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Uganda's Anti-Homosexuality Act: Customary International Law and the Right to Privacy

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Uganda's 2023 Anti-Homosexuality Act has sparked intense debate about cultural relativism and the rights of sexual minorities. This paper investigates what protections sexual minorities have under international law in a multicultural world. While treaty law may be an unreliable source of protection, customary international law surrounding sexual minorities' rights to privacy has emerged over the past half-century. An analysis of case law from the United States, the United Kingdom, Australia, South Africa, and Botswana illustrates how the right to privacy is upheld out of obligation to customary international law – which Uganda's Anti-Homosexuality Act blatantly violates. Customary international law therefore provides opportunities for protecting the rights of sexual minorities in Uganda, including using it to leverage international pressure for domestic legislative change.

On 26 May 2023, Ugandan President Yoweri Museveni signed the Anti-Homosexuality Act into domestic law. This piece of legislation has discriminatory objectives, described in a statement by the Human Rights Campaign as "one of the most draconian anti-LGBTQ+ laws ever" (Human Rights Campaign, 2023). This paper analyzes key developments pertaining to the protection of LGBTQ persons under international human rights law and evaluates the points of leverage it holds over Uganda's law. This specific case demonstrates the inherent tension between international law and state sovereignty and brings into question the course of action states may take against each other to ensure individual human rights. When a state's law that is deeply rooted in culture is opposed to international law, which law prevails?

Uganda is bound by international human rights law – which relies on the twin pillars of equality and non-discrimination following the atrocities of World War II – but whether those principles apply to LGBTQ persons is not universally accepted. This paper argues that the most compelling case for LGBTQ rights is not grounded in treaty law, but rather in international customary law that has evolved over time. The well-established human right to privacy has led to the decriminalization of homosexual

behavior and ensuing LGBTQ rights in countries such as the United States, the United Kingdom, Australia, South Africa, and Botswana. Various aspects of Uganda's Anti-Homosexuality Act conflict with the right to privacy and are clear violations of international human rights under customary law, even if protections for LGBTQ individuals are less agreed upon under binding international law. The international community has engaged in "naming and shaming" in response to Uganda's recent legislation and weighed repercussions such as economic sanctions, but it will perhaps take individual claims and persistent international pressure to change Ugandan laws and state behavior.

Cultural Relativism and International Human Rights Law

The debate about Uganda's 2023 Anti-Homosexuality Act centers around issues of sovereignty and culture that call international law itself into question. Each state is sovereign, meaning it possesses the right to rule its own territory (Klabbers, 2021). Sovereignty and jurisdiction go hand in hand, as jurisdiction enables a state to pass laws over its sovereign domain. It means that each state is independent of the next, having the right to make its own laws and govern itself based on its unique identity and values. If this is true, how can international law even exist? This question becomes more complicated in relation to human rights law, which aims to protect individuals who are already subjects of the state. The American Anthropological Association (AAA)'s 1947 Statement on Human Rights examines how a Universal Declaration of Human Rights could "be applicable to all human beings, and not be a statement of rights conceived only in terms of the values prevalent in the countries of Western Europe and America." If international law (such as international human rights and related frameworks) is formulated by only powerful and influential states, those norms can never truly be universal. A less powerful state may claim that, in some instances, the nature of such law infringes upon its sovereignty.

The AAA's (1947) argument likely had pure intentions, aimed at protecting non-Western states from a kind of human rights imperialism, yet it ignores the overarching goals of international human rights law. It is an argument centered around the protection of the larger group, the state and its subculture, at the peril of the individual, whom human rights law aims to protect. This misunderstanding is seen in the AAA's statement: "There can be no individual freedom, that is, when the group with which the individual identifies itself is not free. There can be no full development of the individual personality as long as the individual is told, by men who have the power to enforce their commands, that the way of life of his group is inferior to that of those who wield the power" (American Anthropological Association Committee for Human Rights, 1947). This statement likens "the individual" to a single state or culture and argues that such a state truly has no freedom when it is subject to those with power. It essentially

claims that a state such as Uganda cannot have true sovereignty when it is subject to the laws made by a group of other states. Yet this exact statement, when framed differently, is an argument for the necessity of international human rights law. When the term "individual" is understood to describe a certain group that is subject to a powerful state government, they are the ones at risk. If sexual minorities are subject to oppressive laws made by those in power, then their individual liberty is being infringed upon in the same way the AAA argues the state is limited by human rights law. In fact it is exactly this sort of predicament, in which a group within a state needs protection from its own government, that demands international human rights law. Indeed, Pastor Martin Niemöller illustrated the circumstances necessitating human rights law in words that now mark the walls of the U.S. Holocaust Memorial Museum (United States Holocaust Memorial Museum, n.d.):

> First they came for the Communists
> And I did not speak out
> Because I was not a Communist
> Then they came for the Socialists
> And I did not speak out
> Because I was not a Socialist
> Then they came for the trade unionists
> And I did not speak out
> Because I was not a trade unionist
> Then they came for the Jews
> And I did not speak out
> Because I was not a Jew
> Then they came for me
> And there was no one left
> To speak out for me

The international human rights system that governs the world today was born of the evil of World War II. The atrocities that took place against Jews and other marginalized groups in Europe and East Asia revealed the necessity of a new kind of international law focused on the rights of individuals within states. As an Allied victory grew more certain, the discourse of the Dumbarton Oaks Conference in 1944 began to emphasize the need to give the war a lasting meaning: a new commitment to the protection of individuals (Lauren, 2011). This was realized in the 1948 United Nations Universal Declaration of Human Rights, which was (as expressed by the Lebanese delegate) "inspired by the opposition of the barbarous doctrines of Nazism and fascism" and (according to the Indian delegate) "born from the need to reaffirm those rights after their violation during the war" (Morsink, 1993, p. 347). It was painfully evident that individuals needed protection under international law – not from each

other, but from their own governments who wielded power over them (Klabbers, 2021). The UDHR and subsequent binding international human rights law were attempts to ensure that the mistakes detailed by Niemöller would not come to pass again; that in cases where "they came" for a certain group, at the very least, international law would speak out on behalf of the marginalized.

This does not mean that cultural values are to be annulled, but that the tension between culture and human rights law needs to be addressed. A system of absolute relativism would result in cultural claims to justify the most outrageous atrocities. The argument that Nazis had the right to behave inhumanely because Hitler had forged a culture that encouraged it is clearly problematic. Similarly, an understanding that dismisses culture in favor of an absolute law is exactly what concerned the AAA: the ideas of the few and powerful being imposed upon the many at the expense of state sovereignty. The answer for true peace is likely found somewhere between the two extremes; one should accept and appreciate the cultural differences that enrich our international community while recognizing that there are individual human beings whose rights must be protected, sometimes from the effects of their own cultures and governments. There is nothing "relative" in the rights that all human beings are entitled to; in fact, its universality is implied in the labeling of the Universal Declaration of Human Rights. Human rights were intentionally conceived to protect "all members of the human family" (United Nations General Assembly, 1948). While there is a conflict here, it is not between state sovereignty and international law. Rather, the notion of strong cultural relativism is hopelessly at odds with human rights, which grant rights based on the possession of a human identity, regardless of the territory such a human resides in (Donnelly, 1984). As such, an international legal system that privileges weak cultural relativism has developed since World War II (Donnelly, 1984).

Notably, international law can only exist when it stands on a state's consent to be governed by it. Those in power do not just make law that is directly binding on all others. Rather, a state must ratify a treaty to be legally bound by it, as expressed clearly in Article 11 of the 1969 Vienna Convention on the Law of Treaties (United Nations, 2005). This principle is not unique to the Convention but was also expressed in the 1927 *Lotus* ruling, stating that the international legal obligations of a state "emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law" (World Courts, 1927). The very structure of international law dislodges the cultural relativist argument concerning the incompatibility of human rights law and state sovereignty, which overlooks the consensual nature of international law. It is a system that can only function based on states' "sovereign right to become less sovereign" (Cassel, 2001).

The events of World War II necessitated a form of international law whose subjects were not the states but the individuals within them. The fact that states have shown a general willingness to surrender their sovereignty by consenting to international human rights law further strengthens the validity of its existence. There are 173 state parties to the 1966 International Covenant on Civil and Political Rights (ICCPR; United Nations, 1967a) and 171 state parties to the 1966 International Covenant on Economic, Social, and Cultural Rights (ICESCR; United Nations, 1967b); Uganda is party to both (United Nations Treaty Collection, 2021). Human rights law was designed to protect the individual from its state, and state consent to this notion only strengthens this truth and emphasizes the importance of action in defense of human rights.

Treaty Law and Protecting Sexual Minorities

International human rights law was founded on the twin pillars of equality and non-discrimination, as seen in Article 13 of the 1945 United Nations Charter which requires the UN's human rights work to be done "without distinction" (United Nations, 1945a). The emphasis placed on these principles is well-articulated in treaty law and accepted in customary law, and some would even find them to be peremptory norms, known as *jus cogens* (Michigan Law Review, 1984). One does not need to go far to understand how the very idea of a law targeted at a specific group is a violation of international law. Still, when applied to LGBTQ persons, these principles have not been readily accepted. This is partly a consequence of the international community's position on LGBTQ rights when the UN was established. At that time, religious and cultural distinctions were widely accepted as a basis for state legislation that discriminated against LGBTQ persons (Forsythe, 2009) – an argument that has not been entirely exhausted, but which is far less accepted in today's world. Such developments lead to the question: Is broadening respect for LGBTQ rights a consequence of applicable international treaty law, or are they a reflection of individual states becoming more progressive?

Article 2 of the ICCPR, which Uganda has ratified, calls on state parties to ensure that the rights described in the Convention are applied to individuals "without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" (United Nations, 1967a). This statement does not reference "sexual orientation" in the protected categories enumerated. While inclusion can and has been inferred in the term "other status," Uganda is unlikely to accept this interpretation. In fact, the term "sexual orientation" is not explicitly referenced in the UDHR (United Nations General Assembly, 1948), ICCPR (as noted), or the ICESCR (United Nations, 1967a). Its first reference in the realm of international law was in *Toonen v. Australia* (1994), in which

the UN Human Rights Committee (HRC) addressed the interpretations of "sex" and "other status" in Article 2 of the ICCPR (University of Minnesota, 1994). Ultimately, the Committee found the term "sex" to imply protection based on sexual orientation (Garvey, 2010).

In addressing Article 26 of the ICCPR, which prohibits discrimination, the HRC went on to wrestle with the inclusion of sexual orientation as a protected "other status." The HRC not only argued for the rights of sexual minorities under the ICCPR but also made a statement on the general character of human rights law. It expressed that, based on the *travaux préparatoires*,[1] the group identities labeled in Articles 2 and 26 "should not be read restrictively" and "support an inclusive rather than exhaustive interpretation" (University of Minnesota, 1994). In other words, human rights law is an inclusionary system. The list of identities provided in the ICCPR was not designed to restrict the scope of human rights, but to make possible the inclusion of other groups who gain recognition over time, such as LGBTQ persons. This understanding bodes well for those who take the decisions of the HRC seriously, but the state obligation to these decisions is contestable.

The HRC was empowered by the Optional Protocol to the ICCPR to further achieve the purposes of the Convention (United Nations, 1966). A primary duty of the HRC outlined in the Optional Protocol is to consider communications from individuals who claim their rights under the ICCPR are under attack or being violated (United Nations, 1966). This is precisely what occurred when Nicholas Toonen brought a complaint against Australia in 1994. However, the text of the Optional Protocol does not clarify the force of law its decisions hold. This uncertainty becomes even more prevalent in decisions regarding the HRC's interpretation of law. For instance, if an individual argues their right to freedom from racial discrimination under ICCPR Article 26 is being violated, the language of the contested article is quite clear. The state, if the violation was indeed found to occur, would be under an obligation not from the HRC but from the treaty itself, *pacta sunt servanda.*[2] Yet the force of an HRC decision is far more contentious when a complaint is based on an interpretation – especially when there is a substantive disunion between the HRC's understanding of a treaty and what a state claims it agreed to in its interpretation. It is likely that a state such as Uganda would reject the HRC's interpretation of Article 2 and not find itself legally bound by it.

[1] The term *travaux préparatoires* refers to official documents that note the discussions and negotiations that occurred during the drafting process of a treaty.

[2] *Pacta sunt servanda* refers to Article 26 of the *Vienna Convention on the Law of Treaties* and means that treaties are binding and must be adhered to (United Nations, 2005).

The primary argument for the binding nature of HRC communications is made by the Committee itself, although their true force is questionable. In its General Comment No. 33 (2008), it argues that while the HRC is not a judicial body, its findings possess some of the "principal characteristics of a judicial decision" and "are arrived at in a judicial spirit" (United Nations Human Rights Committee, 2008). While this is a reasonable characterization of HRC findings, it is still not a full-throated declaration of the binding nature of Committee decisions. The fact that this is the most authoritative declaration of the HRC's authority leads one to be skeptical of its true force. A more widely accepted position is the one expressed by former HRC member Gerald L. Neuman: decisions are not legally binding (Neuman, 2018). In fact, "decisions" is a poor use of language. The nomenclature used by the HRC tends to reference "findings," "recommendations," "observations," and "considerations" (Neuman, 2018). It expresses determinations of violation or non-violation, and these findings hold some authority – but the language used to communicate them demonstrates that they do not hold the force of law.

When seeking to understand the position of LGBTQ persons under international human rights law, Western analysts may be inclined to look at *Toonen* as a key peg upon which an argument can hang. They could argue that, based on the HRC's conclusion, state parties to the ICCPR are bound to ensure equality and non-discrimination for sexual minorities. This may be a strong enough case for many, but there are certainly those who aren't easily convinced. The purpose of researching this issue is not to reaffirm the beliefs and interpretations that are already held in the West, but to bring forth the most convincing argument for the sake of those who are reluctant. As such, the most compelling case for LGBTQ rights protection is not found in treaty law but in international custom that has been molded and developed over time.

Customary International Law

Article 38 of the Statute of the International Court of Justice lays out the four sources of international law: international conventions, international custom, general principles of law, and the decisions of the "most highly qualified publicists of the various nations," the latter being a subsidiary means of determining law (United Nations, 1945b). There is no hierarchical nature to the listing of international conventions and international custom, meaning in a case where treaty law does not speak, such as the subject of the rights of LGBTQ persons, custom may become an undisputed source of law (Klabbers, 2021).

For the establishment of customary law, two components are required: general practices of states and *opinio juris*. General practices refer to an objective element, essentially analyzing if the

principle is one states tend to abide by. Secondly, *opinio juris* refers to the belief that adhering to this practice is legally obligatory. States engage in many practices, such as rolling out a red carpet for foreign diplomats, but they are not all legally required by law (Klabbers, 2021). *Opinio juris* makes this distinction. These objective and subjective elements may appear to be at odds with one another, but international case law has shown how the two work in conjunction. The evidence of general practices must be considered along with the rationale behind these practices to determine *opinio juris*. If one can conclude that states behave a certain way because they believe it is their legal obligation to do so, *opinio juris* may be concluded (Slama, 1990).[3]

A brief legal history in relation to sexual minorities worldwide helps gauge where customary international law stands on the matter. The criminalization of homosexual relations is not a new phenomenon, originating in the nineteenth century on primarily religious bases (Sable, 2010). However, decriminalization is not entirely new, either; France decriminalized homosexual activity in 1791, and the Netherlands, Spain, Belgium, and Italy followed in the nineteenth century (Forsythe, 2009). The trend of decriminalization has gained considerable momentum in the second half of the twentieth century because of the increased visibility of LGBTQ persons globally (Forsythe, 2009). Consequently, 50 states have decriminalized same-sex relations over the period from 1990-2023 (International Lesbian, Gay, Bisexual, Trans and Intersex Association, n.d.). Uganda's draconian legislation, however, may be an attempt to push back against these global trends. Still, 130 of 193 UN Member States (67.4%) do not criminalize homosexuality (International Lesbian, Gay, Bisexual, Trans and Intersex Association, n.d.).

These global trends mean a few things for the development of customary international law. First, it demonstrates that the general practice of states is decriminalization, and this reality is likely to solidify further as time passes. However, it also means there are over 60 states that have not yet accepted this norm. To reach any sort of conclusion concerning customary international law, *opinio juris* must be determined. Are states that are decriminalizing doing so because of perceived legal obligations or cultural shifts? I argue that the strongest argument for the obligation to decriminalize homosexual behavior does not stem from the twin pillars of equality and non-discrimination, but from the well-

[3] Such a principle was displayed in the 1900 *Paquette Habana* case, in which the United States Supreme Court examined the general practices of other states (such as England, France, Holland, Portugal, Italy, Spain, and Argentina) to determine the customary rule that foreign fishing vessels were exempt from capture, even in times of war law (Klabbers, 2021). While this case was decided long before the Statute of the International Court of Justice, it demonstrates the use of general practices and *opinio juris* to determine the existence of customary international law.

established human right to privacy. The following section will review decisions concerning the right to privacy in homosexual relations, thus determining its establishment in customary international law.

The Right to Privacy

The United States

The United States has generally lingered behind Europe in the advancement of LGBTQ rights, and the right to privacy is no different. The U.S. Supreme Court in *Bowers v. Hardwick* (Cornell Law School, 1986) ruled against the claim that a Georgia state law prohibiting sodomy was a violation of the right to privacy, even though this right was conferred in existing SCOTUS case law: *Skinner v. Oklahoma* (1942), *Griswold v. Connecticut* (1965), and *Roe v. Wade* (1973) (Kimble, 1988). It determined that the right to privacy did not extend to homosexual sodomy, despite the Eleventh Circuit Court's opinion that such activity occurring between consenting adults was private (Vlahos, 1986). The Court concluded that they did not have the power to expand rights and expressed concern that ruling differently would open the door for the protection of other sexual "crimes" committed in private (Kimble, 1988). This ruling must be considered for two reasons: it presents an argument that could be used to dispute the extent of the right to privacy, and its overturning in 2003 contributes to the case for customary international law.

The situation surrounding the U.S. case *Lawrence et al. v. Texas* (2003) was strikingly similar to the events leading to *Bowers.* Police entered an apartment on an unrelated matter to find Lawrence and another consenting man engaged in sexual activity, violating a Texas state statute (Jones, 2004). The State Court of Appeals, using *Bowers* as precedent, ruled that such a law was not unconstitutional under the Fourteenth Amendment (Cornell Law School, 2003). This time the U.S. Supreme Court disagreed, ruling that the Texas statute violated the Due Process Clause and overturning the *Bowers* decision. The Court stated that *Bowers* did not sufficiently consider the liberty at stake, reducing a case about individual liberty to one limited to the right of "homosexuals to engage in sodomy" (Cornell Law School, 1986). The Supreme Court, in *Lawrence*, ruled on a much broader scope, arguing that such a law is guilty of "touching upon the most private human conduct, sexual behavior, and in the most private of places," seeking to restrict a relationship that "is within the liberty of persons to choose without being punished as criminals" (Cornell Law School, 2003). The Court did not withhold its critique of the *Bowers* decision, demonstrating that the debate surrounding the criminalization of homosexuality should not be limited to the rights of LGBTQ persons while ignoring the right to privacy. Further, the U.S. Supreme Court ruled this way out of a conviction that such protections are a matter of legal obligation rather than cultural fluctuation.

While Ugandans are not subject to the U.S. Constitution, Uganda is party to the ICCPR, which ensures the right to privacy. The same standard that compelled the U.S. Supreme Court to strike down *Bowers* exists in international law. Article 17, Section 1 of the ICCPR states that "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor or reputation" (United Nations, 1967a). The key term in this article is "arbitrary." There are certainly situations in which the right to privacy can or must be violated. If one harbors a convict in their home or holds a hostage, their right to privacy does not protect them from consequences. It can be infringed upon when there are good reasons – notably if the consequences of one's actions violate the sovereignty of another person or group. A state party to the ICCPR can only justify a violation of the right to privacy if it provides a reason that renders the violation non-arbitrary.

United Kingdom

The decision of the European Court of Human Rights (ECHR) in *Dudgeon v. United Kingdom* furthers the argument in favor of customary international law and addresses uncertainty surrounding arbitrary violation of the right to privacy. While carrying out an unrelated search warrant on Dudgeon's home, the police seized his personal papers in which he described homosexual activity. This led to him being questioned at the police station for four and a half hours concerning offenses categorized as "gross indecency" and "buggery" (European Court of Human Rights, 1981). Dudgeon argued before the ECHR that such a law violated Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which guarantees the right to respect for private and family life, in conjunction with Article 14, which prohibits discrimination (Kimble, 1988). The defense of the United Kingdom was based on the conservative, religious nature of Northern Ireland, even arguing that if the law were changed, it would be met with strong opposition (Connelly, 1982). This perspective parallels one that is commonly used in defense of Uganda's law.

Despite this argument, the Court agreed with Dudgeon, concluding that he "suffered and continues to suffer an unjustified interference with his right to respect for his private life," constituting a breach of Article 8 of the Convention (European Court of Human Rights, 1981). The characterization of the interference as "unjustified" is central to this statement. The Court struck down arguments that this law was necessary for the protection of other marginalized populations or essential for the protection of the morality of society (European Court of Human Rights, 1981). Valuable conclusions can be drawn from this decision. The Court agreed that there was a violation of Article 8 but stated that there was no purpose in examining Article 14 because of this fact (European Court of Human Rights, 1981). It

reasoned that there is no need to even consult the matter of discrimination when the right to privacy is violated. As such, it sidestepped the same question that this paper has, likely for the same reasons; in the present moment, the most compelling case international law can present for the decriminalization of homosexuality is the right to privacy. Additionally, it is important to note that this decision was based on the same principles state parties to the ICCPR are bound by, even though the decision was in a European Court.

The most relevant aspect of this decision, at least for the sake of this study, is its aftermath. In 1982, Northern Ireland issued The Homosexual Offences Order, declaring that "a homosexual act in private shall not be an offence if the parties consent thereto and have attained the age of 21 years" (Northern Ireland Assembly, 1982). This law was instated under the belief that it was legally obligated by the treaties the state was party to. In this case, state practice and *opinio juris* worked in unison: the state's change in practice was a consequence of the feeling of legal obligation.

Australia

The rationale used in *Dudgeon v. United Kingdom* is furthered in the analysis of *Toonen v. Australia* (University of Minnesota, 1994). Toonen argued that the Tasmanian Criminal Code, in its criminalization of private homosexual acts, had violated his human right to privacy (University of Minnesota, 1994). This case is particularly notable because it was brought before the UN Human Rights Committee, which has a level of authority applicable to the formation of customary international law. The Committee, in its examination of the merits of the case, concluded that "it is undisputed that adult consensual sexual activity in private is covered by the concept of privacy" (University of Minnesota, 1994). It determined that the right to privacy enumerated in Article 17 of the ICCPR was incompatible with legislation restricting the private sexual behavior of adults and recommended the repeal of Articles 122(a), (c), and 123 of the Tasmanian Criminal Code. Given the case law examined thus far, such an interpretation is not surprising (Joseph, 1994).

Again, the power of this case regarding customary international law is found in what followed the HRC's examination of merits. The Tasmanian regional government initially refused to comply with the Committee's decision, emphasizing the non-binding nature of the HRC's examinations (Sanders, 1996). The Australian Parliament, however, countered by enacting the Human Rights (Sexual Conduct) Act (1994), enshrining the right to privacy for sexual minorities in law. The High Court determined that this legislation invalidated Tasmania's state law due to its incompatibility with the right to privacy (Purvis & Castellino, 1997). In this case, the law was not changed because of cultural values, for these values

clearly didn't shift in Tasmania, but because the state felt a legal obligation to enforce such protections. State practice was influenced by the conviction of legal obligation.

South Africa and Botswana

A valid study of international law must extend beyond the Western world, and this paper's discussion of customary international law therefore includes two cases from the continent of Africa. First, the Constitutional Court of South Africa expressed the opinion in *National Coalition for Gay and Lesbian Equality v. Minister of Justice* (1998) that aligned with decisions from other parts of the world (Constitutional Court of South Africa, 1998). The case brought before the Court argued that South African common law, which criminalized both sodomy and sexual acts between men, violated the state's Constitution on several counts, including the right to privacy established in Article 14 (Kilpatrick, 1999). The Court ruled in favor of those who brought the case, emphasizing the victimless and consensual nature of the acts in question: "If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy" (Constitutional Court of South Africa, 1998). The determination that these laws were invalid based on aspects of the Constitution that mirror international agreements once again confirms the right to privacy of LGBTQ persons under international law.

Perhaps the strongest argument supporting customary international law, however, can be found in Botswana. Up until 2021, Botswanan law criminalized homosexuality, although it had been challenged in court. In *Kanane v. State* (2003), Kanane was charged with committing "an unnatural offence" and "indecent practices between males" (International Commission of Jurists, 2003). His claim that this violated Botswana's Constitution failed, and Section 164 of the Penal Code was upheld. The deciding factor in this instance was the belief that "gay men and women do not represent a group or class which at this stage has been shown to require protection under the Constitution" (International Commission of Jurists, 2003). Like *Bowers* in the United States, this ruling would be overturned.

In 2019, The High Court of Botswana overturned this decision with *Motschidiemang v. Attorney General Botswana* (High Court of Botswana, 2019), holding that sections 164(a), (c), and 165 of the Penal Code conflicted with Sections 3 and 9 of Botswana's Constitution, which ensured a right to privacy. The Court's opinion breaks down several areas of contradiction between these sections of the Penal Code and the Constitution, with a thorough reliance on international law and case law. Its section on the Right to Privacy essentially argues for the legal obligation to strike down such a law on these bases. It begins by citing the UDHR and ICCPR as evidence that "the limited right to privacy is a cherished

fundamental human right" (High Court of Botswana, 2019). It lists a series of international and regional conventions that prescribe the right to privacy in their own regards, including the UN Conventions on Migrant Workers and on the Rights of a Child, the African Union Principles on Freedom and Expression, the American Convention on Human Rights, the Arab Charter on Human Rights, the ASEAN Human Rights Declaration, and the ECHR (High Court of Botswana, 2019). It goes on to reference the Constitutional Court of South Africa's 1991 ruling and *Lawrence v. Texas* (2003) as evidence of state practice to strengthen their conclusion that an individual "has a right to a sphere of private intimacy and autonomy, which is not harmful to any person, particularly that is consensual" (High Court of Botswana, 2019).

Botswana's decision is evidence of emerging customary international law that protects sexual minorities' right to privacy. It refers to international and regional conventions, case law, and its own Constitution, expressing a legal obligation to tear down invasive legislation. Such a strong ruling coming from the African context demonstrates that this is not an exclusively Western norm, but one that is gradually being expressed throughout the world.

Uganda's Anti-Homosexuality Act

Various aspects of Uganda's Anti-Homosexuality Act conflict with the right to privacy and are problematic from a human rights perspective. They include Article 2(2): "A person who commits the offense of homosexuality is liable, on conviction, to imprisonment for life" and Article 2(3): "A person who attempts to perform a sexual act in the circumstances referred to in subsection (1) commits an offense and is liable, on conviction, to imprisonment for a period not exceeding ten years" (Parliament of the Republic of Uganda, 2023a). Laws that criminalize homosexual activity in this manner, regardless of a society's cultural values, allow for state interference in a consenting adult's private life and fundamentally violates one's right to privacy. This breach of privacy becomes even more blatant in Article 13: "A person who knows or has a reasonable suspicion that a person has committed or intends to commit the offense of homosexuality or any other offense under this Act, shall report the matter to police for appropriate action" (Parliament of the Republic of Uganda, 2023a).The law not only provides law enforcement with a right to infringe upon the right to privacy, but requires citizens to infringe upon each other's rights.

Beyond these fundamental violations, the law is extreme in its inclusion of the possibility of capital punishment in Article 3. It should be noted that most of these offenses that may be punishable by death are condemnable in a heterosexual setting, as well. These include committing the act of

homosexuality against children, against the disabled, against one who is elderly or in an unconscious state, done under coercion, or facilitating the contraction of a terminal illness. However, this list of acts, labeled "aggravated homosexuality," also includes the crime of "serial offense." The argument could be made that the very practice of the death penalty is a violation of customary international law (McKee, 2000). Presently, 112 states have abolished capital punishment, which constitutes a majority of UN members. However, this majority is not an overwhelming one. In fact, Article 6 of the ICCPR, which enshrines a "right to life," makes an exception for states that have not abolished the death penalty. It does make a caveat, stating that the death sentence may only be applied to "the most serious crimes" (United Nations, 1967a). For the sake of argument, this paper will operate under the conclusions that stem from the ICCPR rather than theories regarding customary international law. The death penalty can legally be applicable in Uganda, and many of the crimes listed in Article 3 are quite serious. However, the "serial offence" of homosexuality is not. When between consenting adults, there is no violence and there are no victims. It is a private act that, if intervened in by the state, constitutes a violation of the right to privacy.

Uganda's Anti-Homosexuality Act is in blatant conflict with sexual minorities' rights under customary international law, but it is important to note that the case under binding international law is less clear. An argument can be made that abolishing such a law wouldn't go far enough – that the international community should not only focus on getting this legislation repealed, but also pressure Uganda to enshrine the rights of equality of LGBTQ persons in their law. While 130 UN Member States have decriminalized homosexuality, there are only 30 jurisdictions in which same-sex marriage is recognized by the law (Pew Research Center, 2023).[4] In each of the cases analyzed, the right to privacy of LGBTQ persons preceded the right to marry – which would be necessary under the principles of equality and non-discrimination. In the likely event this trend continues, a concentrated campaign for the right to privacy of sexual minorities may yield better results. The right to privacy has been used effectively to liberate sexual minorities from the most extreme forms of oppression while being cognizant of the reluctance of more conservative cultures.

In the case of Uganda, the violation of international law is clear, and we are left with a question of action. What has the international community done already? Has it been effective? How should it be done? Much of what is being done by foreign governments is merely "naming and shaming" Uganda for its human rights abuses. These include statements by the United Nations (UN News, 2023), the

[4] Among the case studies, same sex marriage was recognized in 2006 in South Africa, 2015 in the United States, 2017 in Australia, 2020 in Northern Ireland, and it is not legal in Botswana (Pew Research Center, 2023).

European Union (2023), the United States (United States Department of State, 2023), and the United Kingdom (Foreign, Commonwealth & Development Office & The Rt Hon Andrew Mitchell MP, 2023). Much of this is merely urging Ugandan President Museveni to oppose this law and labeling the legislation as a violation of human rights, primarily on discriminatory principles. In many cases, however, naming and shaming does not produce meaningful results, even sometimes causing a state to defend its actions more vehemently (Hafner-Burton, 2008).

More substantive measures have been discussed by Western states, including the potential for economic repercussions. The World Bank Group has acted and barred Uganda from receiving new funding for public financing because of the law (World Bank Group, 2023). Uganda has made clear, however, that it will not be swayed by coercion, with members of Parliament claiming that if the West cuts its aid, they will simply turn to Arab states who will likely sympathize with Uganda's position (Parliament of the Republic of Uganda, 2023b). When similar legislation (which was later struck down by Uganda's Constitutional Court on a technicality) passed in 2014, Museveni was indignant at the threat of Western aid cuts: "We don't need the aid in the first place. A country like Uganda is one of the richest on earth" (quoted in Biryabarema, 2014, para 5).

Clearly, the fight for LGBTQ rights in Uganda is an uphill battle and change may take time. The lack of enforcement mechanisms in an international system based on state sovereignty makes this inevitable. Still, there could be value in reframing the argument for sexual minorities to be one concerning the right to privacy as opposed to non-discrimination or equality – a gradual movement towards equality in Uganda. While the idea of taking "marginal victories" in the realm of human rights is far from ideal, Uganda is firm in its convictions and will be unwilling to move drastically any time soon. Changing the conversation to one surrounding the fundamental right to privacy, rather than equality, could be a catalyst for movement. An argument structured around the "right to be let alone" (Warren & Brandeis, 1890) could find more receptive ears than an argument for absolute equality.

However, the most substantive means of addressing this legislation would require action on behalf of an individual Ugandan rather than the collective international community. The Optional Protocol to the ICCPR makes it possible for a communication concerning Uganda's law to be brought before the HRC. Article 2 of the Optional Protocol empowers individuals who claim that their rights under the ICCPR have been violated to submit a communication to the HRC (United Nations, 1966). A Ugandan who identifies as LGBTQ could present a communication alleging that their Article 17 protections are being violated, compelling the HRC to submit findings to the claim. While this decision would not be legally binding, it would enable an international body to send a strong message

condemning the law, contributing to the strong case built by customary international law against the Anti-Homosexuality Act.

These "solutions" are likely to be met by skepticism, and rightly so. The international system of sovereignty creates circumstances in which, when culture and customary international law clash, there is not much that can be done. Yet it remains imperative that those who claim to stand for human rights remain diligent in their recognition of violations and use of good judgment in addressing them. There is great danger in allowing the Anti-Homosexuality Act to become something that is not contested, discouraged, or even discussed. As such, it is critical that the international community keep a degree of pressure on Uganda's government – not to alienate or harden them in their beliefs, but to nudge them towards accepting the rights of sexual minorities under customary international law.

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