UGANDA: ANTI-HOMOSEXUALITY BILL IS INHERENTLY DISCRIMINATORY AND THREATENS BROADER HUMAN RIGHTS

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1 INTRODUCTION

The Anti-Homosexuality Bill (the bill) published on 25 September 2009[1] would, if enacted into law, *prima facie* violate international human rights law and lead to further human rights violations. This memorandum presents Amnesty International's analysis of the bill and highlights specific serious concerns the bill raises. The bill which has already been tabled before the Ugandan Parliament is currently being considered and pending for consideration by two committees of the Parliament before being submitted for parliamentary debate.[2]

If passed, the bill would institutionalise discrimination against those who are, or who are thought to be gay, lesbian, bisexual or transgender. It would reinforce the existing prohibition against consensual sex between individuals of the same sex—legislation that is itself contrary to international norms. The bill would go further, purporting to criminalise the 'promotion' of homosexuality, compelling HIV testing in certain circumstances, imposing life sentences for entering into a same-sex marriage, introducing the death penalty for 'aggravated' homosexuality, and punishing those who fail to report knowledge of any violations of these sweeping provisions within 24 hours. The confidentiality clause[3] would compromise the right to fair trial. The bill would have lasting deleterious effects on the lives of individual Ugandans who are thought to run afoul of its far-reaching provisions, and it would significantly hamper the work of human rights defenders and public health professionals.

In sum, the bill would violate the principle of non-discrimination and would lead to violations of the human rights to freedom of expression, freedom of thought, conscience and religion, freedom of peaceful assembly, freedom of association, liberty and security of the person, privacy, the highest attainable standard of health, and life. These rights are guaranteed under Uganda's Constitution and in international and regional treaties to which Uganda is a party, including the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the African Charter on Human and Peoples' Rights (African Charter).

In the following pages certain provisions of the Anti Homosexuality Bill are analysed in the context of Uganda's international, regional and domestic human rights obligations.

2 THE ANTI-HOMOSEXUALITY BILL – A HUMAN RIGHTS ANALYSIS

2.1 HUMAN RIGHTS VIOLATED BY THE RE-CRIMINALISATION OF 'HOMOSEXUALITY'

Clause 2 of the bill would define and punish what the bill terms the 'offence of homosexuality'. This provision largely replicates the existing prohibition on consensual sex between individuals of the same sex, section 145 of the Penal Code (an offence punishable by life imprisonment). Both the current law, clauses 2 and 14 of the bill (the latter on the 'failure to disclose offences') constitute prima facie violations of a number of human rights including the rights to equality and non-discrimination, privacy, liberty and security of the person, freedom of expression, freedom of thought, conscience and religion and health.

Moreover, section 145 has been and continues to be used by the police and other law enforcement officials to subject lesbian, gay, bisexual and transgender (LGBT) persons in Uganda to arbitrary arrest and detention often resulting in torture, cruel, inhuman and other ill-treatment. Amnesty International and other groups have also documented instances of violence directed at those who are or who are thought to be LGBT persons. Clause 2 of the bill would reinforce such abusive practices, in violation of the rights to equality and non-discrimination; privacy, liberty and security of the person, freedom of expression, freedom of thought, conscience and religion, as outlined more fully in the sections below.

The 'offence of homosexuality' as defined in clause 2 criminalizes engagement in consensual sex with someone of the same sex as well as the 'intention of committing the act of homosexuality'. The criminalisation of both the act and intent renders the definition of the offence excessively broad, imprecise, arbitrary and open to abuse. For example, it paves the way for the use of the so-called "homosexual panic defence" which is a provocation defence that excuses violence against and even the unlawful killing of individuals who are perceived to have transgressed social norms.

The bill deals mostly with homosexuality, but refers to gender identity in clause 18(2). This clause states that "definitions of … 'gender identity' shall not be used in any way to legitimize homosexuality, gender identity disorders and related practices in Uganda." This reference when read together with the strict binary definition of "gender" provided in part 1 of the bill suggests that transgender individuals would also be criminalised if this bill is adopted into law, irrespective of their sexual orientation. Transgender individuals would be at increased risk if they did not appear to conform to gender "norms", and if they were perceived as different by their behaviour, dress, or appearance because their abusers would infer sexual conduct from their gender non-conformity.

The bill, which proposes to strip a section of the population of their human rights, could not only be construed as an official incitement to violence against LGBT persons, or anyone thought to be, but would also deprive the victims of this bill any redress, and allow their

abusers to continue assaulting others with impunity. As noted by the former Special Rapporteur on extrajudicial executions, Asma Jahanghir:

"…The criminalization of matters of sexual orientation increases[s] the social stigmatization of these persons. This in turn makes them 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."[4]

2.1.1 THE RIGHT TO BE FREE FROM DISCRIMINATION

The criminalization of consensual same-sex conduct is discriminatory. It violates the Ugandan constitution's guarantee of equality and freedom from discrimination: "All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law."[5] It is also contrary to Uganda's obligations under the ICCPR, the African Charter and other human rights treaties to which Uganda is party.

The ICCPR recognizes the right to equal protection of the law and the right to freedom from discrimination (articles 2 and 26). In Toonen v Australia, the UN Human Rights Committee, which monitors states' compliance with the ICCPR, confirmed that sexual orientation is a prohibited ground of discrimination under these articles.[6] The UN Human Rights Committee has since urged states not only to repeal laws criminalizing homosexuality but also to enshrine the prohibition of discrimination based on sexual orientation into their constitutions or other fundamental laws.

Article 2 of the African Charter provides that individuals are entitled to the rights under the African Charter "without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national or social origin, fortune, birth or any status". Article 3 of the Charter provides for "every individual's" right to equality before the law and equal protection before the law. In the process of considering state reports submitted to it under Article 62 of the Charter, the African Commission on Human and Peoples' Rights which monitors states' compliance with the Charter has expressed the view that: "Together with equality before the law and equal protection of the law, the principle of non-discrimination provided under Article 2 of the Charter provides the foundation for the enjoyment of all human rights…The aim of this principle is to ensure equality of treatment for individuals irrespective of nationality, sex, racial or ethnic origin, political opinion, religion or belief, disability, age or sexual orientation."[7]

All of the non-discrimination provisions in international human rights law end with reference to "other status", which has repeatedly been interpreted to include sexual orientation. The UN Human Rights Committee, the UN Committee on Economic, Social and Cultural Rights, and the UN Committee on the Elimination of Discrimination against Women have all called for the repeal of laws criminalizing consensual same-sex conduct, and also to enshrine the prohibition of discrimination based on sexual orientation into the constitutions or other fundamental laws of states parties. The UN Committee on Economic, Social and Cultural Rights recently adopted a general comment interpreting the non-discrimination clause in the ICESCR, in which they specifically address discrimination on the basis of sexual orientation

(for example, paragraphs 11 and 32) and gender identity (paragraph 32).[8]

All people, regardless of their sexual orientation or gender identity, are entitled to all human rights described in the Universal Declaration of Human Rights. Affirming human rights as they apply to diverse sexual orientations and gender identities is not claiming new or "special" rights. It is demanding that everyone, regardless of sexual orientation or gender identity, is guaranteed the fullest enjoyment of their civil, cultural, economic, political and social rights.

Amnesty International therefore calls on the Ugandan authorities to ensure consistency in Uganda's commitment guaranteeing each and every individual's right to non-discrimination by withdrawing this bill which targets persons for criminal sanctions on the basis only of their sexual orientation or gender identity.

2.1.2 THE RIGHT TO PRIVACY

Article 17 of the ICCPR states: "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, or to unlawful attacks on his honour and reputation." The right to privacy is also protected by the Ugandan constitution.[9]

In *Toonen,* the UN Human Rights Committee found that "it is undisputed that adult consensual activity in private is covered by the concept of 'privacy.'"[10] The committee calls for the repeal of legislation that criminalises same-sex sexual conduct because such laws amount to a "serious infringement of private life."[11]

Further, invasion of privacy can amount to discrimination where such interference makes distinctions between individuals' ability to exercise their right to privacy on the basis of sexual activity, sexual orientation or gender identity.

2.1.3 THE RIGHT TO LIBERTY AND SECURITY OF PERSON

Arrest and detention on the grounds of consensual same-sex conduct or gender identity or expression constitute arbitrary deprivation of liberty. Freedom from arbitrary arrest or detention is guaranteed by article 9 of the ICCPR and article 6 of the African Charter.

The UN Working Group on Arbitrary Detention, the expert body on the issue, has repeatedly clarified that the detention and prosecution of individuals "on account of their homosexuality" is arbitrary because it violates the ICCPR's guarantees of "equality before the law and the right to equal legal protection against all forms of discrimination, including that based on sex."[12]

The bill, if enacted into law, would further be used as the basis for arbitrary arrests and detention of persons solely on the basis of their sexual orientation or gender identity.

2.1.4 THE RIGHT TO FREEDOM OF EXPRESSION

Freedom of expression is central to issues of human rights, sexual orientation and gender identity. Although it is the sexual act that is criminalized, individuals are frequently targeted for discrimination or violence because of assumptions made on the basis of how individuals present themselves – such as their clothing, hairstyle, speech, manner, the company they keep. As such, laws criminalizing individuals on the basis of their sexual orientation or gender identity constitute a violation of the individual's right to freedom of expression, which is protected by the ICCPR (article 19), the African Charter (article 9) and the Ugandan constitution (article 29(1) (a)).

The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has said that "all citizens, regardless of… their sexual orientation, have the right to express themselves, and to seek, receive and impart information."[13]

2.1.5 THE RIGHT TO FREEDOM OF RELIGION, THOUGHT AND CONSCIENCE

One of the rationales given for the Anti Homosexuality bill is Uganda's "religious values". However, the Ugandan Constitution protects the right to freedom of thought, conscience and belief and the right to practise any religion,[14] and there is no state religion. Article 18 of the ICCPR provides that "everyone shall have the right to freedom of thought, conscience and religion." Article 8 of the African Charter provides that "freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms".

The UN Human Rights Committee, which monitors and advises on implementation of the ICCPR, has commented that: "The fact that a religion is recognized as a state religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant, including articles 18 and 27, nor in any discrimination against adherents to other religions or non-believers."[15]

Indeed the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief notes that action in the name of religion or belief can be a cause of human rights violations: "the disregard and infringement of human rights and fundamental freedoms, in particular of the right to freedom of thought, conscience, religion or whatever belief, have brought, directly or indirectly, wars and great suffering to mankind, especially where they serve as a means of foreign interference in the internal affairs of other States and amount to kindling hatred between peoples and nations".[16]

In other words, under international human rights law, Uganda cannot use religion or traditional African values as a justification to restrict people's human rights.

2.1.6 THE RIGHT TO HEALTH

The Anti Homosexuality bill violates the right to health recognized in article 16 of the African Charter and article 12 of the ICESCR. These articles oblige Uganda as a state party to take measures to protect the health of her people. The re-criminalization of homosexuality, the provisions criminalizing promotion of homosexuality,[17] and "aiding and abetting homosexuality",[18] would negatively impact on the availability, accessibility, acceptability and quality of health services for lesbians, gay men, bisexual or transgender people.

Further, if the proposed bill becomes law, it will almost certainly undermine Uganda's treatment and care for people living with HIV and AIDS. It will also likely have a negative impact on the campaigns to prevent HIV transmission. It will drive populations already suffering stigma for their consensual sexual conduct still further underground; this will make it more difficult for outreach and education efforts and will criminalize civil society groups engaged in that vital work.

The International Guidelines on HIV/AIDS and Human Rights state: "States should review and reform criminal laws and correctional systems to ensure that they are consistent with international human rights obligations and are not misused in the context of HIV or targeted against vulnerable groups."[19]

2.2 HUMAN RIGHTS VIOLATED BY THE PROPOSED OFFENCE OF 'AGGRAVATED HOMOSEXUALITY'

THE OFFENCE OF 'AGGRAVATED HOMOSEXUALITY'

Clause 3 of the bill imposes the death penalty for seven situations which it considers to constitute 'aggravated homosexuality'.

Clause 3(1) states: "A person commits the offence of aggravated homosexuality where the – (a) person against whom the offence is committed is below the age of 18 years; (b) offender is a person living with HIV; (c) offender is a parent or guardian of the person against whom the offence is committed; (d) offender is a person in authority over the person against whom the offence is committed; (e) victim of the offence is a person with disability; (f) offender is a serial offender, or (g) offender applies, administers or causes to be used by any man or woman any drug, matter or thing with intent to stupefy, overpower him or her so as to thereby enable any person to have unlawful carnal connection with any person of the same sex".

This provision violates several human rights as discussed in the sub-sections here below.

2.2.1 THE RIGHT TO LIFE AND APPLICATION OF THE DEATH PENALTY

Clause 3 makes 'aggravated homosexuality' a capital offence.

The proposal to impose death sentences as punishment for the acts described in clause 3 runs counter to the global trend toward a moratorium on the use of the death penalty. The UN General Assembly adopted a resolution in December 2007 calling for a worldwide moratorium on executions. The resolution was adopted by an overwhelming majority of 104 UN member states in favour, 54 countries against and 29 abstentions.[20]

Article 6(2) of the ICCPR stipulates that the death penalty, if it is to be applied at all, may only be imposed for the most serious crimes. The definition of 'crimes' should be consistent with the provisions of the Covenant. As explained in sub-section 2.1.1 above, many provisions of the bill are inconsistent with the prohibitions of discrimination found in international human rights law. In addition article 6(2) requires that the death penalty be reserved for only the most serious crimes. The UN Human Rights Committee has noted that Article 6 is abolitionist in outlook and held that the expression "most serious crimes" must be "read restrictively to mean that the death penalty should be a quite exceptional measure."[21] The former UN Special Rapporteur on extrajudicial executions, Asma Jahanghir, said it was:

"…unacceptable that in some States homosexual relationships are still punishable by death. It must be recalled that under article 6 of the International Covenant on Civil and Political Rights death sentences may only be imposed for the most serious crimes, a stipulation which clearly excludes matters of sexual orientation."[22]

By categorically excluding the criminalization of same-sex relations from the scope of article 6, the Special Rapporteur took a clear position against the criminalization of same-sex relations, not on privacy grounds, but by making the link to other violations of the right to life, saying that "the criminalization of matters of sexual orientation increase[s] the social stigmatization of these persons. This in turn makes them 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."[23]

Amnesty International opposes the death penalty in all cases as the ultimate cruel, inhuman and degrading punishment

2.2.2 DUTY TO PROTECT CHILDREN FROM SEXUAL ABUSE

Amnesty International recognizes that states have a duty to protect against the infringement of others' rights, including by proscribing actions such as coercive sex and the sexual abuse of children. However, consensual same-sex sexual relations should not be associated prejudicially with sexual abuse as clause 3(1) (a) of the Bill does to the extent that it considers all forms of consensual same-sex relations involving persons below the age of 18 as

constituting child abuse.

Sexual crimes against children are already criminalized under Ugandan law. Section 129 of the Ugandan penal code provides that "any person who performs a sexual act with another person who is below the age of 18 years, commits a felony known as defilement and is on conviction liable to life imprisonment."[24] This section also provides for the offence of "aggravated defilement" punishable by death.[25]

Existing provisions on 'defilement' and 'aggravated defilement' under the penal code do not differentiate between same-sex and heterosexual sexual abuse. Hence it is not clear what the proposed offence of 'aggravated homosexuality' under the Anti-Homosexuality bill aims to achieve.

2.2.3 PEOPLE LIVING WITH HIV/AIDS

Under clause 3 'aggravated homosexuality' is also committed where the "offender is a person living with HIV". On its face, the bill would impose criminal penalties in any case in which one of the partners is living with HIV/AIDS. Steps taken to prevent transmission, disclosure, or ignorance of one's status are immaterial, as is actual transmission of HIV.

In practice, the application of the criminal law to HIV and AIDS raises serious concerns, including their potential to interfere with public health strategies and to increase stigma and discrimination against people living with or thought to be infected with HIV/AIDS. If this bill becomes law, it will almost certainly have a negative impact on the campaigns to prevent HIV and AIDS transmission, which have to date met with considerable success in Uganda. It risks driving populations already suffering stigma for their consensual sexual conduct still further away from sources of support and information. This will make it more difficult for outreach and education efforts to reach them, and potentially it will criminalize civil society groups engaged in that vital work.

The question of whether to punish individuals for the transmission of HIV to others has been reviewed by UNAIDS. UNAIDS is the Joint United Nations Programme on HIV/AIDS which brings together ten UN organizations in the global response to HIV and AIDS. Its conclusion was that: "There are no data indicating that the broad application of criminal law to HIV transmission will achieve either criminal justice or prevent HIV transmission. Rather, such application risks undermining public health and human rights. Because of these concerns, UNAIDS urges governments to limit criminalization to cases of intentional transmission, that is, where a person knows his or her HIV positive status, acts with the intention to transmit HIV, and does in fact transmit it."[26]

The UN Human Rights Committee, the body in charge of monitoring the ICCPR, has noted that "the criminalization of homosexual practices cannot be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of HIV/AIDS" and further noted that "criminalization of homosexual activity thus would appear to run counter to the implementation of effective education programmes in respect of the HIV/AIDS prevention.

2.2.4 FORCED HIV TESTING

The bill proposes in clause 3(3) that "Where a person is charged with the offence under this section ["aggravated homosexuality"], that person shall undergo a medical examination to ascertain his or her HIV status."

Forcibly imposing testing on individuals breaches their human rights and risks prejudicial outcomes to those tested in this manner. The right to privacy is violated through coercive measures such as mandatory testing for HIV. The right to liberty and security of the person (article 9 of the ICCPR) is violated when HIV status is used to justify deprivation of liberty or detention.

For the reasons set out in the preceding and this sub-section, Amnesty International opposes the introduction and application of such legislation as a means of stemming HIV transmission. It would be inappropriate, ineffective and incompatible with the right of the individual to privacy, to non-discrimination and to due process. Such legislation would also violate Uganda's obligation to take measures to protect the health of its people, as provided by article 16 of the African Charter and article 12 of the UN International Covenant on Economic Social and Cultural Rights.

2.2.5 THE RIGHTS OF THE CHILD

The proposed provision against same-sexual relations with a person below the age of 18 years (clause 3(1) (a)) would appear to apply even if the accused were also below age 18. Other provisions of the bill could also be applied equally to children and adults—meaning, for example, that an adolescent under the age of 18 could be arrested and prosecuted for having consensual sex with another adolescent under the age of 18. And the criminalization of the "promotion of homosexuality" (clause 13 of the bill), discussed more fully below, may lead to limits on adolescents' access to important health information.

The UN Convention on the Rights of the Child, to which Uganda is a state party, recognises that "the best interests of the child" needs to be the primary consideration in all actions concerning children.[27] These provisions are not in the best interests of children: Criminalization is not an appropriate response to consensual sexual conduct by children. The promotion of adolescent health requires, as the UN Committee on the Rights of the Child has observed, "effective prevention programmes, including measures to change cultural views about adolescents' need for contraception and STI prevention, and to address cultural and other taboos surrounding adolescent sexuality."[28] More generally, the rights to freedom of expression, including the right to be heard in the wider society (guaranteed in article 13 of the Convention on the Rights of the Child); access to information (article 17); and freedom from discrimination (article 2) are essential to prepare children for adulthood. [29]

2.2.6 THE RIGHTS AND AUTONOMY OF PERSONS WITH DISABILITY

The bill proposes to introduce the death penalty for a person who engages in consensual sexual relations with an individual of the same sex who is living with a disability, considering such consensual conduct to be a form of 'aggravated homosexuality' (clause 3(1)(e)).

Whilst it is necessary to protect people living with a disability from sexual violence, the

Convention on the Rights of Persons with Disabilities – which Uganda has ratified – includes in its guiding principles, Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons; Non-discrimination; And respect for difference and acceptance of persons with disabilities as part of human diversity and humanity.[30]

As a state party to the Convention, Uganda is obligated to "provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons, including in the area of sexual and reproductive health and population-based public health programmes."[31] The UN Special Rapporteur on the right to health has provided a definition of 'sexual health' that includes:

"A state of physical, emotional, mental and social well-being related to sexuality, not merely the absence of disease, dysfunction or infirmity; sexual health requires a positive and respectful approach to sexuality and sexual relationships, as well as the possibility of having pleasurable and safe sexual experiences, free of coercion, discrimination and violence."[32]

Rather than affirming the individual autonomy and inherent dignity of persons with disabilities, clause 3 of the bill would in fact discriminate against this category of persons.

2.3 HUMAN RIGHTS VIOLATED BY CRIMINALIZING THE 'PROMOTION' OF HOMOSEXUALITY

The preamble (memorandum) to the bill contends that current Ugandan law "lacks provisions for penalizing the procurement, promoting, disseminating literature and other pantographic materials concerning the offences of homosexuality hence the need for legislation to provide for charging, investigating, prosecuting, convicting and sentencing of offenders."

Following on this, clause 13 of the bill is a wide-ranging provision that would prohibit the "promotion of homosexuality". It seeks to punish what it terms as "participation in production, procuring, marketing, broadcasting, disseminating, publishing pornographic materials for purposes of promoting homosexuality; the funding or sponsoring of homosexuality or other related activities; the offering of premises and other related fixed or movable assets for purposes of homosexuality or promoting homosexuality; the use of electronic devices which include internet, films, mobile phones for purposes of homosexuality or promoting homosexuality".

Persons found guilty of the 'offence of promotion of homosexuality' are "liable on conviction to a fine of five thousand currency points or imprisonment of a minimum of five years and a maximum of seven years or both fine and imprisonment". Where the offender is a corporate body or a business or an association or a non-governmental organization, on conviction its certificate of registration shall be cancelled and the director or proprietor or promoter shall be liable on conviction to imprisonment for seven years.

This clause prohibiting the 'promotion of homosexuality' would criminalize the activities of

individuals or organizations who work on issues of human rights, sexual orientation and gender identity – and have ramifications for other civil society actors, including individuals and organisations working on HIV/AIDS prevention programmes and access to treatment for people living with HIV and AIDS. It poses potential severe unjustifiable restrictions on the right to freedom of expression in the context of legitimate human rights defence work.

Clause 13 also poses unjustifiable restrictions to the exercise of the rights to freedom of assembly and association in human rights defence work. The Ugandan constitution protects the freedom of assembly and association.[33] The African Charter and the ICCPR protect rights central to the promotion of human rights, including the rights to freedom of assembly and freedom of association. Article 22 of the ICCPR states that "Everyone shall have the right to freedom of association with others…" Article 13 of the African Charter provides for the rights of "every citizen" to participate in public life.

The right to promote and strive for the protection and realization of human rights is enshrined in the UN Declaration on Human Rights Defenders, which was adopted by consensus by UN member states.[34] The African Commission on Human and Peoples' Rights has called upon its member states "promote and give full effect to the UN Declaration on Human Rights Defenders, to take all necessary measures to ensure the protection of human rights defenders".[35]

Key to the standards contained in the UN Declaration on Human Rights Defenders is the recognition that individuals or organizations who work on issues of human rights have the rights to freedom of expression, association and peaceful assembly.[36]

The Declaration also recognises that human rights defenders frequently face violence in the course of and because of their work. The Ugandan state should protect human rights defenders against violence, threats and retaliation.[37] Responding to a similar law in Nigeria that sought to restrict the work of human rights defenders working on sexual orientation or gender identity, the UN Special Representative on human rights defenders commented, "In particular, serious concern is expressed in view of the restriction such law would place on freedoms of expression and association of human rights defenders and members of civil society, when advocating the rights of gays and lesbians."[38] The UN Special Representative on human rights defenders has also repeatedly documented violations against Ugandan human rights defenders who work on issues of sexual orientation and gender identity.[39]

As the UN Special Representative to the Secretary General on Human Rights Defenders has noted: "Of special importance will be women's human rights groups and those who are active on issues of sexuality, especially sexual orientation and reproductive rights. These groups are often very vulnerable to prejudice, to marginalization and public repudiation, not only by State forces but by other social actors."[40] Given that this bill refutes the language of sexual rights (clause 18(2)), it could potentially be used against human rights defenders working on other sexual rights issues, such as sexual violence against women. Even if it is not, targeting this marginalised group of human rights defenders in the bill sets a dangerous precedent that could lead to the targeting of other marginalised groups, and those who work to promote and defend their rights.

Far from restricting human rights, "the State has the responsibility to promote and facilitate

the teaching of human rights and fundamental freedoms at all levels of education and to ensure that all those responsible for training lawyers, law enforcement officers, the personnel of the armed forces and public officials include appropriate elements of human rights teaching in their training programme."[41]

Passage of this bill would demonstrate a lack of commitment to the universality of human rights. The bill acts as a warning to human rights organizations that they are neither to work on the application of human rights to sexual orientation and gender identity, nor even to associate with an activist or organization that does so.

The bill would threaten individuals' ability to carry out legitimate activities in the defence of rights either individually or in association. This would apply not only to Ugandan activists, but to regional and international organizations who work in Uganda.

3 THE PROPOSED REWRITING OF UGANDA'S INTERNATIONAL OBLIGATIONS

The memorandum that accompanies the bill states as one of the bill's objectives: "To ensure that no international instruments to which Uganda is already a party can be interpreted or applied in Uganda in a way that was never intended at the time the document was created".

Clause 18(1) of the bill proposes that: "Any international legal instrument whose provisions are contradictory to the spirit and provisions enshrined in this Act, are null and void to the extent of their inconsistency."

Through this clause the bill seeks to give Ugandan domestic legislation primacy over Uganda's legal obligations under international human rights law. International law does not allow Uganda to do this.[42] Moreover, Uganda may not unilaterally re-interpret international human rights treaties to which it is party. Uganda's treaty obligations are to be interpreted in accordance with the rules of interpretation under public international law.[43] Uganda has an obligation to comply in good faith with the provisions of international human rights treaties to which it is party.[44]

4 CONCLUSION

Amnesty International and other human rights organizations have documented instances of discrimination, arbitrary arrests, detention, torture and other ill-treatment of lesbian, gay, bisexual and transgender (LGBT) persons in Uganda. These human rights violations have been committed in the pretext of enforcing existing provisions of the Ugandan penal code. LGBT persons have also been excluded from government HIV/AIDS prevention programmes and the provision of other health services. This bill has the potential to further perpetuate and institutionalise such discrimination. In addition, if enacted into law, this bill would send a clear message that persons who may violently attack LGBT persons solely on the basis of their actual or perceived sexual orientation or gender identity will not be held accountable for such attacks.

If enacted, the entire bill would lead to the violation of a number of human rights including the rights to freedom from discrimination; freedom of expression; life; privacy; health; liberty and security of person; right to fair trial; freedom of conscience and religion; freedom of peaceful assembly; freedom of association and the rights of the child. The bill would significantly restrict the work of human rights defenders. Further the provision in the bill, which seeks to unilaterally re-interpret Uganda's international human rights treaty obligations, would contravene Uganda's general international legal obligations.

Amnesty International calls on the government of Uganda and the Ugandan parliament to reject this bill in its entirety, review existing laws that criminalize homosexuality and reaffirm their commitment to upholding the universality of human rights.

END NOTES

1 See Bill No. 18, The Anti-Homosexuality Bill, 2009, Uganda Gazette No. 47, vol. CII, Bills Suppl. No. 13 (25 September 2009).

2The Parliamentary Sessional Committee on Presidential Affairs has already considered some views on the Bill from groups and individuals. The Bill awaits consideration by the Sessional Committee on Legal and Parliamentary Affairs.

3 Clause 6.

4 Report of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Ms. Asma Jahangir, E/CN.4/2001/9, 11 January 2001, para.50.

5 Constitution of the Republic of Uganda , Article 21(2)

6 UN Human Rights Committee, Communication No. 488/1992: Australia. CCPR/C/50/D/488/1992, 4 April 1994 (Toonen v Australia)

7African Commission on Human and Peoples' Rights, twenty first activity report, EX.CL/322 (X).

8 UN Committee on Economic, Social and Cultural Rights General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para.2), E/C.12/GC/20, 25 May 2009. The Committee in its General Comment 14, "The right to the highest attainable standard of health", U.N. Doc. E/C.12/2000/4 (2000), para.18 has also stated that : "By virtue of article 2.2 and article 3, the Covenant proscribes any discrimination in access to health care and underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health. […]".

9 Constitution of the Republic of Uganda , Article 27.

10 Toonen v Australia, para. 8.6.

11 Concluding Observations of the UN Human Rights Committee: United States of America. 03/10/95. CCPR/C/79/Add.50; A/50/40, para.287.

12 Report of the Working Group on Arbitrary Detention, E/CN.4/2004/3, 15 December 2003, para. 73; see also Working Group on Arbitrary Detention, Opinion No. 7/2002 (Egypt), para. 27, UN Doc. E/CN.4/2003/8/Add.1; Opinion No. 22/2006 (Cameroon), para. 19, UN Doc. A/HRC/4/40/Add.1.

13 Report of the Special Rapporteur on the right to freedom of opinion and expression, Ambeyi Ligabo – Addendum Mission to Colombia, UN Doc. E/CN.4/2005/64/Add.3, 26 November 2004, para.75.

14 Constitution of the Republic of Uganda , Article 7 and Article 29(1)b and c.

15 UN Human Rights Committee General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18): CCPR/C/21/Rev.1/Add.4, 30 July 1993, para.9. And in para.10 of the same general comment, "If a set of beliefs is treated as official ideology in constitutions, statutes, proclamations of ruling parties, etc., or in actual practice, this shall not result in any impairment of the freedoms under article 18 or any other rights recognized under the Covenant nor in any discrimination against persons who do not accept the official ideology or who oppose it."

16 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. UN General Assembly resolution 36/55 of 25 November 1981, preamble.

17 Clause 13

18 Clause 7

19 International Guidelines on HIV/AIDS and Human Rights (2006 Consolidated Version), Guideline 4, http://data.unaids.org/Publications/IRC-pub07/jc1252-internguidelines_en.pdf, accessed on 6 June 2008.

20 UN General Assembly resolution 62/149, 18 December 2007. For more information see, http://www.amnesty.org/en/death-penalty/international-law/moratorium. A further resolution adopted on 18 December 2008, was supported by 106 countries voting in favour – increased support which provides further evidence of the worldwide trend towards the abolition of the death penalty. 46 countries voted against and 34 abstained. Uganda voted against both the 2007 and 2008 resolutions.

21 Human Rights Committee, General Comment No. 6 (1982).

22 Report of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Ms. Asma Jahangir, E/CN.4/2001/9, 11 January 2001, para.50.

23 E/CN.4/2001/9, para.50.

24 Penal Code (Amendment) Act, 2007.

25 "Aggravated defilement" is defined as where, "a person performs a sexual act with another person who is below the age of eighteen years' in circumstances where the victim is below the age of fourteen years; the offender is infected with Human Immunodeficiency Virus (HIV); where the offender is a parent or guardian of, or a person in authority over the victim; where the victim is a person with a disability; or where the offender is a serial offender." Under this law, 'aggravated defilement' is punishable by death and the offence of attempted defilement is punishable by a maximum prison term of 18 years. Criminalisation is not an appropriate response to consensual sexual conduct by children. As the UN Committee on the Rights of the Child has observed in its General Comment No. 4 (2003) on Adolescent Health and Development, para.30 (a): states require "effective prevention programmes, including measures to change cultural views about adolescents' need for contraception and STI prevention, and to address cultural and other taboos surrounding adolescent sexuality." Amnesty International acknowledges the serious nature of the crime of child abuse and affirms the need for states to protect children from violence and sexual abuse. However imposition of the death penalty in cases of child sexual abuse runs counter to international standards seeking to narrow the scope of the death penalty, and contradicts the global trend towards eradication of capital punishment. While children must be protected from violence, the death penalty is not the way to do it. The death penalty has never been shown to be an effective deterrent. A child who becomes a witness is vulnerable to being influenced or coerced into making false statements, a matter of extreme concern when such evidence may be what secures a death sentence. Legal proceedings in such cases need to provide special protection, assistance and support to the child in order to avoid re-victimisation. And while the victims of childhood sexual assault deserve all possible therapeutic assistance, executing the offender does little to heal the trauma caused by the crime. It is Amnesty International's experience that executions detract from other measures more effective at repairing the severe trauma caused by sexual violence.

26UNAIDS. Criminalisation of HIV transmission: Policy brief. Geneva, August 2008. Available at: http://data.unaids.org/pub/BaseDocument/2008/20080731_jc1513_policy_criminalization_en.pdf

27 Convention on the Rights of the Child, article 3.

28 UN Committee on the Rights of the Child, General Comment No. 4 (2003) on Adolescent Health and Development, para.30 (a).

29 See UN Committee on the Rights of the Child, General Comment 12 (2009): The right of the child to be heard. CRC/C/GC/12, 20 July 2009, para.90. See also ibid., paras.80-84. The Committee on the Rights of the Child has affirmed that the non-discrimination provision in the Convention also cover adolescents' sexual orientation. See UN Committee on the Rights of the Child, General Comment, para.6.

30 UN Convention on the Rights of Persons with Disabilities, Article 3, Guiding principles, paragraphs (a), (b) and (d), respectively.

31 Article 25(a)

32 Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health,

E/CN.4/2004/49, 16 February 2004, para.53.

33 Constitution of the Republic of Uganda , Article 29(1)d and e.

34 Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms. General Assembly resolution 53/144, U.N.Doc.A/RES/53/144, 8 March 1999.

35 Resolution on the Protection of Human Rights Defenders in Africa, 35th Ordinary Session of the African Commission n Human and Peoples' Rights, 21 May to 4 June 2004.

36Article 6 of the Declaration provides: "Everyone has the right, individually and in association with others: (a) To know, seek, obtain, receive and hold information about all human rights and fundamental freedoms, including having access to information as to how those rights and freedoms are given effect in domestic legislative, judicial or administrative systems; (b) As provided for in human rights and other applicable international instruments, freely to publish, impart or disseminate to others views, information and knowledge on all human rights and fundamental freedoms; (c) To study, discuss, form and hold opinions on the observance, both in law and in practice, of all human rights and fundamental freedoms and, through these and other appropriate means, to draw public attention to those matters."

37 Article 12.2: "The State shall take all necessary measures to ensure the protection by the competent authorities of everyone, individually and in association with others, against any violence, threats, retaliation, de facto or de jure adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the present Declaration."

38 Report of the Special Representative of the Secretary-General on the situation of human rights defenders, Hana Jilani, Addendum: Summary of cases transmitted to Governments and replies received, U.N. Doc. A/HRC/4/37/Add.1, 27 March 2007, para. 511.

39 Report submitted by the Special Representative of the Secretary-General on the situation of human rights defenders, Addendum: Summary of cases transmitted to Governments and replies received, A/HRC/7/28/Add.1, 5 March 2008, paras.1907 to 1909; Report of the Special Representative of the Secretary-General on the situation of human rights defenders, A/HRC/4/37/Add.1, March 27, 2007, paras.559 and 560. See also Report of the Special Rapporteur on the right to freedom of opinion and expression, Summary of cases transmitted to Governments and replies received, E/CN.4/2006/55/Add.1, March 27, 2006, paras.1046 and 1048.

40 Report of the Special Representative of the Secretary General on Human Rights Defenders, E/CN.4/2001/94, para.89(g).

41 Article 15, UN Declaration on Human Rights Defenders.

42 See article 27 of the Vienna Convention on the Law of Treaties. A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. Although Uganda is not a party to the Vienna Convention, with a few exceptions not relevant here, the Convention is considered to express rules of customary international law.

43See articles 31 and 32 of the Vienna Convention.

44See Article 26 of the Vienna Convention.

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