"Death to Gays!" Uganda's 'One Step Forward, One Step Back' Approach to Human Rights

Tiffany M. Lebrón
“DEATH TO GAYS!” UGANDA’S ‘ONE STEP FORWARD, ONE STEP BACK’ APPROACH TO HUMAN RIGHTS*

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INTRODUCTION

“Homosexuals can forget about human rights.”1 These words, uttered by Uganda’s Minister of Ethics and Integrity, reflect the current status of human rights in Uganda, the land coined “the pearl” of Africa by Sir Winston Churchill.2 The pearl, however, has found herself tarnished at a place where human rights and the rule of law have been frequently and extensively neglected, and this time, sexual minorities are feeling strong consequences.

As James Wilets observed, “[t]he actions of powerful religious and other institutions can have a direct impact on violence and murder against sexual minorities,”3 and the events that have recently taken place in Uganda certainly lend credence to this idea. In March 2009, three American Evangelical Christians arrived in Kampala, Uganda’s capital, to present their

* The title, “Death to Gays!” was an expression that I continually came across in my research. Its audacity repeatedly took me by surprise, as it appeared to serve as a slogan for proponents of the Anti-Homosexuality Bill.
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views on homosexuality and Christianity in a “series of talks” heard by thousands of Ugandans. The conference, which essentially positioned homosexuals as a sexually promiscuous group threatening to overturn the institution of marriage, “helped set in motion what could be a very dangerous cycle.” Inspired, the organizers of the conference helped David Bahati, Ugandan Member of Parliament representing Ndorwa County West Kabale, draft the Anti-Homosexuality Bill (the “Bill”), which was presented to Parliament on October 14, 2009. As of May 2011, Parliament has yet to pass the bill, but it remains on the shelf and could be brought back to the table in the next session.

Among the provisions of the Bill, which “aims at strengthening the nation’s capacity to deal with emerging internal and external threats to the traditional heterosexual family,” Section 3, concerned with the specific offense of aggravated homosexuality, even provides that such offenders “shall be liable on conviction to suffer death.” The Bill, which attempts to position Uganda among the ranks of states such as Mauritania, Nigeria, Sudan, Iran, Yemen, United Arab Emirates, and Saudi Arabia, which all implement capital punishment on homosexuals, would be in direct violation of Ugandan and international law.

4 Gettleman, supra note 1.
5 5
8 The Anti-Homosexuality Bill, Memorandum § 1.1.
9 See infra Part I.B.
10 The Anti-Homosexuality Bill § 3.2.
Amid pressure from donor countries, which include, *inter alia*, the United States, Canada, and Australia, the Ugandan government appears to be steering away from the death penalty provision. Yet the idea that this Bill was presented to the country’s government and not immediately withdrawn, not only reflects Uganda’s current state of human rights in terms of its obligations to respect, protect, and fulfill such rights, but also manifests the inconsistency of Uganda’s national laws and international obligations with how those rights are affected.

Even further troubling is that if this Bill is rejected, it will most likely be for economic purposes, not because the public has opposed it, nor because it will violate the fundamental human rights of Ugandan citizens, nor because it will be in violation of both Ugandan and international law. Since donor countries have put pressure on the Ugandan government, the government has suddenly indicated that it may remove the death penalty provision, and possibly the entire Bill.

But has the issue been quashed, or is it lying dormant? The motivations that may lead to the withdrawal of the death penalty provision, or even the entire Bill, indicate she is a sleeping giant, waiting for a trigger that will alert her state of dormancy. If Uganda rejects the death penalty provision or

11 Donor countries are those States that send aid to other States. This aid can come in various forms, such as debt relief, or emergency aid following a natural disaster. See, e.g., OECD Asks Donor Countries to Honour Aid Promises and Spend Smarter, *Organisation for Economic Co-operation and Development*, Jul. 2, 2006, http://www.oecd.org/document/9/0,2340,en_2649_201185_36066185_1_1_1_1,00.html (last visited May 22, 2011).
13 Gettleman, supra note 1.
14 See ‘Anti-Homosexuality’ Bill Threatens Liberties and Human Rights Defenders, supra note 6 (quoting Victor Mukasa, of the International Gay and Lesbian Human Rights Commission: “It is the government’s responsibility to immediately withdraw this dangerous proposal.”).
the entire Bill, merely bowing to foreign pressure, will the issue truly be resolved? If Uganda is to become a true democratic state where human rights are observed, protected, and promoted, both in law and in practice, then the country must engage in a process of cultural transformation where changes, identities, and tolerance are internalized within the people and society at large.16 This transformation must begin with government ensuring equal rights for all citizens.

This Comment is not a plea for acceptance or endorsement of homosexuality or any other status, but a greater call for promotion, recognition, and respect for the value and sanctity of human life and the indelible rights each person is born with. This Comment will examine the Anti-Homosexuality Bill presented to the Ugandan Parliament, its domestic and international illegality, the history and politics surrounding the issue of homosexuality, and the history of the death penalty in Uganda. The primary purpose of this Comment is to establish that imputing the death penalty for aggravated homosexuality,17 as provided in the Bill, will be in violation of Uganda's Constitution and international law.

Further, this Comment will look at Uganda's struggle to consistently ensure human rights to its people by demonstrating how animus in Uganda's law and instigation by government officials triggers an intense form of homophobia in Ugandan society that leads to violence against sexual minorities. This violence, legitimized by the government in its regulations and remarks to the public, effectuates a sort of societal brainwashing, thus affording the government the "consent" to bypass the rule of law and implement legislation securing its patriarchal agenda. Furthermore, although Uganda has recently made significant strides toward abolishing the death penalty, this proposed piece of legislation has hindered that progress.

Part I of this Comment analyzes the actual legislation presented to Uganda's Parliament in October 2009, its purposes, and its effects. Part II examines the history and politics of sexual orientation in Uganda. In Part III, the analysis will focus on the history of the death penalty in Uganda. Finally, Part IV will examine the domestic and international illegality of the death penalty provision in the Anti-Homosexuality Bill.

17 The Anti-Homosexuality Bill, 2009, § 3.2 (Uganda).
I. ANALYSIS OF THE ANTI-HOMOSEXUALITY BILL – PROVISIONS, PURPOSES, AND EFFECTS

In building a case for the illegality of the death penalty for homosexuality, it is important to understand the provisions of the Anti-Homosexuality Bill as a whole. The following is a brief analysis of the Bill along with the author’s interpretation of the purposes and effects of its provisions.

A. Memorandum

The Memorandum, which precedes the Bill, begins by describing the principle object of the Bill, which is to establish a “comprehensive consolidated legislation to protect the traditional family.” It proposes to do this by prohibiting any form of same-sex sexual relations and the promotion and recognition of such relations by any person or entity inside or outside the country. The Memorandum further describes its aim to “strengthen the nation’s capacity to deal with . . . internal and external threats to the traditional heterosexual family.” It also explicitly states, “same sex attraction is not an innate and immutable characteristic.” This statement completely disregards any and all arguments of a long-time debate on whether homosexuality is innate or learned.

The Memorandum describes additional goals of the Bill to protect the “cherished culture” and the “legal, religious, and traditional family values of the people of Uganda against attempts of sexual rights activists seeking to impose their values of sexual promiscuity . . . .” But who exactly are these “sexual rights activists?” Would they, for example, include non-governmental organizations (NGOs) promoting safe sex? The wording in this section suggests that activists are evil and want to corrupt Ugandan society and culture. It concludes by articulating the need to protect “chil-

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18 The Anti-Homosexuality Bill, Memorandum § 1.1.
19 Id.
20 Id.
21 Id.
22 See, e.g., Jane E. Larson, The New Home Economics, 10 CONST. COMMENT. 443, 457 (1993) (“Gay men, for example, have found a strong argument for tolerance in the assertion that sexual orientation is innate rather than learned.”); Judith A. Lintz, Note, The Opportunities, or Lack Thereof, for Homosexual Adults to Adopt Children—In re Adoption of Charles B, 50 Ohio St. 3d 88, 552 N.E.2D 884 (1990), 16 U. DAYTON L. REV. 471, 488 (1991) (“Another argument against allowing homosexuals to become adoptive parents is founded upon the belief that homosexuality is learned, environmentally influenced, and chosen, rather than innate and immutable.”).
23 The Anti-Homosexuality Bill, Memorandum § 1.1.
This language negatively relates homosexuality to the sexual abuse of children and youth.

The Memorandum further addresses “[d]efects [i]n existing law.” This section articulates that the legislation is intended to “fill the gaps in the provisions of other laws,” namely, the Penal Code Act Chapter 120, Section 145 – Uganda’s sodomy law. The laws in the Penal Code Act lack provisions for the “procurement, promoting, disseminating literature and other pornographic materials concerning the offense of homosexuality.” The section concludes by criminalizing same-sex marriages and same-sex sexual acts.

The Memorandum concludes by summarizing the objectives of the Bill, which are to:

(a) provide for marriage in Uganda as that contracted only between a man and a woman; (b) prohibit and penalize homosexual behavior and related practices in Uganda as they constitute a threat to the traditional family; (c) prohibit ratification of any international treaties, conventions, protocols, agreements and declarations which are contrary or inconsistent with the provisions of this Act; (d) prohibit the licensing of organizations which promote homosexuality.

A reading of the Memorandum alone shows that the effects of the Bill will be disastrous for, inter alia, sexual minorities, nongovernmental organizations, and other social service-related organizations, while overtly violating human rights in Uganda.

B. The Bill

Section I, “Interpretation,” defines the terminology used throughout the Bill. However, several of the terms are defined too narrowly or incor-
rectly. For example, the Bill states, “gender means male or female.” This definition is quite ambiguous. In contrast, according to the United Nations Multilingual Terminology Database, gender refers to:

[T]he attributes and opportunities associated with being male and female and the relationships between women and men and girls and boys, as well as the relations between women and those between men. These attributes, opportunities and relationships are socially constructed and are learned through socialization processes. They are context-specific and changeable. Gender determines what is expected, allowed and valued in a woman or a man in a given context. In most societies there are differences and inequalities between women and men in responsibilities assigned, activities undertaken, access to and control over resources, as well as decision-making opportunities. Gender is part of the broader socio-cultural context. Other important criteria for socio-cultural analysis include class, race, poverty level, ethnic group and age.

Defining this term as narrowly as the Bill does “fails to communicate that gender is a socially constructed set of assumptions regarding the roles of males and females.” Conflating the terms “gender” and “sex” conveys the idea that the sole differences existing between males and females are biological differences, which is offensive not only to sexual minorities, but to women who throughout history have had to bear the brunt of discrimination based on feminine and masculine identities.

31 Id.
34 Oosterveld, supra note 32, at 71 (citing Hilary Charlesworth, Feminist Methods in International Law, 93 AM. J. INT’L L. 379, 394 (1999)).
The Bill defines a "homosexual" as "a person who engages or attempts to engage in same gender sexual activity." However this is one area of the Bill that seems to contradict itself. It may be assumed that the authors of the Bill intended, at the very least, to give the impression that the offenses within the Bill provide punishments for an act rather than a status; however, the wording in parts of the Bill reveal that homosexual status is what the Bill seeks to attack. The Bill interprets "homosexuality" as "same gender or same sex sexual acts." Further, the Bill defines the elements of the offense of homosexuality:

(1) 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.

Based on these two sections of the Bill, it seems clear that homosexuality is the act of engaging in some type of sexual activity with a person of the same sex. However, Section 12, "Same sex marriage," provides, "[a] person who purports to contract a marriage with another person of the same sex commits the offence of homosexuality . . . ." Purporting to contract a marriage with a person of the same sex is not the same as engaging in some type of sexual activity with a person of the same sex. This incongruity in the Bill suggests that its focus is not on the sexual act or attempted act, but on the status of the individual. Status alone should be insufficient to constitute a crime.

Part II, "Homosexuality and Related Practices," contains the offenses and each of their elements punishable under the Bill. Section 2 concerns "The offence of homosexuality," and provides that a person commits homosexuality if:

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35 The Anti-Homosexuality Bill § 1.
36 Id.
37 Id. § 2.
38 Id. § 12.
39 A principle in American law has been that "[s]tatus alone is generally insufficient to constitute a crime." Profit v. City of Tulsa, 617 P.2d 250, 251 (Okla. Crim. App. 1980).
40 The Anti-Homosexuality Bill §§ 2-14.
(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.\textsuperscript{41}

The penalty provided for this offense, which includes touching without the full act of penetration or stimulation, is life imprisonment.\textsuperscript{42} Under Section 4, “Attempt to commit homosexuality” is punishable by seven years imprisonment.\textsuperscript{43}

Section 3, “Aggravated homosexuality” is the most significant and controversial segment of the Bill, and the focus of this Comment. This section provides:

(1) A person commits the offense 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, or (g) offender applies, administers or causes to be used by any man or woman any drug, matter or thing with intent to stupefy overpower him or her so as to there by enable any person to have unlawful carnal connection with any person of the same sex . . . .\textsuperscript{44}

Anyone charged with this offense will be required to undergo a mandatory medical examination to determine his or her HIV status.\textsuperscript{45} The penalty provided for aggravated homosexuality is death,\textsuperscript{46} and an attempt to commit aggravated homosexuality is punishable with life imprisonment.\textsuperscript{47}

The potential effects of these provisions are extremely harsh and could be disastrous. The construction of Section 3 raises many questions.

\textsuperscript{41} Id. § 2.
\textsuperscript{42} Id.
\textsuperscript{43} Id. § 4.
\textsuperscript{44} Id. § 3.
\textsuperscript{45} Id.
\textsuperscript{46} Id.
\textsuperscript{47} Id. § 4.
What would happen if under subsection (a) the offender were under the age of 18 – would minors be subjected to the death penalty as well? Further, in a situation where the act of two minors is consensual, would both be put to death? Would it make any difference under subsection (b) if the act was consensual and the offender made his or her HIV status known? How would the courts address a situation where there are two consenting adults who are both HIV positive?

While the provisions concerning aggravated homosexuality may be the most debatable part of the Bill, the remaining sections also raise significant issues of contention. For example, “[a]iding and abating homosexuality,” “[p]romotion of homosexuality,” and “[f]ailure to disclose the offence” are all punishable with imprisonment.\textsuperscript{48} These provisions would have a major impact on the work of NGOs promoting the rights of sexual minorities. According to Human Rights Watch, the Bill “would criminalize the legitimate work of national and international activists and organizations working for the defense and promotion of human rights in Uganda.”\textsuperscript{49}

Additionally, the Bill would be devastating to HIV/AIDS prevention efforts. In a statement issued by the International AIDS Society, Executive Director Robyn Gorna said, “[w]e are gravely concerned about the chilling effect that the proposed law would have on the ability of AIDS care and prevention program[s] to operate in Uganda, and of health care professionals to care for and counsel those most in need.”\textsuperscript{50} The outcome could include a situation in which “a health care worker could be imprisoned for not disclosing the consensual sexual practices of a patient, or for counseling a patient in risk-reducing sexual practices and providing them with condoms.”\textsuperscript{51} Section 14, requiring persons in “authority” to report within twenty-four hours anyone guilty of an offense,\textsuperscript{52} would potentially trigger a

\textsuperscript{48} Id. §§ 3, 7, 13, 14.

\textsuperscript{49} ‘Anti-Homosexuality’ Bill Threatens Liberties and Human Rights Defenders, \textit{supra} note 6.


\textsuperscript{51} Id.

\textsuperscript{52} “Authority” is defined in the Bill as “having power and control over other people because of your knowledge and official position; and shall include a person who exercises religious[,] political, economic or social authority.” The Anti-Homosexuality Bill § 1.
legal “witch hunt” of all Uganda’s sexual minorities, who are already targeted for discrimination.53

Finally, Section 18, “Nullification of inconsistent international treaties, protocols, declarations and conventions” provides in subsection (1) “Any International legal instrument whose provisions are contradictory to the spirit and provisions enshrined in this Act, are null and void to the extent of their inconsistency.”54 This section alone would violate numerous treaties and conventions to which Uganda is a party.55

II. HISTORY OF SEXUAL ORIENTATION AND POLITICS IN UGANDA – ANIMUS IN UGANDA’S LAW THAT LEGITIMIZES HOMOPHOBIA

Zimbabwe’s President Robert Mugabe described sexual minorities in his country by stating, “they shall be sad people here.”56 While Zimbabwe’s stance on homosexuality can be viewed as one of Africa’s most extreme, the sentiments expressed through President Mugabe’s statement are typical throughout Africa57 with very few exceptions,58 particularly among the political elite; Uganda is no exception. Given the widespread homophobia prevalent throughout Africa, it is no wonder that draconian legislation such as the Anti-Homosexuality Bill with its illegal

54 The Anti-Homosexuality Bill § 18.
55 See infra Part IV.B.
57 Another example can be seen in The Gambia. In 2008, BBC News reported President Yahya Jammeh had announced at a political rally that “gay people had 24 hours to leave the country.” He then said that “he would ‘cut off the head’ of any gay person found in The Gambia.” A gay rights activist told the BBC that this was an attempt by President Jammeh to use gays as a scapegoat for problems in The Gambia. Gambia Gay Death Threat Condemned, BBC NEWS, May 23, 2008, http://news.bbc.co.uk/2/hi/afrique/7416536.stm (last visited May 22, 2011).
58 In 2008, the United Nations General Assembly “supported a statement which called on member states to end discrimination on all grounds including sexual orientation.” However, only six of the fifty-three African states were willing. Jamil Ddamulira Mujuzi, The Absolute Prohibition of Same-Sex Marriages in Uganda, 23 INT’L J.L. POL’Y & FAM. 277, 278 (2009).
(as this Comment argues) death penalty provision,\textsuperscript{59} was presented to Parliament.

How does a society get to this point, and what is it that fuels this severe form of homophobia to a point where the rule of law is overlooked, human rights are annihilated, and death is prescribed? In a study questioning whether sexual identity has already been established as a fundamental human right,\textsuperscript{60} author Anthony Reeves describes how “[t]he increasing tolerance of sexual minorities has caused a harmful backlash of fear.”\textsuperscript{61} Anger is a universal response to fear, and can lead to the development of related emotions such as hostility and aggression.\textsuperscript{62} As Reeves observed, “[n]ot everyone is in favor of the liberalization of attitudes that has emerged in the last twenty-five years.”\textsuperscript{63} These recent changes have frightened many heterosexuals, and as a result, some have responded with “rage, violence, and politicizing against sexual minorities.”\textsuperscript{64} In Uganda, this response has culminated in the current state of affairs, where the state-sponsored killing of homosexuals has been proposed.\textsuperscript{65}

Homophobia in Uganda, which takes the form of intense harassment and discrimination toward sexual minorities, and currently, in this Bill that illegally proposes death, is legitimized through Uganda’s law. In the Uganda Penal Code Act (Uganda’s Criminal Code), Section 145, commonly known as Uganda’s sodomy law,\textsuperscript{66} addresses “Unnatural offenses,” and provides:

Any person who — has carnal knowledge of any person against the order of nature; has carnal knowledge of an animal; or permits a male person to have carnal knowledge

\textsuperscript{59} The Anti-Homosexuality Bill § 3.
\textsuperscript{61} \textit{Id.} at 225.
\textsuperscript{62} \textit{Id.} at 226.
\textsuperscript{63} \textit{Id.} at 225.
\textsuperscript{64} \textit{Id.}
\textsuperscript{65} See The Anti-Homosexuality Bill, 2009, § 3 (Uganda).
of him or her against the order of nature, commits an of-

fence and is liable to imprisonment for life.\(^6\)

The subsequent section punishes the attempt to commit sodomy as a felony, providing for imprisonment of seven years.\(^6\)

Archaic anti-sodomy laws provide a justification for discrimination, harassment, and violence against sexual minorities in Uganda.\(^6\) "All too frequently, government officials, leaders of nongovernmental organizations (NGOs), and social service organizations state incorrectly that homosexuality itself is illegal, despite the fact that only sodomy is illegal under Ugandan law."\(^7\) For example, "[a] spokesman for the Uganda AIDS Commission, the central national clearinghouse for prevention and treatment, conceded in 2006: ‘There’s no mention of gays and lesbians in the national strategic framework, because the practice of homosexuality is illegal.’"\(^7\)

The Ugandan government clearly desires to send homosexuals a discernable message of aversion. Along with the introduction of the 1990 Anti-Homosexuality Bill, the government also raised the punishment for a violation of the sodomy law to life imprisonment, and the revised law was used as a tool for harassing both homosexual individuals and activists by invading their homes, censoring their speech, and threatening them with prison terms.\(^7\)

Further, as the Human Rights Watch reported, the government also uses the


\(^{68}\) Id. § 146.

\(^{69}\) Hollander, supra note 66, at 222. Hollander suggests “[t]here appear to be two types of harassment of the Uganda LGBTI community: human rights violations against this community, as well as failure to provide governmental and non-governmental services to this community.” Id. at 221. See also Kendall Thomas, Beyond the Privacy Principle, 92 COLUM. L. REV. 1431, 1435 (1992) (“My thesis is that homosexual sodomy statutes work to legitimize homophobic violence and thus violate the right to be free from state-legitimated violence at the hands of private and public actors.”); Terry, S. Kogan, Legislative Violence Against Lesbians and Gay Men, 1994 UTAH L. REV. 209, 209 (“[L]egislatures can and, on occasion, do transform homosexuals into social outlaws depicted as deserving of violent treatment.”).

\(^{70}\) Hollander, supra note 66, at 222.


sodomy laws, along with the incorrect assertion that homosexuality is illegal, as a tool for harassing sexual minorities and an excuse for withholding critical services particularly related to HIV/AIDS programs. In 1990, the punishment under section 145 was increased to a life imprisonment.\(^\text{73}\) According to Human Rights Watch:

> Officials also relied on the law to explain, or excuse, their failure to support HIV/AIDS prevention efforts among LGBT people . . . . Four years earlier, the Minister of Information had demanded that both the United Nations and national AIDS authorities shut out all LGBT people from HIV/AIDS programs and planning.\(^\text{74}\)

Notably, the Penal Code provision addresses sodomy, not homosexuality.\(^\text{75}\) Incorrectly asserting that homosexuality is illegal has a very significant and dangerous effect: it criminalizes homosexuality. “[O]ne may ask what legislators expect to fulfill ‘by equating homosexuality with sodomy.’”\(^\text{76}\) One proposed answer:

> [T]hat all homosexuals are sodomites and therefore criminals – is a political answer aimed at influencing the ways in which society understands homosexuality and, in turn, the ways in which society treats those persons it considers to be homosexual. It should not be surprising that some react to an elected official’s assertion that all homosexuals are sodomites by directing violent behavior toward lesbians and gay men.\(^\text{77}\)

This effect, which takes place both inside and outside Africa,\(^\text{78}\) is particularly significant to Uganda, which is prone to mob violence.\(^\text{79}\)

\(^{73}\) Id.; HUMAN RIGHTS WATCH, THIS ALIEN LEGACY, supra note 71.

\(^{74}\) HUMAN RIGHTS WATCH, supra note 71, at 3 (internal citations omitted).

\(^{75}\) PENAL CODE ACT 1950, ch. 120, § 145 (Uganda).


\(^{77}\) Kogan, supra note 69, at 231; see, e.g., HUMAN RIGHTS WATCH, supra note 69.

\(^{78}\) See, e.g., Kogan, supra note 69; Thomas, supra note 69.

"[g]iven their status as outlaws, homosexuals become the target of private law enforcement." While government officials vilify sexual minorities and condemn homosexuality, people within society feel that hatred against sexual minorities is somehow justified because the feeling is shared not only with the government, but also by society as a whole. As homophobia is intensified, people within the society become violent. Believing their hatred toward sexual minorities is legitimized, "[h]omophobic violence may well be perceived as an act of legitimate law enforcement by gay bashers." Essentially, private citizens take matters into their own hands and commit violent acts toward sexual minorities, convinced that their actions are justified as a means of enforcing legal and/or moral norms. To make matters worse, as Kendall Thomas asserts, "[b]ecause gay men and lesbians are seen as members of a criminal class, it is almost as though state governments view prosecution of those who commit crimes of homophobic violence as an invasion of the perpetrator's rights."

President Museveni's government has been particularly harsh toward homosexuals, publicly condemning them and subjecting activists to harassment. An examination of "the political terror directed against gay men and lesbians" in Uganda "suggests that the relationship between homosexual sodomy law and homophobic violence is not merely coincident, but coordinate: the criminalization of homosexual sodomy and criminal attacks on gay men and lesbians work in tandem." The existence of anti-sodomy laws...
laws, even if unenforced, provide a ground on which political leaders can base this hateful rhetoric, which leads to the private justification of violence against sexual minorities.

Over the twenty years following the 1990 modification of Uganda’s sodomy laws, the government-sponsored campaign against sexual minorities grew significantly. In 1998, President Museveni told the press, “When I was a [sic] in America, some time ago, I saw a rally of 300,000 homosexuals. If you have a rally of 20 homosexuals here, I would disperse it.” Then, in 1999, the President called for the arrest of all homosexuals in Uganda: “I have told the Criminal Investigations Department to look for homosexuals, lock them up and charge them.” This announcement of a “nationwide sweep for gays” followed press reports, which may have been false, of a gay marriage taking place in Uganda. The underlying presidential endorsement of the social animus already present in Uganda led to a backlash against Ugandan homosexuals.

Amnesty International reported in September 1999, the month following President Museveni’s remarks, that army and police officers arrested five individuals who were attending a meeting in Kampala, Uganda’s capital. According to the report:

They were accused of being homosexual and held in illegal detention centres, army barracks and police stations for up to two weeks before being released without charge. All five were tortured. One of those arrested said “they tortured me

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88 Same-Sex Marriage Ban Deepens Repression, supra note 72.
89 Human Rights Watch, The Less They Know, the Better: Abstinence-Only HIV/AIDS Programs in Uganda 57 (2005) available at http://www.hrw.org/reports/2005/uganda0305 (analyzing how this, and similar sentiments expressed by the government of Uganda, have a significant effect on the fight against HIV/AIDS, and particularly its impact on LGBT youth, due to the lack of HIV/AIDS education designed for them).
by kicking me on my stomach and slapping my face until it bled. I was made to sleep in a small toilet that was so dirty as it was the only toilet used by all the inmates. The next day I was told to clean the toilet for one week, twice a day, using my bare hands.”

Two months later, denying any anti-gay persecution, the President stated, “Homosexuals could live in Uganda . . . as long as they kept their sexual orientation hidden.” This attempted retraction did little to ease the tension.

The following year, in June 2000, a gay activist and member of Lesgabix, a Kampala lesbian and gay group, was murdered. The young man, who was known to be very active in the gay community and who had no serious enemies, did not appear to be the victim of a robbery attempt as the money he was carrying was not taken, and the rest of his personal belongings had remained intact. According to the post-mortem report, he had been hammered on the head by a heavy metal bar and died due to internal bleeding in the brain. It would be difficult to imagine that his murder was unrelated to his sexual orientation and active role in the gay community. The report also alleged that Ugandan police were attempting to cover up the murder. Since then, various attacks directed at sexual minorities have been perpetrated by the government and people in the community.

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94 Id.
96 Id.
97 Id.
Uganda’s sodomy laws not only exacerbate the severe homophobia already present in the country’s society and culture, but also create a legal mechanism that threatens and oppresses sexual minorities. On September 26, 2005, legal assaults against sexual minorities were even further elevated when the Constitution (Amendment) Act 2005 was passed to establish an absolute prohibition of same-sex marriage. The amendment adds clause (2a), which provides, “Marriage between persons of the same sex is prohibited.” Four years later, Minister of Parliament Bahati attempts to continue this assault against sexual minorities with the Anti-Homosexuality Bill.

III. HISTORICAL ACCOUNT OF THE DEATH PENALTY IN UGANDA

Article 22 of Uganda’s Constitution provides for “Protection of right to life.” One exception to this protection is, “[n]o 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.”

Currently, Ugandan law prescribes the death penalty for a wide range of offenses including: murder, treason, smuggling, rape, defilement of a girl under the age of eighteen, kidnapping or detaining with intent to murder, detention with sexual intent, and robbery (aggravated). The death penalty is also afforded for certain offenses under the

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101 Id.
102 CONST. OF THE REPUBLIC OF UGANDA, 1995, art. 22.
103 Id.
105 Id. § 23.
106 Id. § 319(2).
107 Id. § 124.
108 Id. § 129(1).
109 Id. § 243.
110 Id. § 134.
111 Id. § 286.
Anti-Terrorism Act of 2002 and the Uganda People’s Defense Forces Act.112

In 2001, developments began taking place that significantly impacted the future of the death penalty in Uganda. The events commenced in March when President Museveni established a Constitutional Review Commission (the Commission) to assess the Constitution and to gather opinions concerning its provisions of citizens, NGOs, and state institutions.113 The Commission’s inquiries were derived from twenty “Terms of Reference,” key points the Commission was to focus on throughout its review,114 yet it was free to go beyond the scope of those terms to consider and make recommendations on “any other matters significantly relevant to the Constitution for good governance, the rule of law and affordability by the country of the implementation of the Constitution.”115 One Term of Reference inquired as to the public’s view concerning the death penalty.116 Of the members surveyed by the Commission, 57.5 percent supported retaining the policy.117 In its final report to the government, the Commission “recommended retention, but advocated a mandatory [death] sentence for only the most heinous crimes. The Commission also urged the government to change the method of execution from hanging to one that could ensure instant death.”118

However, while inquiries were being conducted, a group of prisoners on death row requested to meet with the Commission, and their arguments were submitted to them.119 After some time, believing their concerns would not prevail, the group of prisoners, joined by all of the other prisoners on death row in Uganda, filed a historic petition before the country’s Constitutional Court in September 2003 challenging the death penalty.120

John Katende, one of the attorneys representing the petitioners, Susan

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113 Id. at 41. See also Nicola Browne et al., Capital Punishment and Mental Health Issues: Global Examples, 25 St. Louis U. Pub. L. Rev. 383, 401 (2006).
115 Id. at 20 T.O.R.
116 Id. at 18 T.O.R.
117 Browne, supra note 113, at 401.
118 Id.
119 CHALLENGING THE DEATH PENALTY, supra note 112, at 41.
120 Id. at 41-42. The petition was titled Susan Kigula, Fred Tindigwihura, Ben Ogwang and 414 others v. Attorney General. Kigula v. Att’y Gen., 2005 UGCC 8
Kigula, Fred Tindigwihura, Ben Ogwang and 414 others, told the Court, "[t]his is a unique petition which constitute[s] a historic moment in the constitutional development of Uganda. It is the first time anywhere that all prisoners on the death row in the whole world file a case."\(^1\)\(^2\) The International Federation of Human Rights described the case as "a first step on the path to . . . abolition."\(^3\)

The petitioners made a constitutional argument, contending that their death sentences were inconsistent with Articles 22 and 24, which prohibit cruel, inhuman or degrading punishment or treatment.\(^4\)\(^5\) The petition set forth the following claims:

1. Mandatory death sentences are inconsistent with the right to appeal against sentence only (and not conviction).\(^6\)\(^7\) [T]he provisions [that] provide for mandatory death sentence contravene . . . [c]onstitutional provisions: a convict who is sentenced under such a mandatory provision is denied the right to appeal against sentence only.\(^8\)

2. [A] long delay between the pronouncement of the death sentence and the carrying out of the sentence, allows for a death row syndrome to set in. Carrying out of the death sentence after such a long delay constitutes a cruel, inhuman and degrading treatment.\(^9\)

3. Hanging as the legal mode of carrying out [a] death sentence, was cruel, inhuman and degrading.\(^10\)


\(^2\) CHALLENGING THE DEATH PENALTY, supra note 112, at 42.

\(^3\) Kigula, 2005 UGCC 8; see CONST. OF THE REPUBLIC OF UGANDA, 1995, art. 24 & 44.

\(^4\) CHALLENGING THE DEATH PENALTY, supra note 112, at 42; Kigula, 2005 UGCC 8.

\(^5\) Kigula, 2005 UGCC 8.

\(^6\) Id.; see CONST. OF THE REPUBLIC OF UGANDA, 1995, art. 24 & 44 (providing freedom from cruel, inhuman or degrading treatment or punishment); see also CHALLENGING THE DEATH PENALTY, supra note 112, at 43.

\(^7\) Kigula, 2005 UGCC 8; CHALLENGING THE DEATH PENALTY, supra note 111, at 43. See CONST. OF THE REPUBLIC OF UGANDA, 1995, art. 24 & 44; see also THE TRIAL ON INDICTMENTS ACT, 1971, ch. 23, § 99(1) (Uganda), available at http://
While the petitioners waited, in September 2004 the Cabinet responded to the Commission’s recommendations by preparing a Government White Paper for Parliament, which included both the Commission’s recommendations and the Cabinet’s response to each. The Cabinet responded to the Commission’s recommendation regarding mandatory death sentences with an acceptance, noting that “treason is not included in the list of crimes to which a mandatory death penalty applies.” In response to the Commission’s recommendation that hanging be eliminated as a method of execution, the Cabinet also agreed and accepted, noting that the protection of the right to life in Article 22 “will not require any amendment.”

Three months later, the Legal and Parliamentary Affairs Committee (the Committee) submitted their reply to the Cabinet’s report. Their response to the death penalty concerns of the White Paper was as follows:

On the various issues relating to human rights, the Committee agrees with all the recommendations of the CRC as agreed to by the Government and recommends that the proposals be adopted and implemented through the appropriate machinery for implementation.

Although the Committee acknowledged and agreed with the Commission’s recommendations, these were part of the proposals that did not require
amendment of the Constitution.\textsuperscript{134} Thus, the death penalty was not mentioned in either of the two constitutional Amendment Acts of 2005.\textsuperscript{135}

In June 2005, the Constitutional Court of Uganda issued a judgment on the prisoners' challenge to the death penalty.\textsuperscript{136} The Court found that it is not a cruel, inhuman, degrading treatment or punishment within the meaning of the Constitution since "the right to life is not absolute and it can be taken away after due process."\textsuperscript{137} The Court reasoned that the framers of Uganda's Constitution were aware of the provisions set forth in articles 24 and 44(a) when they drafted article 22, which protects\textsuperscript{138} the right to life.\textsuperscript{139} The judge stated:

\begin{quote}
In my view, they could not have permitted a death sentence in one article and prohibited it in another. This means that the right to life is a derogation of a fundamental human right which provides an exception to acts of torture, cruel, inhuman and degrading form of punishment prohibited by article 24.\textsuperscript{140}
\end{quote}

Notably more positive, however, on the second issue of whether mandatory death sentences are inconsistent with the right to appeal, the Court found,

\begin{quote}
[It is] cruel and degrading to tell an accused person that he or she has no right of being heard about the sentence to be imposed. It is not Parliament that tries criminal cases where a mandatory death penalty is imposed. In all fairness, the legislature should not determine for the court what sentence it should impose.\textsuperscript{141}
\end{quote}

\begin{footnotes}
\textsuperscript{134} Id. at 47.
\textsuperscript{137} Id.
\textsuperscript{138} See CONST. OF THE REPUBLIC OF UGANDA, 1995, art. 22 (protecting the right to life, with the exception of execution of a sentence passed after a fair trial).
\textsuperscript{139} Kigula, 2005 UGCC 8.
\textsuperscript{140} Id.
\textsuperscript{141} Id.
\end{footnotes}
The Court was finally beginning to scrutinize the manner in which the death penalty is carried out and to evaluate the procedures involved.

Furthermore, concerning the issue of “death row syndrome” resulting from a long delay between sentencing and execution, the Court found that a period of more than three years after the sentence was confirmed by the highest appellate court is unreasonable and in violation of the right to be free from cruel, inhuman or degrading treatment.\textsuperscript{142} The judge set forth:

\begin{quote}
[A]ny delay to carry out the death sentence after it had been confirmed by the highest appellate court in the land is inexcusable. The sentence ought to be carried out within a reasonable time. What constitutes a reasonable time is a question of fact. A person who is sentenced to death does not lose the protection of the law against cruel, inhuman or degrading treatment. \ldots If the death sentence is to retain its meaning, then it has to be carried out within a reasonable time at best within three years after the highest appellate court had confirmed the sentence. Any period beyond that would in my view constitute inordinate delay and therefore [be] unacceptable.\textsuperscript{143}
\end{quote}

In their petition, the prisoners had described the anguish of death row syndrome, “the mental and physical state of condemned prisoners who remain on death row for long periods,” by describing how “executions are carried out early morning and within the hearing of the other condemned inmates.”\textsuperscript{144} This description demonstrates the agony death row inmates are forced to endure.

Finally, in regard to the issue of whether hanging as a method of execution was cruel, degrading, and inhuman, the Court held that since it found the death penalty to be constitutional, “the mode of carrying it out cannot be said to be unconstitutional.”\textsuperscript{145}

After the judgment, and as expected, appeals were filed before the Supreme Court of Uganda. The Attorney General appealed the decisions regarding mandatory sentences and delays in carrying out executions, while the prisoners cross-appealed the decisions concerning the constitutionality.

\textsuperscript{142} Id.
\textsuperscript{143} Id.
\textsuperscript{145} Kigula, 2005 UGCC 8.
of the death penalty and hanging.\textsuperscript{146} In January 2009, the Supreme Court confirmed the declarations of the Constitutional Court but made two modifications.\textsuperscript{147} The first provided that any person whose death sentence is confirmed by the highest court, and whose petition for mercy\textsuperscript{148} is not processed and determined within three years, shall have their sentence commuted to life imprisonment.\textsuperscript{149} The second modification provided that any prisoner whose sentence arose from the mandatory death sentence provisions was entitled to have his case remitted to the High Court to be heard on mitigation of the sentence.\textsuperscript{150}

While the Supreme Court agreed with the Constitutional Court that the death penalty was not unconstitutional per se, the Court suggested that the Legislature reconsider and assess the death penalty question:\textsuperscript{151}

Before we leave this subject, we wish to urge that the Legislature should re-open debate on the desirability of the death penalty in our Constitution, particularly in light of findings that for many years no death sentences have been executed yet the individuals concerned continue to be incarcerated on death row without knowing whether they were pardoned, had their sentences remitted, or are to be executed. The failure, refusal or neglect by the Executive to decide on those death sentences would seem to indicate a desire to do away with the death penalty.\textsuperscript{152}

Although this case did not succeed in abolishing the death penalty, at the very least, it introduced the idea for discourse. A 2005 Internal Fact Finding Mission by the International Federation of Human Rights (known by its French acronym, FIDH) found that the majority of the people encountered by the FIDH and media were in favor of keeping the death penalty.\textsuperscript{153} Prison officials, however, were found to have the strongest opposition to the policy, “probably because of the involvement of the prison staff in the ex-

\textsuperscript{147} Id. at 63.
\textsuperscript{148} The petition for mercy is a presidential pardon. See \textit{Const. of the Republic of Uganda}, 1995, art. 121(4).
\textsuperscript{149} Kigula, 2009 UGSC 6, at 63.
\textsuperscript{150} Id. at 64.
\textsuperscript{151} Id. at 63.
\textsuperscript{152} Id.
\textsuperscript{153} \textit{Challenging the Death Penalty}, supra note 112, at 11.
executions and the resulting trauma.\textsuperscript{154} In fact, the Commissioner General of Uganda Prisons, the Deputy Commissioner General, and two assistant Commissioners of Prisons all swore affidavits supporting the petitioners in the challenge to the death penalty.\textsuperscript{155} In a 2007 interview, Commissioner of Prisons Johnson Byabashaija, stated his adamant opposition to the policy and believed “some of the 520 or so death row inmates [in Ugandan prisons] are innocent.”\textsuperscript{156} There may be merit to his statement. The 2005 FIDH report found that of the 417 inmates supporting the petition to the Constitutional Court, most were very poor, 86 percent could not afford to hire private lawyers for their defense, nearly 90 percent were believed “to have committed the offenses they were charged with in back woods or rural areas,” 27 percent had never been to school, 53 percent experienced very little primary school education, and 87 percent “have no knowledge or a very poor command of the English language, which is the language of the courts.”\textsuperscript{157} It is likely that the majority of the prisoners in this last group barely understood what took place during their respective trials. When this is coupled with their socioeconomic status, one can infer that the prospect of having a fair trial was minimal. “Ignoring these factors in the decision-making process constitutes a serious threat to the due process of law.”\textsuperscript{158} These problems in Uganda’s criminal justice system, rife with deficiencies, imply that death row inmates are most vulnerable. However, just as Uganda began making progress in abolishing the death penalty, the country took two steps back and is now expanding the group to which it applies.

IV. The Death Penalty for Homosexuality in Uganda – Domestic and International Illegality

International law unquestionably prohibits the arbitrary deprivation of life. In some states, however, the targeting of sexual minorities has become a widespread problem, revealing itself through the denial of basic human rights and sometimes even systematic murder as a result of government acquiescence or specific legislation.\textsuperscript{159} While the death penalty in Uganda has yet to be abolished, the courts have provided an interesting

\textsuperscript{154} Id.
\textsuperscript{156} Glenna Gordon, Prisons Boss Against Death Penalty, \textit{The Monitor} (Uganda), Sept. 12, 2007.
\textsuperscript{157} CHALLENGING THE DEATH PENALTY, supra note 112, at 22.
\textsuperscript{158} Id. at 23.
\textsuperscript{159} See, e.g., Alasti, supra note 76, at 162 (quoting Wilets, supra note 3, at 26).
framework upon which arguments against the application of the death penalty may be applied. It has yet to be seen whether its application to persons convicted of homosexuality will survive the courts.

The purpose of this section is to analyze the illegality of the death penalty for aggravated homosexuality based on provisions in Uganda’s Constitution\(^\text{160}\) and international legal instruments to which Uganda is a party, including: the Universal Declaration of Human Rights,\(^\text{161}\) the International Covenant on Civil and Political Rights,\(^\text{162}\) the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,\(^\text{163}\) and the African (Banjul) Charter on Human and People’s Rights.\(^\text{164}\)

A. **Summary of Applicable Law**


   Uganda’s Constitution protects the right to life and provides that no person shall be deprived of life intentionally unless it is the result of a sentence passed by a court.\(^\text{165}\) Article 24 of the Constitution protects against torture or cruel, inhuman or degrading treatment or punishment.\(^\text{166}\) Finally, Article 44(a) specifically notes that there shall be no derogation from the right to be free from torture or cruel, inhuman or degrading treatment or punishment.\(^\text{167}\)

2. **The Universal Declaration of Human Rights**

   The Universal Declaration of Human Rights (UDHR), adopted in 1948 by the United Nations General Assembly, provides the right to life,

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\(^{160}\) **CONST. OF THE REPUBLIC OF UGANDA, 1995.**


\(^{165}\) **CONST. OF THE REPUBLIC OF UGANDA, 1995, art. 22(1).**

\(^{166}\) *Id.* art. 24.

\(^{167}\) *Id.* art. 44(a).
liberty and the security of person, and prohibits torture or cruel, inhuman or degrading treatment or punishment.\textsuperscript{168}

3. The International Covenant on Civil and Political Rights

Uganda ratified the International Covenant on Civil and Political Rights (ICCPR) on June 21, 1995.\textsuperscript{169} The ICCPR protects against torture or cruel, inhuman or degrading treatment and punishment and provides for the right to life, specifically addressing those jurisdictions which have yet to eliminate the death penalty: \textquotedblleft [i]n 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.\textsuperscript{170}

4. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) was ratified by Uganda on November 3, 1986.\textsuperscript{171} It defines \textquotedblleft torture\textquotedblright in Article 1:

\begin{quote}
For the purposes of this Convention, the term \textquotedblleft torture\textquotedblright means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.\textsuperscript{172}
\end{quote}

Article 16(1) obligates each State Party to:

\footnotesize{\begin{itemize}
\item \textsuperscript{168} Id. art. 5.
\item \textsuperscript{170} Id. art. 6(1), 6(2).
\item \textsuperscript{171} See U.N. Treaty Collection Database, supra note 169.
\item \textsuperscript{172} CAT, supra note 163, art. 1.
\end{itemize}}
Prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.\textsuperscript{173}

5. African (Banjul) Charter on Human and People’s Rights

The African (Banjul) Charter on Human and People’s Rights provides in article 4, “[h]uman beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.”\textsuperscript{174} Article 5 follows, ensuring the right to respect for human dignity and prohibiting torture, cruel, inhuman or degrading treatment of punishment.\textsuperscript{175}


Article 27 of the Vienna Convention on the Law of Treaties prohibits States from invoking any provisions of its internal law as justification for a failure to comply with treaty obligations.\textsuperscript{176} This article essentially means that if there is a conflict between an internal law and a treaty obligation, the State will still be expected to follow through with the duty provided for in the treaty.

B. Application

Addressing the constitutionality of the death penalty, the Supreme Court of Uganda in \textit{Attorney General v. Kigula} 6 (“Kigula II”) recognized that “one should look at all the relevant provisions regarding the death pen-
ality in their totality and how they relate to the International Instruments . . . " Relying on Semogerere v. Attorney General, the Court then noted:

\[\text{[I]}\text{t in interpreting the Constitution, provisions should not be looked at in isolation. The Constitution should be looked at as a whole with no provision destroying another, but provisions sustaining each other. . . . [P]rovisions bearing on a particular issue should be considered together to give effect to the purpose of the Constitution.}\]

This establishes that in its analysis the Supreme Court will consider the relevant international laws to which Uganda is a party and frame its decision in light of each.

The Anti-Homosexuality Bill blatantly states that international law that contradicts the Bill's own spirit and terms "are null and void to the extent of their inconsistency." This attempt to discredit the countless international instruments to which Uganda is a party, is itself an invalid assertion as it directly contradicts the Supreme Court's holding in Kigula II and Article 27 of the Vienna Convention on the Law of Treaties, which prohibits a party from invoking its internal law in opposition to the provisions of a treaty it is party to. Therefore, the applicable law for analyzing the illegality of the death penalty for homosexuality must include Ugandan law and the international legal instruments ratified by Uganda.

1. **The Right to Life**

   The right to life is one of the most fundamental human rights. The Uganda Supreme Court in Kigula II found that because the right to life is qualified, the death penalty was constitutional. However, several times in the opinion, the Court referenced provisions of applicable law, such as Article 6(2) of the ICCPR, which maintains that, "sentence of death may be

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178 Id. (citing Paul Semogerere v. Att’y Gen. (Const. Appeal. No. 1 of 2002)) (emphasis omitted).


180 See Kigula, 2009 UGSC 6, at 23; Vienna Convention on the Law of Treaties, supra note 176 at art. 27.

181 Meaning the right to life, as provided in the constitution, provides an exception for execution of a sentence passed by a court. Kigula, 2009 UGSC 6, at 34.

182 Kigula, 2009 UGSC 6, at 34.
imposed only for the *most serious crimes* . . .”183 The Court also cited to the Constitutional Review Commission’s recommendation that “[c]apital punishment should be the maximum sentence for *extremely serious crimes*, namely murder, treason, aggravated robbery, and kidnapping with intent to murder.”184 In addition, the Court referenced a United Nations Economic and Social Council Resolution concerning safeguards for those sentenced to death: “In countries which have not abolished the death penalty, capital punishment may be imposed only for the *most serious crimes*, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences.”185

The penalty of death for aggravated homosexuality, as provided in the Anti-Homosexuality Bill, is not a *most serious crime*, because as the United Nations Economic and Social Council noted in the above-mentioned resolution, the scope of crimes for which the death penalty is applied “should not go beyond intentional crimes with lethal or other extremely grave consequences.”186 According to a report from the United Nations Secretary General, this reference means that “the offenses should be life-threatening, in the sense that this is a very likely consequence of the action.”187 In 1999, the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions further considered that:

> [T]hese restrictions *exclude* the possibility of imposing death sentences for economic and other so-called victimless offences, or activities of a religious or political nature - including acts of treason, espionage and other vaguely defined acts usually described as “crimes against the State” or “disloyalty”. Similarly, this principle would exclude actions primarily related to prevailing moral values, such as adul-

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183 ICCPR, *supra* note 162, art. 6(2) (emphasis added).
184 *Kigula*, 2009 UGSC 6, at 22 (citing the Constitutional Review Commission recommendations) (emphasis added).
186 *Id*.
tery and prostitution, as well as matters of sexual orientation.  

The United Nations Human Rights Committee reiterated this idea in General Comment No. 6 on the right to life provisions of the ICCPR. The Committee found that under Article 6, state parties were “obliged to limit [the] use [of the death penalty] and, in particular, to abolish it for other than the ‘most serious crimes.’ Accordingly, they ought to consider reviewing their criminal laws in this light and, in any event, are obliged to restrict the application of the death penalty to the ‘most serious crimes.’” The Committee further found that the expression “most serious crimes” demands a restrictive reading, stating, “the death penalty should be a quite exceptional measure.”

The Anti-Homosexuality Bill asserts that the aim of the legislation is to protect the “traditional heterosexual family” from internal and external threats, and “to protect the cherished culture of the people of Uganda [and the] legal, religious, and traditional family values of the people of Uganda against the attempts of sexual rights activists.” Yet, sentencing an individual to death, on the basis of their status, to preserve morality and pro-

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190 Id.

191 The Anti-Homosexuality Bill, 2009, Memorandum § 1.1 (Uganda). This line of reasoning is similar to that rejected by the ICCPR Human Rights Committee in Toonen v. Australia when it held that an Australian law criminalizing “private homosexual behavior” violated the ICCPR. Toonen v. Australia, ¶¶ 8.3, 9, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994), available at http://www1.umn.edu/humanrts/undocs/html/vws488.htm. The government claimed that its anti-sodomy laws were “justified on public health and moral grounds, as they [were] intended in part to prevent the spread of HIV/AIDS.” Id. at ¶ 8.4. However, the Committee found that there was no link between these laws and preventing the spread of HIV/AIDS and rejected the argument that “moral issues are exclusively a matter of domestic concern, as this would open the door to withdrawing from the Committee’s scrutiny a potentially large number of statutes dealing with privacy.” Id. at ¶¶ 8.5, 8.6.

192 See infra Part I (discussing how the Anti-Homosexuality Bill focuses on punishing an individual’s status rather than the acts in which they engage).
tect values cannot be justified, and as the Special Rapporteur stated, imposing death sentences for offenses related to “moral values” and “matters of sexual orientation” is excluded from the “most serious crimes” restriction.\(^{193}\) Same-sex sexual activities, especially when consensual, do not have lethal or other extremely grave consequences,\(^{194}\) nor do they fall into the Commission’s concept of “extremely serious crimes,” such as murder, treason, aggravated robbery, and kidnapping with intent to murder.\(^{195}\) Because the right to life is provided in the Constitution, the UDHR, the ICCPR, and the African [Banjul] Charter on Human and People’s Rights, imposing the death penalty for aggravated homosexuality violates the right to life and would thus constitute a violation of each of the international instruments.

2. Cruel, Inhuman, and Degrading Treatment or Punishment

Uganda’s Constitution, the UDHR, the ICCPR, the CAT, and the African [Banjul] Charter on Human and People’s Rights all contain provisions which provide that no one shall be subjected to cruel, inhuman and degrading treatment or punishment. In spite of the ruling by the Supreme Court of Uganda that the death penalty is per se constitutional and does not amount to such characterization, it has yet to be determined whether that holding would apply where the death penalty is imposed for aggravated homosexuality.\(^{196}\)

Criminalization of consensual homosexual acts “contradicts the object and purpose of the Universal Declaration of Human Rights and virtually every other law concerning sexual minorities.”\(^{197}\) The U.S. Supreme Court in \textit{Furman v. Georgia}, a case to which the Supreme Court of Uganda alluded in \textit{Kigula II},\(^{198}\) noted factors to consider in determining whether a punishment is cruel and unusual: “[i]f a punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially

\(^{193}\) Special Rapporteur, \textit{supra} note 188, at 22.

\(^{194}\) While some may argue that these types of sexual activities can result in sexually transmitted diseases that can be considered lethal or grave, this Comment argues that these risks are present in heterosexual relations/activities as well, and therefore should not be distinguished. When adults consent to these activities, they are responsible for the consequences, and instead of criminalizing these activities, the government should engage in awareness campaigns, educating both heterosexuals and sexual minorities, on the dangers of unprotected sex.

\(^{195}\) Kigula, 2009 UGSC 6, at 22.

\(^{196}\) Kigula, 2009 UGSC 6, at 24-37.

\(^{197}\) Alasti, \textit{supra} note 76, at 149.

\(^{198}\) Kigula, 2009 UGSC 6, at 29-30.
rejected by contemporary society, and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment.” Using this framework provided by the U.S. Supreme Court in *Furman v. Georgia*, it is clear that an imposition of the death penalty for aggravated homosexuality is a blatant violation of the provisions set forth in the international instruments that Uganda has ratified. A capital sentence for aggravated homosexuality is inherently cruel and severe because it is the ultimate punishment that can be inflicted on a human being; it is final and cannot be reversed. It is also excessive and disproportionate because it punishes victimless offenses with death, and it is unnecessary because many of the offenses that comprise aggravated homosexuality under the Anti-Homosexuality Bill, such as committing “homosexuality” with a person under 18, are already prohibited in other sections of the Penal Code Act. The international community has condemned Uganda’s imposition of the death penalty for aggravated homosexuality since the Bill was first introduced. Making it even further unacceptable to society is the fact that the provisions providing for the punishment are imposed arbitrarily, as they do not apply to everyone but instead target sexual orientation and persons with HIV.

V. Conclusion

While a capital punishment sentence for homosexual acts violates international law, “the fact that over one-third of the states in the world impose criminal punishment for unconventional sexuality with impunity seems to indicate very significant disagreement about the limitations that international human rights law imposes on the state’s power to dictate how individuals behave in their private and intimate associations.” Across the globe, a substantial number of countries classify sexual minorities as

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200 Caroline M. Wong, Comment, *Chemical Castration: Oregon’s Innovative Approach to Sex Offender Rehabilitation, or Unconstitutional Punishment?*, 80 OR. L. REV. 267, 283-84 (2001) (internal citations omitted). See also Alasti, supra note 76, at 150 (applying these considerations in his analysis of cruel and unusual punishment for engaging in consensual homosexual acts).


202 Ugandan government “may withdraw” anti-homosexuality bill, supra note 15.

203 See the Anti-Homosexuality Bill, §§ 3(1)(b), (3)(g)(3).

This criminalization of sexuality is a leading culprit of violence directed toward sexual minorities. Ultimately, it is states such as Uganda that must put an end to the severe homophobia that they themselves instigate.

In addition, “[a]bolition of the death penalty is generally considered to be an important element in democratic development for states breaking with a past characterized by terror, injustice and repression.” Uganda has certainly seen its fair – or unfair – share of terror, injustice and repression. Yet, after President Museveni’s election, Uganda briefly experienced a rebirth, and there was reason to be hopeful about her future. Sadly, after some time the progression of human rights development within Uganda began to linger and eventually became stagnant. The Kigula cases briefly inspired hope that abolition of the death penalty might have been on the horizon. This would truly be a significant development in the human rights law of Uganda. Those hopes were overshadowed several months later by the introduction of the Anti-Homosexuality Bill, which has the potential to set Uganda back decades in terms of its development and promotion of human rights.

This is the story of Uganda: a constant back and forth struggle between constraint and freedom, liberty and oppression, persecution and protection. While the pearl of Africa now finds herself at a crossroads, the people of Uganda have proven themselves resilient and forgiving, qualities that inspire hope that one day the country will rediscover her brilliance.
