 2 and 3. Article 2, the African Charter’s anti-discrimination provision, declares that “every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.”\textsuperscript{86} Furthermore, Article 3 serves as the African Charter’s equal protection provision, proclaiming that

\textsuperscript{82} In this sense, the African Charter embodies all three generations of rights. The term “generation of rights” refers to the classification scheme into which types of human rights are often divided. This scheme was fashioned after the mantras of the French Revolution – liberty, equality, and fraternity. The first generation of human rights includes civil and political rights (liberty). The second generation of human rights includes economic, social, and cultural rights (equality). Finally, the third generation of human rights is a more recent and still-developing category of human rights that includes so-called solidarity rights (e.g., the right to development, to the environment, and to peace and self-determination). For a full discussion on this stratification of human rights, see Asbjørn Eide & Allan Rosas, Economic, Social and Cultural Rights: A Universal Challenge, in Economic, Social, and Cultural Rights 16 (Allan Rosas eds., 1995).

\textsuperscript{83} African Charter, supra note 54, arts. 3, 5, 6.

\textsuperscript{84} Id. art. 22(1).

\textsuperscript{85} Id. art. 10, 27(2).

\textsuperscript{86} Id. art. 2.
"[e]very individual shall be equal before the law."\textsuperscript{87} These provisions mirror the substance and language of Articles 2 and 26 of the ICCPR, respectively.

The African Commission on Human and Peoples’ Rights ("Commission"), the body charged with the enforcement of the African Charter’s terms, has expressed the view that sexual orientation is encompassed in the language of Article 2. In its only reference to sexual orientation to date, the Commission observed in Zimbabwe NGO Human Rights Forum v. Zimbabwe that:

Together with equality before the law and equal protection of the law, the principal of non-discrimination provided under Article 2 of the [African] Charter provides the foundation for the enjoyment of human rights . . . The aim of this principle is to ensure equality of treatment for individuals irrespective of nationality, sex, racial or ethnic origin, political opinion, religion or belief, disability, age or sexual orientation.\textsuperscript{88}

Hence, when taken together, Articles 2 and 3 seemingly create the strongest argument against the Anti-Homosexuality Bill - that it violates LGBT Ugandans’ right to equal protection on the basis of “sex” or “other status.”\textsuperscript{89}

As mentioned earlier, there is one major limiting clause that sharply curtails the potential efficacy of the aforementioned argument. Article 27(2) of the African Charter promulgates that “[t]he rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.”\textsuperscript{90} This raises the possibility of an array of robust arguments in support of the Anti-Homosexuality Bill. For instance, Uganda can argue that the Anti-Homosexuality Bill seeks to uphold the morality and common interest of the Ugandan people. This contention is buttressed by the fact that the Anti-Homosexuality Bill is popularly supported by the Ugandan people, and by the domestically prevalent sentiment that homosexuality is morally abhorrent.\textsuperscript{91} Moreover, Uganda can argue that

\textsuperscript{87} Id. art. 3 (alteration in original).
\textsuperscript{90} African Charter, supra note 54, art. 27(2).
if the bill is deemed illicit under the African Charter, the rights of the
Ugandan majority to enact laws pursuant to the democratic process
would be untenably derogated. Furthermore, Uganda can contend that
its right to self-determination would be infringed if the Anti-Homo-
sexuality Bill is adjudged illicit under the African Charter.92

It must be noted that the Commission has required that once it
determines that a right has been infringed under the African Charter,
the onus is on the state to prove that the justification asserted for lim-
itng the contested right under Article 27(2) is “strictly proportionate
with and absolutely necessary for the advantages that are to be ob-
tained.”93 Therefore, if the Commission agrees that the Anti-
Homosexuality Bill deprives LGBT Ugandans of equal protection of the
law, the burden will rest on Uganda to prove that any argument made
pursuant to Article 27(2)’s limitation clause is absolutely necessary
(and not merely reasonable) for the protection of the interests enumer-
ated therein.

Despite the African Commission’s recognition of sexual orienta-
tion as a characteristic protected under the African Charter in
Zimbabwe, the notable absence of any explicit right to privacy under
the African Charter,94 coupled with the broad nature of Article 27(2)’s
limitation clause, creates the likelihood that the argument based on
Articles 2 and 3 of the African Charter against the Anti-Homosexuality
Bill would be too weak to withstand counter arguments based on Arti-
cle 27(2)’s limitation clause.

B. Death Penalty

As noted earlier, the fact that the Anti-Homosexuality Bill in-
cludes the prospect of the death penalty for those charged with
aggravated homosexuality warrants a distinct legal analysis. This sec-
tion analyzes the Anti-Homosexuality Bill’s capital punishment
 provision under applicable international and regional treaties. The

92. See supra note 80.
93. Communication 105/93, 128/94, 130/94 and 152/96, Media Rights Agenda and
Another v Nigeria AHRLR, at ¶ 69, 70.
94. The right to privacy was essential to the finding of the U.N. Human Rights
Committee in Toonen v. Australia that anti-sodomy laws violate the ICCPR. Although the
African Charter does not provide any analogous right to privacy, some have argued that
Article 4’s right to respect for one’s life and integrity of one’s person, Article 5’s right to
respect of dignity inherent in a human being, and Article 6’s right to individual freedom and
security combine to provide an implicit right to privacy. See Rachel Murray & Frans Viljoen,
Lobbying on Sexual Orientation Issue: The possibilities before the African Commission on
current state of international law can be described as tolerant of the death penalty, aiming to implement safeguards and restrictions on its use rather than completely bar it. Presently, no widely-accepted international treaty issues an outright ban on the use of the death penalty. Nevertheless, an increasing number of countries have followed a recent “clear and emphatic trend” in abandoning the use of the death penalty. However, this apparent trend notwithstanding, it is premature to assert that there exists customary international law in favor of abolition of the death sentence. The international treaties to which Uganda is a party that address the death penalty are: the ICCPR, the African Charter, and the African Charter on the Rights and Welfare of the Child (ACRWC).

1. International Convention on Civil and Political Rights

The ICCPR is the most important and most specific treaty delineating the circumstances around which the death penalty is permissible. Article 6 of the ICCPR creates a general right to life and prohibits arbitrary deprivations of life. Additionally, Article 6 creates a set of procedural safeguards governing the use of capital punishment, including a requirement that a final judgment of a competent

97. See ICJ Statute 38(1)(b) (defining international custom as a source of international law).
98. See supra note 95, at 4.
99. ICCPR, supra note 53, art. 6 states:

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.
3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.
4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.
court be issued before the death penalty is administered and a right to seek pardon or commutation of a death sentence. The ICCPR also exempts pregnant women and children under the age of eighteen from the death penalty under all circumstances. Finally, and most relevant to this discussion, Article 6 of the ICCPR restricts the use of the death penalty to cases of “the most serious crimes.” In the context of this discussion, this provision necessitates the question of whether violations of anti-sodomy laws can be considered a “most serious crime.”

There is no definitively agreed-upon definition of what crimes can be considered “most serious” under Article 6(2) of the ICCPR, and thereby warrant the death penalty. However, decisions of various U.N. human rights bodies have offered some insight on this matter. In 1982, the U.N. Human Rights Committee first attempted to offer guidance on this issue, stating that the restriction of the death penalty to the most serious crimes under Article 6(2) of the ICCPR should be “read restrictively to mean that the death penalty should be a quite exceptional measure.” Subsequently, in 1996 and 1999, the U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions expressed the view that the category of “most serious crimes” does not include economic crimes, drug-related crimes, victimless offences, and moral crimes such as adultery, prostitution, and crimes based on sexual orientation. Most pertinently, the U.N. Human Rights Committee expounded on its initial guidance on this matter in 1997, concluding that the crimes of illicit sex and repeated acts of homosexuality should not be considered “serious crimes.” This interpretation of Article 6(2) of the ICCPR supports the assertion that the prescription of the death penalty in the Anti-Homosexuality Bill for aggravated homosexuality violates Article 6(2) of the ICCPR.

100. Id.
101. Id.
102. Id.
2. African Charter on Human and Peoples’ Rights

The African Charter also addresses the issue of the death penalty, albeit not directly and explicitly like the ICCPR. Article 4 of the African Charter pronounces a right to life in adamant terms, stating that “human beings are inviolable” and “shall be entitled to respect for [their] life and the integrity of [their] person,” without any “arbitrary deprivation” of this right.”\(^{107}\) By implication, the African Charter, at the very least, prohibits any arbitrary applications of the death penalty. Moreover, Article 7 of the African Charter sets forth numerous procedural safeguards that protect against arbitrary impositions of the death penalty, including the right to be presumed innocent until proven guilty by a competent court and the right to defense counsel.\(^{108}\) Furthermore, Article 5 prohibits “cruel, inhumane, or degrading” punishment.\(^{109}\) To the extent that it can be argued that the death penalty constitutes a form of “cruel, inhumane, or degrading” punishment, the death penalty violates Article 5 of the African Charter.

Interestingly, Article 60 of the African Charter allows the Commission to “draw inspiration from international law on human and people’s rights, particularly from […] the Charter of the United Nations [and] the United Declaration of Human Rights […] as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations.”\(^{110}\) This authorization to use U.N. hard law and soft law\(^{111}\) in interpreting whether the death penalty violates Article 4’s right to life or constitutes a form of cruel or inhumane punishment under Article 5 emboldens the argument that the death penalty violates the African Charter, since the U.N. has promulgated numerous resolutions that call for a blanket ban of the death penalty.\(^{112}\) Most notably, the U.N. adopted the Second Optional Protocol to the International Covenant on Civil and Political Rights in 1989, which seeks to completely abolish the death penalty with only one narrow exception: the application of the death penalty for a wartime crime of

\(^{107}\) African Charter, supra note 54, art. 4 (alteration in original).

\(^{108}\) Id. art. 7.

\(^{109}\) Id. art. 5.

\(^{110}\) Id. art. 60 (alteration in original).

\(^{111}\) Hard law is binding on States, and usually comes in the form of treaties. Soft law, on the other hand, is non-binding international law, and usually takes the form of resolutions.

the most serious nature.\textsuperscript{113} Furthermore, based on its drafting history and subsequent soft law of U.N. organs, the Universal Declaration of Human Rights clearly points toward abolition of the death penalty as a goal.\textsuperscript{114}

Most indicative of how the African Commission would rule on the legality of the death penalty under the African Charter is a 2008 Resolution of the African Commission urging all State parties to “observe a moratorium on the execution of death sentences with a view to abolishing the death penalty [and] ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights on the abolition of the death penalty.”\textsuperscript{115} This resolution, taken together with Article 4’s right to life, Article 5’s protection against cruel and inhuman punishment, and Article 60’s reliance on U.N. instruments connotes that the African Charter potentially provides a stronger prohibition of the death penalty than the ICCPR. Since the African Charter utilizes broad language that strongly disfavors death as a penal measure, the African Commission has more freedom to reach the likely conclusion - in line with the general view expressed in the aforementioned resolution - that the Anti-Homosexuality Bill’s death penalty provision violates Articles 4 and 5 of the African Charter.


The final treaty to which Uganda is a signatory that addresses the death penalty is the ACRWC, which is a comprehensive regional human rights treaty that delineates prevailing norms on the civil, political, economic, social, and cultural rights of children. Unlike the African Charter, the ACRWC does not provide the potential for completely proscribing the death penalty. Rather, it merely adds one more regulation to the use of the death penalty with regard to its use on children. Article 5(3) of the ACRWC states that “[t]he death sentence shall not be pronounced for crimes committed by children.”\textsuperscript{116} The term “child” is defined under Article 2 of this treaty as anyone under the age

\textsuperscript{113} See Seconç Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty (1990), reprinted in 29 I.L.M. 1464 (1992). Uganda is not a party to this treaty.


of eighteen. Therefore, the ACRWC adds a straightforward and blanket safeguard around the use of the death penalty: a complete prohibition on its administration to individuals below the age of eighteen. It is worth noting the African Commission cited Article 5(3) of the ACRWC as support for the above-mentioned resolution of the African Charter urging State parties to work toward the complete abolition of the death penalty.

The Anti-Homosexuality Bill does not purport to prescribe the death penalty to juvenile offenders. In fact, the Anti-Homosexuality Bill seems to apply only to adults, citing as a quintessential principal for its inception the “need to protect children and youths of Uganda who are made vulnerable to [. . .] increasing attempts by homosexuals to raise children in homosexual relationships through adoption, foster care, or otherwise.” Furthermore, Uganda has adopted in its domestic law the principal that individuals under the age of eighteen who commit capital offenses should not be executed, but instead detained for a period of no more than six months. Therefore, even if a juvenile were convicted of aggravated homosexuality under the Anti-Homosexuality Bill, Uganda’s domestic law would mandate a replacement of the death penalty with a detention sentence, thereby avoiding any infractions of Article 5(3) of the ACRWC. For these reasons, it is clear that the Anti-Homosexuality Bill does not offend Article 5(3) of the ACRWC.

In summation, none of the international and regional treaties to which Uganda is a party bear the potential for a complete eradication of the death penalty, save for the African Charter. Furthermore, an examination of the Anti-Homosexuality Bill’s codification of aggravated homosexuality as a capital offense under the relevant terms of the ICCPR and the African Charter reveal that the enforcement bodies of these respective treaties would almost decidedly deem the Anti-Homosexuality Bill’s imposition of the death penalty in this context unlawful. Finally, in its current form, the Anti-Homosexuality Bill does not offend the ACRWC’s blanket ban on the administration of the death penalty to individuals below the age of eighteen.

117. Id. art. 2.
118. See supra note 115.
119. Anti-Homosexuality Bill, supra note 18, § 1.1 (alteration in original).
Laws penalizing homosexual acts can be found throughout history and across cultures. The historical near-ubiquity of anti-sodomy laws notwithstanding, modern perceptions of human rights have incited a trend toward the eradication of laws that criminalize homosexual conduct between consenting adults. Not all countries have followed this trend or accepted the notion that anti-sodomy laws violate current notions of human rights. Uganda is one such country that received massive international attention as a result of its fervent push to intensify already-existing domestic anti-sodomy laws with the recent introduction of the Anti-Homosexuality Bill of 2009. This proposed bill implicates human rights questions in two major respects: do current notions of human rights prohibit a ban on consensual adult homosexual conduct, and do current notions of human rights prohibit the prescription of the death penalty for repeated acts of consensual homosexual conduct?

Under the Ugandan Constitution, it is uncertain and seemingly unlikely that the Anti-Homosexuality Bill’s proscription of homosexual conduct violates the rights to privacy, equal protection, and anti-discrimination guaranteed by the Ugandan Constitution. This uncertainty primarily stems from the fact that Uganda’s domestic courts have yet to directly address the applicability of the right to privacy, equal protection, and anti-discrimination to LGBT Ugandans. Moreover, the bill’s prescription of capital punishment for aggravated homosexuality is seemingly permissible under the Ugandan Constitution, as the constitutionality of the death penalty has been upheld by Uganda’s Supreme Court as recently as 2009.

An analysis of the applicable international and regional treaties by which Uganda has agreed to abide results in a more definitive answer on whether the Anti-Homosexuality Bill is unlawful. Regarding its status as an anti-sodomy law, the ICCPR’s anti-discrimination clause, right to equal protection, and right to privacy, coupled with multiple rulings from U.N. bodies finding that the category of sexual orientation is encompassed in the ICCPR’s protection from discrimination on the basis of sex, lead to a robust argument that the Anti-Homosexuality Bill is unlawful. On the other hand, arguments against the Anti-Homosexuality Bill as a sodomy law based on the ICESCR and the African Charter are considerably weaker than those emerging under the ICCPR. With respect to its incorporation of the death penalty for the offense of aggravated homosexuality, the Anti-Homosexuality Bill likely violates both the ICCPR and the African
Charter. Specifically, the U.N. Human Rights Committee has explicitly propounded that capital punishment cannot be attached to crimes based on sexual orientation under Article 6(2) of the ICCPR.\textsuperscript{121} Moreover, the African Commission has expressed the view that the African Charter's broadly-phrased right to life should lead member States to abolish the death penalty.\textsuperscript{122}

Although the Anti-Homosexuality Bill has not been passed as of this writing, there are strong indications that it will soon become law, including its overwhelming domestic support and the recent reassurance of this outcome by the bill's creator, David Bahati.\textsuperscript{123} If this bill is indeed passed and incorporated into Uganda's domestic law, it will almost certainly be challenged under the aforementioned legal frameworks. If the bill is challenged under Uganda's domestic law, the resulting rulings from Uganda's courts will provide greater clarity on where Uganda stands on the issues of anti-sodomy laws and the prescription of death for violations thereof. More significantly, if challenged under international law, rulings from the monitoring bodies of the international treaties to which Uganda is a signatory will provide a deeper insight into whether the recent trends toward abolishing anti-sodomy laws and eradicating the death penalty can be said to be the beginning of an emerging custom under international law. As is necessary for a challenge of the Anti-Homosexuality Bill to be considered under international law, the Anti-Homosexuality Bill, if passed, should first be challenged in Uganda's domestic courts. If the law survives the scrutiny of Uganda's court system, a challenge filed with the ICCPR's Human Rights Committee would provide the greatest likelihood of a holding that the bill is unlawful, and would hopefully provide significant clarification on the status of anti-sodomy laws and the death penalty under current international law.

\textsuperscript{121} See supra note 99.
\textsuperscript{122} See supra note 115.