

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

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BANJUL, THE GAMBIA

**REPORT ON THE RIGHTS OF LESBIAN, GAY,
BISEXUAL AND TRANSGENDER PEOPLE IN THE
REPUBLIC OF UGANDA
UNDER THE
AFRICAN CHARTER OF HUMAN AND PEOPLES'
RIGHTS**

In Response to the

**PERIODIC REPORT OF THE REPUBLIC OF UGANDA
Presented at the 39th Ordinary Session of the Commission
in May 2006**

Prepared by
the International Gay and Lesbian Human Rights Commission
and
Sexual Minorities of Uganda

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SUMMARY LIST OF THE CRITICAL ISSUES PERTAINING TO UGANDA'S PERIODIC REPORT TO THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

While under arrest, same-sex practising people – either perceived or actual – are disproportionately vulnerable to the use of **torture and cruel, inhuman or degrading treatment**. Yet **impunity for torture** exists in Uganda. This is in violation of Article 5 of the African Charter. Hence the recommended action is as follows:

- Uganda must ensure that the prohibition against torture and the use of cruel, inhuman or degrading treatment is vehemently adhered to.

Same-sex practising people in Uganda are also disproportionately affected by the **abuse of police powers, extortion and arbitrary arrests** in violation of Article 6 of the African Charter. In the uneven application of the so-called sodomy laws, Ugandan police and government officials are denying Ugandans their right to liberty. Hence, the recommended action is as follows:

- Uganda should remedy the lack of police accountability in order to ensure the protection of its citizens' fundamental human rights.

Discrimination against same-sex practising people is pervasive in Uganda. **Articles 140, 141 and 143 of the Ugandan Penal Code** are in violation of Articles 2, 3, 28 of the African Charter. In its specific application to same-sex practising people, it is also in violation of Articles 4, 5 and 6. Hence the recommended action is as follows:

- Articles 140, 141, 143 should be repealed to bring Uganda in line with the African Charter, international human rights standard and to ensure that equality before and of the law for lesbian, gay, bisexual and transgender persons in Uganda is respected.

Uganda's **HIV/AIDS "Abstinence-until-marriage" policy** has a harmful effect on same-sex practising people and directly affects their **right to health** as protected under Article 16 of the African Charter. Hence the recommended action is as follows:

- Policies should be amended to address the needs of same-sex practising people in the fight against HIV/AIDS.

The constitutional amendment on the **Prohibition of Same-Sex Marriage** stands in violation of Articles 2, 28 and 3 of the African Charter. The prohibition is redundant in Uganda given the illegality of homosexual acts and the already implicit Constitutional prohibition against same-sex marriage. Hence the recommended action is as follows:

- In order to bring Uganda in conformity with the African Charter, it is necessary that the Constitutional amendment be reversed.

The International Gay and Lesbian Human Rights Commission and Sexual Minorities Uganda

This report has been developed by the International Gay and Lesbian Human Rights Commission (IGLHRC) and Sexual Minorities Uganda (SMUG). SMUG is a Uganda-based network of several gay and lesbian groups working in Uganda to achieve equality and justice for lesbian, gay, bisexual and transgender (LGBT) individuals. They provide direct assistance and advocacy on behalf of Ugandan LGBT people who face human rights violations.

IGLHRC is a US-based non-profit, non-governmental organization (NGO) whose mission is to secure the full enjoyment of the human rights of all people and communities subject to discrimination or abuse on the basis of sexual orientation or expression, gender identity or expression, and/or HIV status. IGLHRC effects this mission through advocacy, documentation, coalition building, public education, and technical assistance.

I. Scope of this Report

This document has been developed in response to Uganda's periodic report submitted to the African Commission on Human and Peoples' Rights (the Africa Commission) pursuant to Article 62 of the *African Charter on Human and Peoples' Rights* (the African Charter). The principal obligation of every State party to the African Charter is to recognize the Charter rights and to give effect to them by adopting relevant legislative and other measures. The presentation of a State's report to the African Commission, and the Commission's consideration of that report, also presents the international community with an opportunity for inspection of the State's compliance with its obligations under the treaty.

This shadow report raises a number of critical issues of concern that Uganda's periodic report fails to mention. It makes no claim to provide a comprehensive or exhaustive list of issues with regards to the implementation of the African Charter in Uganda. Rather, it purposefully focuses on the specific concerns of LGBT people in Uganda and how specific human rights violations illustrate Uganda's failure to comply with its international obligations.

Because Uganda has signed and ratified numerous international human rights conventions, its human rights obligations are clearly accessible. In addition to the African Charter¹, Uganda is a State party to the International Covenant on Economic, Social and Cultural Rights (ICRESCR)², the International Covenant on Civil and Political Rights (ICCPR)³, the Convention on the Elimination of All Forms of Discrimination against

¹ Signed on 18 August 1986, ratified on 10 May 1986.

² Acceded on 21 January 1987.

³ Acceded on 21 June 1995.

Women (CEDAW)⁴ and the Convention on the Rights of the Child (CRC)⁵. Uganda's international obligations under these instruments are relevant in further clarifying its obligations under the African Charter. In interpreting and applying the Charter, Article 60 empowers the African Commission to "draw inspiration from international law on human and peoples' rights...as well as from the provisions of various instruments adopted within the...United Nations of which the Parties to the present Charter are members." *Law Office of Ghazi Suleiman v Sudan* specifically acknowledged the relevance of Article 60 by applying jurisprudence from the European Court on Human Rights and the Inter-American Court of Human Rights.⁶ In fact, several African Commission cases draw from jurisprudence decided in analogous regional human rights bodies.⁷

Uganda has also incorporated several protections into its domestic law, with several internationally recognised human rights paralleled in its Constitution.⁸

In its May 2006 report to the African Commission, Uganda states that it:

"undertakes to honour treaty obligations and to this end endeavours to interpret the various articles contained in the covenant [the ICCPR] in good faith with a view of realising each covenant's objectives."⁹

It furthermore states that:

"the foreign policy of Uganda shall be based on the principles of respect for international law and treaty obligations and opposition to all forms of domination, racism and other forms of oppression and exploitation."¹⁰

In making these statements, Uganda has promised to meet international standards of respect for human rights. IGLHRC and SMUG commends this commitment but is concerned that there have been several sexuality-based human rights violations in Uganda that are illustrative of its failure to conform with international standards of respect for all citizens including sexual minorities.

Indeed, Uganda's report distinctly ignores the existence of any human rights violations against its citizens on the basis of sexual orientation and gender identity. The report is notably silent concerning LGBT rights. Given the prevalence of human rights violations

⁴ Signed on 30 July 1980, ratified on 22 July 1985.

⁵ Signed and ratified on 17 August 1990.

⁶ Communication 228/1999 – 16th Annual Activity Report at 48-50.

⁷ For example, *Curtis Fancis Doebller v Sudan* [Communication 236/2000 – 16th Annual Activity Report] applied jurisprudence from the European Court of Human Rights.

⁸ Uganda's Constitution contains provisions protecting the right to equality and freedom from discrimination (Article 21), the right to life (Article 22), the right to personal liberty (Article 23), respect for human dignity and protection from inhuman treatment (Article 24), the right to privacy of person, home and other property (Article 27) and the freedom of expression, movement, assembly and association (Article 29).

⁹ The Republic of Uganda, "Report to the Commission on Human and Peoples' Rights", Presented at the 39th Ordinary Session of the Commission on Human and Peoples' Rights, Banjul, The Gambia, May 2006, p.6, accessed at www.achpr.org on 8 September 2006.

¹⁰ Ibid.

on the basis of sexual orientation in Uganda, this silence seems at odds with the human rights situation on the ground.

II. Critical Issues in Uganda

The critical issues in relation to LGBT rights protection in Uganda fall under five areas of reform, namely:

- Reform of impunity for torture and cruel, inhuman and degrading treatment.
- Reform of the police system to ensure accountability for abuse of police powers.
- Reform of Uganda's Penal Code to remove the discriminatory Articles 140, 141 and 143.
- Reform of Uganda's HIV/AIDS "Abstinence-until-marriage" policy.
- Reform of the same-sex marriage prohibition recently added to the Ugandan Constitution.

a. Impunity for Torture and Cruel, Inhuman and Degrading Treatment

Amnesty International has reported on cases of torture and cruel, inhuman and degrading treatment perpetrated against members of the LGBT community in Uganda. In its 2001 report "Crimes of Hate, Conspiracy of Silence: Torture and ill-treatment based on sexual identity", Amnesty reports that one Ugandan lesbian human rights activist was tortured and raped in secret detention after being left alone in a room with three male detainees.¹¹ The other members of her organization were also arrested and subjected to beatings, sexual abuse and degrading treatment such as being made to sleep in a toilet and clean it twice a day with their hands.¹² The five members of this organization were released after two weeks of detention. Five years on, there has still been no governmental action to remedy the abuses that occurred.

The United States Department of State has reported that although Ugandan law prohibits torture and other cruel, inhuman or degrading treatment, there have been "credible reports that security forces tortured and beat suspects."¹³ This is particularly concerning for LGBT detainees. Given the propensity for torture and ill-treatment to occur in general, it is arguable that LGBT prisoners are increasingly susceptible to abuse. President Museveni has been particularly vocal in his condemnation of "abominable"¹⁴ homosexual acts and in 1999 he ordered the Criminal Investigations Department to "look for

¹¹ AI, "Crimes of hate, conspiracy of silence: Torture and ill-treatment based on sexual identity", ACT 40/016/2001, available at <http://web.amnesty.org/library/Index/ENGACT400162001?open&of=ENG-347> accessed on 14 October 2006.

¹² Ibid.

¹³ US Department of State, "Country Report on Human Rights Practices, Uganda"

¹⁴ BBC News, "Moi Condemns Gays", Thursday, September 30 1999, available at <http://news.bbc.co.uk/2/hi/africa/461626.stm> accessed 25 September 2006.

homosexuals, lock them up and charge them.”¹⁵ State-sponsored media has similarly called for stronger measures against homosexual conduct.¹⁶ In July 2005, a writer for the government owned New Vision encouraged the government to crack down on homosexuality, writing “the police should visit the holes mentioned in the press, spy on the perverts, arrest and prosecute them. Relevant government departments must outlaw or restrict websites, magazines, newspapers and television channels promoting immorality – including homosexuality [and] lesbianism.”¹⁷ Such public comments create a climate of impunity for the ill-treatment of sexual minorities in violation of Article 5 of the African Charter.

The African Commission has held that Article 5 of the Charter prohibits “not only cruel, but also inhuman and degrading treatment...[which] includes not only actions which cause serious physical or psychological suffering, but which humiliate or force the individual against his will or conscience.”¹⁸ In *Curtis Francis Doebller v Sudan*, the Commission held that whether an act constitutes a violation of Article 5 will depend on the circumstances of the particular case, but it also decided that “torture, cruel, inhuman or degrading treatment or punishment is to be interpreted as widely as possible to encompass the widest possible array of physical and mental abuses.”¹⁹ This broad interpretation of what behaviour is prohibited is also complemented by the Human Rights Committee’s interpretations of the correlative provisions under ICCPR.

The Human Rights Committee’s General Comment No. 20 established that the purpose of the prohibition against torture and cruel, inhuman or degrading treatment is to “protect both the dignity and the physical and mental integrity of the individual.”²⁰ The Human Rights Committee has also stated that the protection contained in Article 10 of ICCPR imposes a “positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of liberty.”²¹ However, given the protection contained in Article 5 of the African Charter is not limited to circumstances where persons are deprived of their liberty, it is clearly broader in its application. Furthermore, the Human Rights Committee has affirmed that even in times of public emergency, no derogation from Article 7 is permissible. This protection is mirrored in the African Charter, which allows no derogation from rights contained in the Charter.²²

¹⁵ BBC News, “Lock up gays, says Ugandan President”, Wednesday, September 29, 1999, available at <http://news.bbc.co.uk/2/hi/africa/460893.stm> accessed 25 September 2006.

¹⁶ Human Rights Watch, “Uganda: Same-Sex Marriage Ban Deepens Repression.”

¹⁷ Ibid.

¹⁸ *Curtis Francis Doebller v Sudan*, [Communication 236/2000 – 16th Annual Activity Report], at 36.

¹⁹ Ibid.

²⁰ OHCHR, “General Comment No. 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art 7):. 10/03/92.” Available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/6924291970754969c12563ed004c8ae5?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6924291970754969c12563ed004c8ae5?Opendocument) accessed on 22 September 2006.

²¹ OHCHR, “General Comment No. 21: Replaces general comment 9 concerning humane treatment of persons deprived of their liberty (Art. 10):. 10/04/92. available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/3327552b9511fb98c12563ed004cbe59?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/3327552b9511fb98c12563ed004cbe59?Opendocument) accessed 13 October 2006.

²² *Constitutional Rights Project v Nigeria*, (2000) AHRLR 227 (ACHPR 1999) at 41.

The UN Special Rapporteur on Torture has specifically addressed the prevalence of the use of torture against sexual minorities. In his 2001 Report he outlined communications he had received where “members of sexual minorities have been subjected, inter alia, to harassment, humiliation and verbal abuse relating to their real or perceived sexual orientation or gender identity and physical abuse, including rape and sexual assault.”²³ In particular, he expressed concern that “members of sexual minorities are disproportionately subjected to torture and other forms of ill-treatment, because they fail to conform to socially constructed gender expectations.”²⁴

In order to guarantee respect for Article 5 of the African Charter, as well as international human rights standards, Uganda should implement clear policies to address the current impunity for torture. It should specifically educate officials to end social stigma surrounding homosexuality which heightens same-sex practising peoples’ vulnerability to torture and cruel, inhuman and degrading treatment.

b. Lack of Accountability for Police Abuse

In July 2005, Ugandan government officials raided the home of a lesbian human rights activist. Amnesty International and IGLHRC reported that local councillors in Kampala raided the woman’s home in her absence. They seized documents and other materials – apparently looking for “incriminating material” – and arbitrarily arrested and detained another woman staying at the house.²⁵ The councillors had no authority to take such action and no warrant was produced on request. The arrested woman was taken to the police station and subjected to humiliating and degrading treatment including being made to undress.²⁶

Almost one-and-a-half years after the incident, there has been no governmental investigation or action at any level to remedy the wrongs that occurred. The human rights activist is currently attempting to pursue a private suit and Uganda should ensure that both her and similarly situated individuals are guaranteed protection in making such claims.

In relation to ensuring this protection, it is relevant to note that the UN Special Rapporteur on Torture specifically states that “discriminatory attitudes towards members of sexual minorities can mean that they are perceived as less credible by law enforcement

²³ “Report of the Special Rapporteur on the question of torture and other cruel, inhuman and degrading treatment or punishment”, 3 July 2001, UN Doc A/56/156, p.6.

²⁴ Ibid.

²⁵ AI, “Public Statement: Uganda: Intimidation of lesbian and gay activists”, available at <http://web.amnesty.org/library/index/engaf90032005> accessed on 15 September 2006.

²⁶ International Lesbian and Gay Association, “Human Rights Activists Brutalised by Police and Local Government official”, 27/7/2005, http://www.ilga.org/news_results.asp?LanguageID=1&FileCategory=9&ZoneID=2&FileID=683 accessed on 22 September 2006.

agencies or not fully entitled to an equal standard of protection.”²⁷ In addition, “members of sexual minorities, when arrested for other alleged offences or when lodging a complaint of harassment by third parties, have reportedly been subjected to further victimization by the police, including verbal, physical and sexual assault.”²⁸ Such statements reflect the situation in Uganda where the lack of police accountability translates to abuse of police power.

The aforementioned case provides a clear example of how Uganda is failing to uphold Article 6 of the African Charter. The basis of the search and the arrest is presumably the so called sodomy laws contained in Articles 140, 141 and 143 of Uganda’s Penal Code. These laws have been used in Uganda to specifically target same-sex practising people and deny them of their right to liberty. Relevantly, the UN Working Group on Arbitrary Detention has recently declared that the detention of eleven men in Cameroon on the basis of their presumed sexual orientation constitutes an arbitrary deprivation of liberty contrary to the ICCPR. The UN body further called on the government of Cameroon to adopt measures to remedy the situation, including the possible repeal of the offending laws. Given the existence of similar sodomy laws in Uganda, any detention made on the basis of such laws would be subject to the same finding.

Articles 140, 141 and 143 of Uganda’s Penal Code have in fact been the basis of recent arrests. In September, Evangelista Ariel Ramos, a Philippino national, was reportedly arrested in Mbare along with Hamis Ssentongo, a Ugandan national under the sodomy laws. David Kamoga is being held in Kirinya Prison pursuant to the sodomy laws and Mutayi Vincent and Safari Joseph have recently been arrested in Kibye. The occurrence of such arrests has also forced many Ugandans to go into hiding in order to avoid their own arrests. Given the specificity of the UN Working Group’s recent determination, it seems clear that Uganda would be subject to similar determinations in relation to these arrests.

Abuse of police power also comes in the form of extortion. Extortion is the single most common abuse facing gay men and lesbians in Uganda. IGLHRC and SMUG have documented dozens of cases of gay men and lesbians who have been forced to pay money to extortionists. Extortion usually takes the form of a threat by someone to inform police, family, school or employers about someone’s sexuality. The police themselves often act as the blackmailer, and when they are not, they are still often complicit in the crime. The Ugandan Constitution has no guarantees for its citizens’ protection from sexuality-based discrimination. In fact, laws against “carnal knowledge” and the new same-sex marriage prohibition in the Constitution send a clear message to the population that same-sex practising people have no enforceable rights. Without explicit protection of individuals against sexuality-related discrimination, extortionists operate with impunity.

Whether the victim pays the extortionist or not, blackmail leaves the victim demoralized and vulnerable. If the victim pays, the result may be financial bankruptcy, particularly if

²⁷ “Report of the Special Rapporteur, Sir Nigel Rodley on Civil and Political Rights, including the questions of Torture and Detention”, 27 December 2001, UN Doc 5/CN.4/2002/76, p.11.

²⁸ Ibid.

the perpetrator continues with demands for money. If the victim cannot or does not pay, the result can be loss of employment, housing, children, ostracism from family and the community, imprisonment or even death. Extortion can also take the form of demands for sexual favors—lesbian and bisexual women are at particular risk for this type of abuse placing them at increased risk for sexually transmitted diseases including HIV and unwanted pregnancies.

The government of Uganda should ensure that the police are held accountable for their acts and in particular ensure that extortion and arbitrary arrests are strictly prohibited.

c. Discrimination Against Marginalized Groups and Denial of Equal Protection of the Law

i. Legal Discrimination

Uganda's Penal Code criminalizes homosexual acts. Article 140 criminalizes "carnal knowledge against the order of nature" and imposes a maximum penalty of life imprisonment. Article 141 punishes "attempts" at carnal knowledge with a maximum sentence of 7 years imprisonment and Article 143 outlaws acts of "gross indecency", imposing up to 5 years imprisonment by way of penalty. Despite the clear-cut ruling of the Human Rights Committee condemning sodomy laws, Articles 140, 141 and 143 remain intact and indeed operational in Uganda.

The concerns related to these laws are numerous. One key concern relates to their discriminatory application to sexual minorities in Uganda. While the laws' language is gender neutral, rendering them potentially applicable to heterosexual acts as well, their application in reality is limited to same-sex practising individuals. As such, their existence amounts to discriminatory treatment prohibited under Article 2 of African Charter. *Toonen v Australia*²⁹ established that States cannot abridge the human rights of their citizens based on sexual orientation, yet Uganda's sodomy laws continue to apply to a specific group of individuals solely on the basis of their sexual orientation.

The existence and application of these laws amounts to discrimination which is prohibited under Article 2 and 28 of the African Charter. While the African Commission does not have extensive jurisprudence outlining a clear interpretation of Articles 2 and 28, Article 60 encourages the consideration of international law and decisions from comparable human rights bodies in understanding the rights contained in the Charter. In determining the meanings of the analogous non-discrimination protections in ICCPR, the Human Rights Committee stipulates that "non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights."³⁰ While

²⁹ *Toonen v Australia*, Communication No. 488/1992, U.N Doc CCPR/C/50/D/488/1992 (1994).

³⁰ Office of the High Commission for Human Rights (OHCHR), "General Comment No. 18: Non-Discrimination" 10/11/89. CCPR Comment No. 18, available at

“discrimination” is not defined in ICCPR, the Human Rights Committee has drawn from the CERD and CEDAW to elucidate its meaning. The Committee has stated that “discrimination” under the ICCPR

“should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion...or other status...which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”

The categories of prohibited discriminatory grounds are broad. Importantly, the Human Rights Committee in *Toonen v Australia* interpreted references to “sex” in Articles 2(1) and 26 of ICCPR as including sexual orientation. It furthermore stated that any domestic law criminalizing private, same-sex sexual behaviour between consenting adults violates the principle of non-discrimination. It is clear, then, that States cannot abridge the rights of their citizens on the basis of sexual orientation.

Complementary to the protection of non-discrimination contained in Articles 2 and 28, Article 3 of the African Charter outlines the protection of equality before the law. In *Legal Resources Foundation/Zambia* the Commission referred to the importance of the right to equality. Elaborating on this, the Commission noted that “citizens should expect to be treated fairly and justly within the legal system and be assured of equal treatment before the law and equal enjoyment of the rights available to all citizens.”³¹ They further stated that “equality, or the lack of it, affects the capacity of one to enjoy many other rights.”³²

According to international human rights law, the right to equality before the law and the equal protection of the law is a broader, more expansive protection than its non-discrimination counterpart. Eminent legal theorist, Manfred Nowak, has stated that “the prohibition of discrimination for personal characteristics is merely one aspect of the substantive structuring of the principle of equality.”³³ While the requirements of Article 2 and 28 protects enjoyment of the African Charter rights, Article 3 applies to *any* legal right and is not restricted to those enunciated in the Charter. As a consequence, it seems clear that discriminating or denying equality before the law on the basis of sexual orientation is covered under international human rights law.

In particular, the Human Rights Committee decision of *Young v Australia* held that Australia had violated Article 26 of the ICCPR – the analogous equal protection clause under ICCPR – by “denying the author a pension on the basis of his sex or sexual

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/3888b0541f8501c9c12563ed004b8d0e?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/3888b0541f8501c9c12563ed004b8d0e?Opendocument)
accessed 22 Sept 2006.

³¹ *Legal Resources Foundation v Zambia*, [Communication 211/98 – 14th Annual Activity Report: 2000-2001], at 63.

³² *Ibid.*

³³ Manfred Nowak, “UN Covenant on Civil and Political Rights: CCPR Commentary”, Kehl am Rhein: Strasbourg, 1993, p.459.

orientation.”³⁴ In so doing, the Committee decided that a distinction made on the basis of sexual orientation, was a denial of the right to equality before the law. The Committee recalled its earlier jurisprudence of *Toonen* “that the prohibition against discrimination under Article 26 [also] comprises discrimination based on sexual orientation.”³⁵ Furthermore, *Young* extended the application of *Toonen*, by applying a standard set in relation to a criminal law to the administrative matter of pension benefits. Such an extension demonstrates the importance for respect of equality in relation to sexual orientation.

Sodomy laws are not only inherently discriminatory, but they also foster a climate of social discrimination against LGBT persons. As demonstrated by the complainant in *Toonen v Australia*, the criminalization of homosexual acts “fuels discrimination and violence against and harassment of the homosexual community.”³⁶ This has indeed been the case in Uganda, where several human rights organizations have documented a “climate of hostility and prejudice against members of the LGBT community.”³⁷ Indeed, the United States Department of State noted that “homosexuals faced widespread discrimination and legal restrictions” in Uganda in 2005.³⁸ Furthermore, the UN Special Rapporteur on Torture has specifically noted that “discrimination on grounds of sexual orientation or gender identity may often contribute to the process of the dehumanization of the victim, which is often a necessary condition for torture and ill-treatment to take place.”³⁹ The legal proscription of homosexuality acts as badge of legitimacy allowing discrimination against same sex practising men and women to continue to occur.

Toonen also held that the Tasmanian sodomy laws violated Article 17 of the ICCPR – the right to privacy. While there is no analogous textual provision for the right to privacy under the African Charter, the African Commission should perhaps emulate the international standard set in the Human Rights Committee decision. The Committee held that it was “undisputed that adult consensual sexual activity in private is covered by the concept of ‘privacy’.”⁴⁰ It further held that the sodomy law was “arbitrary” in its failure to be “proportional to the end sought and necessary in the circumstances.”⁴¹ Notably, the Committee rejected Tasmania’s argument that the criminalization of homosexual practices was a reasonable and proportionate measure to “achieve the aim of preventing

³⁴ *Edward Young v Australia*, Communication No. 941/2000: Australia. 18/09/2003. U.N Doc. CCPR/C/78/D/941/2000 (2003) at 10.4.

³⁵ *Ibid.*

³⁶ *Ibid.*, at 2.7.

³⁷ Amnesty International (AI), “Public Statement: Uganda: Intimidation of lesbian and gay activists”, AI Index AFR 59/003/2005 (Public), News Service No: 208, 2 August 2005, available at <http://web.amnesty.org/library/index/engaf590032005> accessed on 15 September 2006.

³⁸ US Department of State, “Country Report on Human Rights Practices, Uganda”, March 8 2006, <http://www.state.gov/g/drl/rls/hrrpt/2005/61598.htm>, accessed on 14 September 2006.

³⁹ UN Special Rapporteur on Torture, “Civil and Political Rights, Including the Question of: Torture and Detention”, 2001, available at <http://daccessdds.un.org/doc/UNDOC/GEN/G01/165/00/PDF/G0116500.pdf?OpenElement>, accessed 16 October 2006.

⁴⁰ *Toonen v Australia* at 8.2.

⁴¹ *Ibid.* at 8.3.

the spread of HIV/AIDS” and to preserve morals.⁴² Importantly, the Committee also held that despite the law having not been used in 10 years, its “continued existence...continuously and directly ‘interferes’ with the author’s privacy.”⁴³ This is particularly relevant since Ugandan laws are actually enforced and thus clearly fall within the scope of the Human Rights Committee’s decision.

ii. Social Discrimination

On July 27 this year, Martha Gabula, a high school student, died in hospital after allegedly being assaulted by her teacher, Noah Nawagali.⁴⁴ While the facts of the case remain unclear, it seems that Gabula was attempting to commit suicide after being accused by fellow students of lesbianism. Newspaper reports describe the teacher as beating Gabula in order to extract information from her on whether she had taken an overdose of chloroquine.⁴⁵ Information reported to Kiira Road Police suggests that the “teacher...beat Martha so heavily that she later died at Mulago Hospital.”⁴⁶ Nawagali has been arrested in connection with Gabula’s death.

Despite the lack of clarity in relation to the exact course of events, it seems undeniable that the accusations about Gabula being a lesbian played a significant role in her eventual death. In a society where the State criminalizes sodomy and discrimination and marginalization of sexual minorities is widespread, this case is a demonstration of the dangerous ramifications associated with being gay, or being perceived as gay. It is an illustration of how State-sponsored discrimination can result in the denial of the right to life and is thus demonstrative of a failure to respect Article 4 of the Charter.

The Article 4 protection of the right to life and the inviolability of the human person is arguably the most significant of all human rights protections. The Commission has called it “the fulcrum of all other rights...the foundation through which other rights flow.”⁴⁷ Gabula’s death is a tragic illustration of the effect State-sponsored discrimination.

In order to take steps to eradicate all forms of discrimination and act in conformity with established international human rights standards, Uganda should immediately repeal the so-called sodomy laws.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ The New Vision “School director charged with student’s murder”, Monday 2 October 2006, available at <http://www.newvision.co.ug/D/8/13/524495> accessed on 3 October 2006.

⁴⁵ Ibid.

⁴⁶ Harrison Thembo, Wavah Broadcasting Service, “Teacher beats student to death”, Tuesday 3 October 2006, available at <http://www.wbs-tv.com/teacherbeats.php> accessed on 3 October 2006.

⁴⁷ *Foundation of Conscience v Sierra Leone*, (2000) AHRLR 293 (ACHPR 2000) at 19.

d. “Abstinence-until-Marriage” Policy and the Right to Health

Uganda’s new and exclusive focus on abstinence-until-marriage HIV/AIDS prevention programming deny young people information about any other method of HIV prevention.⁴⁸ In particular, there are no HIV/AIDS policies in Uganda that specifically address the particular concerns of same-sex practising people. Indeed, President Museveni has publicly condemned condoms as inappropriate for Ugandans, an action that is particularly harmful for same-sex practising people.⁴⁹ Furthermore, restricted access to treatment and information regarding HIV transmission has increasingly excluded the LGBT community. In November 2004, the government of Uganda warned UNAIDS not to assist sexual minorities in organizing a campaign reaching out to the members of the LGBT community to stem HIV infections.⁵⁰

The “Abstinence-until-Marriage” policy reflects inherent social discrimination and marginalization of LGBT people in Uganda and thus has a detrimental effect on their ability to achieve the right to health. Ugandans are denied access to treatment and services on the basis of their perceived or actual sexual orientation which indisputably results in disproportionate HIV/AIDS awareness and treatment compared to their heterosexual counterparts. This government-sponsored lack of awareness may lead to the proliferation of unsafe sexual practices and increased HIV rates among the same-sex practising population. By continuously denying that homosexuality exists in Uganda, the government is implementing discriminatory and harmful HIV/AIDS policies that will deleteriously affect same-sex practising people and their achievement of the right to health in violation of Article 16 of the African Charter.

Social Economic Rights Centre (SERAC) and Others v Nigeria has specifically held that the right to health “obligates governments to desist from directly threatening the health...of their citizens.”⁵¹ In particular, governments must “desist from carrying out, sponsoring or tolerating any practice, policy or legal measure violating the integrity of the individual.”⁵² The UN Committee on Economic, Social and Cultural Rights has also elaborated on the importance of the right to health:

“health is a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity.”⁵³

⁴⁸ Human Rights Watch, “Uganda: ‘Abstinence-Only’ Programs Hijack AIDS Success Story”, 30 March 2005, available at <http://hrw.org/english/docs/2005/03/30/uganda10380.htm> accessed 15 September 2006.

⁴⁹ Ibid.

⁵⁰ Sexual Minorities Uganda, “Submission to the Ugandan Human Rights Commission on the Systematic Human Rights Abuses in Ugandan HIV/AIDS Policy.”

⁵¹ *Social Economic Rights Centre (SERAC) and Others v Nigeria* (2001) AHRLR 60 (ACHPR 2001) at 52.

⁵² Ibid.

⁵³ UN Committee on Economic, Social and Cultural Rights, “General Comment No. 14 (2000), The right to the highest attainable standard of health”, available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/40d009901358b0e2c1256915005090be?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/40d009901358b0e2c1256915005090be?Opendocument) accessed on 27 October 2006.

Clearly, policies that deny access to treatment and information regarding HIV transmission are “directly threatening the health” of Uganda’s citizens.

Incursions on freedom of expression contained in Article 9 of the African Charter also have a deleterious effect on the realization of the right to health. The government of Uganda has recently silenced the discussion of gay and lesbian rights and issues. A radio station that hosted a lesbian and two gay men on a talk show was fined 1.8 million shillings (more than US\$1,000) by the governmental Broadcasting Council.⁵⁴ The guests were discussing issues of concern for same sex practising people in Uganda – including LGBT specific HIV/AIDS concerns – and calling for the repeal of the sodomy laws. The silencing of discussion in relation to these kinds of issues, not only impinges on the freedom of expression, but also denies Ugandans information about essential health related issues.

The Committee on Economic, Social and Cultural Rights states that “information accessibility” is an essential element of the human right to health. Recognizing the importance of information accessibility, the Committee also interpreted the right to health to include the “right to seek, receive and impart information concerning health issues.”⁵⁵ Furthermore, the Committee has affirmed that States must refrain from “censoring, withholding or intentionally misrepresenting health-related information, including sexual education information.”⁵⁶ Nevertheless, Uganda is doing little to ensure that same-sex practising people have access to information on HIV prevention, treatment and care. In fact, Uganda has stifled attempts to disseminate relevant information.

The government of Uganda should review its HIV/AIDS policies to specifically address the needs of men who have sex with men and women who have sex with women thereby ensuring the adequate protection of the right to health.

e. Same-Sex Marriage Prohibition

On July 6 2006, the Ugandan Parliament amended Article 31 of the Constitution to prohibit same-sex marriage. The text of Article 31 already contained an implicit prohibition against same-sex marriage by stipulating that “marriage shall be entered into with the free consent of the man and woman intending to marry.”⁵⁷ The Article now explicitly prohibits same-sex marriage by stating that “marriage is lawful only if entered into between a man and a woman.” It further specifies that “it is unlawful for same-sex couples to marry” and a Parliamentary spokesperson has noted that criminal sanctions for engaging in such marriages will be imposed in the future.⁵⁸

⁵⁴ Human Rights Watch, “Uganda: Press Homophobia Raises Fears of Crackdown”, 8 September 2006 available at <http://hrw.org/english/docs/2006/09/08/uganda14154.htm> accessed 15 September 2006.

⁵⁵ UN Committee on Economic, Social and Cultural Rights, “General Comment No. 14 (2000), The right to the highest attainable standard of health”

⁵⁶ Ibid.

⁵⁷ Article 31 of the *Constitution of the Republic of Uganda* 1995, available at <http://www.trybunal.gov.pl/constit/constitu/constit/uganda/uganda-e.htm>, accessed 12 September 2006.

⁵⁸ US Department of State, “Country Report on Human Rights Practices, Uganda.”

Given the already implicit prohibition against same-sex marriage and the criminalization of homosexual acts, this Constitutional amendment was unnecessary and redundant and therefore raises concern about invidious discrimination. Indeed, human rights activists have argued that “new criminal penalties against people who dare to marry can only have one purpose: to codify prejudice against same-sex couples.”⁵⁹ Its existence is thus a violation of Articles 2, 3 and 28 of the African Charter.

In order to comply with Articles 2, 3 and 28 of the African Charter, Uganda should reverse the constitutional amendment banning same-sex marriage.

III. Conclusion

Uganda has been a State Party to the African Charter for 20 years. It is plainly bound by the requirements of Article 1 to “recognise the rights, duties and freedoms enshrined in the Charter and...to adopt legislative or other measures to give effect to them.” Yet this report illustrates the extent to which the country is failing to comply with its obligations under the African Charter. Central to human rights protections is the principle of non-discrimination and equality before the law. In Uganda, a climate of social and state-sponsored discrimination has developed to exclude same-sex practising people from the enjoyment of basic human rights on an equal footing with their heterosexual counterparts. This denial has in some cases culminated in serious violations including arbitrary arrest, invasions of the right to privacy, and impunity for the use of torture, inhuman and degrading treatment.

There are many areas where Uganda’s actions in relation to LGBT persons are clearly sub-standard. Below are some areas on which the African Commission may request detailed and more accurate information from Uganda when it examines the State’s periodic report:

- The failure of the Ugandan government to protect against the use of torture and cruel, inhuman or degrading treatment.
- The failure to protect the right to liberty and freedom from arbitrary arrests through allowing police to search homes and arrest individuals without warrants.
- The justifications for maintaining Articles 140, 141 and 143 of the Penal Code given its inconformity with the African Charter and international human rights law.
- The justification for outlawing same-sex marriage given its already implicit prohibition in Uganda.

⁵⁹ Human Rights Watch, “Uganda: Same-Sex Marriage Ban Deepens Repression”, 12 July 2005, available at <http://hrw.org/english/docs/2005/07/12/uganda11307.htm> accessed 15 September 2006.

- The discriminatory HIV/AIDS policies which are disproportionately harmful to LGBT persons.