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The Criminalization of Sexual Orientation: Why Uganda’s Anti-Homosexuality Act Threatens Its Trade Benefits with the United States

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"GROSS VIOLATION": WHY UGANDA’S ANTI-HOMOSEXUALITY ACT THREATENS ITS TRADE BENEFITS WITH THE UNITED STATES

LUCY HEENAN EWINS *

Abstract: In the fall of 2009, a Ugandan Minister of Parliament introduced legislation to further criminalize homosexual conduct in Uganda, which has been illegal since colonialism. This legislation would impose the death penalty on certain homosexual activity and would require citizens to report homosexual activity to the police or face jail time. Condemned by world leaders, some western governments threatened to withhold financial aid. In the United States, Senator Ron Wyden of Oregon has argued that, should the legislation become law, Uganda would be ineligible for trade benefits under the African Growth and Opportunity Act (AGOA). AGOA requires that beneficiary nations not engage in gross violations of internationally recognized human rights. This Note argues that sexual orientation is an internationally recognized human right and that the criminal penalties provided for in the Ugandan legislation constitute a gross violation of this right. It concludes that should the Ugandan legislation become law, Uganda would be ineligible for trade benefits under AGOA.

Introduction

Uganda, long associated with a bloody decades-long conflict plagued by child abductions, rape, and murder, has garnered attention again in the Western media due to a new human rights matter.¹ In the fall of 2009, after a visit by a group of U.S. evangelicals who promote conversion from homosexuality to heterosexuality through prayer and faith, Ugandan Minister of Parliament (MP) David Bahati introduced

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the Anti-Homosexuality Bill of 2009 (Anti-Homosexuality Bill).\(^2\) Although homosexuality has been illegal in Uganda for more than 100 years, the proposed legislation goes significantly further than current law.\(^3\) The Anti-Homosexuality Bill creates the crime of “aggravated homosexuality” which makes engaging in homosexual sex while living with HIV, or repeatedly engaging in homosexual activity, a crime punishable by death.\(^4\) It would also impose prison sentences on anyone who fails to report homosexual activity to the police within twenty-four hours.\(^5\) The author, a first-term lawmaker, stated that “[a]nybody who does not believe that homosexuality is a crime is a sympathizer.”\(^6\)

The global backlash to this bill has been significant.\(^7\) President Barack Obama recently denounced it as “odious” and Secretary of State Hillary Clinton communicated her “strongest concerns” over the proposed legislation directly to Ugandan President Yoweri Museveni.\(^8\) Resolutions have been introduced in the U.S. Congress condemning the proposed bill, calling on the Ugandan Parliament to reject it, and urging all governments to reject and repeal similar laws criminalizing homosexuality.\(^9\) Some countries have gone even further; Sweden has threatened to cut off all aid to Uganda should the bill become law.\(^10\) In the United States, Senator Ron Wyden, Chairman of the International Trade Subcommittee of the Senate Committee on Finance, has suggested that this proposed legislation could violate the African Growth and Opportunity Act (AGOA).\(^11\) AGOA, among other things, provides duty-free treatment to imports from eligible beneficiary countries.\(^12\) One of the eligibility requirements is that a beneficiary nation “not en-


\(^4\) Anti-Homosexuality Bill, pt. II § 3.

\(^5\) Id. pts. I § 1, III § 14.

\(^6\) Thompkins, supra note 3.


\(^8\) Spetalnick, supra note 1.


\(^10\) *Uganda Anti-Gay Law “Unnecessary,”* supra note 7.


\(^12\) Id.
gage in gross violations of internationally recognized human rights.” Senator Wyden argues that should the Anti-Homosexuality Bill become law, it would constitute a “gross violation of internationally recognized human rights,” making Uganda ineligible for the benefits of AGOA. He has announced that he intends to sponsor legislation to amend U.S. trade laws to “preclude countries that fail to adequately respect sexual orientation and gender identity as human rights from benefiting from any U.S. trade preference scheme.”

This Note first examines the proposed Ugandan legislation and the requirements of AGOA. Then, through an analysis of multilateral treaties and statements, regional actions, and the behavior of state actors, this Note explores whether sexual orientation is an internationally recognized human right. Assuming, arguendo, that sexual orientation is an internationally recognized human right, this Note discusses what would constitute a gross violation. Finally, this Note argues that sexual orientation has evolved into a protected international human right and that capital punishment, or life imprisonment for homosexual acts constitutes a gross violation of this human right.

I. Background

A. The Ugandan Anti-Homosexuality Bill of 2009

On September 25, 2009, MP Bahati introduced the Anti-Homosexuality Bill, his first-ever piece of legislation. News reports have suggested that the legislation was not homegrown but the result of a conference held in Kampala, Uganda in March 2009 with U.S. evangelicals. The conference, which drew thousands of Ugandans, focused on how to convert homosexuals into heterosexuals. The U.S. conference participants have since distanced themselves from the legislation, but speculation remains about their influence. Nevertheless, culturally

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14 Press Release, supra note 11.
15 Id.
16 Anti-Homosexuality Bill, 2009, Bill [18], (Uganda); Thompkins, supra note 3.
17 Thompkins, supra note 3.
19 See Thompkins, supra note 3.
and legally, gays have long been ostracized and subject to unequal treatment in Uganda.20

Under the Ugandan Penal Code, any person who has “carnal knowledge of any person against the order of nature” commits an offense that is punishable by life in prison.21 This indistinct language, deriving from the British common law system, refers to sodomy.22 Although the law does not distinguish between homosexual and heterosexual sodomy, practically speaking, only homosexual sodomy is criminalized.23 Despite the fact that it is rarely enforced, the law serves as a justification for discrimination, harassment, and the denial of government services.24 Homosexuals face harassment in public spaces, expulsion from schools, and discrimination in employment.25 There have also been high-profile asylum cases of homosexual Ugandans fleeing persecution.26 Furthermore, a misconception exists that homosexuality itself is illegal.27 As one scholar writes:

[I]t is not illegal to be a homosexual nor is it illegal for men to kiss, live together, or take any other action short of intercourse. Only anal sex has been criminalized in Uganda; however, people throughout the country seem to have taken this to mean that it is illegal merely to be homosexual.28

As a result, many non-governmental organizations (NGOs) and government service providers refuse to provide assistance to homosexuals for fear of retribution.29 In its most recent human rights report, the U.S. State Department reported that homosexuals in Uganda face discrimination and legal restrictions.30 It also noted that several members of the Ugandan NGO Sexual Minorities Uganda were harassed and

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21 The Penal Code Act of 1950 (Uganda), ch. 120 § 145.
22 Hollander, supra note 20, at 220 n.2 (citing Lillian Tibatemwa-Ekirikubinza, Criminal Law in Uganda: Sexual Assaults and Offenses Against Morality 97–99 (2005)).
23 Id. at 259.
24 Id. at 222.
25 Id. at 221.
27 Hollander, supra note 20, at 224.
28 Id. at 222 n.12.
29 See id. at 222.
arrested by police after protesting against sexual orientation discrimi-
nation.\textsuperscript{31}

MP Bahati’s legislation, however, proposes to take the existing laws
and policies a step further.\textsuperscript{32} According to its preamble, the purpose of
the bill is to “protect the cherished culture of the people of Uganda, le-
gal, religious, and traditional family values of the people of Uganda
against the attempts of sexual rights activists seeking to impose their val-
ues of sexual promiscuity on the people of Uganda.”\textsuperscript{33} The bill creates
the “offense of homosexuality,” which is defined to include any act to
penetrate or stimulate the sexual organ or mouth of a person of the
same sex.\textsuperscript{34} Furthermore, touching another person with the “intention
of committing the act of homosexuality” is also an offense.\textsuperscript{35} These of-
fenses would be punishable by life in prison.\textsuperscript{36} Attempts to commit ho-
mosexual acts are also considered a felony, punishable by seven years in
prison.\textsuperscript{37}

The most egregious provision, which has garnered international
attention, is the creation of the offense of “aggravated homosexuality,”
which is punishable by death.\textsuperscript{38} As drafted, aggravated homosexuality
occurs: (1) when an adult offender has homosexual sex with someone
under the age of eighteen; (2) when the offender is a person living with
HIV; (3) when the offender is the parent or guardian of the victim; (4)
when the offender is a person of authority over the victim; (5) when the
victim has a disability; (6) when the offender uses anything to “stupefy
or overpower” another in order to have homosexual sex; or (7) where
the offender is a serial offender, defined as a person who has previous
convictions of the offense of homosexuality or related offenses.\textsuperscript{39} Any
person charged with aggravated homosexuality would be required to
undergo HIV testing.\textsuperscript{40} Attempts to commit aggravated homosexuality
would also constitute a felony punishable by life in prison.\textsuperscript{41}

The proposed bill also requires an authority figure to report sus-
ppected offenses to relevant authorities within twenty-four hours or face

\begin{footnotes}
\item[31] Id.
\item[32] See generally Anti-Homosexuality Bill.
\item[33] Id. at memorandum § 1.1.
\item[34] Id. pt. II § 2.
\item[35] Id.
\item[36] Id.
\item[37] Id. pt. II § 4(1).
\item[38] Anti-Homosexuality Bill, pt. II § 3(2); see Getlemen, supra note 18.
\item[39] Anti-Homosexuality Bill, pts. I § 1, II § 3(1).
\item[40] Id. pt. II § 3(3).
\item[41] Id. pt. II § 4(2).
\end{footnotes}
up to three years in prison.42 Of great concern to many human rights organizations and NGOs is a broadly-worded provision that criminalizes the promotion of homosexuality.43 Some argue this provision could potentially curb HIV/AIDS prevention activity.44

News stories have sought to demonstrate the cumulative effect of these proposed provisions—a doctor who treats HIV-positive gay patients could be imprisoned for “aiding and abetting homosexuality,” anyone who fails to report him could also be imprisoned for “failure to disclose the offense,” and his patients could end up on death row.45 Pressure on the Ugandan government, and President Museveni in particular, mounted for months after the bill was introduced, and there was speculation that the death penalty would be dropped from the final bill and replaced with life in prison.46 A year after its introduction, the bill remains unamended; it is an open question whether any potential amendments would soften the positions of those who assert that the Act violates recognized international human rights.47

B. The African Growth and Opportunity Act

Within the United States, Senator Wyden was an early vocal opponent of the proposed Act and has suggested that its passage would make Uganda ineligible for trade preferences under AGOA.48 In a letter to U.S. Secretary of State Hillary Clinton and U.S. Trade Representative Ron Kirk, Wyden wrote: “I strongly urge you to communicate immediately to the Ugandan government, and President Yoweri Museveni directly, that Uganda’s beneficiary status under AGOA will be revoked should the proposed legislation be enacted.”49

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42 Id. pt. III § 14.
44 Anti-Homosexuality Bill, pt. III § 13; see HRW Uganda, supra note 43.
45 Alsop, supra note 2.
46 Gettlemen, supra note 18.
48 See Press Release, supra note 11.
49 Id.
AGOA was enacted in 2000 in order to encourage economic growth in Africa.\textsuperscript{50} Eligible sub-Saharan African countries benefit from trade preferences, including duty-free and quota-free access to the United States, and receive technical assistance and trade capacity support.\textsuperscript{51} Uganda has been an eligible beneficiary since AGOA’s initial passage.\textsuperscript{52} One of the eligibility requirements of AGOA beneficiaries is that they “not engage in gross violations of internationally recognized human rights . . . and cooperate[] in international efforts to eliminate human rights violations.”\textsuperscript{53} Though undefined in AGOA, this requirement is described in the U.S. Foreign Assistance Act as the “right to life, liberty, and the security of person.”\textsuperscript{54} Senator Wyden argues that the “jurisprudence in the area of international human rights supports respect of sexual orientation and gender identity as human rights.”\textsuperscript{55}

President Obama has demonstrated a willingness to remove countries from the AGOA process if they no longer meet the eligibility criteria.\textsuperscript{56} In December 2009, the White House announced that Guinea, Madagascar, and Niger were being terminated from the AGOA program due to recent undemocratic transfers of power.\textsuperscript{57} The White House explained that these events are “incompatible with making progress toward establishing the rule of law or political pluralism . . . and make it extremely difficult to achieve the progress necessary to satisfy the other AGOA eligibility criteria.”\textsuperscript{58} As one scholar indicated, President Obama’s recent stated support for human rights abroad in his 2010 State of the Union address may mean that should Uganda enact this Anti-Homosexuality Bill, its AGOA benefits will be terminated.\textsuperscript{59}


\textsuperscript{51} Id. at 2.

\textsuperscript{52} Wyden Press Release, supra note 11.


\textsuperscript{55} Wyden Press Release, supra note 11.


\textsuperscript{57} Id. at 69,230; Doug Palmer, Obama Ends Benefits for Guinea, Madagascar, Niger, REUTERS (Dec. 23, 2009), http://www.reuters.com/assets/print?aid=USTRE5BM4HZ20091224.

\textsuperscript{58} Palmer, supra note 57.

\textsuperscript{59} Gregory Simpkins, AFRICA RISING 2010 (Feb. 1, 2010, 14:10 EST), http://africaris- ing2010.blogspot.com (stating that President Obama’s recent removal of three countries from AGOA and his support for international human rights “likely will mean a termination of AGOA benefits for Uganda if the anti-homosexual law is approved”).
II. Discussion

A. Is Sexual Orientation an Internationally Recognized Human Right?

The legal definition of human rights is “[t]he freedoms, immunities, and benefits that, according to modern values (esp. at an international level), all human beings should be able to claim as a matter of right in the society in which they live.”60 The particulars of these rights have evolved from a sum of international, regional and state action.61 Legal positivists note that international and regional treaties and conventions, as well as state practice informs the development of international human rights norms.62 The terminology, “internationally recognized human rights,” is briefly defined in the U.S. Foreign Assistance Act of 1961 as the “right to life, liberty, and the security of the person.”63 The U.S. State Department has taken this to mean rights set forth by the Universal Declaration of Human Rights (UDHR), which is discussed more fully below.64 An assessment of international, regional, and state action informs whether protection of sexual orientation has risen to the level of an internationally recognized human right.65

1. International Action

The close of World War II ushered in a new era of international recognition of human rights.66 The development of the United Nations Charter in 1945 and the Nuremberg and Tokyo trials forever changed the landscape of international law.67 These events led to the creation and adoption of international agreements which “converted moral imperatives to international law.”68 The basis of modern multilateral hu-

64 See U.S. Dep’t of St., Human Rights Reports, http://www.state.gov/g/drl/rls/hrrpt/.
67 Id.
68 Id. at 221.
human rights treaties is the UDHR, signed in 1948. The UDHR applies to all people and has been adopted as a sort of charter by the international community, forming the basis for future human rights treaties. As the African Union Commissioner for Political Affairs stated, it has “inspired regional human rights instruments and mechanisms that [have] led to a comprehensive system of legally binding treaties for their promotion and protection.” The UDHR states that all human beings are “born free and equal in dignity and rights” and that everyone is entitled to all the rights and freedoms in the declaration regardless of status. Some of the rights include: the right to equal protection and freedom from discrimination; freedom from arbitrary arrest and cruel or inhuman treatment; the right to freedom of thought, opinion, and association; and the right to protection against “arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation.”

The International Covenant on Civil and Political Rights (ICCPR), to which Uganda is a signatory, is derived from the UDHR and re-states it in “greater detail and with legal precision.” Although no treaty explicitly states that sexual orientation is a protected human right, because the treaties were ratified in the 1970s and jurisprudence surrounding sexual orientation evolved in the 1990s, the ICCPR has

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70 See G.A. Press Release, supra note 69; Thomas Buergenthal et al., International Human Rights in a Nutshell 35–36 (3d ed. 2002) (“Because of its moral status and the legal and political importance it has acquired over the years, the Declaration ranks with the Magna Carta, the French Declaration of the Rights of Man and the American Declaration of Independence as a milestone in mankind’s struggle for freedom and human dignity.”).


73 Id. art. 2.

74 Id. art. 7.

75 Id. art. 9.

76 Id. art. 5.

77 Id. arts. 18–20.

78 UDHR, supra note 72, art. 12.

79 Hollander, supra note 20, at 226–27.

been used to uphold the rights of gays and lesbians.\textsuperscript{81} The adjudicating body of ICCPR, the Human Rights Committee (HRC), has ruled that discrimination on the basis of sexual orientation is prohibited under the treaty.\textsuperscript{82} Each ruling relied in part on Articles 2, 17, and 26 of the ICCPR, which recognize the rights of individuals regardless of status;\textsuperscript{83} protect interference with privacy, family, honor or reputation;\textsuperscript{84} and govern non-discrimination regardless of status.\textsuperscript{85}

In \textit{Toonen v. Australia}, the ICCPR HRC directly applied these provisions to overturn a Tasmanian law criminalizing sodomy.\textsuperscript{86} Toonen, a citizen of Tasmania, claimed that the Tasmanian criminal code, which penalized sexual conduct between men, violated his right to privacy under the ICCPR.\textsuperscript{87} The HRC found the Tasmanian law to be in direct violation of Article 17, and held that “in so far as Article 17 is concerned, it is undisputed that adult consensual sexual activity in private is covered by the concept of ‘privacy.’”\textsuperscript{88} Even though the Tasmanian law had not been enforced in a decade, the HRC found that this lack of

\begin{footnotesize}
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\item \textsuperscript{81} See Laurence R. Helfer & Alice M. Miller, \textit{Sexual Orientation and Human Rights: Toward a United States and Transnational Jurisprudence}, \textit{Harv. Hum. Rts. J.} 61, 61 (1996); Hollander, supra note 20, at 225, 229 (noting that the Human Rights Committee, the adjudicating body of the ICCPR, has utilized the treaty to uphold the rights of gays and lesbians); Mittelstaedt, supra note 80, at 360–61.
\item \textsuperscript{82} Hollander, supra note 20, at 229.
\item \textsuperscript{83} International Covenant on Civil and Political Rights, \textit{opened for signature} Dec. 16, 1966, S. Exec. Doc. E, 95–2, 999 U.N.T.S. 171, art. 2(1) [hereinafter ICCPR]:
\begin{quote}
Each State Party to the present Covenant undertakes to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
\end{quote}
\textit{Id.}
\item \textsuperscript{84} \textit{Id.} art. 17 (“No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.”).
\item \textsuperscript{85} \textit{Id.} art. 26:
\begin{quote}
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, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
\end{quote}
\textit{Id.}
\item \textsuperscript{86} Hollander, supra note 20, at 22–30.
\item \textsuperscript{88} \textit{Id.} ¶¶ 8.2, 8.6.
\end{itemize}
\end{footnotesize}
enforcement did not guarantee that it would not be enforced in the future, stating, “[t]he continued existence of the challenged provisions therefore continuously and directly ‘interferes’ with the author’s privacy.”\textsuperscript{89} The HRC also extended the meaning of the word “sex” in Articles 2 and 26 of the ICCPR to include sexual orientation.\textsuperscript{90} This unanimous decision was groundbreaking and added “force to the claim that both criminalizing consensual homosexual conduct and discriminating on the basis of sexual orientation violate international human rights law.”\textsuperscript{91} For the first time, protection against discrimination on the basis of sexual orientation was extended to the global forum with the HRC clearly stating that sexual orientation was a protected status under the ICCPR.\textsuperscript{92} This decision became the foundation for international protection of homosexual rights.\textsuperscript{93}

Other decisions in recent years have expanded on \textit{Toonen}.\textsuperscript{94} In 2000, the HRC found that the denial of pension rights to the same-sex partner of a deceased Australian war veteran was a violation of Article 26 of the ICCPR.\textsuperscript{95} And in 2006, the U.N. Working Group on Arbitrary Detention found that the detention of eleven men in Cameroon based on their sexual orientation violated the ICCPR.\textsuperscript{96}

In addition to HRC rulings, other U.N. treaty bodies have advocated for the decriminalization of consensual sexual relations and have denounced policies that discriminate on the basis of sexual orientation.\textsuperscript{97} The U.N. Committee on the Elimination of Discrimination Against Women (CEDAW) recommended that Kyrgyzstan consider lesbianism a sexual orientation and abolish related penalties.\textsuperscript{98} Similarly, the Committee on Economic, Social and Cultural Rights (CESCR) expressed regret that Hong Kong’s anti-discrimination legislation failed to

\textsuperscript{89} Id. ¶ 8.2.
\textsuperscript{90} Id. ¶ 8.7 (“The Committee confines itself to noting, however, that in its view the reference to ‘sex’ in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation.”).
\textsuperscript{91} Helfer & Miller, \textit{supra} note 81, at 62–63.
\textsuperscript{92} Id. at 69–70.
\textsuperscript{93} Mittelstaedt, \textit{supra} note 80, at 361.
\textsuperscript{94} See Hollander, \textit{supra} note 20, at 229–30; Mittelstaedt, \textit{supra} note 80, at 361.
\textsuperscript{95} Mittelstaedt, \textit{supra} note 80, at 361.
\textsuperscript{96} Hollander, \textit{supra} note 20, at 229–30.
include discrimination on the basis of sexual orientation.\textsuperscript{99} Other treaty bodies have requested that nations repeal laws that criminalize consensual sexual relations between same-sex individuals.\textsuperscript{100} For instance, in 2002, the HRC and the Committee against Torture (CAT) requested that Egypt repeal its law criminalizing same-sex sexual relations, and in 1998, the HRC and CESCR requested that Cyprus repeal a similar law.\textsuperscript{101} In fact, HRC regularly expresses concern that nations are discriminating on the basis of sexual orientation, noting this concern in thirteen out of eighty-four country reviews between 2000 and 2006.\textsuperscript{102}

The proceedings of the Special Procedures of the U.N. Human Rights Council, formerly the U.N. Human Rights Commission, also lend support for the concept that general human rights protections extend to homosexuals.\textsuperscript{103} In 2005 and 2006, two joint statements were offered in support of sexual orientation as a human right and were supported by dozens of states.\textsuperscript{104} High-level U.N. officials have spoken out against discrimination and condemned attacks against gays and lesbians.\textsuperscript{105} In 2004, a Special Rapporteur on physical and mental health declared that “fundamental human rights principles, as well as existing human rights norms, lead ineluctably to the recognition of sexual rights as human rights.”\textsuperscript{106} In 2007, the former High Commissioner for Human Rights, Louise Arbour, noted that cultural and moral beliefs were no justification for criminalizing consensual same-sex private relations, and that laws which criminalize this behavior “violate the fundamental right to life, security and privacy.”\textsuperscript{107} Ms. Arbour’s remarks were offered in support of the Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and

\textsuperscript{99} See id.

\textsuperscript{100} IGLHRC, \textit{Summary}, \textit{supra} note 97.

\textsuperscript{101} Id.

\textsuperscript{102} O’Flaherty & Fisher, \textit{supra} note 98, at 218.

\textsuperscript{103} Id. at 222.

\textsuperscript{104} Kate Sheill, \textit{Human Rights, Sexual Orientation, and Gender Identity at the UN General Assembly}, 1 J. Hum. Rts. Prac. 315, 315 n.2 (2009).

\textsuperscript{105} O’Flaherty & Fisher, \textit{supra} note 98, at 222–23 (quoting the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health).

\textsuperscript{106} Id. at 223.

Developed by human rights experts and promulgated in 2007, the purpose of these principles is to provide clarity to states on their obligations under international human rights law as it relates to sexual orientation and gender identity. The Principles unequivocally state that international human rights law applies to sexual orientation and gender identity.

Following the launch of the Yogyakarta Principles, the U.N. Statement on Human Rights, Sexual Orientation and Gender Identity (The Statement) was presented to the U.N. General Assembly in December 2008. The Statement, sponsored by France and Argentina and backed by a group of states from all five U.N. regions, was unprecedented. It reaffirmed the principle of non-discrimination in the UDHR and explicitly stated that its protections extend to sexual orientation and gender identity. It also urged all states to take action to ensure that individuals are not subject to arrest, detention, or criminal penalties due to their sexual orientation. The largest-ever statement on this matter, 66 out of 192 member countries signed the declaration. Though the Holy See opposed the statement, it urged, for the first time ever, that all states decriminalize homosexuality and it called for an end to discrimination against homosexuals.

The Organization of the Islamic Conference, led by the Syrian delegation, proposed an opposing statement. This statement, signed by fifty-seven nations—including most of Africa and Asia—claimed that the “notion of orientation spans a wide range of personal choices that expand way beyond the individual’s sexual interest in copulatory behav-

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108 Id.
110 See generally The Yogyakarta Principles, supra note 109.
113 Statement on Human Rights, supra note 111, ¶ 3.
114 Id. ¶ 11.
115 Arcus, supra note 112, at 4.
117 Arcus, supra note 112, at 4; MacFarquhar, supra note 112.
bour with normal consenting adult human beings, thereby ushering in the social normalisation . . . of paedophilia.” Nevertheless, it still de-

118 See Arcus, supra note 112, at 4; see also MacFarquhar, supra note 112.

119 Arcus, supra note 112, at 4.


122 See Hollander, supra note 20, at 236.

123 Id. at 235–36.

124 See O’Flaherty & Fisher, supra note 98, at 218.

This division between Western nations and those in Africa and parts of Asia emerged again in December of 2009 when these nations voted along these lines to delete a reference to sexual orientation in the CESCR General Comment. The proposed General Comment No. 20 passed through the CESCR and would have explicitly added sexual orientation and gender identity as categories protected from discrimination. Although many believe that sexual orientation is a protected status under U.N. human rights treaties and norms, many nations in Africa and parts of Asia do not recognize an extension of these rights to sexual minorities. As one scholar states:

Over the past thirty years, an international consensus has emerged condemning laws that discriminate against gay individuals. . . . [T]his emerging consensus is almost entirely a Western phenomenon, not one that has been embraced by Africa or many parts of Asia. However, the recognition of a right in much of the world should serve as an indicator . . . that this is neither a fleeting right nor an outrageous claim.

2. Regional Action

The actions of regional instrumentalities provide further insight into the state of sexual orientation as an internationally recognized human right. Again, the divide between Africa and the West is ap-
parent.\textsuperscript{125} The African Charter on Human and People’s Rights, while a “well-meaning rhetorical device,” has not been used to uphold the rights of gays and lesbians.\textsuperscript{126} Because the majority of African states do not recognize the rights of gays and lesbians to non-discrimination, privacy, and freedom of association, the commission overseeing the Charter also does not recognize or enforce these rights.\textsuperscript{127} As one scholar writes, “[a]n adjudicative and protective body is only as strong as the members that comprise it.”\textsuperscript{128}

On the other hand, Europe has made serious steps towards equal rights for gays and lesbians.\textsuperscript{129} In 1994, the European Union (EU) Parliament called for the decriminalization of homosexual activity in all EU member states\textsuperscript{130} and in 2000 the Council of Europe’s Parliamentary Assembly stated that it would only accept states that had abolished criminal prohibitions on homosexual intercourse.\textsuperscript{131} By August 1, 2003, Europe was free from all laws criminalizing same-sex, consensual, adult sex.\textsuperscript{132} Quite significantly, the European Court of Human Rights (ECtHR) has struck down anti-sodomy laws and required equal treatment for gays and lesbians.\textsuperscript{133} The ECtHR held that Articles 8 and 14 of the European Convention on Human Rights (ECHR) guarantee the right to privacy, family, and freedom from discrimination.\textsuperscript{134} In its influential case on the matter, \textit{Dudgeon v. United Kingdom of Great Britain and Northern Ireland}, the court held in 1981 that the crimes of “buggery” and “attempted buggery” violated the ECHR.\textsuperscript{135} The court noted the “extreme effects that the mere existence of the anti-sodomy laws had on the private lives of gay individuals.”\textsuperscript{136} The court reaffirmed this position in \textit{Modinos v. Cyprus}, in 1993, where the plaintiff claimed that he was negatively affected by a Cypriot anti-sodomy law even though he

\textsuperscript{125} See Hollander, \textit{supra} note 20, at 235.
\textsuperscript{126} \textit{Id.} at 234.
\textsuperscript{127} \textit{Id.} at 235.
\textsuperscript{128} \textit{Id.}
\textsuperscript{130} \textit{Id.} at 821.
\textsuperscript{131} \textit{Id.} at 822.
\textsuperscript{132} \textit{Id.} at 814.
\textsuperscript{133} Hollander, \textit{supra} note 20, at 239.
\textsuperscript{134} \textit{Id.}
\textsuperscript{136} \textit{Dudgeon}, 45 Eur. Ct. H.R. ¶ 41.
was not charged with a crime. The court held that failure to enforce was not a defense, and was no guarantee that individuals would not be prosecuted in the future.

Building on this case law, the ECtHR expressly found that sexual orientation is a protected “other status” under the ECHR, which as one scholar writes, “open[s] the way for the application of all other Convention rights to lesbians and gay men.” The ECtHR has held that failing to extend benefits available to unmarried heterosexual partners to same-sex partners violates the rights to privacy, family, and equality. Significantly, more nations in Europe provide constitutional protections for gays and lesbians than anywhere else in the world.

The Organization of American States (OAS) also has stated that non-discrimination principles apply to sexual orientation. In June 2008, the OAS General Assembly unanimously voted to condemn human rights violations based on sexual orientation and to affirm the fundamental principles of non-discrimination.

3. State Action

State behavior also illuminates the trend toward recognizing sexual orientation as a human right. As one scholar writes, “there has been an undeniable, if gradual, trend toward recognition of freedom from state interference in sexual conduct and nondiscrimination based on sexual orientation in the corpus of international human rights law through state domestic practices.” In 1996, South Africa was the first country in the world to explicitly include sexual orientation as a protected class in its Constitution. Relying on this provision and the constitutional principles of equality, dignity, and privacy, the Constitutional

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140 Id.
141 Reeves, supra note 66, at 259.
143 Id.
144 See Fellmeth, supra note 129, at 811.
145 Id.
146 Hollander, supra note 20, at 247.
Court then struck down the common law offense of sodomy.\textsuperscript{147} As Justice Albie Sachs stated in his concurrence: “At the heart of equality jurisprudence is the rescuing of people from a caste-like status and putting an end to their being treated as lesser human beings because they belong to a particular group.”\textsuperscript{148}

Other nations have followed and abolished anti-sodomy laws.\textsuperscript{149} In \textit{Lawrence v. Texas} in 2003, the U.S. Supreme Court held that state anti-sodomy statutes unconstitutionally infringed on an individual’s freedom and privacy.\textsuperscript{150} The Court recognized that by criminalizing homosexual conduct, it could encourage further discrimination against homosexuals.\textsuperscript{151} Today decriminalization of homosexual sexual relations is the “fastest receding area of state discrimination against sexual minorities.”\textsuperscript{152} As of 2008, sexual relations between women were subject to criminal penalties in 41 out of 192 U.N. member states, and 81 states and 3 sub-states criminalized sexual relations between men.\textsuperscript{153}

States have also extended non-discrimination protections to individuals on the basis of sexual orientation.\textsuperscript{154} In the landmark Canadian case of \textit{Vriend v. Alberta}, Vriend was dismissed from his job because of his sexual orientation.\textsuperscript{155} He brought a complaint to the Alberta Human Rights Committee; the complaint was denied because sexual orientation was a not a protected status.\textsuperscript{156} Vriend claimed that excluding sexual orientation from the Individual Rights Protection Act of 1975 (IRPA) violated Section 15 of the Canadian Charter of Rights and Freedom.\textsuperscript{157} The Canadian court held that excluding sexual orientation from IRPA “sends a message that it is permissible, and perhaps even acceptable, to discriminate against individuals on the basis of their sexual orientation.”\textsuperscript{158} The court concluded that sexual orientation

\textsuperscript{148} See Hollander, supra note 20, at 246–47.
\textsuperscript{150} Lawrence v. Texas, 539 U.S. 558, 578 (2003); Fellmeth, supra note 129, at 822.
\textsuperscript{151} \textit{Lawrence}, 539 U.S. at 575; Hollander, supra note 20, at 250.
\textsuperscript{152} Fellmeth, supra note 129, at 814.
\textsuperscript{153} Id. at 815.
\textsuperscript{154} See Bromley & Walker, supra note 149, at 111.
\textsuperscript{156} Vriend, 1 S.C.R. at 508.
\textsuperscript{157} Id.
\textsuperscript{158} Id. at 551.
should be read into IRPA as a protected status. Beyond Canada, at least ten OAS countries have laws which prevent discrimination on the basis of sexual orientation.

Refugee law is considered by some scholars to be a part of international human rights law, and it provides unique insight into the trend towards support for sexual orientation as a human right. Over the past fifteen years, thousands of refugee claims based on sexual orientation have been brought under the Refugee Convention. As one scholar writes, “[d]espite initial doubt over whether sexual orientation could be regarded as a particular social group for the purposes of the Convention, by the mid to late 1990s this was well accepted in most refugee receiving nations.” Alien homosexuals in the United States are considered members of a particular social group for the purposes of asylum; criminal prosecution due to sexual orientation can be considered persecution where the law or punishment is particularly severe. Severity can be determined by comparing United States law to the law in the alien’s home country; in the case of prosecution due to same-sex consensual sex, courts may rely on Lawrence v. Texas to determine that a law criminalizing same-sex consensual sex is persecutory.

Although great strides have been taken to protect gays and lesbians from discrimination and prosecution, many countries retain anti-sodomy laws with grave punishments. Should Uganda’s Anti-Homosexuality Act become law, it would join seven other nations that impose the death penalty for the crime of sodomy.

159 Id. at 578.
160 HRW-OAS, supra note 142.
161 See Millbank, supra note 139, at 197.
163 Berg & Millbank, supra note 162, at 195.
164 Nat’l Immigrant Justice Ctr., Winning Asylum, Withholding and CAT Cases Based on Sexual Orientation, Transgender Identity and/or HIV-Positive Status 1, 21, 26 (June 2006).
165 Id. at 21.
166 Fellmeth, supra note 129, at 816.
167 Id. (noting that those countries include: Afghanistan, Iran, Mauritania, Pakistan, Saudia Arabia, Sudan, and Yemen).
B. What Constitutes a Gross Violation of Internationally Recognized Human Rights?

Although neither AGOA nor its legislative history defines “gross violation” of human rights, the term derives some meaning from the U.S. Foreign Assistance Act of 1961, as amended. According to this Act, a “gross violation” of internationally recognized human rights includes:

[T]orture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges, causing the disappearance of persons by the abduction and clandestine detention of those persons, or other flagrant denial of the right to life, liberty, and the security of person.

Furthermore, a consistent pattern of the violation of fundamental rights “intrinsic to human dignity,” such as “systematic harassment, invasions of the privacy of the home, arbitrary arrest and detention, ... denial of personality before the law [and] denial of basic privacy” as a matter of state policy may be “deemed ‘gross’ ipso facto.” A state party to the ICCPR is responsible for even a “single, isolated violation of any of these rights.”

Capital punishment may be considered a gross violation where it is disproportionate to the crime. Article 6 of the ICCPR provides that capital punishment may only be imposed for the “most serious crimes in accordance with law in force at the time of the commission of the crime.” Whether “aggravated homosexuality” is considered the most serious of crimes is discussed later in this Note.

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169 Id.
171 Id.
172 Id. § 702(f).
173 ICCPR, supra 83, art. 6(2).
III. Analysis

A. Sexual Orientation Has Evolved into an Internationally Recognized Human Right

Over the past twenty years there has been a remarkable shift in the approach to sexual orientation and human rights.\(^{174}\) Today, the right to privacy, a fundamental internationally recognized human right, includes the right to adult consensual homosexual sex.\(^{175}\) Additionally, non-discrimination principles include protection from discrimination based on sexual orientation.\(^{176}\) As discussed earlier in this Note, these rights have evolved from international, regional, and state action.\(^{177}\) Even though the ICCPR does not explicitly reference sexual orientation, the HRC has ruled that adult consensual sex is protected under Article 17 (the right to privacy), and that discrimination on the grounds of sexual orientation is prohibited under Article 26 (non-discrimination regardless of status).\(^{178}\) These rulings often impact the direction of signatory nations.\(^{179}\)

Courts and regional and national bodies from Europe, North America, and Latin America have reinforced the principle that the right to privacy applies to adult consensual homosexual sex.\(^{180}\) The ECtHR in Dudgeon and Norris recognized that criminalizing adult consensual sex violated the right to privacy under the European Convention and had a detrimental effect on homosexual individuals, even if the criminal law was not enforced.\(^{181}\) The reasoning employed in Dudgeon, and also in

\(^{174}\) See Fellmeth, supra note 129, at 811, 819; Helfer & Miller, supra note 81, at 61–63.


\(^{176}\) See Toonen, ¶ 8.7, U.N. Doc. CCPR/C/50/D/488/1992; Fellmeth, supra note 129, at 828; Mittelstaedt, supra note 80, at 361.


\(^{178}\) See generally Toonen, U.N. Doc. CCPR/C/50/D/488/1992 (holding that the right to privacy under the ICCPR includes the right to adult consensual homosexual sex and that the ICCPR prohibits discrimination on the basis of sexual orientation).

\(^{179}\) See Fellmeth, supra note 129, at 824; Helfer & Miller, supra note 81, at 70; Hollander, supra note 20, at 250.

\(^{180}\) See Bromley & Walker, supra note 149, at 111; Fellmeth, supra note 129, at 822; Hollander, supra note 20, at 250; Arcus, supra note 112, at 3.

\(^{181}\) See Bromley & Walker, supra note 149, at 94–95, quoting the court:
Toonen, impacted the U.S. Supreme Court in Lawrence.\textsuperscript{182} There, the Court found that the power of the state could not be used to control the personal private lives of consenting adults.\textsuperscript{183} The impact of Dudgeon spread beyond Europe as, over the next twenty years, nations liberalized their sodomy laws.\textsuperscript{184} In the 1980s, Cuba and New Zealand decriminalized same-sex intercourse, followed by Hong Kong, China, most of Eastern Europe, the Baltics, and some Central Asian countries in the 1990s.\textsuperscript{185} Constitutional courts in Colombia, Ecuador, and South Africa struck down anti-sodomy laws as well, with the South African Court referring explicitly to Toonen.\textsuperscript{186} These events demonstrate the effect that state actions had on the global spread of decriminalization.\textsuperscript{187}

Although there are still nations that criminalize consensual adult homosexual sex, and some which penalize it through death, jurisprudence indicates that these nations are increasingly becoming the minority.\textsuperscript{188} International human rights jurisprudence has not required universal agreement before a principle can be considered a norm.\textsuperscript{189} Instead these norms evolve from the words and deeds of international and regional treaties, conventions and state practices.\textsuperscript{190} Thus, the actions of multilateral institutions, regional bodies, and state actors lend credence to the principle that consensual homosexual sex is protected under the international human rights norm of the right to privacy.\textsuperscript{191}

The crimes of “aggravated homosexuality”\textsuperscript{192} and the “offense of homosexuality” in the Anti-Homosexuality Bill most clearly violate internationally recognized human rights because they intrude on an individual’s fundamental right to privacy by criminalizing the private be-

\textsuperscript{182} See Hollander, \textit{supra} note 20, at 250–51.
\textsuperscript{183} See \textit{id.} at 250.
\textsuperscript{184} See Bromley & Walker, \textit{supra} note 149, at 109–11; Fellmeth, \textit{supra} note 129, at 819.
\textsuperscript{185} Bromley & Walker, \textit{supra} note 149, at 111; Fellmeth, \textit{supra} note 129, at 819.
\textsuperscript{186} Fellmeth, \textit{supra} note 129, at 821–22.
\textsuperscript{187} See Bromley & Walker, \textit{supra} note 149, at 109–11; Fellmeth, \textit{supra} note 129, at 819–22.
\textsuperscript{188} See Fellmeth, \textit{supra} note 129, at 814–15.
\textsuperscript{189} See \textit{Heinze}, \textit{supra} note 62, at 123–24.
\textsuperscript{190} \textit{Id.} at 122.
\textsuperscript{191} See \textit{id.} at 122–24.
\textsuperscript{192} Anti-Homosexuality Bill, pt. II § 3. The section of the Anti-Homosexuality Bill that applies to minors would not be a violation of this principle, but perhaps could be considered disproportionate punishment if heterosexual sex with a minor is not also punishable by death; however, this topic is outside the scope of this note. \textit{See id.}
havior of consenting adults. Nevertheless, because the Ugandan penal code currently criminalizes sodomy, the United States could find that Uganda is in violation of an internationally recognized human right even without passage of the Anti-Homosexuality Bill.

The provision of the Anti-Homosexuality Bill that makes the promotion of homosexuality a crime also violates the internationally recognized human right of non-discrimination on the basis of status. Discrimination based purely on sexual orientation violates the ICCPR. As the HRC stated in Toonen, the reference to sex in Articles 2 and 26 of the ICCPR includes sexual orientation, thereby extending the rights of non-discrimination on the basis of status to sexual orientation. Additionally, a more recent case dealing with the denial of benefits to a same-sex partner was found to violate the non-discrimination provision of Article 26. Moving beyond these multilateral actions, regional and state actors have also found that it is impermissible to discriminate on the grounds of sexual orientation. As discussed earlier, in Vriend, the Canadian Court held that sexual orientation is a protected status under Article 15 of the Canadian Charter of Rights and Freedoms. Similarly, the ECtHR expressly stated that sexual orientation is included as an “other status” under the ECHR. Thus, because promotion of heterosexual activity is not a crime in Uganda, this proposed provision is discriminatory and violates internationally recognized human rights standards.

B. The Criminalization of Consensual Homosexual Acts and the Promotion of Homosexuality Is a Gross Violation of This Right

The offenses included in the Anti-Homosexuality Bill, which are punishable by death or life imprisonment, violate internationally rec-
ognized human rights in such a way as to constitute gross violations of these rights.\textsuperscript{203}

The crime of “aggravated homosexuality,” carrying the punishment of death, is in direct violation of Article 6 of the ICCPR, which provides that capital punishment be reserved only for the most serious crimes.\textsuperscript{204} The HRC has interpreted the phrase “most serious crimes” restrictively, meaning that capital punishment should only be used as an “exceptional measure.”\textsuperscript{205} According to the HRC, exceptional measure is limited to crimes resulting in loss of life.\textsuperscript{206} In fact, the HRC stated that homosexual acts do not meet the standard of “most serious crimes.”\textsuperscript{207} As such, the act of adult consensual sex where one party is HIV positive, or a serial offender,\textsuperscript{208} or the “victim” is disabled should not be considered the most serious of crimes.\textsuperscript{209}

Should capital punishment be replaced with life in prison, as has been suggested as a possibility, the punishment would still be considered a gross violation of internationally recognized human rights.\textsuperscript{210} Where the state, as a matter of policy, denies basic privacy to individuals it may be considered a gross violation \textit{ipso facto}.\textsuperscript{211} As discussed earlier in this Note, consensual adult sex, whether homosexual or heterosexual, is covered by the notion of privacy under Article 17 of the ICCPR.\textsuperscript{212} Here, the state, through its penal code, is denying individuals of the right to privacy by criminalizing consensual adult homosexual sex.\textsuperscript{213} As such, Uganda’s punishment of this private activity would con-
stitute a gross violation of this right.\textsuperscript{214} Uganda’s current law criminalizing sodomy, which carries the punishment of life imprisonment, as well as these proposed provisions, are invasions of the basic internationally recognized human right to privacy.\textsuperscript{215} As such, Uganda is currently in violation of the eligibility requirements of AGOA and should be removed as a beneficiary.\textsuperscript{216}

The criminalization of the promotion of homosexuality would also constitute a gross violation of internationally recognized human rights.\textsuperscript{217} Because only the promotion of homosexuality, and not heterosexuality, is criminalized in Uganda, this provision would constitute systematic discrimination by the state.\textsuperscript{218} Where the state singles out one particular group over another, systematic discrimination can occur, and this type of state-sponsored discrimination is also considered a gross violation \textit{ipso facto}.\textsuperscript{219} As a result, unless Uganda also prohibited the promotion of heterosexuality, this provision would constitute a gross violation of internationally recognized human rights, making Uganda ineligible under AGOA.\textsuperscript{220}

The conclusion that the criminalization of homosexual adult consensual sex and systematic state-sponsored discrimination on the basis of sexual orientation constitutes a gross violation of internationally recognized human rights extends to countries beyond Uganda.\textsuperscript{221} Any nation that receives trade preferences under AGOA and criminalizes adult consensual homosexual sex or systematically discriminates based

\begin{footnotes}
\footnotetext[214]{See \textit{Restatement (Third) of Foreign Rel. L. of the U.S.} § 702(m) (1987); Anti-Homosexuality Bill, pt. II §§ 2–4; HRC-Sudan, supra note 207, ¶ 8; HRC-Iran, \textit{supra} note 206, ¶ 8.}
\footnotetext[217]{See \textit{Restatement (Third) of Foreign Rel. L. of the U.S.} § 702(m) (1987); Anti-Homosexuality Bill, pt. III, ¶ 13.}
\footnotetext[218]{See generally Ugandan Penal Code (demonstrating that only homosexuality is a crime because of the absence of the crime of heterosexuality in the Code); Anti-Homosexuality Bill, pt. III § 13.}
\footnotetext[219]{See \textit{Restatement (Third) of Foreign Rel. L. of the U.S.} § 702(m) (1987).}
\footnotetext[220]{See 19 U.S.C. § 3703(a)(3); \textit{Restatement (Third) of Foreign Rel. L. of the U.S.} § 702(m) (1987); Anti-Homosexuality Bill, pt. III § 13.}
\end{footnotes}
on sexual orientation could be at risk of losing its eligibility.222 Currently forty nations in Sub-Saharan Africa are eligible under AGOA, and twelve of these nations (not including Uganda) criminalize adult consensual homosexual sex.223 As a result, close to half of the current beneficiaries may be ineligible for assistance under AGOA.224

CONCLUSION

Beginning with Toonen in 1994, major multilateral, regional and state bodies have addressed the rights of gays and lesbians. From asylum claims and non-discrimination provisions to the decriminalization of consensual homosexual sex, the law has evolved such that sexual orientation has become part of the fabric of international human rights law. Though gays and lesbians do not enjoy full equal rights under the law in many countries—most notably the right to marry—a majority of nations provide for the basic human rights of freedom from discrimination and protection of privacy. These rights have evolved into internationally recognized human rights and the gross violation of these rights could, in the future, result in nations losing their eligibility to participate in AGOA or other U.S. foreign assistance programs.

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222 See 19 U.S.C. § 3703(a)(3); AGOA Eligible Countries, supra note 221; HRW-Sodomy, supra note 221.
223 See 19 U.S.C. § 3703(a)(3); AGOA Eligible Countries, supra note 221; HRW-Sodomy, supra note 221.
224 See 19 U.S.C. § 3703(a)(3); AGOA Eligible Countries, supra note 221; HRW-Sodomy, supra note 221.