

# Being Gay in Kenya: The Implications of Kenya's New Constitution for its Anti-Sodomy Laws

Courtney E. Finerty<sup>†</sup>

<b>Introduction</b> .....	431
<b>I. Violence and Discrimination Against LGBT Kenyans:</b>	
<b>Cultural Attitudes and Kenya's Penal Code</b> .....	434
A. Violence and Discrimination Against LGBT Kenyans ...	434
B. Kenya's Penal Code .....	436
<b>II. LGBT Rights in the International Sphere</b> .....	438
A. The United Nations .....	438
B. The Universal Declaration of Human Rights .....	439
C. The International Covenant on Civil and Political Rights .....	440
D. The International Covenant on Economic, Social and Cultural Rights .....	442
E. The African Charter on Human and Peoples' Rights ...	442
F. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment .....	443
G. The Human Rights Council .....	444
<b>III. Kenya's New Constitution</b> .....	447
A. Background .....	447
B. The Bill of Rights .....	449
C. The Incorporation of International Law into Domestic Law .....	450
<b>IV. The Unconstitutionality of Kenya's Anti-Sodomy Laws</b> ...	450
A. Kenya's Anti-Sodomy Laws Directly Violate the New Constitution's Bill of Rights .....	450
B. Kenya's Anti-Sodomy Laws Violate General Principles of International Law and International Agreements to Which Kenya has Bound Itself .....	452
<b>Conclusion: Overcoming Practical Obstacles to Repealing Kenya's Anti-Sodomy Laws</b> .....	456

## Introduction

On August 27, 2010, after over twenty years of debate, Kenyan citizens

---

<sup>†</sup> J.D. Candidate, Cornell Law School, 2013. The author wishes to thank Professor Muna Ndulo for providing invaluable guidance and suggestions throughout the writing process. Thanks also to Ashley and my family for their love and support.

achieved a new Constitution,<sup>1</sup> replacing the one in place since Kenya gained independence from Britain in 1963. Heralded by local sources as the “birth of the second republic,”<sup>2</sup> the new Constitution guarantees all Kenyans fundamental rights and freedoms; these include, among others, the right to life,<sup>3</sup> equality and freedom from discrimination,<sup>4</sup> human dignity,<sup>5</sup> privacy,<sup>6</sup> and freedom of expression.<sup>7</sup> The new Constitution also incorporates international treaties to which Kenya is a party, as well as general principles of international law into Kenya’s domestic law, thereby enshrining international human rights norms into the new Constitution.<sup>8</sup>

Despite the new Constitution’s more progressive stance, not all Kenyans are able to enjoy the rights guaranteed to them under its provisions. In particular, lesbian, gay, bisexual and transgender (LGBT) Kenyans continue to be targets of verbal and physical injury, sexual violence, and social marginalization.<sup>9</sup> Additionally, they are subject to imprisonment on the basis of their sexual orientation.<sup>10</sup> Under Kenya’s Penal Code, engaging in same-sex sexual activity, termed “carnal knowledge of a person against the order of nature,” is characterized as an “unnatural offense” and is a felony punishable by up to fourteen years in prison.<sup>11</sup> Although the laws are rarely enforced, LGBT Kenyans are still prosecuted and imprisoned under these laws.<sup>12</sup> Furthermore, the laws codify and legitimize a general atti-

1. *Kenya President Ratifies New Constitution*, BBC NEWS AFR. (Aug. 27, 2010), <http://www.bbc.co.uk/news/world-africa-11106558>.

2. Xan Rice, *Kenyan Constitution Signed into Law*, GUARDIAN (Aug. 27, 2010), <http://www.guardian.co.uk/world/2010/aug/27/kenya-constitution-law>.

3. CONSTITUTION, art. 26 (2010).

4. *Id.* art. 27.

5. *Id.* art. 28.

6. *Id.* art. 31.

7. *Id.* art. 33.

8. *Id.* art. 2, §§ 5–6; Muna Ndulo, *African Customary Law, Customs, and Women’s Rights*, 18 IND. J. GLOBAL LEGAL STUD. 87, 99 (2011).

9. The Kenya Human Rights Commission conducted a series of interviews with 474 LGBT Kenyans aged eighteen to sixty-five to document their experiences of homophobia within the country. KENYA HUMAN RIGHTS COMMISSION, *THE OUTLAWED AMONGST US: A STUDY OF THE LGBTI COMMUNITY’S SEARCH FOR EQUALITY AND NON-DISCRIMINATION IN KENYA 19* (2011) [hereinafter *THE OUTLAWED AMONGST US*].

10. See *infra* Part I.B.

11. The Penal Code, (2009) Cap. 162. In addition, attempting to commit the crime of carnal knowledge against the order of nature is a felony punishable by up to seven years imprisonment, and,

“any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or in private is guilty of a felony and is liable to imprisonment for five years.”

*Id.* Caps. 163, 165.

12. For example, in 2006 Francis Odingi was sentenced to six years in prison for having “carnal knowledge of M.O. against the order of nature,” and the only reason he did not receive a higher sentence is because he was a student at the time of the “offense.” *Francis Odingi v. Republic*, (2006) 2011 e.K.L.R. (C.A. Nakuru).

tude of homophobia that exists within the country<sup>13</sup> and thereby lead to the routine human rights violations that LGBT Kenyans suffer.<sup>14</sup> As such, the laws instill fear,<sup>15</sup> facilitate abuse, and prevent LGBT Kenyans from achieving the equality to which they are legally entitled.

Beyond Kenya, there has been a growing consensus in the international community that discrimination on the basis of sexual orientation and gender identity runs contrary to fundamental human rights principles and international law.<sup>16</sup> Most notably, on November 17, 2011, the United Nations (U.N.) High Commissioner for Human Rights issued a report at the request of the General Assembly entitled, *Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on Their Sexual Orientation and Gender Identity*.<sup>17</sup> In the report, the Commissioner asserts, “[t]he fact that someone is lesbian, gay, bisexual or transgender does not limit their entitlement to enjoy the full range of human rights”<sup>18</sup> and enumerates obligations that states have toward LGBT citizens under international human rights law.<sup>19</sup> Additionally, the Commissioner makes it clear that “[t]he criminalization of private consensual homosexual acts violates an individual’s right to privacy and to non-discrimination and constitutes a breach of international human rights law.”<sup>20</sup> Because Kenya’s new Constitution includes an extensive Bill of Rights for individuals under Kenya’s jurisdiction<sup>21</sup> and incorporates international law into the Law of Kenya under the Constitution,<sup>22</sup> the increasing recognition of sexual minorities’ rights as human rights has major ramifications for the constitutionality of Kenya’s anti-sodomy laws.

This Note examines the incompatibility of international human rights norms with anti-sodomy laws, and argues that Kenya’s new Constitution renders its anti-sodomy laws unconstitutional under Kenya’s own domestic

13. In a survey conducted in 2007, approximately 96% of Kenyans indicated that society should reject homosexuality as a valid way of life. PEW RESEARCH CENTER, WORLD PUBLICS WELCOME GLOBAL TRADE—BUT NOT IMMIGRATION: 47-NATION PEW GLOBAL ATTITUDES SURVEY 35 (2007), available at <http://www.pewglobal.org/files/pdf/258.pdf>.

14. See *infra* note 136 and accompanying text.

15. See David McKenzie, ‘We Live in Fear’ Say Gays in Kenya, CNN (May 15, 2008), <http://edition.cnn.com/2008/WORLD/africa/05/15/gay.kenya/index.html>; see also Jesus Ramirez-Valles, *Out in Kenya: Encountering Friends Like Us*, 16(3) THE GAY & LESBIAN REV. WORLDWIDE 45, 48 (2009).

16. See U.N. High Commissioner for Human Rights, *Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on Their Sexual Orientation and Gender Identity*, ¶¶ 15-19, U.N. Doc. A/HRC/19/41 (Nov. 17, 2011) (enumerating the obligations that States have to prevent violence and discrimination based on sexual orientation and gender identity under “various international human rights instruments”).

17. *Id.*

18. *Id.* ¶ 16.

19. *Id.* ¶¶ 8-19.

20. *Id.* ¶ 41 (emphasis added). Despite the U.N.’s progressive stance, seventy-six countries have laws that criminalize people on the basis of gender or sexual identity. See *id.* ¶ 40 (citing INTERNATIONAL LESBIAN, GAY, BISEXUAL, TRANSGENDER & INTERSEX ASSOCIATION, BRUSSELS, STATE-SPONSORED HOMOPHOBIA: A WORLD SURVEY OF LAWS CRIMINALISING SAME-SEX SEXUAL ACTS BETWEEN CONSENTING ADULTS 9 (2011)).

21. See *infra* Part IV.A.

22. See *infra* Part IV.B.

law. Part I of the Note discusses the harsh realities facing LGBT Kenyans in the current culture of homophobia throughout the country, explores how Kenya's anti-sodomy laws contribute to human rights violations, and puts forth a counter-narrative to the view that homosexuality was imported to Kenya from the West. Part II analyzes LGBT rights in the international sphere. Part III examines Kenya's new Constitution, highlighting its Bill of Rights and the incorporation of international law into Kenya's domestic law. Part IV argues that Kenya's anti-sodomy laws are unconstitutional in light of the Bill of Rights and international human rights agreements to which Kenya has legally bound itself. Finally, the Note concludes by discussing the current obstacles to overturning Kenya's anti-sodomy laws and suggesting ways to overcome these obstacles.

## I. Violence and Discrimination Against LGBT Kenyans: Cultural Attitudes and Kenya's Penal Code

### A. Violence and Discrimination Against LGBT Kenyans

In 2011, the Kenyan Human Rights Commission interviewed LGBT Kenyans in regions known to have a considerable LGBT presence to document the current discrimination and abuses that these Kenyans face.<sup>23</sup> The findings indicate that LGBT Kenyans are harassed by state officials, subjected to physical violence and death threats, and generally stigmatized by their families and society at large as a result of their sexual orientation or gender identity.<sup>24</sup>

LGBT Kenyans are routinely harassed or abused by the police, held in "remand houses" beyond the constitutional limit without being informed of the charges against them, and brought into court on false charges.<sup>25</sup> Additionally, interviewees reported that there is a group of corrupt police officers who extort and blackmail LGBT individuals with the threat of arrest and imprisonment if they do not pay those officers bribe money.<sup>26</sup> The report also indicates that other Kenyan citizens physically and sexually assault LGBT Kenyans. In one case, three interviewees reported being gang-raped by groups who "specifically targeted gay men and raped them

---

23. THE OUTLAWED AMONGST US, *supra* note 9, at 18.

24. *Id.* at 1-2.

25. *Id.* at 21.

26. One story that exemplifies this abusive behavior was told by a twenty-nine-year-old doctor:

"I was in my house with my partner when persons claiming to be police officers banged my door demanding entry. As I was trying to open they forced themselves in without identifying themselves and proceeded to search the house without a warrant. They claimed that they had been tracking my text messages and knew we were about to commit an act of gross indecency (sodomy). . . . They then made us strip naked, beat us up and told us to have sex for them to see what we do. We refused and they beat us further. They said they would frog march us naked from my fourth floor apartment, call the media and make an arrest of gay people caught in the act. I am a respected doctor and live in the staff residence. They said that if I paid them 100,000shs they would leave us alone. I reluctantly agreed."

to ‘punish them for their errant ways.’”<sup>27</sup>

In addition to being subjected to violence, LGBT Kenyans face general stigmatization and exclusion from their families and society at large.<sup>28</sup> For example, 89% of interviewees who “came out” or “were outed” to their families reported that family members disowned them upon discovering their sexual orientation or gender identity.<sup>29</sup> Others were forced to undergo psychological therapy to “cure” their “confusion.”<sup>30</sup> Still others were expelled from school<sup>31</sup> or fired from their jobs.<sup>32</sup> Religious and political leaders in the community often reinforce these attitudes.<sup>33</sup> For example, a religious elder in the Wajir region publicly stated, “I would remove my dagger and kill if I met any [homosexual or lesbian].”<sup>34</sup>

One incident that highlights the general attitude towards sexual minorities in Kenya is the violent reaction to rumors that a “gay wedding” was to be held in Mtwapa in the Kilifi District.<sup>35</sup> In response to these rumors, religious leaders in the area “openly called for the ‘flushing out’ of people suspected of being homosexual.”<sup>36</sup> Vigilante violence hit the town, and armed mobs attacked KEMRI, a local health center offering HIV/AIDS services, as well as individuals suspected of being gay.<sup>37</sup> The violence was so severe that the international human rights organization Human Rights Watch sent a letter to Kenyan officials urging them to “act swiftly to stem the tide of violence . . . [and] publicly condemn the homophobic statements . . . as well as mob violence targeting people presumed to be homosexual.”<sup>38</sup> The government, however, did nothing to stop the attacks. Indeed, in late 2010 at a rally in Kibera, Nairobi, Prime Minister Raila Odinga stated that, “[t]he constitution is very clear [that] men or women found engaging in homosexuality will not be spared . . . . If we find a man engaging in homosexuality or a woman in lesbianism, we’ll arrest them and put them in jail.”<sup>39</sup>

---

*Id.*

27. *Id.* at 27.

28. *See id.* at 24-27.

29. *Id.* at 24-25.

30. *Id.* at 25.

31. 23% of those interviewed reported being disciplined or expelled from high school or college due to their sexual orientation or gender identity. *Id.* at 32.

32. *Id.* at 26.

33. *Id.* at 30; *see infra* note 39 and accompanying text.

34. THE OUTLAWED AMONGST US, *supra* note 9, at 31.

35. Letter from Scott Long, Director of the Lesbian, Gay, Bisexual, and Transgender Rights Program Human Rights Watch, to Government of Kenya, Letter to the Government of Kenya on Recent Attacks Against Health Workers and Activists (Feb. 17, 2010), available at <http://www.hrw.org/news/2010/02/17/letter-kenya-ministry-state-provincial-administration-internal-security>.

36. *Id.*

37. *Id.*

38. *Id.*

39. Aliza I. Kassim & Lillian Leposo, *Gay, Lesbian Groups Criticize Kenyan Leader’s Remarks*, CNN (Nov. 30, 2010), [http://articles.cnn.com/2010-11-30/world/kenya.gay.reaction\\_1\\_lesbian-groups-lesbian-community-gay-rights?\\_s=PM:WORLD](http://articles.cnn.com/2010-11-30/world/kenya.gay.reaction_1_lesbian-groups-lesbian-community-gay-rights?_s=PM:WORLD).

Kenya's anti-sodomy laws undeniably increase the vulnerability of LGBT Kenyans to blackmail and abuse. The laws instill a fear of imprisonment that dissuades LGBT Kenyans from reporting human rights violations to the authorities and, indeed, provide authorities and other individuals with a justification for committing the abuse.<sup>40</sup> This link is most readily demonstrated in the targeted police abuse against LGBT Kenyans: because officers can legitimately arrest people for committing "carnal knowledge of a person against the order of nature,"<sup>41</sup> they are essentially handed a *carte blanche* to punish Kenyans on the basis of their sexual orientation or gender identity. LGBT Kenyans have no means of adequately responding to the abuse because of the constant threat of imprisonment or other forms of retaliation at the hands of bigoted officials.<sup>42</sup> For example, when commenting on the attacks that occurred in Mtwapa, a senior police commander (who ostensibly has a duty to prevent violence) stated that "[homosexuality] is an offence, an unnatural offence, and also their behaviour is repugnant to the morality of our people."<sup>43</sup> As another example, a Police Constable interviewed by the Kenya Human Rights Commission voiced the opinion that "Mashoga wote ni criminals [all homosexuals are criminals], these are rapists who should be locked up forever."<sup>44</sup> In equating LGBT Kenyans with criminals, the laws contribute to the overall atmosphere of homophobia throughout the country, which leads to violence against LGBT Kenyans in the first instance.

## B. Kenya's Penal Code

One of the most common arguments used against granting LGBT individuals legal equality in Kenya is that homosexuality is an imported Western concept and that "[a]mongst traditional Kenyan people, it was unheard of."<sup>45</sup> Former President Daniel Arap Moi once stated, "[h]omosexuality is against African norms and traditions . . . . Kenya has no room for homosexuals and lesbians."<sup>46</sup>

The irony of this view is that the anti-sodomy laws, not homosexuality, were imported into Kenyan culture from the West. In Kenya, as in most African states, pre-colonial law was "essentially customary in character, having its source in the practices, traditions and customs of the people."<sup>47</sup> Once the British colonized Kenya in 1895,<sup>48</sup> however, they instituted their

40. THE OUTLAWED AMONGST US, *supra* note 9, at 44.

41. The Penal Code, (2009) Cap. 163; *see supra* note 11 and accompanying text.

42. *See* THE OUTLAWED AMONGST US, *supra* note 9, at 21-24.

43. *Id.* at 31.

44. *Id.* at 24.

45. McKenzie, *supra* note 15 (quoting Patrick Kuchio, a popular preacher at a Pentecostal Church in Kenya).

46. *Being Gay in Kenya*, NEWS24 (Feb. 22, 2006), <http://www.news24.com/Africa/Features/Being-gay-in-Kenya-20060222>; *see also* KENYA HUMAN RIGHTS INSTITUTE, RETHINKING CONTESTED RIGHTS: CRITICAL PERSPECTIVES ON MINORITY RIGHTS IN KENYA 9 (2011).

47. Ndulo, *supra* note 8, at 94.

48. J.B. OJWANG, CONSTITUTIONAL DEVELOPMENT IN KENYA: INSTITUTIONAL ADAPTATION AND SOCIAL CHANGE 23 (1990).

own system of justice to exist alongside customary law:

By the East Africa Order in Council 1897 (later repeated in the 1921 Order and applied to the Protectorate), the jurisdiction of the Supreme Court and subordinate courts of Kenya was to be exercised 'so far as circumstances admit . . . in conformity with the Civil Procedure and Penal Codes of India and the other Indian Acts which are in force in the Colony . . .'.<sup>49</sup>

In 1930, the British replaced the Indian Penal Code with the Colonial Office Model Code (based on the Queensland Code of 1899), which remains Kenya's Penal Code to this day.<sup>50</sup>

Although the colonizers set up a parallel system of courts to administer justice according to "the native law and custom prevailing in the jurisdiction of the tribunal," customary law had to give way to English law if it was "repugnant to justice or morality or inconsistent with the provisions of any Order in Council or with any other law in force in the Colony."<sup>51</sup> This "repugnancy clause" had two implications for customary law: first, customary law was treated as inferior to English law; second, English ideals of legal norms, justice, and morality would be the ultimate test for the validity of customary law.<sup>52</sup> In the area of Kenya's criminal law, customary law gradually gave way to the Penal Code Provisions:

Native Criminal law was applied firstly in Native Tribunals subject to the supervision of district officers. But gradually the Tribunals were given jurisdiction to try certain offenses under the Penal Code. . . . [G]radually, where a Tribunal or a Court was given jurisdiction to try a Penal Code offence, it was tried under the relevant sections of the Penal Code and not under 'native law and custom,' even where there existed a similar offence under native law and custom. Eventually this resulted in the virtual disappearance of the customary criminal law and so at the end of the colonial period there were only some ten offences which were tried under native law and custom in the African Courts.<sup>53</sup>

When Kenya achieved independence in 1963, the new government inherited, recognized and applied the former British legal system, including its Colonial Office Model Code.<sup>54</sup> As Kenya's anti-sodomy laws originated from this penal code, they are ultimately reflective of British norms and

49. Eugene Cotran, *The Development and Reform of the Law in Kenya*, 27 J. AFR. L. 42, 42 (1983).

50. *Id.* at 44. For an in-depth history behind the replacement of the Indian Penal Code with the Colonial Office Model Code, see H.F. Morris, *A History of the Adoption of Codes of Criminal Law and Procedure in British Colonial Africa, 1876-1935*, 18 J. AFR. L. 6, 13-17 (1974).

51. Cotran, *supra* note 49, at 42-43.

52. Ndulo, *supra* note 8, at 95.

53. Cotran, *supra* note 49, at 44-45.

54. *Id.* at 47. This is not to say that Kenya has abandoned its customary law. Indeed, there have been changes to Kenya's legal system since independence that attempt to re-integrate customary law into the country. See *id.* at 47-54; see also Laurence Juma, *Reconciling African Customary Law and Human Rights in Kenya: Making a Case for Institutional Reformation and Revitalization of Customary Adjudication Processes*, 14 ST. THOMAS L. REV. 459, 480-81 (2002) ("As far as the Kenyan legal system is concerned, the substance of African Customary Law remains in the fields of contract law, tort law, family law, and land law . . . . [But t]here is no doubt that African Customary Law is inferior to

morality, as opposed to embodying “traditional Kenyan ideals.”<sup>55</sup> This is not to argue that sexual minorities were celebrated or even accepted in pre-colonial Kenya.<sup>56</sup> However, the sentiment that being gay is anti-Kenyan fails to acknowledge the crucial role that the West played in entrenching homophobia into Kenya’s legal system and its continuous role in preventing LGBT Kenyans, as well as LGBT individuals in other African countries, from having legal rights.<sup>57</sup> Indeed, the argument against imposing Western values onto Kenya, as well as other African countries, is ultimately an argument in favor of repealing anti-sodomy laws.

## II. LGBT Rights in the International Sphere

In recent years, the international community has begun to recognize the heightened risk of human rights abuses that sexual minorities face and has increasingly focused on their need for protection. As a result, general principles of equality and universality under international law are now being applied to sexual minorities under numerous human rights documents, such that states have heightened obligations towards LGBT individuals in their jurisdictions.<sup>58</sup> The newfound focus on LGBT rights under international law has significant implications for the constitutionality of Kenya’s anti-sodomy laws because Kenya is a member of the U.N. and a state party to many of these agreements.

### A. The United Nations

The U.N. has served as the principal organ for protecting international

---

other laws within the Kenyan legal system.”). Nevertheless, Kenya’s anti-sodomy laws are part of the British law that was imposed on Kenyans during colonization.

55. For example, the Zambian custom of woman-to-woman marriage in the event that a wife could not produce children for her husband was deemed repugnant to justice and morality. See Ndulo, *supra* note 8, at 95–96 (citing C.O. Akpamgbo, A “Woman to Woman” Marriage and the Repugnancy Clause: A Case of Putting New Wine into Old Bottles, 14 AFR. L. STUD. 87, 88–89 (1977)).

56. There is, however, a logical fallacy in the argument that sexual minorities did not exist in pre-colonial Kenya and that homosexuality is against traditional Kenyan customs. Something cannot simultaneously be against custom and not exist. If anything, sexual minorities either had to exist and violate customary law, or customary law never prohibited the conduct.

57. A particularly disturbing example of Western influence occurred in Uganda when a Ugandan politician introduced the Anti-Homosexuality Bill of 2009 in Uganda’s Parliament that would have imposed the death penalty for “homosexual conduct” if ratified. American evangelical Christians held workshops and met with key government officials one month before the bill was introduced. Although the visitors claimed not to know that Ugandan officials would subsequently introduce the bill, their topics of discussion included the following: the ability to “make gay people straight,” the tendency of gay men to sodomize teenage boys, and the gay movement as an “evil institution” that sought to “defeat the marriage-based society and replace it with a culture of promiscuity.” Jeffrey Gettleman, *Americans’ Role Seen in Uganda Anti-Gay Push*, N.Y. TIMES, Jan. 3, 2010, at A1, available at <http://www.nytimes.com/2010/01/04/world/africa/04uganda.html>; see also Frank Mugisha, Op-Ed., *Gay and Vilified in Uganda*, N.Y. TIMES, Dec. 22, 2011, at A31, available at <http://www.nytimes.com/2011/12/23/opinion/gay-and-vilified-in-uganda.html>.

58. See *infra* Part II.G.

human rights since its formation in 1945.<sup>59</sup> Currently, 193 states, including Kenya,<sup>60</sup> are members of the organization.<sup>61</sup> The Charter of the United Nations (Charter), its founding treaty,<sup>62</sup> sets forth the purposes and goals of the U.N.,<sup>63</sup> as well as binding directives that Member States must follow.<sup>64</sup> One such goal is to “reaffirm faith in fundamental human rights, in the dignity and worth of the human person, [and] in the equal rights of men and women . . . .”<sup>65</sup> To that end, Member States are required to grant fundamental human rights and equality to all individuals “without distinction as to race, sex, language or religion.”<sup>66</sup> Although the Charter does not explicitly require states to grant fundamental human rights to sexual minorities, the U.N. has made it clear that these individuals are entitled to protection under the Charter’s provisions through subsequent decisions and documents.<sup>67</sup>

## B. The Universal Declaration of Human Rights

On December 10, 1948, the U.N. General Assembly adopted the Universal Declaration of Human Rights (UDHR).<sup>68</sup> Commonly viewed as the foundation of international human rights law, the UDHR sets forth numerous civil, political, social, cultural and economic rights.<sup>69</sup> It further specifies that all people are “entitled to all the rights and freedoms set forth in [the] Declaration, 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.”<sup>70</sup> Although the UDHR is not legally binding, it has provided the foundation for legally binding treaties such as the International Covenant on Civil and Political Rights and the International

59. See MARY ELLEN O’CONNELL ET AL., *THE INTERNATIONAL LEGAL SYSTEM: CASES AND MATERIALS* 268 (6th ed. 2010); Pratima Narayan, Note, *Somewhere Over the Rainbow . . . International Human Rights Protections for Sexual Minorities in the New Millennium*, 24 B.U. INT’L L.J. 313, 324 (2006).

60. Kenya was admitted to the U.N. on December 16, 1963. Press Release, Dep’t of Pub. Info., United Nation Member States, U.N. Press Release ORG/1469 (July 3, 2006).

61. See *Member States of the United Nations*, UNITED NATIONS, <http://www.un.org/en/members/index.shtml> (last visited Feb. 28, 2012).

62. See U.N. Charter pmbl.

63. See *id.* art. 1.

64. See *id.* art. 2.

65. *Id.* pmbl.

66. *Id.* art. 1, ¶ 3.

67. See *infra* Part II.B–C.

68. See O’CONNELL ET AL., *supra* note 59, at 438.

69. See *id.* at 439. The rights set forth in the UDHR include the following:

[T]he right to life, liberty, and security of person; the right to equal protection and non-discrimination; the right to a fair trial; the right against arbitrary interference with privacy; freedom of movement; the right to family; the right to property; freedom of religion[;] freedom of assembly; the right to choose employment; the right to an adequate standard of living, medical care, and education; and the right to participate in the cultural life of the community.

Narayan, *supra* note 59, at 328 (citing Universal Declaration of Human Rights arts. 3, 7, 10, 12, 13, 16, 17, 18, 20, 23, 25, 26, 27, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR]).

70. UDHR, *supra* note 69, art. 2.

Covenant on Economic, Social and Cultural Rights. In addition, many of its provisions are binding on states as customary international law.<sup>71</sup>

Even though the UDHR does not explicitly list sexual orientation or gender identity as a protected category, the inclusion of “other status” affords protections to LGBT individuals. In particular, the U.N. has deliberately used the term “other status” to provide anti-discrimination measures for LGBT people,<sup>72</sup> and the Human Rights Council has affirmatively stated that the inclusion of “other status” encompasses sexual minorities.<sup>73</sup> Indeed, in his remarks to the Summit of the African Union on January 29, 2012, U.N. Secretary General Ban Ki-moon urged African states to uphold their obligations under the UDHR and stop discriminating against people on the basis of sexual orientation or gender identity:

The Universal Declaration of Human Rights is a promise to all people in all places at all times. Let me mention one form of discrimination that has been ignored or even sanctioned by many States for far too long . . . discrimination based on sexual orientation or gender identity. This has prompted some governments to treat people as second-class citizens, or even criminals. Confronting this discrimination is a challenge. But we must live up to the ideals of the Universal Declaration.<sup>74</sup>

### C. The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) entered into force in 1976 and creates a legally binding obligation on states parties to observe its provisions.<sup>75</sup> The ICCPR specifically guarantees the right to self-determination,<sup>76</sup> privacy,<sup>77</sup> and liberty and security of person.<sup>78</sup> States parties are required to ensure these rights for all individuals within their territories and subject to their jurisdictions “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth[,] or other

71. See O'CONNELL ET AL., *supra* note 59, at 439; Narayan, *supra* note 59, at 328.

72. See Naryan, *supra* note 59, at 329.

73. See U.N. High Commissioner for Human Rights, *supra* note 16, ¶ 7. One provision in the UDHR that states may use against sexual minorities is Article 29, which declares that individuals will only be guaranteed protection if they meet “the just requirements of morality, public order and the general welfare in a democratic society.” Because many states justify discriminatory behavior and laws against sexual minorities on the basis of morality, these states can invoke Article 29 to prevent international intervention on behalf of LGBT people. Article 30, however, declares that no provision of the UDHR can be used to deprive people of any rights set forth in the UDHR. As such, states cannot exploit Article 29 to deprive sexual minorities of the basic human rights guaranteed in the UDHR. See Narayan, *supra* note 59, at 329-30 (analyzing the UDHR); see also UDHR, *supra* note 69, arts. 29, 30.

74. Ban Ki-moon, U.N. Secretary General, Remarks to the Summit of the African Union (Jan. 29, 2012), available at [http://www.un.org/apps/news/infocus/speeches/statments\\_full.asp?statID=1442](http://www.un.org/apps/news/infocus/speeches/statments_full.asp?statID=1442).

75. See International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171; see also Narayan, *supra* note 59, at 330.

76. See International Covenant on Civil and Political Rights, *supra* note 75, art. 1.

77. See *id.* art. 17.

78. See *id.* art. 9.

status.”<sup>79</sup>

The ICCPR also established the Human Rights Committee, which serves as its judicial monitoring body.<sup>80</sup> In *Toonen v. Australia*, the Committee held that the term “sex” includes sexual orientation for purposes of the ICCPR and that statutes criminalizing homosexual sodomy in Tasmania violated the rights to privacy and nondiscrimination regardless of whether they were actually enforced.<sup>81</sup> In *Toonen*, the plaintiff alleged that the very existence of anti-sodomy laws in Tasmania violated his rights in the following way:

[The laws] interfered with his private life by empowering police officials to investigate intimate aspects of his sexual behavior with other men, by chilling the public expression of his sexuality . . . and by “creating the conditions for discrimination in employment, constant stigmatization, vilification, threats of physical violence and the violation of basic democratic rights.”<sup>82</sup>

The Committee agreed with the plaintiff’s allegations and further held that “moral issues” are not exclusively a matter of domestic concern, as this would interfere with the Committee’s ability to scrutinize “a potentially large number of statutes interfering with privacy.”<sup>83</sup> The Committee has subsequently urged states to “guarantee equal rights to all individuals, as established in the Covenant, regardless of their sexual orientation”<sup>84</sup> and has welcomed legislation that prohibits discrimination on the basis of sexual orientation.<sup>85</sup> Although Kenya has not submitted itself to the Committee’s jurisdiction,<sup>86</sup> because it acceded to the ICCPR on May 1, 1972,<sup>87</sup> it is legally bound to adhere to the ICCPR’s provisions,<sup>88</sup> which the Committee has the power to interpret.<sup>89</sup>

79. *Id.* art. 2.

80. *See id.* art. 41; Optional Protocol to the International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, 999 U.N.T.S. 302, art. 1.

81. *See Toonen v. Australia*, Communication No. 488/1992, ¶ 8.7, U.N. Doc. CCPR/C/50/D/488/1992 (Apr. 4, 1994).

82. Laurence R. Helfer & Alice M. Miller, *Sexual Orientation and Human Rights: Toward a United States and Transnational Jurisprudence*, 9 Harv. Hum. Rts. J. 61, 65 (1996) (citing *Toonen*, U.N. Doc. CCPR/C/50/D/488/1992, at ¶ 7.11).

83. *Toonen*, U.N. Doc. CCPR/C/50/D/488/1992, at ¶ 8.6.

84. U.N. High Commissioner for Human Rights, *supra* note 16, ¶ 17.

85. *Id.* ¶ 14.

86. To submit to the Committee’s jurisdiction, parties must sign Optional Protocol I to the ICCPR. Kenya has not done so. *See Ratification of International Human Rights Treaties—Kenya*, UNIV. MINN. HUM. RTS. LIBR., <http://www1.umn.edu/humanrts/research/ratification-kenya.html> (last visited Feb. 29, 2012).

87. *See id.*

88. Accession is an act whereby a state that has not signed a treaty expresses its consent to become a party to that treaty. Accession has the same legal effect as ratification, acceptance, or approval. States generally accede to treaties to express their consent to be bound by the treaty’s terms when the deadline for signing the treaty has passed. *See Vienna Convention on the Law of Treaties* arts. 2 § 1(b), 15, May 23, 1969, 1155 U.N.T.S. 331.

89. Because the Committee’s power to make general comments interpreting the ICCPR is set forth in the Covenant, the Committee’s interpretation of the ICCPR is bind-

#### D. The International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights (ICESCR) entered into force on January 3, 1976, and, like the ICCPR, creates a legally binding obligation on states parties to observe its provisions.<sup>90</sup> Kenya acceded to the ICESCR on May 1, 1972.<sup>91</sup> The ICESCR guarantees the following rights, among others: self-determination,<sup>92</sup> “enjoyment of just and favourable conditions of work,”<sup>93</sup> social security,<sup>94</sup> the highest attainable standard of health,<sup>95</sup> education,<sup>96</sup> and the ability to take part in cultural life.<sup>97</sup> The ICESCR requires states parties to “undertake to guarantee that the rights enunciated in the . . . [ICESCR] will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth[,] or other status.”<sup>98</sup>

Although sexual orientation is not explicitly listed as a protected category, the Committee on Economic, Social and Cultural Rights has noted in its General Comments that “other status” includes sexual orientation.<sup>99</sup> Furthermore, the Committee has specified that “[s]tates parties should ensure that a person’s sexual orientation is not a barrier to realizing Covenant rights” and that “gender identity is recognized as among the prohibited grounds of discrimination. . . .”<sup>100</sup>

#### E. The African Charter on Human and Peoples’ Rights

The African Charter on Human and Peoples’ Rights (Charter) entered into force on October 21, 1986 and guarantees individuals many of the same civil, political, social, and economic rights that the ICCPR and ICESCR protect.<sup>101</sup> Kenya acceded to the Charter on January 23, 1992<sup>102</sup> and is therefore bound by its terms. The Charter also created the African Commission on Human and Peoples’ Rights (African Commission) to

---

ing on Kenya, even though Kenya has not ratified the Optional Protocol. See International Covenant on Civil and Political Rights, *supra* note 75, art. 44(4).

90. International Covenant on Economic, Social and Cultural Rights, *adopted by the General Assembly* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

91. See *Ratification of International Human Rights Treaties—Kenya*, *supra* note 86.

92. International Covenant on Economic, Social and Cultural Rights, *supra* note 90, art. 1(1).

93. *Id.* art. 7.

94. *Id.* art. 9.

95. *Id.* art. 12(1).

96. *Id.* art. 13(1).

97. International Covenant on Economic, Social and Cultural Rights, *supra* note 90, art. 15(1)(a).

98. *Id.* art. 2(2).

99. U.N. Comm. on Econ., Soc., and Cultural Rights (CESCR), General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (art. 2, ¶ 2, of the International Covenant on Economic, Social and Cultural Rights), ¶ 32, U.N. Doc. E/C.12/GC/20 (July 2, 2009).

100. *Id.*

101. African Charter on Human and Peoples’ Rights, *adopted* June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58.

102. See *Ratification of International Human Rights Treaties—Kenya*, *supra* note 86.

ensure the protection of human and peoples' rights under the Charter and interpret all of the Charter's provisions.<sup>103</sup> In *Social and Economic Rights Action Center v. Nigeria*, the African Commission held that states have four levels of duties with respect to social and economic (as well as civil and political) human rights obligations: "namely, the duty to respect, protect, promote, and fulfil these rights."<sup>104</sup> The African Commission noted that these duties impose a positive obligation on states parties to progressively move toward realizing the rights set forth in the Charter.<sup>105</sup> Importantly, this affirmative obligation is reiterated in Kenya's new Constitution with respect to its Bill of Rights.<sup>106</sup>

Similar to other human rights instruments, the Charter does not mention sexual orientation as a protected category for purposes of nondiscrimination,<sup>107</sup> and the issue of sexual orientation has remained largely outside of the African Commission's consideration.<sup>108</sup> The Charter does, however, include "other status," which other U.N. bodies have interpreted as including LGBT individuals,<sup>109</sup> and the African Commission has expressed concern about "intolerance towards sexual minorities."<sup>110</sup> This strengthens the case for arguing that the Charter's provisions should extend to them as well. Furthermore, although the Charter states that rights must be exercised "with due regard to the rights of . . . collective morality," the African Commission has held that these "limitations must be strictly proportionate with and absolutely necessary for the advantages that are to be obtained."<sup>111</sup> As such, the principle set forth in *Social and Economic Rights Action Center*, along with the open-ended anti-discriminatory language in the Charter, provides a strong basis for concluding that sexual minorities are protected.

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

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) entered into force on June 26, 1987 and creates a legally binding obligation on states parties to "take effective

103. See African Charter on Human and Peoples' Rights, *supra* note 101, art. 45.

104. *Social and Economic Rights Action Center v. Nigeria*, African Commission on Human and Peoples' Rights, Communication No. 155/96, ¶ 44 (2001).

105. *Id.* ¶ 47.

106. See *infra* Part III.B.

107. See African Charter on Human and Peoples' Rights, *supra* note 101, art. 2.

108. Rachel Murray & Frans Viljoen, *Towards Non-Discrimination on the Basis of Sexual Orientation: The Normative Basis and Procedural Possibilities Before the African Commission on Human and Peoples' Rights and the African Union*, 29 HUM. RTS. Q. 86, 87 (2007).

109. See *supra* note 99 and accompanying text.

110. African Commission on Human and Peoples' Rights, Concluding Observations and Recommendations on the Periodic Report of the Republic of Cameroon, May 11-25, 2005, ¶ 14, ACHPR, 39th Ordinary Sess. (2005).

111. Murray & Viljoen, *supra* note 108, at 92 (citing *Media R. Agenda v. Nigeria*, African Commission on Human and Peoples' Rights, Communication No. 105/93, ¶¶ 69-70 (1998)).

legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.”<sup>112</sup> Kenya acceded to CAT on February 21, 1997<sup>113</sup> and is therefore bound by its terms. For purposes of CAT, torture is defined as the intentional infliction of severe pain or suffering on a person by, or with the consent of, a public official or person acting in an official capacity.<sup>114</sup> In 2001, the Special Rapporteur of the Commission on Human Rights called for reports from States regarding ill-treatment of sexual minorities by state officials and, based on the submissions, concluded that discrimination based on sexual orientation contributes to the dehumanization of LGBT people, which is often a necessary condition to torture.<sup>115</sup>

In commenting on CAT, the Committee Against Torture has noted that part of states parties’ obligations to prevent torture or ill-treatment is to provide protection for certain minority or marginalized populations that face heightened risks of torture.<sup>116</sup> The Committee specifically lists sexual orientation and transgender identity among these minority groups and further notes that states parties have a duty to prosecute and punish “all acts of violence and abuse against these individuals and *ensur[e] implementation of other positive measures of prevention and protection.*”<sup>117</sup>

#### G. The Human Rights Council

The Human Rights Council (Council) is a forty-seven member, inter-governmental body within the U.N. that is responsible for strengthening the promotion and protection of human rights throughout the world.<sup>118</sup> The U.N. General Assembly created the Council in 2006 to identify human

112. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2(1), *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85.

113. See *Ratification of International Human Rights Treaties—Kenya*, *supra* note 86.

114. See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 112, art. 1(1). The full text of the definition is:

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

*Id.*

115. Special Rapporteur of the Commission on Human Rights, *Report of the Special Rapporteur on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment*, ¶ 21, GAOR, U.N. Doc. A/56/156 (July 3, 2001).

116. Committee Against Torture, *General Comment No. 2: Implementation of Article 2 by States Parties*, ¶ 21, CAT/C/GC/2/CRP (Nov. 23, 2007).

117. *Id.* (emphasis added).

118. *Background Information on the Human Rights Council*, U.N. HUM. RTS. COUNCIL, <http://www.ohchr.org/EN/HRBodies/HRC/Pages/AboutCouncil.aspx> (last visited Mar. 14, 2012).

rights violations and recommend ways to best address them.<sup>119</sup>

On June 15, 2011, the Council issued a draft resolution in which the Council expressed “grave concern at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity”; and requested the U.N. High Commissioner for Human Rights, Navi Pillay, to commission a study documenting discriminatory laws, practices, and acts of violence against individuals based on their sexual orientation and gender identity.<sup>120</sup> That study, published on November 17, 2011, is the U.N.’s first formal report on LGBT rights<sup>121</sup> and constitutes the organization’s most powerful affirmation that LGBT individuals are entitled to protection within the international human rights paradigm.

The report provides a comprehensive overview of the worldwide discrimination and violence that LGBT people experience on the basis of their sexual orientation and gender identity and notes that states have obligations to protect sexual minorities under various international treaties and customary law.<sup>122</sup> As an initial matter, it states that the application of international human rights law is guided by the principles of universality and non-discrimination as set forth in Article 1 of the UDHR.<sup>123</sup> It then asserts that the Vienna Declaration confirms that, although cultural differences must be respected, all states have a duty to “promote and protect all human rights and fundamental freedoms.”<sup>124</sup> In other words, cultural beliefs regarding homosexuality do not trump states’ obligations to ensure that people are not discriminated against on the basis of their sexual orientation or gender identity.

The report then enumerates obligations that states have toward LGBT individuals under international human rights law: to protect the right to life, liberty and security of persons irrespective of sexual orientation or gender identity;<sup>125</sup> to prevent torture and other cruel, inhuman or degrading treatment on the grounds of sexual orientation or gender identity;<sup>126</sup> to protect the right to privacy and protect against arbitrary detention on the basis of sexual orientation or gender identity;<sup>127</sup> to protect individuals from discrimination on grounds of sexual orientation and gender identity;<sup>128</sup> and to protect the right to freedom of expression, association and assembly in a non-discriminatory manner.<sup>129</sup>

---

119. *See id.*

120. Human Rights Council Res. 17/19, 17th Sess., June 15, 2011, Supp. No. A/HRC/17/L.9.

121. *UN Issues First Report on Human Rights of Gay and Lesbian People*, UN NEWS CENTRE (Dec. 15, 2011), <http://www.un.org/apps/news/printnewsAr.asp?nid=40743>.

122. U.N. High Commissioner for Human Rights, *supra* note 16, ¶¶ 8-19.

123. *Id.* ¶ 5.

124. *Id.*

125. *Id.* ¶¶ 9-10.

126. *Id.* ¶¶ 11-12.

127. *Id.* ¶¶ 13-14.

128. *Id.* ¶¶ 15-17.

129. *Id.* ¶¶ 18-19.

The report draws upon the works of other U.N. bodies in asserting these rights.<sup>130</sup> For instance, in discussing states' obligations to prevent torture and other cruel, inhuman or degrading treatment, the Committee Against Torture provides that states must protect all individuals in their jurisdiction from such treatment, "regardless of sexual or transgender identity."<sup>131</sup> Furthermore, the Committee on Economic, Social and Cultural Rights has affirmed the principle of non-discrimination on grounds of sexual orientation in its general comments on the rights to work, water, social security, and the highest attainable standard of health.<sup>132</sup>

Most significantly for the purposes of this Note, the report explicitly states that "[t]he criminalization of private consensual homosexual acts . . . constitutes a breach of international human rights law."<sup>133</sup> Citing *Toonen*, the report reiterates that, regardless of whether countries enforce these laws, their mere existence "violates an individual's right to privacy and to non-discrimination."<sup>134</sup> As a result of these findings, the Commissioner ultimately recommends that states "repeal laws used to criminalize individuals on grounds of homosexuality for engaging in consensual, same-sex conduct . . . [and] ensure that other criminal laws are not used to harass or detain people based on their sexuality or gender identity."<sup>135</sup>

The report also confirms the link between anti-sodomy laws and the overwhelming occurrence of human rights abuses against LGBT individuals:

Special procedures mandate holders have emphasized the link between criminalization and homophobic hate crimes, police abuse, torture, and family and community violence, as well as constraints that criminalization places on work of human rights defenders working to protect the rights of LGBT persons. The Special Rapporteur on health noted that 'sanctioned punishment by States reinforces existing prejudices, and legitimizes community violence and police brutality directed at affected individuals.' The Special Rapporteur on extrajudicial executions noted that criminalization increases social stigmatization and made people 'more vulnerable to violence and human rights abuses, including death threats and violations of the right to life, which are often committed in a climate of impunity.'<sup>136</sup>

In confirming the link between human rights abuses and anti-sodomy laws, the report highlights that these laws violate international human rights law on two levels. First, they violate international human rights law on their face. Second, they perpetuate other forms of abuse and discrimination that violate international human rights law.<sup>137</sup> Furthermore, by situating the discussion of anti-sodomy laws within the broader context of human rights law, the report clearly demonstrates that these laws are

---

130. See *id.* ¶ 3.

131. *Id.* ¶ 12.

132. *Id.* ¶ 17.

133. *Id.* ¶ 41.

134. *Id.*

135. *Id.* ¶ 84(d).

136. *Id.* ¶ 42.

137. See *supra* Part I.A and note 136 and accompanying text.

incompatible with numerous human rights treaties and conventions, many of which include Kenya as a party.<sup>138</sup> Although the report itself does not create legally binding obligations on Kenya to repeal its anti-sodomy laws, the report clearly demonstrates that anti-sodomy laws run afoul of treaties that do create legally binding obligations on Kenya and are therefore unconstitutional under Kenya's domestic law.<sup>139</sup>

### III. Kenya's New Constitution

#### A. Background

The origin of Kenya's new Constitution is the Independence Constitution, a British-made document that came into force on December 12, 1963, after Kenya gained independence.<sup>140</sup> Over time, Kenyan citizens came to find the Independence Constitution dissatisfactory for many reasons, chiefly because it created an overly powerful and politically unaccountable President.<sup>141</sup> In 2000, the Constitution of Kenya Review Commission (Review Commission) was created to "ensure a comprehensive review of the current Constitution 'by the people of Kenya.'"<sup>142</sup> In 2005, the Review Commission issued a detailed report on the current state and shortcomings of Kenya's Constitution.<sup>143</sup> The Review Commission asserted that the Constitution's Bill of Rights was deficient because its rights could be easily limited or suspended;<sup>144</sup> it did not protect economic and social rights; it did not recognize the principle of gender equality; the rights and duties of citizens and officials were not specified; and there were not adequate mechanisms for enforcing the rights that did exist.<sup>145</sup>

Although the Independence Constitution underwent numerous

138. See *infra* Part III.

139. See *infra* Part IV.B.

140. See ROBERT M. MAXON, KENYA'S INDEPENDENCE CONSTITUTION 19 (2011); see also CONSTITUTION OF KENYA REVIEW COMMISSION, THE FINAL REPORT OF THE CONSTITUTION OF KENYA REVIEW COMMISSION 21 (2005).

141. In assessing the shortcomings of the Independence Constitution, the Constitution of Kenya Review Commission wrote the following critique:

"The primary purpose of the Independence Constitution was to acknowledge and assert the sovereignty of the people of Kenya and to transform the colonial state from an instrument of domination to a democratic state for the people's welfare. Due to the primacy given to the administrative practices of the colonial period, and with numerous amendments to give an elected President the powers of the colonial governor, the basic characteristics of the colonial state were reinstated and reinforced. These included organization of administration and politics on the basis of ethnicity, distracting attention from social and economic policies, discouraging full and direct people's participation in government, bureaucratic control of resources, absence of independence in security forces, lack of accountability by the state and, most significantly, lack of commitment to any fundamental constitutional principles."

CONSTITUTION OF KENYA REVIEW COMMISSION, *supra* note 140, at 34.

142. *Id.* at 9.

143. See generally *id.*

144. *Id.* at 34.

145. *Id.*

reforms,<sup>146</sup> it was not until the post-election violence of late 2007 and early 2008 that proposals to draft a new constitution were fruitful.<sup>147</sup> In November 2009, the Proposed Constitution of Kenya was published, and the public was given thirty days to review the draft and forward comments to a Committee of Experts,<sup>148</sup> who presented a revised draft to the Parliamentary Select Committee on Constitutional Review in January 2010.<sup>149</sup> The Parliamentary Select Committee made comments and returned the draft to the Committee of Experts, who made revisions and published a Proposed Constitution on February 23, 2010.<sup>150</sup> A majority of Kenyans voted in favor of ratifying the Proposed Constitution in August 2010, and President Kibaki signed it into law on August 27, 2010.<sup>151</sup>

Although efforts to achieve marriage rights for LGBT Kenyans ultimately failed,<sup>152</sup> the new Constitution incorporates three changes that have significant implications for the legality of Kenya's anti-sodomy laws. First, it features an extensive Bill of Rights and imposes an affirmative duty on the State to promote and fulfill the rights enumerated in the Bill of Rights.<sup>153</sup> Second, it incorporates international laws into Kenya's domestic law.<sup>154</sup> Third, under Article 2 § 4, "[a]ny law, including customary law, that is inconsistent with [the] Constitution is void to the extent of the inconsistency, and any act or omission in contravention of [the] Constitution is invalid."<sup>155</sup> The new Constitution's heightened protection of individual rights, coupled with the increased recognition that discrimination based on sexual orientation or gender identity violates international human rights law,<sup>156</sup> provides a strong framework for arguing that Kenya's

146. CONSTITUTION OF KENYA REVIEW COMMISSION, *supra* note 140, at 21.

147. See Eric Kramon & Daniel Posner, *Kenya's New Constitution*, 22 J. OF DEMOCRACY 89, 89 (2011).

148. COMMITTEE OF EXPERTS ON CONSTITUTIONAL REVIEW, THE REPORT OF THE COMMITTEE OF EXPERTS ON CONSTITUTIONAL REVIEW ISSUED ON THE SUBMISSION OF THE REVIEWED HARMONIZED DRAFT CONSTITUTION TO THE PARLIAMENTARY SELECT COMMITTEE ON CONSTITUTIONAL REVIEW, 8TH JANUARY, 2010 (2010).

149. See generally *id.*

150. COMMITTEE OF EXPERTS ON CONSTITUTIONAL REVIEW, FINAL REPORT OF THE COMMITTEE OF EXPERTS ON CONSTITUTIONAL REVIEW 13 (2010).

151. *Id.* at 14.

152. The new Constitution explicitly defines marriage as being between a man and a woman: "Every adult has the right to marry a person of the opposite sex, based on the free consent of the parties." CONSTITUTION, art. 45 § 2 (2010).

153. See *id.* ch. 4. The Bill of Rights set forth in the old Constitution read as follows: "[E]very person in Kenya is entitled to the fundamental rights and freedoms of the individual . . . whatever his race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest."

CONSTITUTION, art. 70 (2008). The freedoms to which Kenyan citizens were entitled included the following: the right to life, liberty, security of person, and protection of law; freedom of conscience, expression, assembly and association; and protection for the privacy of his home and other property and from deprivation of property without compensation. *Id.*

154. CONSTITUTION, art. 2 §§ 5-6 (2010).

155. *Id.* art. 2 § 4.

156. See *supra* Part II.

anti-sodomy laws are currently unconstitutional under Kenya's own domestic law.

## B. The Bill of Rights

Under the Bill of Rights, every individual under Kenya's jurisdiction has the following rights and fundamental freedoms, among others: the right to life;<sup>157</sup> equality and freedom from discrimination;<sup>158</sup> human dignity;<sup>159</sup> freedom and security of person - which includes protection from torture and cruel, inhuman or degrading treatment;<sup>160</sup> privacy;<sup>161</sup> freedom of expression;<sup>162</sup> freedom of association;<sup>163</sup> the highest attainable standard of health;<sup>164</sup> education;<sup>165</sup> and access to justice.<sup>166</sup> Elaborating on the right to freedom from discrimination, the new Constitution prohibits discrimination on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, color, age, disability, religion, conscience, belief, culture, dress, language, or birth.<sup>167</sup>

Although the Constitution does not explicitly list sexual orientation as a prohibited ground of discrimination, the rights and fundamental freedoms set forth in the Bill of Rights must apply to LGBT individuals in Kenya under its "on any ground" catchall provision. Furthermore, unlike the Independence Constitution, which allowed "fundamental rights" to be curtailed for the "public interest," a right or fundamental freedom in the Bill of Rights can only be limited under the new Constitution to "the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors . . ." <sup>168</sup> Significantly, the "public interest" is not one of the enumerated relevant factors. The new Constitution also creates fundamental freedoms that cannot be limited regardless of any other provision in the Constitution:<sup>169</sup> freedom from torture and cruel, inhuman or degrading treatment or punishment;<sup>170</sup> freedom from slavery or servitude;<sup>171</sup> the right to a fair trial;<sup>172</sup> and the right to an order of *habeas corpus*.<sup>173</sup>

157. CONSTITUTION, art. 26 (2010).

158. *Id.* art. 27.

159. *Id.* art. 28.

160. *Id.* art. 29 § f.

161. *Id.* art. 31.

162. Notably, the right to freedom of expression does not extend to hate speech or advocacy of hatred that is an incitement to cause harm or is based on any ground of discrimination set forth in Article 27 § 4. *Id.* art. 33 § 2(c), (d)(ii).

163. *Id.* art. 36.

164. *Id.* art. 43 § 1(a).

165. *Id.* art. 43 § 1(f).

166. *Id.* art. 48.

167. *Id.* art. 27 § 4.

168. *Id.* art. 24 § 1.

169. *Id.* art. 25.

170. *Id.* art. 25 § a.

171. *Id.* art. 25 § b.

172. *Id.* art. 25 § c.

173. *Id.* art. 25 § d.

Additionally, the new Constitution imposes an affirmative duty on the State and State organs to “observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.”<sup>174</sup> The new Constitution also provides that State organs and public officers have a duty to address the needs of vulnerable groups within society.<sup>175</sup> Although the new Constitution does not explicitly name sexual minorities as a “vulnerable group,” it includes “members of minority or marginalised communities” within this category.<sup>176</sup> Given the societal oppression, stigmatization and abuse that LGBT individuals currently experience in Kenya,<sup>177</sup> as well as their recognition as a marginalized group by the international community, they certainly qualify for this status and the corresponding protections under the new Constitution.

### C. The Incorporation of International Law into Domestic Law

The new Constitution incorporates international law into its domestic law through Article 2 § 5, which provides that “[t]he general rules of international law shall form part of the law of Kenya”;<sup>178</sup> and Article 2 § 6, which states that “[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya under this constitution.”<sup>179</sup> The new Constitution also provides that “[a]ny law, including [Kenyan] customary law, that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.”<sup>180</sup> Finally, the new Constitution specifies that the State must “enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.”<sup>181</sup> As Professor Muna Ndulo notes, the implications of these constitutional provisions are clear: “international human rights norms prohibiting discrimination are applicable to Kenya.”<sup>182</sup>

## IV. The Unconstitutionality of Kenya’s Anti-Sodomy Laws

### A. Kenya’s Anti-Sodomy Laws Directly Violate the New Constitution’s Bill of Rights

Sexual minorities in Kenya experience numerous violations of their constitutional rights as set forth in the Bill of Rights. As discussed in Part I(A), LGBT Kenyans face systemic abuse and discrimination as a result of their sexual orientation or gender identity: they are routinely harassed by police officers, often in their own homes; imprisoned for prolonged periods of time on false charges; physically abused and killed; expelled from

---

174. *Id.* art. 21 § 1.

175. *Id.* art. 21 § 3.

176. *Id.*

177. *See supra* Part I.A.

178. CONSTITUTION, art. 2 § 5 (2010).

179. *Id.* art. 2 § 6.

180. *Id.* art. 2 § 4.

181. *Id.* art. 21 § 4.

182. Ndulo, *supra* note 8, at 99.

school; targeted for hate speech; and generally stigmatized and discriminated against by society at large, including public officials.<sup>183</sup> As a result, LGBT Kenyans are currently deprived of their guaranteed rights to freedom and security of person, privacy, access to justice, right to life, education, freedom from discrimination, and, ultimately, their human dignity.

Kenya's anti-sodomy laws play a crucial role in these violations. They create conditions that make it easier for the violence to occur – a link that is both demonstrated through the reported experiences of LGBT Kenyans<sup>184</sup> and recognized by the international community<sup>185</sup> – and directly violate the rights to equality and non-discrimination by sending a general message that LGBT individuals are not equal to heterosexual individuals in Kenyan society.

Because the new Constitution imposes an affirmative duty on State organs and public officials to respect and promote individual rights,<sup>186</sup> it follows that Kenyan authorities have a duty to repeal laws that interfere with these rights. This heightened duty counters any argument that Kenyan officials must prevent the actual abuse and discrimination that is occurring but have no obligation to repeal the anti-sodomy laws in the Penal Code. The duty to promote individual rights implies that Kenya must take progressive measures to eradicate conditions that result in violations of the Bill of Rights.<sup>187</sup> Due to the inherently discriminatory nature of the anti-sodomy laws and their link to constitutional violations against Kenyans on the basis of sexual orientation, Kenya cannot fulfill its duty to promote individual rights and simultaneously leave these laws in its Penal Code.

Proponents of anti-sodomy laws will likely counter this claim by arguing that the Bill of Rights can be constitutionally curtailed with respect to LGBT Kenyans because “all relevant factors” can be considered in determining whether to limit rights.<sup>188</sup> Traditional values and morality concerns, they would argue, justify limiting the practice of homosexuality in Kenya, which, in turn, legitimizes the anti-sodomy laws. Such an argument, however, does not withstand the new Constitution's demands. First, some fundamental rights, such as freedom from torture and cruel, inhuman and degrading treatment, cannot be limited.<sup>189</sup> Second, any limitation on a right or fundamental freedom must be “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.”<sup>190</sup>

Imposing anti-sodomy laws on LGBT Kenyans directly counters the principles of equality, freedom and human dignity and must therefore ulti-

183. See *supra* Part I.A.

184. THE OUTLAWED AMONGST US, *supra* note 9, at 44.

185. See *supra* note 136 and accompanying text.

186. See *supra* note 174 and accompanying text.

187. See Social and Economic Rights Action Center v. Nigeria, African Commission on Human and Peoples' Rights, Communication No. 155/96, ¶¶ 46-48 (2001).

188. See *supra* Part III.B.

189. See *supra* notes 170-73 and accompanying text.

190. See *id.*

mately fail the constitutional test. Even if morality and traditional values were grounds for limiting the application of the Bill of Rights to LGBT Kenyans, they certainly could not outweigh the effects of murder, police brutality, false imprisonment, and discrimination that stem from the anti-sodomy laws. In short, given the requirements for limiting rights under the new Constitution, arguments that the Bill of Rights affords no protection to LGBT Kenyans and that anti-sodomy laws are justified by traditional Kenyan values are no longer constitutionally viable.

Notwithstanding the new Constitution's demand that the Bill of Rights be applied to all individuals, and that the "public interest" is not a concern that justifies curtailing these rights, the argument that the new Constitution's Bill of Rights does not apply to LGBT Kenyans will be a major hurdle to repealing Kenya's anti-sodomy laws due to the country's climate of homophobia. Indeed, Prime Minister Ralia Odinga has voiced the view that being gay is outlawed in the new Constitution because marriage is defined as being between a man and a woman.<sup>191</sup>

Despite the clear logical fallacy of the Prime Minister's inextricable link between legalizing gay marriage and legalizing an LGBT identity, proponents of LGBT rights in Kenya must advance their own arguments to promote the repeal of anti-sodomy laws. This is where the importance of Kenya's domestication of international human rights laws comes into play. Irrespective of the majority's view on sexual and gender minorities in Kenya, the international community has made it clear that LGBT individuals are entitled to protection under international law and that anti-sodomy laws violate international law and fundamental rights of sexual minorities.<sup>192</sup>

#### B. Kenya's Anti-Sodomy Laws Violate General Principles of International Law and International Agreements to Which Kenya has Bound Itself

Given that the new Constitution states that any general rules of international law and treaties or conventions ratified by Kenya are part of Kenya's constitutional law, and that laws that are inconsistent with the Constitution are void,<sup>193</sup> Kenya is under a constitutional obligation to repeal anti-sodomy laws if they run afoul of international law. Indeed, because the new Constitution places international law above customary law,<sup>194</sup> if anti-sodomy laws violate international law, the argument that repealing anti-sodomy laws contradicts traditional Kenyan beliefs is futile.

191. See *supra* note 39 and accompanying text.

192. See *supra* Part II; *infra* Part IV.B.

193. See *supra* Part III.C.

194. That international law takes precedence over customary law is the logical conclusion of Article 2, sections 4-6 of the Kenyan Constitution. Article 2, sections 5-6 render general rules of international law and treaties that Kenya has ratified as part of Kenyan law; and Article 2, section 4 states that any law, including customary law, that is inconsistent with the constitution is void to the extent of the inconsistency. CONSTITUTION, art. 2 §§ 4-6 (2010).

Upon reviewing the international community's current stance on LGBT human rights, it is undeniable that anti-sodomy laws violate international human rights law. As discussed in Part II, numerous U.N. bodies have interpreted crucial human rights treaties to include sexual minorities in their provisions, and there is an ever-growing consensus in the international community that anti-sodomy laws contravene fundamental human rights of LGBT individuals that are protected by international law.<sup>195</sup> Additionally, the binding international agreements to which Kenya is a party mandate that states parties take positive measures to realize their provisions,<sup>196</sup> and the new Constitution requires Kenyan officials to "enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms."<sup>197</sup> Instead, anti-sodomy laws fuel an overall atmosphere of stigmatization that facilitates discrimination and human rights abuses. The inescapable conclusion of these conditions is that Kenya's anti-sodomy laws violate its new Constitution.

The strongest examples of how Kenya's anti-sodomy laws violate international law come from direct statements that anti-sodomy laws violate international human rights law or treaty provisions. For instance, in her report on LGBT Human Rights, the U.N. Human Rights Commissioner explicitly stated that anti-sodomy laws constitute a breach of international human rights law.<sup>198</sup> In making this statement, the Commissioner drew upon the work of monitoring bodies for numerous human rights treaties.<sup>199</sup> As such, the Commissioner's statement reflects a general sentiment in the international legal community regarding anti-sodomy laws.

The Human Rights Committee's interpretation of the ICCPR provides a clearer example. In *Toonen v. Australia*, the Committee explicitly held that anti-sodomy laws violate individuals' right to privacy under the treaty, regardless of whether the laws are enforced.<sup>200</sup> LGBT Kenyans face the same invasion of privacy complained of in *Toonen*: police officers use the laws to investigate their homes and often harass and abuse them once inside.<sup>201</sup> As such, proponents of anti-sodomy laws cannot argue that the laws do not have the same ramifications in the Kenyan context. Because Kenya is a party to the ICCPR, its provisions are part of Kenya's law under the new Constitution. Therefore, Kenya's anti-sodomy laws constitute a direct violation of the ICCPR and, by extension, the new Constitution.

Kenya's anti-sodomy laws also result in LGBT Kenyans' being deprived of rights guaranteed to them in other international treaties to which Kenya has acceded. Because these treaties specify that states should provide the freedoms and rights set forth in the treaty without discrimination,<sup>202</sup> the anti-sodomy laws violate Kenya's obligations under international law. For

---

195. See *supra* Part II.

196. See *id.*

197. CONSTITUTION, art. 21 § 4 (2010).

198. U.N. High Commissioner for Human Rights, *supra* note 16, ¶ 41.

199. See *id.* ¶ 3.

200. See *supra* note 81 and accompanying text.

201. See *supra* note 26 and accompanying text.

202. See *supra* Part II.

instance, despite the Committee on Economic, Social and Cultural Rights' decree that states parties should ensure that sexual orientation is not a barrier to people's obtaining the rights set forth in the ICESCR,<sup>203</sup> LGBT Kenyans are routinely deprived of the enjoyment of just and favorable conditions of work, education, and the highest attainable standard of health. For example, they are often fired from their jobs or expelled from school if their sexual orientation is revealed;<sup>204</sup> many are afraid to seek out health services for fear of judgment or punishment;<sup>205</sup> and those who do seek out medical care are often denied services.<sup>206</sup> Because states have an affirmative duty to progressively implement the rights set forth in the ICESCR without discrimination,<sup>207</sup> and there is a demonstrated connection between anti-sodomy laws and a culture of homophobia that leads to deprivations of these rights, Kenya's failure to repeal its anti-sodomy laws constitutes a violation of its obligations under the ICESCR and thus its new Constitution.

The African Charter on Human and Peoples' Rights guarantees many of same rights set forth in the ICCPR and ICESCR.<sup>208</sup> Because anti-sodomy laws contribute to LGBT Kenyans' being deprived of the rights set forth in those documents, there is a strong foundation for arguing that Kenya's anti-sodomy laws contravene the Charter as well. Admittedly, the Charter allows states to limit rights due to "collective morality," and the African Commission on Human and Peoples' Rights has not explicitly held that the Charter's provisions apply to sexual minorities.<sup>209</sup> Nevertheless, the Commission has expressed concern over intolerance of sexual minorities.<sup>210</sup> Furthermore, because the Commission has held that any limits placed on the Charter must be strictly proportionate to the goals advanced,<sup>211</sup> and Kenya's anti-sodomy laws create conditions that lead to systemic discrimination, abuse, and, in the most extreme instances, murder, it is difficult to see how the "benefit" of discouraging same-sex sexual activity meets this requirement. Therefore, the Commission's holding in *Social and Economic Rights Actions Center* that states have an affirmative duty to protect and promote the rights set forth in the Charter<sup>212</sup> ought to impose an obligation on Kenya to repeal its anti-sodomy laws, which

---

203. See *supra* notes 99-100 and accompanying text.

204. See *supra* Part I.A.

205. The Special Rapporteur on Health has observed that the criminalization of homosexuality may deter individuals from seeking health services due to fear of revealing criminal conduct and being imprisoned as a result. See The Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health Anand Grover*, ¶ 6, U.N. Doc. A/HRC/14/20 (Apr. 27, 2010).

206. See *id.*; see also THE OUTLAWED AMONGST US, *supra* note 9, at 37.

207. See *supra* Part II.D.

208. See *supra* note 101 and accompanying text.

209. See Murray & Viljoen, *supra* note 108, at 87.

210. See *supra* note 110 and accompanying text.

211. See *supra* note 111 and accompanying text.

212. See *supra* note 104 and accompanying text.

achieve the very opposite of protecting and promoting the Charter's rights for LGBT Kenyans.

The link between anti-sodomy laws and torture is the most disturbing example of how anti-sodomy laws lead to the deprivation of guaranteed rights under treaty provisions. Quantifying torture against LGBT Kenyans is difficult because Kenya, like many countries, does not have an official reporting system for these incidents.<sup>213</sup> Nevertheless, given the reported police abuse that LGBT Kenyans suffer, including rape, beatings and false imprisonment,<sup>214</sup> it is almost certain that they routinely incur abuse that rises to the level of torture under CAT. Moreover, because there is a demonstrable link between anti-sodomy laws and torture,<sup>215</sup> and states parties must take effective legislative measures to prevent acts of torture in their territories,<sup>216</sup> Kenya's failure to repeal its anti-sodomy laws violates Kenya's obligations under CAT and thus its new Constitution.

In addition to violating specific international agreements to which it has acceded, Kenya's anti-sodomy laws contravene the general principles of universality, equality and non-discrimination under international human rights law. As noted in the U.N. High Commissioner's Report on LGBT Human Rights, Article 1 of the UDHR states that "all human beings are born free and equal in dignity and rights"; and non-discrimination is a core human rights principle in the U.N. Charter and many human rights agreements.<sup>217</sup> In criminalizing same-sex sexual acts between consenting adults, anti-sodomy laws necessarily discriminate against LGBT individuals and render them unequal to heterosexual individuals in society. Even if the laws did not contribute to stigmatization and abuse, in preventing LGBT Kenyans from legally entering into relationships of their choosing, anti-sodomy laws deprive them of one of the most fundamental aspects of being human. As it is, the laws legitimize a culture of homophobia, which, in turn, prevents LGBT Kenyans from participating in many aspects of society; deprives them of fundamental rights; and causes them to fear for their lives.<sup>218</sup>

The international legal community has affirmatively stated that the foundational principles of international human rights take precedence over domestic customs or moral views.<sup>219</sup> As the U.N. Secretary General declared in his speech on Human Rights Day 2010,

Yes, we recognize that social attitudes run deep. Yes, social change often comes only with time. Yet, let there be no confusion: where there is a tension between cultural attitudes and universal human rights, universal human rights must carry the day. Personal disapproval, even society's disapproval, is no excuse to arrest, detain, imprison, harass or torture anyone -

---

213. See *THE OUTLAWED AMONGST US*, *supra* note 9, at 17; U.N. High Commissioner for Human Rights, *supra* note 16, ¶ 23.

214. See *supra* Part I.A.

215. See *supra* notes 115, 136 and accompanying text.

216. See *supra* note 112 and accompanying text.

217. U.N. High Commissioner for Human Rights, *supra* note 16, ¶¶ 5-7.

218. See *supra* Part I.A.

219. See *supra* notes 122-124 and accompanying text.

ever. . . . Together, we seek the repeal of laws that criminalize homosexuality, that permit discrimination on the basis of sexual orientation or gender identity, that encourage violence.<sup>220</sup>

Despite the widespread rhetoric in Kenya that LGBT rights are a product of Western influence that do not deserve recognition under Kenyan law, under the new Constitution international human rights norms take precedence over these views.<sup>221</sup> As such, Kenya is obligated to repeal its anti-sodomy laws under its own domestic law.

### Conclusion: Overcoming Practical Obstacles to Repealing Kenya's Anti-Sodomy Laws

From the foregoing discussion, it is clear that Kenya's anti-sodomy laws are unconstitutional given the new Constitution's Bill of Rights and its incorporation of international law into Kenya's domestic law. Nevertheless, there are a number of practical obstacles to actually repealing these laws. As discussed in Part I, there is widespread homophobia in Kenya among the general population, religious leaders, and influential governmental figures. It is highly unlikely that there will be a sudden acceptance of LGBT Kenyans simply because Kenya has ratified a new Constitution. Cultural attitudes will therefore likely be a large barrier to creating change at the domestic level because they will create internal pressure to keep the laws on the books.

At the international level, although Kenya has acceded to numerous treaties that require states to provide protections to sexual minorities, Kenya has not always acceded to the jurisdiction of the judicial bodies for those agreements.<sup>222</sup> For instance, Kenya is not a party to the Optional Protocol to the ICCPR,<sup>223</sup> which is how a state party "recognizes the competence of the [Human Rights] Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of violation by that [s]tate [p]arty of any of the rights set forth in the covenant."<sup>224</sup> Because the Human Rights Committee has explicitly

---

220. Ban Ki-moon, U.N. Secretary General, Address at the Event on Ending Violence and Criminal Sanctions Based on Sexual Orientation and Gender Identity (Dec. 10, 2010), in U.N. Doc. SG/SM/13311.

221. Under Article 2, section 4 of the new Constitution, if any law is inconsistent with the Constitution, it is "void to the extent of the inconsistency." CONSTITUTION, art. 2 § 4 (2010). Articles 2, sections 5-6 provide that the general rules of international law and ratified treaties and conventions form part of the law of Kenya. Id. art. 2 §§ 5-6. The logical conclusion of these constitutional provisions is that general rules of international law as well as ratified treaties and conventions trump customary laws and views of morality. In the case of anti-sodomy laws, the preceding sections of this note have demonstrated that these laws violate both general principles of international law as well as ratified treaties and conventions.

222. For a general overview of monitoring of compliance with international human rights treaties and mechanisms for bringing complaints against states parties that violate treaty provisions, see O'CONNELL ET AL., *supra* note 59, at 452-56.

223. See *Ratification of International Human Rights Treaties—Kenya*, *supra* note 86.

224. Optional Protocol to the International Covenant on Civil and Political Rights, *supra* note 80.

held that anti-sodomy laws violate the ICCPR,<sup>225</sup> bringing a claim would be the most straightforward approach to attacking Kenya's anti-sodomy laws in the international arena; however, this option is unavailable until Kenya signs the protocol.

Even if claims can be brought before a judicial body, standing is another obstacle preventing a potential litigant from reaching the court. For example, only the African Commission, states parties to the African Charter on Human and Peoples' Rights, and African Intergovernmental Organizations can submit cases to the African Court on Human and Peoples' Rights against Kenya.<sup>226</sup> Because the African Commission has not directly addressed the rights of sexual minorities, and many African states have the same culture of homophobia as Kenya does, it is very unlikely that these bodies will bring a claim against Kenya for failing to repeal its anti-sodomy laws.

Finally, despite the increasing recognition that sexual minorities are entitled to protection under international human rights law, there is a general lack of legal enforcement of LGBT human rights.<sup>227</sup> Although recent efforts to bring awareness to LGBT human rights may ultimately lead to legal ramifications for states with laws that criminalize homosexuality, the international community currently appears to be limiting its influence to non-legal measures.

Despite these obstacles, LGBT advocates have numerous options available to them to fight for the repeal of Kenya's anti-sodomy laws. These measures include networking with mainstream human rights organizations and Kenyan LGBT organizations, building upon local efforts to document violence against LGBT Kenyans, taking advantage of the current focus on LGBT rights in the international community, and attempting to have a claim filed in the Supreme Court of Kenya.<sup>228</sup>

First, advocates should create partnerships with mainstream human rights organizations. Starting in the early 1990s, organizations such as Amnesty International began advocating on behalf of LGBT individuals who were imprisoned under anti-sodomy laws.<sup>229</sup> In recent years, Kenya

---

225. See *supra* note 81 and accompanying text.

226. Article 5 of Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights states that the entities enumerated above are entitled to submit cases before the court. Article 34(6) of the Protocol Establishing the Court requires that for individuals and Non-Governmental Organizations to have direct access to the Court, the State must make a declaration accepting the competence of the Court to receive applications from these entities under Article 5(3) of the Protocol. See Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted June 9, 1998, O.A.U. Doc. CAB/LEG/665 (entered into force Jan. 1, 2004). Kenya ratified the Protocol on February 4, 2004, but has not made the declaration under Article 34, section 6. See *List of Countries Which Have Signed, Ratified/Acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights*, AFRICAN UNION (March 11, 2011), <http://www.au.int/en/sites/default/files/992achpr.pdf>.

227. See generally Narayan, *supra* note 59.

228. See *infra* text accompanying notes 229-34.

229. Helfer & Miller, *supra* note 82, at 90.

has become a focus of some organizations' efforts such as Human Rights Watch.<sup>230</sup> Because LGBT Kenyans face systemic abuse and there is a strong legal argument for repealing Kenya's anti-sodomy laws, mainstream organizations that want to attack anti-sodomy laws may view Kenya as a strategic country to target. These organizations have the advantage of strong financial resources and access to international media sources that would help bring widespread attention to the issue and are therefore valuable assets to advocates.<sup>231</sup>

Local LGBT rights organizations in Kenya such as the Gay and Lesbian Coalition of Kenya<sup>232</sup> are also a highly useful resource. These organizations will have a greater sense of the local barriers to repealing anti-sodomy laws and how to best overcome them. Furthermore, they will be better situated to conduct further fact-finding studies on the violence that LGBT Kenyans suffer as a result of Kenya's anti-sodomy laws that could provide crucial evidence for a potential claim filed before the Supreme Court of Kenya.

The recent report by the U.N. High Commissioner on Human Rights on LGBT human rights violations signals an important milestone in the international community regarding its commitment to enforcing the rights of sexual minorities. Never before has there been such an explicit statement that LGBT rights are human rights and that anti-sodomy laws violate international law. Because Kenya's new Constitution incorporates general principles of international law into domestic law, advocates can point to this report in fighting for change in Kenya. Moreover, although there is a general sentiment of homophobia in Kenya, the Chief Justice of the Supreme Court of Kenya, Willy M. Mutunga, supports LGBT rights.<sup>233</sup> Indeed, in a recent speech, Chief Justice Mutunga declared, "Gay rights are human rights." Although Chief Justice Mutunga qualified his remarks by stating that he was not commenting on gay rights in the context of Kenya's new Constitution, he continued by remarking, "as far as I know, human rights principles that we work on do not allow us to demand human rights selectively."<sup>234</sup> As such, there has never been a better time to file a case in the Supreme Court challenging the constitutionality of Kenya's anti-sodomy laws.

The combination of heightened awareness of LGBT Human Rights in the international community; greater constitutional protections and domestic incorporation of international law under Kenya's new Constitution; and sympathetic justices on the Kenyan Supreme Court has created a crucial opportunity for Kenya's anti-sodomy laws to be repealed. Regard-

---

230. See *supra* note 38 and accompanying text.

231. See, e.g., BDO USA, LLP, HUMAN RIGHTS WATCH, INC. FINANCIAL STATEMENTS YEAR ENDED JUNE 30, 2011, at 4 (2011) (noting that Human Rights Watch's net assets for the year 2011 were \$215,273,019).

232. GALCK: GAY AND LESBIAN COALITION OF KENYA, <http://galck.org/> (last visited Mar. 1, 2012).

233. FIDA Uganda, "Gay Rights are Human Rights!"—Dr. Willy Mutunga, YOUTUBE (Jan. 31, 2012), <http://www.youtube.com/watch?v=PPfiwXNuOg>.

234. *Id.*

less of the method, human rights activists must seize upon this opportunity so that LGBT Kenyans do not have to live in fear and, instead, can achieve the legal equality to which they are constitutionally entitled.

