

# Unintended Consequences of International Human Rights Advocacy in Uganda

Ciara Bottomley\*

*This Article analyses the unintended consequences human rights advocacy has had on the rights of LGBTI persons in Uganda. This Article traces the criminalisation of homosexuality in former British colonies to modern day anti-homosexuality laws and discusses the interplay between LGBTI rights and state sovereignty. An analysis is provided of the background to the legislation and the role of American religious leaders in its drafting. This Article analyses the unintended consequences of both international and national LGBTI advocacy in Uganda in light of the assertion that the international non-governmental organisation movement may have done more harm than good. This Article concludes that any hope of repealing the law rests on the success of strategic litigation. Since this Article was written the Anti-Homosexuality Law has been struck down by the Constitutional Court in Uganda on the basis that parliamentary quorum was not met when the law was passed. This is a positive if somewhat perfunctory advancement as Parliamentarians have drafted a new, almost identical bill which is currently under consideration.*

---

## I. INTRODUCTION

The Anti-Homosexuality Act was passed in Uganda in February 2014. The Act received strong support from American Christian missionaries and builds upon a long history of criminalised homosexuality inherited from colonial rule.<sup>1</sup> Despite this, the new law has received a considerable amount of attention in Western media and international non-governmental organisations. Under the new law, promoting, funding, offering premises or 'aiding and abetting'

---

\* Ciara Bottomley is currently studying for an LLM in Human Rights, Conflict and Justice at SOAS, University of London and received an LLB (Hons) in English and French Laws with French from the University of Liverpool and Université de Paris 1, Panthéon Sorbonne. The author would like to thank Professor Lynn Welchman for her invaluable insights, guidance and support throughout.

<sup>1</sup> Ugandan Penal Code Act 1950, s 15(2).

homosexuality carries a prison sentence of five to seven years.<sup>2</sup> Directors of organisations that seek to support lesbian, gay, bisexual, trans/transgender, intersex (LGBTI) persons, if convicted, can be sentenced for up to seven years in prison and have their trading licences revoked.<sup>3</sup> This provision presents a grave threat to the work of human rights defenders and violates fundamental human rights including freedom of expression, assembly and association.<sup>4</sup> This law has grave implications not only for the civil and political rights of LGBTI persons, but also for their economic, social and cultural rights.

This Article seeks to determine how to defend the human rights of the Ugandan LGBTI community in this climate of fear and oppression. Past and present advocacy strategies that seek to defend the rights of LGBTI persons in Uganda will be analysed in light of the new law. To do so, this Article looks at the background of the legislation and the role of American religious leaders in its drafting. There is critique of the advocacy strategies employed by international non-governmental organisations and analysis on some of the ethical dilemmas faced. This Article concludes that any hope for change must come from Uganda itself, as international decriminalisation efforts often ignore local realities.

## II. HOMOPHOBIC UGANDA?

Homosexuality was neither condoned nor condemned in the territories that are known today as Uganda.<sup>5</sup> Laws regulating homosexual activity were a colonial import. The first anti-homosexuality law, section 377 of the Indian Penal Code, dates to 1860. A carbon copy of this law has also been used in other former British colonies. The British are said to have believed the laws could 'inculcate European morality into resistant masses. They brought in the legislation, in fact, because they thought 'native' cultures did not punish 'perverse' sex enough'.<sup>6</sup>

At the time of writing, there are 82 jurisdictions with laws criminalising private, consensual sexual conduct between adults of the same sex. 53 of these jurisdictions are Commonwealth countries and 80% of them criminalise

---

<sup>2</sup> Anti-Homosexuality Act 2014, Pt 3.

<sup>3</sup> *ibid* s 13.

<sup>4</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, arts 19, 21-22.

<sup>5</sup> Sylvia Tamale, 'Out of the Closet: Unveiling Sexuality Discourses in Uganda' (2003) 2 *Feminist Africa* 42.

<sup>6</sup> 'This Alien Legacy: The Origins of "Sodomy" Laws in British Colonialism' (Human Rights Watch 2008) <[http://www.hrw.org/sites/default/files/reports/lgbt1208\\_web.pdf](http://www.hrw.org/sites/default/files/reports/lgbt1208_web.pdf)> accessed 24 April 2014.

homosexuality.<sup>7</sup> For example, consensual sex between persons of the same sex has been a criminal offence in Uganda since 1950. According to section 145:

Any person who has carnal knowledge of any person against the order of nature; has carnal knowledge of an animal; or permits a male person to have carnal knowledge of him or her against the order of nature, commits an offence and is liable to imprisonment for life.<sup>8</sup>

A Ugandan Member of Parliament, David Bahati, from the ruling party, the National Resistance Movement, introduced the Anti-Homosexuality Bill (the Bill) in September 2009.<sup>9</sup> The Bill proposed the death sentence<sup>10</sup> for those found guilty of homosexuality and created a public duty to report persons suspected of homosexuality.<sup>11</sup> Unsurprisingly, these provisions provoked outcry from national and international non-governmental organisations (NGOs). In February 2014, the amended Bill abandoned these provisions and was signed into law by President Yoweri Museveni. Under the Anti-Homosexuality Act 2014 (the Act), engaging in a sexual act with someone of the same sex, touching someone of the same sex 'with the intention of committing the act of homosexuality',<sup>12</sup> or marrying someone of the same sex all carry the penalty of life imprisonment.<sup>13</sup>

Section 13(1) criminalises the 'promotion' of homosexuality. Under this section, disseminating materials, providing funds or premises, using electronic devices or acting as an accomplice for the purpose of 'promoting' homosexuality is punishable by a prison sentence of up to seven years. Section 13(2) criminalises the activities of organisations that promote homosexuality. On conviction, the certificate of registration of the organisation is to be revoked and the director, proprietor or promoter may be sentenced to up to seven years' imprisonment.<sup>14</sup>

Section 13 gravely undermines both individual and collective rights to freedom of expression. Without a clear definition of the criminalised material, the broad

---

<sup>7</sup> 'The Criminalisation of Homosexuality is a Denial of Human Rights' (*Human Dignity Trust*) <<http://www.humandignitytrust.org>> accessed 21 April 2014.

<sup>8</sup> Ugandan Penal Code Act 1950, ss 145-46, 148.

<sup>9</sup> The Anti-Homosexuality Bill 2009 (25 September 2009).

<sup>10</sup> *ibid* s 3.

<sup>11</sup> *ibid* s 14.

<sup>12</sup> Anti-Homosexuality Act 2014, s 2.

<sup>13</sup> *ibid*.

<sup>14</sup> *ibid* s 13.

list of offences is open to abuse. It is easy to envisage unscrupulous persons using this law to unfairly target people in the LGBTI community. The case of Robert Kayanja, an influential pastor in Uganda, who was wrongly accused of sodomy by conspirators within his ministry, serves as an example of how vexatious individuals may use the law for personal gain.<sup>15</sup>

The Act will foreseeably censor a wide range of organisations that work in diverse fields including, *inter alia*, health, education and law reform. The Act criminalises persons who counsel or advocate on behalf of LGBTI persons. This will create ramifications with regards to health service provision, particularly in relation to HIV/AIDS. This broad wording of the section may also criminalise the distribution of materials seeking to educate the public on HIV/AIDS transmission. It also creates a chilling effect among health professionals, advocates and activists who are fearful of prosecution.

In addition to the Anti-Homosexuality Act, a number of other laws have recently been passed. These laws similarly seek to curtail individual freedom in the name of morality; for example, the Anti-Pornography Act 2014, the so-called mini-skirt ban, and the reduction of public space available to Ugandan civil society by the Public Order Management Act (POMA) 2013.<sup>16</sup> In the name of 'safeguarding the public order', POMA significantly limits the right to protest or hold public meetings.<sup>17</sup> Where a public meeting is held contrary to the Act, law enforcement agencies can stop the meeting and participants in the meeting may be imprisoned for a period of up to 12 months or subject to fines.<sup>18</sup>

These laws present serious challenges to freedom of expression and assembly, specifically with regard to the rights conferred by Article 29 of the Constitution.<sup>19</sup> These laws are difficult to reconcile with Uganda's obligations under the African Charter on Human and Peoples' Rights (ACHPR).<sup>20</sup> Furthermore, it is likely that the laws are incompatible with Uganda's international obligations under the International Covenant on Civil and

---

<sup>15</sup> John Semakula, 'A fresh chapter for Kayanja family after case' (*New Vision*, 7 October 2012) <<http://www.newvision.co.ug/news/636063-a-fresh-chapter-for-kayanja-family-after-case.html>> accessed 25 April 2014.

<sup>16</sup> Public Order Management Act 2013.

<sup>17</sup> *ibid* ss 5-6.

<sup>18</sup> *ibid* s 10(3).

<sup>19</sup> Parliament of Uganda, 'Constitution of the Republic of Uganda (1995)' <[http://www.parliament.go.ug/new/images/stories/constitution/Constitution\\_of\\_Uganda\\_1995.pdf](http://www.parliament.go.ug/new/images/stories/constitution/Constitution_of_Uganda_1995.pdf)> accessed 30 March 2014.

<sup>20</sup> African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) OAU Doc CAB/LEG/67/3 (1982) 21 ILM 58, arts 2, 9-11.

Political Rights (ICCPR)<sup>21</sup> and the United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms.<sup>22</sup>

The 21st century LGBTI movement has been marked by a polarisation of views. This polarisation, at its most extreme, is demonstrated by the legalisation of same-sex marriage in countries such as Britain, the United States and New Zealand as compared to moves to further criminalise homosexuality as in Uganda, Russia or Nigeria. It seems that legislation regulating homosexuality to one extreme or the other has become the focal point of a culture war between the developed and so-called 'developing' world. In both cases, this legislation wins votes. For example, a reported 96% of Ugandans believe that homosexuality should not be accepted by society.<sup>23</sup> A recent survey in Britain has shown that nearly 70% of the population are in favour of same-sex marriage, a figure that has quadrupled in the past four decades.<sup>24</sup> These statistics do not operate in a vacuum; there is a direct relationship between wealth, religiosity and tolerance of homosexuality.

Uganda is experiencing an economic crisis, crippled by rising food prices with an estimated eight million people living below the poverty line.<sup>25</sup> In addition, widespread corruption is reported; Transparency International has assessed Uganda as 'highly corrupt' every year since 1996. Uganda was ranked 144th out of 177 countries on the corruption index in 2013.<sup>26</sup> Rising inequality has caused the mobilisation of certain groups. For example, in 2012, Activists 4 Change called on citizens to walk to work in protest.<sup>27</sup> The protest was violently

---

<sup>21</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, arts 19, 21-22.

<sup>22</sup> Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms (adopted 9 December 1998, entered into force 8 March 1999) 53 UNGA 144.

<sup>23</sup> 'The Global Divide on Homosexuality' (*Pew Research Center*, 4 June 2013)

<<http://www.pewglobal.org/2013/06/04/the-global-divide-on-homosexuality/>> accessed 24 April 2014.

<sup>24</sup> 'Dramatic change in attitudes towards gay couples' (*Ipsos Mori*, 23 April 2014)

<<http://www.ipsos-mori.com/researchpublications/researcharchive/3371/Dramatic-change-in-attitudes-towards-gay-couples.aspx>> accessed 24 April 2014.

<sup>25</sup> 'Enabling poor rural people to overcome poverty in Uganda' (*International Fund for Agricultural Development*, November 2013)

<<http://www.ifad.org/operations/projects/regions/Pf/factsheets/uganda.pdf>> accessed 24 April 2014.

<sup>26</sup> 'Corruption by Country/Territory' (*Transparency International*)

<<http://www.transparency.org/country#UGA>> accessed 24 April 2014.

<sup>27</sup> 'World Report 2014: Uganda' (*Human Rights Watch*, 2014) <<http://www.hrw.org/world-report/2014/country-chapters/Uganda>> accessed 29 April 2014.



suppressed by police and the group was subsequently declared illegal. This has prompted a wider crackdown on activism and civil society, which is most palpable with regard to LGBTI groups. Ugandan society is clearly changing. Inequality created through neo-liberal policies threatens to 'undermine the social hierarchies and experiences of gendered and inter-generational interdependence that have long defined Ugandan sociality and selfhood'.<sup>28</sup> This creates a fear about lost morality, which has been the subtext to the creation of the aforementioned laws.

A line of rhetoric that has developed among political and religious leaders is that homosexuality is 'unAfrican'. This theory ignores the colonial laws that imported homophobia and declares that homosexuality is a Western phenomenon. According to McAllister, this idea draws justification from three theories: 'a naïve naturalism, a fundamentalist reading of scripture and a nationalist idealisation of 'authentic' African culture'.<sup>29</sup> The Government and certain media outlets propagate these ideas.<sup>30</sup> Additionally, criticism from the West about the Act is condemned as neo-colonialist. The Anti-Homosexuality Act is evidently equally concerned with asserting Ugandan sovereignty as it is with curtailing individual freedom.

According to Kaoma, this is the result of the exported culture war between right-wing religious groups and their critics in the United States.<sup>31</sup> Some extremist American religious leaders who have largely lost the battle against LGBTI rights in America have taken their message to Uganda. According to Rachelle Digges of IAM Youth Ablaze, an international missionary organisation:

There's a very strategic position that Uganda is in. Fifty percent of the population is under fifteen years old. We can multiply ourselves

---

<sup>28</sup> Lydia Boyd, 'The Problem with Freedom: Homosexuality and Human Rights in Uganda' (2013) 86(3) *Anthropological Quarterly* 697, 701.

<sup>29</sup> John McAllister, 'Tswanarising Global Gayness: 'the UnAfrican' Argument', *Western Gay Media Imagery, Local Responses and Gay Culture in Botswana* (2013) 15 *Culture Health and Sexuality* 88, 89.

<sup>30</sup> 'President Museveni's full speech at signing of Anti-Homosexuality bill' (*Daily Monitor*, 24 February 2014) <<http://www.monitor.co.ug/News/National/Museveni-s-Anti-Homosexuality-speech/-/688334/2219956/-/item/0/-/6t248n/-/index.html>> accessed 24 April 2014.

<sup>31</sup> Kapyia Kaoma, 'Globalizing the Culture Wars: The US Conservatives, African Churches and Homophobia' (*Political Research Associates*, 2009) <<http://www.publiceye.org/publications/globalizing-the-culture-wars/pdf/africa-full-report.pdf>> accessed 24 April 2014.

in these young people and they can reach multitudes. They can reach nations.<sup>32</sup>

Extremists use the United States as evidence of the encroaching 'gay conspiracy', inciting fear, bigotry and sometimes violence among their African audiences.<sup>33</sup> Of note is Scott Lively, the founder of Abiding Truth Ministry. Not long before the Bill was presented, Lively, an anti-homosexuality activist, visited Uganda in 2009.<sup>34</sup> He gave various talks about the 'gay agenda', stirred up fear about the 'recruitment' of young persons by LGBTI groups, and effectively obfuscated the issues of human rights defence, homosexuality and paedophilia.<sup>35</sup> Lively terms himself as a 'gay expert' and has published a number of books which call for the criminalisation of LGBTI advocacy.<sup>36</sup> He argues that:

Homosexual activist organisations seek to recruit all young people to be their allies by styling themselves as victims needing protection. They take advantage of the humanitarian idealism of teenagers and young adults who are too immature to recognize that they are being manipulated.<sup>37</sup>

Lively is alleged to have been crucial to the drafting of the Act and stands accused of persecution by LGBTI groups based in Uganda (this will be explored in Section 4).

Uganda has become a breeding ground for homophobic vitriol for a number of reasons; imported homophobia under colonial rule, increasing poverty, an unpopular government, the rise of religious extremism, and the presence of American religious leaders. It is important to understand the causes and context of the crisis to establish appropriate advocacy strategies.

---

<sup>32</sup> Roger Ross Williams, 'God Loves Uganda' (Full Credit Productions 2013).

<sup>33</sup> Kaoma (n 31) 5.

<sup>34</sup> Kapya Kaoma, 'Scott Lively Uganda Anti-Homosexuality Conference 2009' (Political Research Associates 2014).

<sup>35</sup> *ibid.*

<sup>36</sup> Scott Lively, *Seven Steps to Recruit-Proof Your Child: A Parent's Guide To Protecting Children From Homosexuality and the "Gay" Movement* (Founders Publishing Corporation 1998).

<sup>37</sup> Scott Lively, 'Redeeming the Rainbow: A Christian Response to the "Gay" Agenda' (*Veritas Aeterna Press*, 2009) <[http://www.defendthefamily.com/\\_docs/resources/1889235.pdf](http://www.defendthefamily.com/_docs/resources/1889235.pdf)> accessed 24 April 2014.

### III. UNINTENDED CONSEQUENCES OF INTERNATIONAL ADVOCACY

The debate on LGBTI rights in Uganda is largely being sustained by the West. As illustrated in Section 2, religious extremists fan the flames of homophobic sentiment. What role has the advocacy of international non-governmental organisations (INGOs) played in the enactment of the Anti-Homosexuality Act?

The first dilemma experienced by INGOs is the conflict between human rights and local norms.<sup>38</sup> Throughout Africa, there has been strong pressure from international human rights groups to decriminalise homosexuality. In many cases, this has been met with fierce opposition leading to increased attacks on gay men and 'corrective rape' in some areas.<sup>39</sup> Simultaneously, LGBTI organisations have proliferated across Africa. According to some critics, the increased visibility of LGBTI NGOs has led to 'an increase in homophobic rhetoric'.<sup>40</sup> There is a strong critique that cites the INGO movement as part of the problem in attempts to protect LGBTI rights.

Palestinian scholar Joseph Massad has written extensively about what he terms 'the Gay International', namely the International Lesbian and Gay Association (ILGA) and the International Gay and Lesbian Human Rights Commission. Massad argues that the Gay International's failure to understand local realities has led to the imposition of a Westernised sexual identity that has served to perpetuate violence against the very people it seeks to liberate:

... [I]t is not the Gay International or its upper-class supporters in the Arab diaspora who will be persecuted, but rather the poor and nonurban men who practice same-sex contact and who do not *necessarily* identify as homosexual or gay.<sup>41</sup>

---

<sup>38</sup> Daniel A Bell and Joseph H Carens, 'The Ethical Dilemmas of International Human Rights and Humanitarian NGOs: Reflections on a Dialogue between Practitioners and Theorists' (2004) 26 Human Rights Quarterly 300, 303.

<sup>39</sup> Patrick Strudwick, 'Crisis in South Africa: The Shocking Practice of 'Corrective Rape' – Aimed at 'Curing' Lesbians' (*The Independent*, 4 January 2014) <<http://www.independent.co.uk/news/world/africa/crisis-in-south-africa-the-shocking-practice-of-corrective-rape--aimed-at-curing-lesbians-9033224.html>> accessed 21 April 2014.

<sup>40</sup> Patrick Awondo, Peter Geschiere and Graeme Reid, 'Homophobic Africa?: Toward a More Nuanced View' (2012) 55(3) African Studies Review 145, 148.

<sup>41</sup> Joseph Andoni Massad, *Desiring Arabs* (University of Chicago Press 2007) 189.



It is true that there is some disconnect between Western ideas of homosexuality and a localised view of men who have sex with men. It is likely that this has contributed to the rhetoric that homosexuality is 'unAfrican', as detailed in Section 2. Sensitive issues such as LGBTI rights in a conservative and religious country must be addressed tactfully. As most INGO headquarters are based in urban Western settings like London, Geneva or New York, it is likely that INGO advocates will experience a conflict between human rights and local norms. Advocacy for LGBTI rights in the West often take the form of high-decibel campaigns or visible demonstrations like Gay Pride. When mirrored by Ugandan activists, it results in police harassment.<sup>42</sup> This begs the question of whether this approach is appropriate to Ugandan LGBTI issues.

Another conflict arises in relation to social justice and human rights. LGBTI rights are usually based on civil and political rights such as non-discrimination, privacy and human dignity. In Africa, one problem with this approach is that the rights become abstract and, to a certain extent, Westernised. Today's human rights movement is rooted in the Universal Declaration of Human Rights (UDHR).<sup>43</sup> When the UDHR was being drafted, many African countries were still under colonial rule, which limited their input. This highlights the Northern dominance over the human rights movement. As Mutua notes:

It is this exclusionary beginning and lack of universality, the absence of major cultures and geographically specific historical perspectives that are the source of serious tensions within the human rights movement today.<sup>44</sup>

The International Covenant on Civil and Political Rights (ICCPR) followed suit and created a hierarchy between civil and political rights, and economic, social and cultural rights. The Eurocentric vision of human rights failed to fully account for the interdependency of these rights, which is often reflected in INGO advocacy. In the case of Uganda, INGOs have prioritised concerns about discrimination, privacy, dignity and freedom of expression and association. In the nine statements drafted by Amnesty International (AI) from 20 December

---

<sup>42</sup> Dan Littauer, 'First Uganda Gay Pride A Success Despite Police Raid' (*Gay Star News*, 6 August 2012)

<<http://www.gaystarnews.com/article/first-uganda-gay-pride-success-despite-police-raid060812>> accessed 24 April 2014.

<sup>43</sup> Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III) (UDHR).

<sup>44</sup> Makau Wa Mutua, 'Domestic Human Rights Organisations in Africa: Problems and Perspectives' (1994) 22(2) *A Journal of Opinion* 30.

2013 to 24 February 2014, health is mentioned in eight. However, on each occasion, health concerns have only been mentioned toward the end of the statement or under 'additional information'.<sup>45</sup> This has been an oversight. To some critics, 'civil and political rights can only be meaningful in Africa if addressed in the context of the denials of economic and social rights'.<sup>46</sup> Failure to recognise the threat posed to economic, social and cultural rights such as healthcare, employment, and education will only serve to isolate the cause of the LGBTI community. Furthermore, it leads to accusations of selectivity and lends weight to the idea that human rights are part of an elite movement.<sup>47</sup> This in turn perpetuates suspicion and mistrust with regard to Western intentions. This is demonstrated in the comments of an interviewee in Boyd's article:

... [W]hen you come and talk about homosexuality, when there is a mother who can't feed her children, how does this make sense? Why does the West care more about homosexuals than those who suffered under the [Lord's Resistance Army]? This is how it seems. This is what it seems human rights is.<sup>48</sup>

A similar trend has been noted in Ugandan human rights groups' attempts to publicise the issue. Strand analysed the two largest newspapers' coverage of the Bill in 2009 and 2010. She compared articles from *New Vision*, the government-owned newspaper, and the *Daily Monitor*, the largest privately owned newspaper in Uganda. In her analysis, she sought to identify the effectiveness of Ugandan human rights groups in influencing the media. Through interviews with activists, she identified three themes in their advocacy: the Bill was anti-public health; the Bill was anti-human rights and anti-constitutional; and the Bill had repercussions for all Ugandans.<sup>49</sup>

---

<sup>45</sup> 'Human Rights in the Republic of Uganda' (*Amnesty International*)

<<https://www.amnesty.org/en/countries/africa/uganda/>> accessed 25 April 2014; There are ten statements, however, one was not drafted by Amnesty International. It has therefore been excluded.

<sup>46</sup> Mutua (n 44) 32.

<sup>47</sup> Chidi Anselm Odinkalu, 'Why More Africans Don't Use Human Rights Language' (1999) 2.1 Human Rights Dialogue

<[http://www.carnegiecouncil.org/publications/archive/dialogue/2\\_01/articles/602.html](http://www.carnegiecouncil.org/publications/archive/dialogue/2_01/articles/602.html)> accessed 24 April 2014.

<sup>48</sup> Lydia Boyd, 'The Problem with Freedom' (n 28) 703.

<sup>49</sup> Cecilia Strand, 'Kill Bill! "Ugandan Human Rights Organisations" Attempts to Influence the Media's Coverage of the Anti-Homosexuality Bill' (2011) 13(8) *Culture, Health & Sexuality* 917, 921.

Strand found that while there was a difference in how frequently the Bill was reported in the government-owned and privately owned newspapers, both newspapers were more likely to report that the Bill was 'anti-human rights' and 'anti-constitutional', rather than reporting that it posed a risk to public health or that the Bill was a matter for concern for all Ugandans. It is surprising that the 'anti-public health' theme was the least covered. Uganda was internationally praised for its efforts to reduce HIV/AIDS transmission, which included the identification of men who have sex with men as a group particularly at risk.<sup>50</sup> The Act contains provisions which will seriously affect the work of medical practitioners and may serve to further institutionalise stigma against LGBTI people. The offence of aggravated homosexuality, which carries a penalty of life imprisonment for persons living with HIV, may prevent people from accessing the care they need and carries grave risks for the whole of Ugandan society.<sup>51</sup>

INGOs are often criticised for failing to report on the structural-historic nature of the crisis. As many human rights crises take place in former colonies, understanding the impact of colonialism is important to determine an appropriate advocacy strategy. In circumstances where states face disintegration or where there is strong competition for natural resources, 'violence and persecution can more easily take hold and systemic deprivation of basic human needs is common'.<sup>52</sup> Understanding structural inequalities and the economic conditions in Uganda is vital to creating an effective advocacy strategy on behalf of LGBTI people. According to Bettinger-Lopez:

Without an effort to understand and unpack the genesis of human rights violations, we will contribute to a human rights discourse limited to victims and perpetrators, and a depiction of barbaric regions of the world or blameworthy neighbourhoods in our communities.<sup>53</sup>

Although consensual sex between same-sex couples has been illegal since 1950, the Bill caused uproar among both local and international human rights groups. Though INGOs were successful in removing the death penalty and duty to report from the Bill, the watered-down version of the Bill still became law.

---

<sup>50</sup> Strand (n 49) 927.

<sup>51</sup> Anti-Homosexuality Act 2014, s 3(1)(b).

<sup>52</sup> Caroline Bettinger-Lopez and others, 'Redefining Human Rights Lawyering Through the Lens of Critical Theory: Lessons for Pedagogy and Practice' (2011) 18(3) Georgetown Journal on Poverty Law & Policy 337, 359.

<sup>53</sup> *ibid* 360.

INGOs have failed to highlight that the Act is built upon existing law imported by the British. The new provisions relate to the criminalisation of touching with intent to commit homosexuality (section 2), aggravated homosexuality (section 3) and promotion of homosexuality (section 13).

British Prime Minister David Cameron was lobbied to this effect in the past, but has taken no steps to acknowledge Britain's role in implementing the original anti-homosexuality policy.<sup>54</sup> To date, half of the articles published by Human Rights Watch (HRW) concerning Uganda in 2014 have concerned the Act. Of these articles, not one makes reference to colonialism.<sup>55</sup> Publicising the fact that the Act is built on British colonial policy could mitigate accusations of neo-colonialism. Unfortunately, INGOs have opted for another strategy.

Naming and shaming has been central to the INGOs strategy on the Act. It is an effective strategy, but it is not a remedy for all types of abuse. For example, terror can sometimes increase after publicity.<sup>56</sup> AI,<sup>57</sup> HRW<sup>58</sup> and the International Federation for Human Rights (FIDH),<sup>59</sup> have heavily publicised the issue in their annual reports, articles, and campaigns. FIDH expressed 'strong concern and support for all organisations defending the rights of the LGBTI community in Uganda'.<sup>60</sup> HRW cautioned that the 'Anti-Homosexuality Law will come at a serious cost'.<sup>61</sup> AI condemned the law, stating that the 'Anti-

---

<sup>54</sup> Corinne Lennox and Matthew Waites, 'Human Rights, Sexual Orientation and Gender Identity in the Commonwealth: From History and Law to Developing Activism and Transnational Dialogues' in Corinne Lennox and Matthew Waites (eds), *Human Rights, Sexual Orientation and Gender Identity in The Commonwealth: Struggles for Decriminalisation and Change* (Human Rights Consortium 2013) 38.

<sup>55</sup> 'Human Rights in Uganda' (*Human Rights Watch*) <<http://www.hrw.org/africa/uganda>> accessed 23 April 2014.

<sup>56</sup> Emilie Hafner-Burton, 'Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem' (2008) 62(4) *International Organisation* 689, 707.

<sup>57</sup> 'Uganda: Anti-Homosexuality Act must be scrapped' (*Amnesty International*, 20 December 2013) <<http://www.amnesty.org/en/news/uganda-anti-homosexuality-bill-must-be-scrapped-2013-12-20>> accessed 25 April 2014.

<sup>58</sup> 'World Report 2013: Uganda' (*Human Rights Watch*, 2013) <<http://www.hrw.org/world-report/2013/country-chapters/uganda>> accessed 24 April 2014.

<sup>59</sup> 'Uganda: Anti-Homosexuality signed into Law' (*FIDH*, 25 February 2014) <<http://www.fidh.org/en/africa/uganda/14777-uganda-anti-homosexuality-signed-into-law>> accessed 24 April 2014.

<sup>60</sup> *ibid.*

<sup>61</sup> 'Uganda: Anti-Homosexuality Law Will Come at a Serious Cost' (*Human Rights Watch*, 19 February 2014) <<http://www.hrw.org/news/2014/02/19/uganda-anti-homosexuality-law-will-come-serious-cost>> accessed 25 April 2014.

Homosexuality Bill must be scrapped'.<sup>62</sup> INGOs have mobilised their members, consulted with intergovernmental organisations and lobbied governments to ensure that the issue is placed on the political agenda. HRW has been particularly vocal with regards to the US government's funding arrangements with Uganda:

The U.S. should also review funding assistance to Uganda to ensure that U.S. funding is not used to further prosecution of anyone under the law ... All U.S. funded health research, especially related to HIV, might also need to be re-reviewed by ethics committees to examine if research participants face negative consequences from the law or if health personnel are at risk of prosecution.<sup>63</sup>

In 2011 David Cameron made a statement suggesting that the United Kingdom might reduce development aid if respect was not shown for human rights. This was heavily criticised by certain African leaders; Uganda accused the UK of adopting a 'bullying' attitude, and former President of Ghana, John Atta Mills, said:

No one can deny Prime Minister Cameron his right to make policies, take initiatives or make statements that reflect his societal norms and ideals but he does not have the right to direct other sovereign nations as to what they should do especially where their societal norms and ideals are different from those which exist in the Prime Minister's society ... I as president of this nation will never initiate or support any attempt to legalise homosexuality in Ghana.<sup>64</sup>

This statement is indicative of the extent to which anti-gay legislation has become a focal point in asserting sovereignty. In 2009, President Museveni was quoted telling parliamentarians to 'Go Slow' and was reported to have told supporters of the Bill that it was not just a matter of internal policy but that it would also have implications for foreign policy.<sup>65</sup> In a response to threats from

---

<sup>62</sup> Amnesty International, 'Uganda: Anti-Homosexuality Act must be scrapped' (n 57).

<sup>63</sup> Human Rights Watch, 'Uganda: Anti-Homosexuality Law Will Come at a Serious Cost' (n 61).

<sup>64</sup> Lawrence Quartey, 'Ghana: MPs reject British PM's aid conditions' (*The Africa Report*, 4 November 2011)

<<http://www.theafricareport.com/West-Africa/ghana-mps-reject-british-pms-aid-conditions.html>> accessed 21 April 2014.

<sup>65</sup> Gregory Branch, 'Uganda president: 'Go slow' on anti-gay Bill' (*Global Post*, 15 January 2010) <<http://www.globalpost.com/dispatch/africa/100114/uganda-anti-gay-bill-museveni>> accessed 24 April 2014.



the British government to cut development aid, a coalition of African LGBTI NGOs wrote an open letter to David Cameron. The response stated that donor sanctions were coercive and served to reinforce power imbalances, which would not result in improved protection for the LGBTI community:

[Donor sanctions] are often based on assumptions about African sexualities and the needs of African LGBTI people. They disregard the agency of African civil society movements and political leadership. They also tend, as has been evidenced in Malawi, to exacerbate the environment of intolerance in which political leadership scapegoat LGBTI people for donor sanctions in an attempt to retain and reinforce national state sovereignty.<sup>66</sup>

Despite this, President Obama condemned the Bill as 'odious'<sup>67</sup> and threatened that the foreign aid relationship between the US and Uganda would become more complicated.<sup>68</sup> HRW said that this statement did not go far enough:

While donors have voiced concerns, I'm not sure that that has actually translated into a really serious understanding in Uganda of the impact of the Bill and what that will mean for relationships. We think that it's very important that the U.S. and others send a very strong message that there will be consequences for signing this law.<sup>69</sup>

Days later, President Museveni signed the law. This shows a worrying reluctance to listen to African NGOs and a failure to appreciate the crisis in Uganda. The threats may have actually been a driving force behind the decision to pass the law, as Museveni has since declared that he has reaffirmed Ugandan sovereignty by signing the law.<sup>70</sup>

---

<sup>66</sup> 'Statement on British 'Aid Cut' Threats to African Countries That Violate LGBTI Rights' (*Pambazuka News*, 27 October 2010)

<<http://www.pambazuka.org/en/category/advocacy/77470>> accessed 25 April 2014.

<sup>67</sup> 'Obama Condemns Uganda Anti-Gay Bill as 'Odious'' (*BBC News*, 4 February 2014) <<http://news.bbc.co.uk/1/hi/world/africa/8498836.stm>> accessed 21 April 2014.

<sup>68</sup> 'Barack Obama Warns Uganda's Museveni Over Anti-Gay Bill' (*BBC News*, 17 February 2014) <<http://www.bbc.co.uk/news/uk-26219468>> accessed 21 April 2014.

<sup>69</sup> Hilary Heuler, 'Rights Group: US Should Pull Ambassador Over Uganda Anti-Gay Bill' (*Voice of America*, 20 February 2014) <<http://www.voanews.com/content/rights-group-says-us-should-pull-ambassador-over-uganda-anti-gay-bill/1855743.html>> accessed 25 April 2014.

<sup>70</sup> Richard Wanambwa, 'Museveni: I Signed Anti-Gay Law to Affirm Ugandan Sovereignty' (*Africa Review*, 1 April 2014) <<http://www.africareview.com/News/-/979180/2265134/-/8hw20z/-/index.html>> accessed 25 April 2014.



The most substantial response to the law was the decision of the World Bank to freeze a loan of \$90 million to improve health care in Uganda.<sup>71</sup> This creates another common criticism of human rights advocacy: selectivity. Conditioning the granting of aid to 'gay rights' has situated the LGBTI community in the middle of crucial diplomatic debates as members are viewed as the stumbling block to access public welfare funding for health, education, shelter and other basic public amenities tied to Western funding.<sup>72</sup> According to the Kampala Observer:

Withdrawing healthcare funding meant to help poor Ugandans because their president has signed a law that the West does not like, is no more tolerant than signing a law to punish people whose sexual preferences we do not like ... Engagement with, rather than isolation of, the Ugandan public would help the gay cause. For ultimately, this journey is more cultural than political.<sup>73</sup>

While Ugandan authorities should be condemned for the Act, donor agencies and NGOs should continue to operate, provide assistance and work with Ugandan people. The people of Uganda should not suffer because of the draconian decisions of their government.<sup>74</sup> Engaging in discourse about the origins of the law and dispelling the myth that homosexuality is 'unAfrican' will go a long way to solve this crisis. Thus far, the international strategies of naming and shaming, and threatening withdrawal of funding have at best prompted accusations of paternalism and neo-colonialism. At worst, they have served to intensify the homophobic sentiment by positioning the LGBTI community at the centre of the debate.

This analysis demonstrates a profound lack of co-ordination between INGOs and Ugandan NGOs. Strategies have directly conflicted with one another,

---

<sup>71</sup> 'World Bank freezes aid to Uganda over gay law' (*Al Jazeera*, 28 February 2014)

<<http://www.aljazeera.com/news/africa/2014/02/world-bank-freezes-aid-uganda-over-gay-law-201422874410793972.html>> accessed 21 April 2014.

<sup>72</sup> Lucas Paoli Itaborahy and Jingshu Zhu, 'State Sponsored Homophobia: A world survey of laws: Criminalisation, protection and recognition of same-sex love' (*ILGA*, 2013)

<[http://old.ilga.org/Statehomophobia/ILGA\\_State\\_Sponsored\\_Homophobia\\_2013.pdf](http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2013.pdf)> accessed 24 April 2014.

<sup>73</sup> 'Uganda: Donors Should Not Be More Intolerant Than Anti-Gay Bill' (*All Africa*, 2 March 2014) <[http://allafrica.com/stories/201403032110.html?aa\\_source=useful-column](http://allafrica.com/stories/201403032110.html?aa_source=useful-column)> accessed 21 April 2014.

<sup>74</sup> Alessandro Bruno, 'The Fallacy of Cutting Aid in Response to Uganda's Anti-Gay Law' (*Geopolitical Monitor*, 6 March 2014) <<http://www.geopoliticalmonitor.com/the-fallacy-of-an-aid-cut-over-ugandas-anti-gay-law-4940/>> accessed 24 April 2014.

particularly in relation to cutting aid. The next Section analyses strategic litigation, perhaps the only option left available to Ugandan LGBTI organisations to challenge the law.

#### IV. HOPE LIES IN STRATEGIC LITIGATION?

As outlined above, one of the key challenges facing LGBTI groups under the Act is that their activities have effectively been criminalised. The remaining option available to LGBTI NGOs is strategic litigation. Members of Sexual Minorities Uganda (SMUG), a coalition of LGBTI groups, have brought a number of cases to the High Court. In 2012, they issued a claim under the Alien Tort Act 1789 in an attempt to hold Scott Lively responsible for crimes against humanity. They have also recently entered a petition to the Constitutional Court. The decision to take action as organisations or in groups is important to dispel criticism that strategic litigation perpetuates victimhood or neglects the needs of the victim.<sup>75</sup>

The case of *Mukasa and Another v Attorney-General* involves two LGBTI activists who brought a claim against the Attorney General for breaches of privacy and human dignity.<sup>76</sup> The applicants complained that government representatives had forced their way into their home and illegally searched and seized papers. The second applicant alleged she had been taken into custody, sexually harassed and indecently assaulted by officers who ordered her to undress and groped her to 'confirm her sex'.<sup>77</sup> The question before the Court was whether there had been a breach of privacy, denial of personal liberty and denial of protection from any form of torture, cruel or inhuman, and degrading treatment.

The Court specifically stated that the case concerned violations of the applicants' human rights and was not about homosexuality.<sup>78</sup> Judge Arach-Amoko found in favour of the applicants, relying on the principles of equality and human dignity.<sup>79</sup>

---

<sup>75</sup> Barbora Bukovská, 'Perpetrating Good: Unintended Consequences of International Human Rights Advocacy' (2008) 5(9) International Journal on Human Rights 7.

<sup>76</sup> *Mukasa and Another v Attorney-General* (2008) High Court of Uganda AHRLR 248.

<sup>77</sup> *ibid* 4.

<sup>78</sup> *ibid* 18.

<sup>79</sup> Constitution of Uganda 1955, art 24; Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 1; and Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13, art 3.

In the case *Kasha Jacqueline, David Kato Kisuule and Onziema Patience v Rolling Stone Ltd and Giles Muhame*,<sup>80</sup> the applicants sought a permanent injunction against the respondents' newspaper to restrain them from publishing injurious information about the applicants. The applicants complained that an article published on 2 October 2010 titled 'HANG THEM; THEY ARE AFTER OUR KIDS!!!! Pictures of Uganda's 100 Homo Leak', exposed them to:

Possible violence, ridicule, hatred and mob justice [which] would constitute a threat to the violation of the right of respect to human dignity and protection from inhuman treatment entrenched in Article 24 of the Constitution.<sup>81</sup>

The article spoke of a community that was plotting to recruit 'at least one million members by 2012' and included pictures of LGBTI persons with details of their home addresses.<sup>82</sup> On two occasions, the article called for homosexuals to be hung. It was argued by the respondent that the applicants had admitted they were homosexuals. The respondent continued that since homosexuality was a criminal offence under section 145 of the Penal Code Act, the applicants had not come to court with clean hands and equity should bar them from relief.<sup>83</sup> In coming to its decision, the Court stated that the application did not concern homosexuality *per se*, as the question before the court was whether fundamental rights and freedoms had been breached. Judge Kibuuka said that section 145 of the Penal Code Act was narrower than the respondent suggested. One was not a criminal by virtue of being gay, but one had to commit a criminal act prohibited under section 145 to be a criminal.<sup>84</sup>

In these cases, the Court has affirmed the criminality of homosexuality where homosexual acts have been occasioned. However, the judgments demonstrate that such crimes do not preclude individuals from the guarantee of protection for fundamental human rights. As there is no law in Uganda excluding LGBTI people from the scope of protection, they are protected by default, according to the principle of universal application. While these court cases represented a considerable victory for LGBTI activists, homophobic sentiment was growing

---

<sup>80</sup> *Kasha Jacqueline, David Kato Kisuule and Onziema Patience v Rolling Stone Ltd. and Giles Muhame*, High Court of Uganda (Civil Division) (Miscellaneous Cause No 163 of 2010).

<sup>81</sup> *ibid* 4-5.

<sup>82</sup> *ibid* 2-4.

<sup>83</sup> *ibid* 5-6.

<sup>84</sup> *ibid* 9.

outside the courtroom. Not long after the verdict, one of the applicants, David Kato, was murdered.<sup>85</sup>

Following the introduction of the law, LGBTI activists, members of parliament (including the leader of the opposition party) and lawyers made a petition to the courts.<sup>86</sup> The petitioners alleged a number of substantive breaches of fundamental human rights: privacy, equality and non-discrimination. They alleged that in criminalising aiding, abetting, counselling, procuring and promotion of homosexuality, sections 7 and 13:

Create offences that are overly broad, penalise legitimate debate, professional counsel, HIV related services provision and access to health services, in contravention of the principle of legality, the freedoms of expression, thought, assembly and association, and the right to civic participation.<sup>87</sup>

Procedurally, the petitioners alleged that the Anti-Homosexuality Act 2014 was passed without quorum, in breach of Ugandan parliamentary rules and is therefore null and void. According to Fox Odoi MP, a head count was not undertaken on the day the Bill was voted.<sup>88</sup> In August 2014, the Constitutional Court of Uganda struck down the law. The court did not make a substantive finding on the question of breach of fundamental rights but ruled on a technicality.<sup>89</sup> It held that the law passed in February 2014 was unconstitutional because a quorum was not met.

The issue of quorum was briefly reported in Western media outlets including the BBC<sup>90</sup> and CNN<sup>91</sup> and by the Ugandan newspaper The Daily

---

<sup>85</sup> 'Uganda gay rights activist David Kato killed' (*BBC News*, 27 January 2011)

<<http://www.bbc.co.uk/news/world-africa-12295718>> accessed 25 April 2014.

<sup>86</sup> *Onyanga and others v Attorney General of Uganda*, Constitutional Court of Uganda (Petition No 8 of 2014).

<sup>87</sup> Onyanga (n 86).

<sup>88</sup> Sulaiman Kakaire, 'Fox Odoi: Why the Anti-Gay Law is Illegal' (*The Observer*, 23 March 2014)

<<http://www.observer.ug/viewpoint/interview/30836-fox-odoi-why-the-anti-gay-law-is-illegal>> accessed 24 April 2014.

<sup>89</sup> *Oloka-Onyango & 9 Ors v Attorney General* [2014] UGCC 14.

<sup>90</sup> 'Ugandan MPs Pass Life in Jail Anti-Homosexual Law' (*BBC News*, 20 December 2013)

<<http://www.bbc.co.uk/news/world-africa-25463942>> accessed 25 April 2014.

<sup>91</sup> Faith Karimi, 'Gays and Lesbians 'Sick,' Ugandan President Says In Blocking Anti-Gay Bill' (*CNN*, 18 January 2014)

<<http://edition.cnn.com/2014/01/17/world/africa/uganda-anti-gay-bill-rejected>> accessed 25 April 2014.

Monitor.<sup>92</sup> However, it was neither mentioned in HRW's press release issued on the day,<sup>93</sup> nor in the press release announcing the petition.<sup>94</sup> This is a striking oversight on the part of INGOs. Highlighting the lack of quorum connects what may be perceived as an LGBTI issue to wider questions of governance and democracy. This was an opportunity to deflect attention from LGBTI groups by questioning the democratic legitimacy of the law instead. It poses wider questions about the curtailment of freedom under President Museveni and it is inextricably linked with his efforts to silence dissent, as evidenced by the POMA 2013. This failure to appreciate the issue holistically is an unfortunate example of INGOs ignoring local realities.

President Museveni has expressed his intention to appeal this decision to the Supreme Court. He also stated that if the law were to be amended to drop tough penalties on consenting adults, the law would still be tough on the 'recruitment of children and exploiting financially vulnerable youths'.<sup>95</sup> This suggests that even if some of the most draconian parts of the law are dropped, LGBTI NGOs will still be severely limited. In the absence of a finding that the law is in breach of fundamental rights, the risk of reintroducing the law is grave and measures should be implemented to ensure that this law is permanently revoked.

In March 2012, the not-for-profit US law firm, the Centre of Constitutional Rights, lodged a claim at the federal court in Massachusetts on behalf of SMUG on the basis of the Alien Tort Statute 1789 (ATS).<sup>96</sup> They allege that Scott Lively, individually and as President of the Abiding Truth Ministry, is guilty of breaches of international law contrary to the ATS. His role in the anti-gay movement in Uganda, including advocacy provided to the Ugandan government prior to the enactment of the Anti-Homosexuality Law 2014, is

---

<sup>92</sup> Isaac Imaka and Mercy Nalugo, 'Gays To Spend Life in Jail as MPs Pass Anti-Homosexuality Bill' (*Daily Monitor*, 20 December 2013) <<http://www.monitor.co.ug/News/National/Parliament-passes-Anti-Homosexuality-Bill/-/688334/2119844/-/864354z/-/index.html>> accessed 25 April 2014.

<sup>93</sup> 'Uganda: President Should Reject Anti-Homosexuality Bill' (*Human Rights Watch*, 2013) <<http://www.hrw.org/news/2013/12/20/uganda-president-should-reject-anti-homosexuality-bill>> accessed 25 April 2014.

<sup>94</sup> 'Uganda: Anti-Homosexuality Law Challenged' (*Human Rights Watch*, 11 March 2014) <<http://www.hrw.org/news/2014/03/11/uganda-anti-homosexuality-law-challenged>> accessed 25 April 2014.

<sup>95</sup> 'Uganda Seeks to Reinstate Anti-Gay Bill' (*Al Jazeera*, 13 August 2014) <<http://www.aljazeera.com/news/africa/2014/08/uganda-seeks-reinstate-anti-gay-bill-20148138256501947.html>> accessed 7 November 2014.

<sup>96</sup> *Sexual Minorities Uganda v Scott Lively*, Civil Action 3:12-CV-30051 (MAP) (US District Court for the District of Massachusetts).



alleged to amount to persecution on grounds of sexual orientation or gender identity. In December 2014, the United States First Circuit Court denied Scott Lively's application to have the case dismissed on First Amendment grounds, ruling that the trial would go ahead.<sup>97</sup>

The Alien Tort Statute 1789 is a powerful piece of legislation that allows non-US nationals to take civil claims against American citizens in order to seek accountability for human rights abuses. According to the terse provision of the ATS, '[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States'.<sup>98</sup>

As part of their application, the claimant alleged that the defendant worked with a number of Ugandans in order to carry out his persecutory campaign. The claimant also alleged that the defendant, through advocacy and his publications, was responsible for devising strategies designed to repress and intimidate the LGBTI community and related organisations, culminating in the 2013 Bill.<sup>99</sup> Legally, the ATS claim is pursued on the grounds of crimes against humanity of persecution, which are based on individual responsibility, joint enterprise and conspiracy.

The defendant filed two motions to dismiss the claim on a number of grounds. For the purpose of this Article, analysis is focused on the decision of the court in relation to the defendant's assertion that 'international norms do not bar persecution based on sexual orientation or gender identity with sufficient clarity and historical lineage to fall under the scope of the ATS'.<sup>100</sup> The Court rejected this motion. Judge Ponsor unequivocally ruled:

... [W]idespread, systematic persecution of LGBTI people constitutes a crime against humanity that unquestionably violates international law ... The fact that a group continues to be vulnerable to ...

---

<sup>97</sup> Denis LeBlanc, 'Scott Lively, US Anti-gay Evangelist to Stand Trial' (76 Crimes, 7 December 2014) <<http://76crimes.com/2014/12/07/scott-lively-us-anti-gay-evangelist-to-stand-trial/>> accessed 20 December 2014.

<sup>98</sup> Alien Tort Statute 28 USC §1350 (US).

<sup>99</sup> *Sexual Minorities Uganda* (n 96) 37.

<sup>100</sup> *Sexual Minorities Uganda v Scott Lively*, Civil Action 3:12-CV-30051 (MAP) (US District Court for the District of Massachusetts), Memorandum and Order Regarding Defendant's Motions to Dismiss Dkt NOs 21 & 30 (14 August 2013).



persecution in some parts of the world simply cannot shield one who commits a crime against humanity from liability.<sup>101</sup>

The judge stated that while LGBTI rights are not expressly established as part of international law, there is scope to interpret human rights law to include these rights. For an action for persecution to succeed under the ATS, it must amount to a crime against humanity, part of a widespread or systematic attack directed against any civilian population, with knowledge that the attack has the effect of 'intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity'.<sup>102</sup> Judge Ponsor stated that while LGBTI groups are not expressly listed as a protected group, statute<sup>103</sup> and international jurisprudence<sup>104</sup> was in favour of a broad interpretation of the categorisation of a 'group'. Judge Ponsor ruled that the allegations were of sufficient gravity to state a claim for the commission of a crime against humanity.

If this claim is successful, it will be the first finding of persecution against LGBTI persons as a crime against humanity. It could pave the way for future claims against other clerics currently operating in the US. The most far-reaching effect of this litigation is likely to be in relation to donations to Lively's church; such litigation will inevitably bring about negative publicity.

However, there is a risk that a ruling from an American court finding that Scott Lively is a criminal may strengthen his claim that the US government has been infiltrated by the 'gay' movement in Uganda. It is important for Ugandan groups to maintain ownership of the claim to avoid allegations of neo-colonialism which seek to detract from their message.<sup>105</sup> Another risk is that the 'crimes against humanity' claim is quite high-profile, which has been proven to be problematic in Uganda. However, it is a welcome departure from the aforementioned paternalistic measures employed by the INGOs and Western governments. It is certainly a more innovative way to engage with human rights violations, as compared to previous strategies of condemnation and threats to cut development aid.

---

<sup>101</sup> *ibid* 31.

<sup>102</sup> United Nations General Assembly, Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) A/CONF.183/9 art 7(2)(g).

<sup>103</sup> *ibid* art 7(2)(h).

<sup>104</sup> *Prosecutor v Naletilic and Martinovic* (Judgment) ICTY-98-34-T (31 March 2013) 636.

<sup>105</sup> Lennox and Waites (n 54) 41.

#### IV. CONCLUSION

Whether any of these courses of action will have an effect on the Anti-Homosexuality Act 2014 remains to be seen. While LGBTI groups have had previous success in the Ugandan courts, there is no Ugandan precedent regarding decriminalisation.<sup>106</sup> Two measures need to be employed: one regarding decriminalisation of homosexuality or declaration of unconstitutionality, and a measure which seeks to improve the situation of the LGBTI community economically, socially and culturally. The stigma attached to the LGBTI community has been exacerbated by the provisions in the new law. Unless added to a general campaign that includes other restrictive measures taken by the Ugandan government, it will be difficult for LGBTI advocates to improve the situation of the LGBTI community in Uganda in light of the section 13 restrictions.

INGO efforts had early success in relation to the Bill, but it is necessary to review the implications of their more recent strategies which ignored local realities. The battle against the Anti-Homosexuality Act will not be won by INGOs alone. There needs to be greater co-operation between Northern and Southern NGOs to have the best possible chance of achieving this goal. A public education programme must emphasise the law's colonial nature. To defend what appears to be an American culture war being waged on Ugandan soil, LGBTI concerns must be linked to the concerns of the wider community. Local and international advocacy strategy should focus on the risks the law poses to public health. Museveni's attempts to curtail freedom of expression and association must also form part of the dialogue. While the law may have been struck down on a technicality, there is no guarantee that the law will not be passed once again. To this effect, a leaked copy of the draft legislation in November 2014 suggested that the law will be equally, if not more, oppressive as it contains far reaching restrictions on 'promoting' homosexuality, revealing once again the Ugandan Government's relentless intention to target defenders of LGBTI rights.<sup>107</sup>

---

<sup>106</sup> Adrian Jjuuko, 'The Incremental Approach: Uganda's Struggle For the Decriminalisation of Homosexuality' in Corinne Lennox and Matthew Waites (eds), *Human Rights, Sexual Orientation and Gender Identity in The Commonwealth: Struggles for Decriminalisation and Change* (Human Rights Consortium 2013) 381, 399.

<sup>107</sup> Chris Johnston, 'Uganda Drafts New Anti-gay Laws' (*The Guardian*, 8 November 2014) <<http://www.theguardian.com/world/2014/nov/08/uganda-drafts-anti-gay-laws-prison-promotion-homosexuality>> accessed 6 December 2014.

## BIBLIOGRAPHY

### BOOKS

- Lennox C and Waites M, 'Human Rights, Sexual Orientation and Gender Identity in the Commonwealth: From History and Law to Developing Activism and Transnational Dialogues' in Lennox C and Waites M (eds), *Human Rights, Sexual Orientation and Gender Identity in The Commonwealth: Struggles for Decriminalisation and Change* (Human Rights Consortium 2013)
- Massad JA, *Desiring Arabs* (University of Chicago Press 2007)
- Jjuuko A, 'The Incremental Approach: Uganda's Struggle For the Decriminalisation of Homosexuality' in Lennox C and Waites M (eds), *Human Rights, Sexual Orientation and Gender Identity in The Commonwealth: Struggles for Decriminalisation and Change* (Human Rights Consortium 2013)

### JOURNAL ARTICLES

- Awondo P, Geschiere P and Reid G, 'Homophobic Africa?: Toward a More Nuanced View' (2012) 55(3) *African Studies Review* 145
- Bell DA and Carens JH, 'The Ethical Dilemmas of International Human Rights and Humanitarian NGOs: Reflections on a Dialogue between Practitioners and Theorists' (2004) 26 *HRQ* 300
- Bettinger-Lopez C, 'Redefining Human Rights Lawyering Through the Lens of Critical Theory: Lessons for Pedagogy and Practice' (2011) 18(3) *Georgetown Journal on Poverty Law & Policy* 337
- Boyd L, 'The Problem with Freedom: Homosexuality and Human Rights in Uganda' (2013) 86(3) *Anthropological Quarterly* 697
- Bukovská B, 'Perpetrating Good: Unintended Consequences of International Human Rights Advocacy' (2008) 5(9) *International Journal on Human Rights* 7
- Hafner-Burton E, 'Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem' (2008) 62(4) *International Organisation* 689
- Mutua MW, 'Domestic Human Rights Organisations in Africa: Problems and Perspectives' (1994) 22(2) *Issue: A Journal of Opinion* 30
- McAllister J, 'Tswanarising Global Gayness: the 'UnAfrican' Argument, Western Gay Media Imagery, Local Responses and Gay Culture in Botswana' (2013) 15 *Culture Health and Sexuality* 88
- Odinkalu CA, 'Why More Africans Don't Use Human Rights Language' (1999) 2.1 *Human Rights Dialogue*
- Strand C, 'Kill Bill! 'Ugandan Human Rights Organisations' Attempts To Influence the Media's Coverage of the Anti-Homosexuality Bill' (2011) 13(8) *Culture, Health & Sexuality* 917
- Tamale S, 'Out of the Closet: Unveiling Sexuality Discourses in Uganda' (2003) 2 *Feminist Africa*

**CASES**

*Kasha Jacqueline, David Kato Kisuule and Onziema Patience v Rolling Stone Ltd. and Giles Muhame*, High Court of Uganda (Civil Division) (Miscellaneous Cause No 163 of 2010)

*Mukasa and Another v Attorney-General* (2008) High Court of Uganda AHRLR 248

*Oloka-Onyang'o & 9 Ors v Attorney General* [2014] UGCC 14

*Onyang'o and others v Attorney General of Uganda*, Constitutional Court of Uganda (Petition No 8 of 2014)

*Prosecutor v Naletilic and Martinovic* (Judgment) ICTY-98-34-T (31 March 2013) 636

*Sexual Minorities Uganda v Scott Lively* Civil Action 3:12-CV-30051 (MAP) (US District Court for the District of Massachusetts) (application)

*Sexual Minorities Uganda v Scott Lively*, Civil Action 3:12-CV-30051 (MAP) (US District Court for the District of Massachusetts), Memorandum and Order Regarding Defendant's Motions to Dismiss Dkt NOs 21 & 30 (14 August 2013)

**STATUTES**

Alien Tort Statute, 28 USC §1350

Anti-Homosexuality Act 2014

Penal Code Act of 1950

Public Order Management Act 2013

The Anti-Homosexuality Bill 2009

Uganda Order of Council 1902

**INTERNATIONAL LAW SOURCES AND TREATIES**

African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986)

Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13

Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms (adopted 9 December 1998, entered into force 8 March 1999) 53 UNGA 144

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171

United Nations General Assembly, Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) A/CONF.183/9

Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III) (UDHR)

**WEBSITES AND OTHER SOURCES**

'Anti-Homosexuality Bill Must Be Scrapped' (*Amnesty International*, 20 December 2013) <<http://www.amnesty.org/en/news/uganda-anti-homosexuality-bill-must-be-scrapped-2013-12-20>> accessed 24 April 2014

'Barack Obama Warns Uganda's Museveni Over Anti-Gay Bill' (*BBC News*, 17 February 2014) <<http://www.bbc.co.uk/news/uk-26219468>> accessed 21 April 2014

- Branch G, 'Uganda President: 'Go Slow' On Anti-Gay Bill' (*Global Post*, 15 January 2010) <<http://www.globalpost.com/dispatch/africa/100114/uganda-anti-gay-bill-museveni>> accessed 24 April 2014
- Bruno A, 'The Fallacy of Cutting Aid in Response to Uganda's Anti-Gay Law' (*Geopolitical Monitor*, 6 March 2014) <<http://www.geopoliticalmonitor.com/the-fallacy-of-an-aid-cut-over-ugandas-anti-gay-law-4940/>> accessed 24 April 2014
- 'Corruption by Country/Territory' (*Transparency International*) <<http://www.transparency.org/country#UGA>> accessed 24 April 2014
- 'Dramatic Change in Attitudes Towards Gay Couples' (*Ipsos Mori*, April 2014) <<http://www.ipsos-mori.com/researchpublications/researcharchive/3371/Dramatic-change-in-attitudes-towards-gay-couples.aspx>> accessed 24 April 2014
- 'Enabling Poor Rural People to Overcome Poverty In Uganda' (*International Fund for Agricultural Development*, November 2013) <<http://www.ifad.org/operations/projects/regions/Pf/factsheets/uganda.pdf>> accessed 24 April 2014
- Heuler H, 'Rights Group: US Should Pull Ambassador Over Uganda Anti-Gay Bill' (*Voice of America*, 20 February 2014) <<http://www.voanews.com/content/rights-group-says-us-should-pull-ambassador-over-uganda-anti-gay-bill/1855743.html>> accessed 25 April 2014
- 'Human Rights in the Republic of Uganda' (*Amnesty International*) <<https://www.amnesty.org/en/countries/africa/uganda/>> accessed 25 April 2014
- 'Human Rights in Uganda' (*Human Rights Watch*) <<http://www.hrw.org/africa/uganda>> accessed 23 April 2014
- Imaka I and Nalugo M, 'Gays To Spend Life In Jail As MPs Pass Anti-Homosexuality Bill' (*Daily Monitor*, 20 December 2013) <<http://www.monitor.co.ug/News/National/Parliament-passes-Anti-Homosexuality-Bill/-/688334/2119844/-/864354z/-/index.html>> accessed 25 April 2014
- Itaborahy LP and Zhu J, 'State Sponsored Homophobia: A world survey of laws: Criminalisation, protection and recognition of same-sex love' (*ILGA*, 2013) <[http://old.ilga.org/Statehomophobia/ILGA\\_State\\_Sponsored\\_Homophobia\\_2013.pdf](http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2013.pdf)> accessed 24 April 2014
- Johnston C, 'Uganda Drafts New Anti-gay Laws' (*The Guardian*, 8 November 2014) <<http://www.theguardian.com/world/2014/nov/08/uganda-drafts-anti-gay-laws-prison-promotion-homosexuality>> accessed 6 December 2014
- Kakaire S, 'Fox Odoi: Why the Anti-Gay Law is Illegal' (*The Observer*, 23 March 2014) <<http://www.observer.ug/viewpoint/interview/30836-fox-odoi-why-the-anti-gay-law-is-illegal>> accessed 24 April 2014
- Kaoma K, 'Globalizing the Culture Wars: The US Conservatives, African Churches and Homophobia' (*Political Research Associates*, 2009) <<http://www.publiceye.org/publications/globalizing-the-culture-wars/pdf/africa-full-report.pdf>> accessed 24 April 2014



- Karimi F, 'Gays and Lesbians 'Sick,' Ugandan President Says In Blocking Anti-Gay Bill' (CNN, 18 January 2014)  
<<http://edition.cnn.com/2014/01/17/world/africa/uganda-anti-gay-bill-rejected/>> accessed 25 April 2014
- LeBlanc D, 'Scott Lively, US Anti-gay Evangelist to Stand Trial' (76 Crimes, 7 December 2014)  
<<http://76crimes.com/2014/12/07/scott-lively-us-anti-gay-evangelist-to-stand-trial/>> accessed 20 December 2014
- Littaur D, 'First Uganda Gay Pride A Success Despite Police Raid' (Gay Star News, 6 August 2012)  
<<http://www.gaystarnews.com/article/first-uganda-gay-pride-success-despite-police-raid060812>> accessed 24 April 2014
- Lively S, 'Redeeming the Rainbow: A Christian Response to the "Gay" Agenda' (Veritas Aeterna Press, 2009)  
<[http://www.defendthefamily.com/\\_docs/resources/1889235.pdf](http://www.defendthefamily.com/_docs/resources/1889235.pdf)> accessed 24 April 2014.
- 'Obama Condemns Uganda Anti-Gay Bill As 'Odious'' (BBC News, 4 February 2014)  
<<http://news.bbc.co.uk/1/hi/world/africa/8498836.stm>> accessed 21 April 2014
- Parliament of Uganda, 'Constitution of the Republic of Uganda (1995)'  
<[http://www.parliament.go.ug/new/images/stories/constitution/Constitution\\_of\\_Uganda\\_1995.pdf](http://www.parliament.go.ug/new/images/stories/constitution/Constitution_of_Uganda_1995.pdf)> accessed 30 March 2014
- 'President Museveni's Full Speech At Signing of Anti-Homosexuality Bill' (Daily Monitor, 24 February 2014)  
<<http://www.monitor.co.ug/News/National/Museveni-s-Anti-Homosexuality-speech/-/688334/2219956/-/item/0/-/6t248n/-/index.html>> accessed 24 April 2014
- Quartey L, 'Ghana: MPs Reject British PM's Aid Conditions' (The Africa Report, 4 November 2011)  
<<http://www.theafricareport.com/West-Africa/ghana-mps-reject-british-pms-aid-conditions.html>> accessed 21 April 2014
- Semakula J, 'A Fresh Chapter for Kayanja Family After Case' (New Vision, 7 October 2012)  
<<http://www.newvision.co.ug/news/636063-a-fresh-chapter-for-kayanja-family-after-case.html>> accessed 25 April 2014
- 'Statement on British 'Aid Cut' Threats to African Countries That Violate LGBTI Rights' (Pambazuka News, 27 October 2010)  
<<http://www.pambazuka.org/en/category/advocacy/77470>> accessed 25 April 2014
- Strudwick P, 'Crisis in South Africa: The Shocking Practice of 'Corrective Rape' - Aimed at 'Curing' Lesbians' (The Independent, 4 January 2014)  
<<http://www.independent.co.uk/news/world/africa/crisis-in-south-africa-the-shocking-practice-of-corrective-rape--aimed-at-curing-lesbians-9033224.html>> accessed 21 April 2014
- 'The Criminalisation of Homosexuality is a Denial of Human Rights' (Human Dignity Trust) <<http://www.humandignitytrust.org>> accessed 21 April 2014
- 'The Global Divide on Homosexuality' (Pew Research Centre, 4 June 2013)  
<<http://www.pewglobal.org/2013/06/04/the-global-divide-on-homosexuality/>> accessed 24 April 2014



- 'This Alien Legacy The Origins of 'Sodomy' Laws in British Colonialism' (*Human Rights Watch*, 2008)  
 <[http://www.hrw.org/sites/default/files/reports/lgbt1208\\_web.pdf](http://www.hrw.org/sites/default/files/reports/lgbt1208_web.pdf)> accessed 24 April 2014
- 'Uganda: Anti-Homosexuality Law Challenged' (*Human Rights Watch*, 11 March 2014)  
 <<http://www.hrw.org/news/2014/03/11/uganda-anti-homosexuality-law-challenged>> accessed 25 April 2014
- 'Uganda: Anti-Homosexuality Law Will Come At A Serious Cost' (*Human Rights Watch*, 19 February 2014)  
 <<http://www.hrw.org/news/2014/02/19/uganda-anti-homosexuality-law-will-come-serious-cost>> accessed 25 April 2014
- 'Uganda: Anti-Homosexuality Signed Into Law' (*FIDH*, 25 February 2014)  
 <<http://www.fidh.org/en/africa/uganda/14777-uganda-anti-homosexuality-signed-into-law>> accessed 24 April 2014
- 'Uganda: Donors Should Not Be More Intolerant Than Anti-Gay Bill' (*All Africa*, 2 March 2014) <[http://allafrica.com/stories/201403032110.html?aa\\_source=useful-column](http://allafrica.com/stories/201403032110.html?aa_source=useful-column)> accessed 21 April 2014
- 'Uganda Gay Rights Activist David Kato Killed' (*BBC News*, 27 January 2011)  
 <<http://www.bbc.co.uk/news/world-africa-12295718>> accessed 25 April 2014
- 'Uganda: President Should Reject Anti-Homosexuality Bill' (*Human Rights Watch*, 20 December 2013)  
 <<http://www.hrw.org/news/2013/12/20/uganda-president-should-reject-anti-homosexuality-bill>> accessed 25 April 2014
- 'Uganda Seeks To Reinstate Anti-Gay Bill' (*Al Jazeera*, 13 August 2014)  
 <<http://www.aljazeera.com/news/africa/2014/08/uganda-seeks-reinstate-anti-gay-bill-20148138256501947.html>> accessed 7 November 2014
- Wanambwa R, 'Museveni: I Signed Anti-Gay Law To Affirm Ugandan Sovereignty' (*Africa Review*, 1 April 2014)  
 <<http://www.africareview.com/News/-/979180/2265134/-/8hw20z/-/index.html>> accessed 25 April 2014
- 'World Bank Freezes Aid to Uganda Over Gay Law' (*Al Jazeera*, 28 February 2014)  
 <<http://www.aljazeera.com/news/africa/2014/02/world-bank-freezes-aid-uganda-over-gay-law-201422874410793972.html>> accessed 21 April 2014
- 'World Report 2013: Uganda' (*Human Rights Watch*, 2013) <<http://www.hrw.org/world-report/2013/country-chapters/uganda>> accessed 24 April 2014
- — Uganda' (*Human Rights Watch*, 2014)  
 <<http://www.hrw.org/world-report/2014/country-chapters/uganda>> accessed 29 April 2014

## FILM

- Williams RR, 'God Loves Uganda' (Full Credit Productions 2013)
- Kaoma K, 'Scott Lively Uganda Anti-Homosexuality Conference 2009' (Political Research Associates 2014)