



**UNITED NATIONS COMMITTEE ON ECONOMIC, SOCIAL AND  
CULTURAL RIGHTS**

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**THE INTERNATIONAL COMMISSION OF JURISTS'  
SUBMISSION TO THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL  
RIGHTS IN ADVANCE OF THE EXAMINATION OF UGANDA'S INITIAL PERIODIC  
REPORT UNDER ARTICLES 16 AND 17 OF THE INTERNATIONAL COVENANT ON  
ECONOMIC, SOCIAL AND CULTURAL RIGHTS**

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## **INTERNATIONAL COMMISSION OF JURISTS**

### **SUBMISSION TO THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN ADVANCE OF THE EXAMINATION OF UGANDA'S INITIAL PERIODIC REPORT UNDER THE COVENANT**

#### **Introduction**

1. During its 55<sup>th</sup> session, from 1 to 19 June 2015, the Committee on Economic, Social and Cultural Rights ('the Committee') will examine Uganda's implementation of the International Covenant on Economic, Social and Cultural Rights ('the Covenant'), including in light of the State party's initial report under articles 16 and 17 of the Covenant.<sup>1</sup> The International Commission of Jurists (ICJ) welcomes the opportunity to submit the following comments to the Committee.<sup>2</sup>
2. In this submission, the ICJ wishes to draw the Committee's attention to:
  - a) the detrimental impact of the adoption and enforcement of the Anti-Homosexuality Act, 2014;
  - b) the effect of pre-existing and extant criminalization of consensual same-sex sexual conduct;<sup>3</sup> and
  - c) the introduction of the Prohibition of Promotion of Unnatural Sexual Practices Bill, on the respect for and the protection and realization of certain Covenant rights.<sup>4</sup>
3. The organization considers that those laws violate -- or would violate if adopted in the case of the above-mentioned Bill -- the following Covenant rights of Uganda's population generally, and in particular of lesbian, gay, bisexual and transgender persons in the country:
  - a) the principle of non-discrimination (article 2(2));
  - b) the right to work (article 6) and to just and favourable conditions of work (article 7);
  - c) the right to an adequate standard of living, including adequate housing (article 11);

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<sup>1</sup> Committee on Economic, Social and Cultural Rights, Consideration of reports submitted by States parties under articles 16 and 17 of the International Covenant on Economic Social and Cultural Rights, Initial reports submitted by States parties due in 1990 Uganda\*, 5 December 2013, E/C.12/UGA/1, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fUGA%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fUGA%2f1&Lang=en).

<sup>2</sup> See, also, The International Commission of Jurists' submission to the UN Committee on Economic, Social and Cultural Rights on the preparation of a List of Issues for the examination of the Initial Periodic Report of Uganda, 9 October 2014, available at [http://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/UGA/INT\\_CESCR\\_ICO\\_UGA\\_18579\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/UGA/INT_CESCR_ICO_UGA_18579_E.pdf).

<sup>3</sup> In Uganda, "carnal knowledge of any person against the order of nature" can lead, upon conviction, to a sentence ranging from ten years' to life imprisonment; Penal Act 1950 (Chapter 120) (as amended), Section 145(a).

<sup>4</sup> There is no question that these laws violate a whole host of other human rights, which are however outside the scope of this submission. See e.g., UN High Commissioner for Human Rights, 'Anti-Homosexuality law in Uganda violates human rights and endangers LGBT people' (24 February 2014); UNAIDS, 'UNAIDS expresses deep concern over impact of Ugandan bill on the rights of gay men' (18 February 2014); Committee on the Elimination of All Forms of Discrimination against Women, Concluding Observations: Uganda, UN Doc. CEDAW/C/UGA/CO/7 (2010), para. 43-44.

- d) the right to the enjoyment of the highest attainable standard of physical and mental health (article 12); and
  - e) the right to education (article 13).
4. The Anti-Homosexuality Act, 2014 was in force between 24 February and 1 August 2014, when the Constitutional Court declared the Act invalid, as Parliament had adopted it without the required quorum.<sup>5</sup> As detailed below, its adoption and enforcement gave rise to numerous violations of economic, social and cultural rights.
5. Furthermore, in addition to the human rights violations arising from the continued criminalization of "carnal knowledge against the order of nature", the ICJ considers it of paramount importance that the Committee addresses these issues because doing so may help to prevent the enactment of a further incarnation of legislation similar to the 2014 Act. In this respect, the ICJ's concern has been heightened by the recent introduction of the Prohibition of Promotion of Unnatural Sexual Practices Bill. Indeed, preparations had been underway to introduce a bill since September 2014. To the ICJ's knowledge, the Prohibition and Promotion of Unnatural Sexual Practices Bill, in its current draft dated 29 October 2014,<sup>6</sup> retains the substance of the Anti-Homosexuality Act, and introduces new elements, such as among others ineligibility to apply for adoption, guardianship or fostering of a child for persons who would be convicted under its provisions;<sup>7</sup> and the inclusion in the definition of "unnatural sexual practice" of any sexual act involving transgender persons.<sup>8</sup>

#### **ARTICLE 2(2): The principle of non-discrimination**

6. The long title to the Anti-Homosexuality Act defined it as "[a]n Act to prohibit any form of sexual relations between persons of the same sex; prohibit the promotion or recognition of such relations and to provide for other related matters". This criminalization directly resulted in discrimination on the basis of sexual orientation.
7. The same is true for the Prohibition of Promotion of Unnatural Sexual Practices Bill, which according to its long title aims "to prohibit the promotion of unnatural sexual practices; to criminalise funding for purposes of promoting unnatural sexual practices; to make it an offence to exhibit unnatural sexual practices; to criminalise inducement with intent to engage in unnatural sexual practices". Unnatural sexual practices are defined as sexual acts "between persons of the same sex, or with or between transsexual person, a sexual act with an animal and anal sex".<sup>9</sup>
8. The Bill's treatment of the above-mentioned conducts, in combination with provisions criminalizing for instance adoption "for the purpose of engaging that child in unnatural sexual practices"<sup>10</sup> or aggravated inducement with intent to engage in unnatural sexual practice where the perpetrator "adopts, is a guardian or fosters a child for the purpose of engaging the child in unnatural sexual practices",<sup>11</sup> not only lacks the clarity and specificity that the criminal law requires, but it also conflates and

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<sup>5</sup> Constitutional Court (Uganda), *Oloka-Onyango & 9 Ors v Attorney General*, Constitutional Petition No. 8 of 2014 (1 August 2014).

<sup>6</sup> See <http://goo.gl/lhnhiu> (last accessed 5 May 2015). It concerns a leaked copy of the draft.

<sup>7</sup> Prohibition of Promotion of Unnatural Sexual Practices Bill, S. 7.

<sup>8</sup> Prohibition of Promotion of Unnatural Sexual Practices Bill, S. 1.

<sup>9</sup> Prohibition of Promotion of Unnatural Sexual Practices Bill, S. 1.

<sup>10</sup> Prohibition of Promotion of Unnatural Sexual Offences Bill, S. 2(2)(g).

<sup>11</sup> Prohibition of Promotion of Unnatural Sexual Offences Bill, S. 6(2).

confuses criminal conduct which the State has a legitimate interest in criminalizing, with conduct protected under international human rights law. In doing so, it foments an atmosphere of stigma, prejudice and hatred in the country directed at LGBT individuals.

9. This Committee has clarified that “[i]n order for States parties to ‘guarantee’ that the Covenant rights will be exercised without discrimination of any kind, discrimination must be eliminated both formally and substantively”:

(a) *Formal discrimination: Eliminating formal discrimination requires ensuring that a State’s constitution, laws and policy documents do not discriminate on prohibited grounds...;*

(b) *Substantive discrimination: Merely addressing formal discrimination will not ensure substantive equality as envisaged and defined by article 2, paragraph 2. The effective enjoyment of Covenant rights is often influenced by whether a person is a member of a group characterized by the prohibited grounds of discrimination. Eliminating discrimination requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations. State parties must therefore immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or de facto discrimination.*<sup>12</sup>

10. This Committee has also repeatedly stated that “other status” as recognized in article 2(2) includes sexual orientation and gender identity, and that “States parties should ensure that a person’s sexual orientation is not a barrier to realizing Covenant rights”.<sup>13</sup>

11. The Anti-Homosexuality Act, because of its explicitly discriminatory purpose, constituted the legislative introduction of further, formal unlawful discrimination (given the pre-existing criminalization of consensual same-sex sexual conduct) on the basis of sexual orientation and/or gender identity in Uganda’s legal order. It also constituted substantive discrimination, as it prevented the adoption of measures to prevent, diminish and eliminate the conditions and attitudes that cause substantive or *de facto* discrimination. In fact, it fanned the flames of pre-existing stigma, prejudice and hatred and thus contributed to a rise in substantive discrimination, including in the enjoyment of certain Covenant rights as elaborated below in this submission.

12. For these reasons, the ICJ considers that the State party’s enactment and enforcement of the Anti-Homosexuality Act and the extant criminalization of same-sex sexual conduct, as well as the introduction of the Prohibition of the Promotion of Unnatural Sexual Practices Bill, have violated, or would violate in the case of the Bill’s adoption, the principle of non-discrimination.

13. In light of the above, the ICJ invites the Committee to address the following recommendations to the Ugandan authorities:

**a. the State party must amend its legislation and repeal Section 145(a) of the Penal Code Act 1950 (Chapter 120), which**

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<sup>12</sup> Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 20: Non-discrimination in social, economic and cultural rights, UN Doc. E/C.12/GC/20, para. 8.

<sup>13</sup> Among others, CESCR, General Comment No. 20: Non-discrimination in social, economic and cultural rights, UN Doc. E/C.12/GC/20, para. 32.

- criminalizes "carnal knowledge of any person against the order of nature" and is used to persecute persons engaging in consensual same-sex sexual conduct;**
- b. the State party should withdraw the Prohibition of Promotion of Unnatural Sexual Practices Bill; and**
  - c. the State party must introduce concrete measure aimed at eliminating formal and substantive discrimination on the basis of sexual orientation and/or gender identity.**

**ARTICLE 6 and 7: the right to work, including access to employment, and the enjoyment of just and favourable conditions of work, and equal treatment in the employment context**

14. The right to work, as elucidated by this Committee in its General Comment No. 18, "affirms the obligation of States parties to assure individuals their right to freely chosen or accepted work, including the right not to be deprived of work unfairly".<sup>14</sup> It requires the existence of a number of essential elements, which comprise, among other things, the prohibition of "any discrimination in access to and maintenance of employment on the grounds of ...sexual orientation... which has the intention or effect of impairing or nullifying exercise of the right to work on a basis of equality".<sup>15</sup>
15. This Committee has defined the core obligations under article 6 of the Covenant as follows:

*"In the context of article 6, this 'core obligation' encompasses the obligation to ensure non-discrimination and equal protection of employment. Discrimination in the field of employment comprises a broad cluster of violations affecting all stages of life, from basic education to retirement, and can have a considerable impact on the work situation of individuals and groups. Accordingly, these core obligations include at least the following requirements:*

- (a) To ensure the right of access to employment, especially for disadvantaged and marginalized groups, permitting them to live a life of dignity;*
- (b) To avoid any measure that results in discrimination and unequal treatment in the private and public sectors of disadvantaged and marginalized individuals and groups or in weakening mechanisms for the protection of such individuals and groups;*
- (c) To adopt and implement a national employment strategy and plan of action based on and addressing the concerns of all workers on the basis of a participatory and transparent process that includes employers' and workers' organizations. Such an employment strategy and plan of action should target disadvantaged and marginalized individuals and groups in particular and include indicators and benchmarks by which progress in relation to the right to work can be measured and periodically reviewed."<sup>16</sup>*

16. Furthermore, this Committee has stated that the "national employment strategy must take particular account of the need to eliminate discrimination in access to employment".<sup>17</sup> Victims of violations of the right to work must have access to effective judicial or other appropriate remedies at the national level, and State parties

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<sup>14</sup> CESCR, General Comment No. 18: The right to work, UN Doc. E/C.12/GC/18, para. 4.

<sup>15</sup> CESCR, General Comment No. 18: The right to work, UN Doc. E/C.12/GC/18, para. 12.

<sup>16</sup> CESCR, General Comment No. 18: The right to work, UN Doc. E/C.12/GC/18, para. 31.

<sup>17</sup> CESCR, General Comment No. 18: The right to work, UN Doc. E/C.12/GC/18, para. 44.

must respect the work of civil society groups who assist disadvantaged and marginalized individuals and groups in the realization of their right to work.<sup>18</sup>

17. The criminalization of consensual same-sex sexual conduct engenders stigma and gives rise to unlawful discrimination against people based on their real or imputed sexual orientation and/or gender identity, and/or against members of their families.<sup>19</sup> Further, it results in the cutting off of avenues to obtain redress for those whose access to or enjoyment of the right to work was impeded on those grounds. Moreover, it impedes the elaboration of specific, targeted policies aimed at realizing the right to work for people at risk of unlawful discrimination and human rights abuses because of prejudice and animus against their or their family members' real or imputed sexual orientation and/or gender identity. The criminalization of consensual same-sex sexual conduct thus violates the core obligations under article 6 of the Covenant.
18. Domestic civil society organizations have documented several recent cases of individuals whose employment was terminated explicitly on the basis of their sexual orientation or gender identity.<sup>20</sup>
19. Beyond their effects on the right to work as defined in article 6, the Anti-Homosexuality Act (when in force) and the extant criminalization of consensual same-sex sexual conduct have sanctioned and promoted stigma, prejudice and animus against LGBT people, and have contributed to a climate in which LGBT persons are persecuted and discriminated against with impunity. In addition, they have also affected the enjoyment by LGBT persons of just and favourable conditions of work, including fair and equal remuneration and opportunity for promotion, protection against harassment,<sup>21</sup> including sexual harassment, which includes harassment on the basis of sexual orientation and/or gender identity<sup>22</sup> and safe and healthy working conditions, protected by article 7 of the Covenant.
20. For these reasons, the ICJ considers that the State party's enactment and enforcement of the Anti-Homosexuality Act and the extant criminalization of same-sex sexual conduct have violated the right to work, including access to employment, and the enjoyment of just and favourable conditions of work, and equal treatment in the employment context.
21. In light of the above, the ICJ invites the Committee to address the following recommendations to the Ugandan authorities:

**a. the State party must take measures in order to realize access to employment, under safe, healthy, just and favourable conditions of**

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<sup>18</sup> CESCR, General Comment No. 18: The right to work, UN Doc. E/C.12/GC/18, paras. 48-51.

<sup>19</sup> See Amnesty International & Human Rights Watch, *Uganda: Anti-Homosexuality Act's Heavy Toll* (May 2014). <http://goo.gl/2R04Jm> (last accessed 7 October 2014).

<sup>20</sup> Civil Society Coalition on Human Rights and Constitutional Law, Human Rights Awareness and Promotion Forum, Rainbow Health Foundation, Sexual Minorities Uganda & Support Initiative for Persons with Congenital Disorder, *Uganda Report of Violations Based on Sex Determination, Gender Identity, and Sexual Orientation* (October 2014), p. 28-30. <http://goo.gl/tSd9SQ> (last accessed 4 May 2015).

<sup>21</sup> See Guideline 22 on article 7 of the Guidelines on treaty-specific documents to be submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/C.12/2008/2 (2009).

<sup>22</sup> See CESCR, Concluding Observations: Jamaica, UN Doc. E/C.12/JAM/CO/3-4(2013) para. 9. See also *Toonen v. Australia*, HRCttee, Communication No. 488/1992, Views of 31 March 1994, UN Doc. CCPR/C/50/D/488/1992 (1994), paras. 7.8-7.11.

- work, and equal treatment in the employment context, taking particular account of the challenges faced by those perceived as engaging in consensual same-sex sexual conduct; and**
- b. the State party must improve access to justice for those seeking redress for violations of the above-mentioned rights and provide remedies for persons who face or have faced discrimination in the enjoyment of the right to work, under safe, healthy, just and favourable conditions, on the basis of their real or perceived sexual orientation and/or gender identity.**

#### **ARTICLE 11: the right to adequate housing**

22. Under the misnomer "Brothels", the Anti-Homosexuality Act criminalized the following:

*"(1) A person who keeps a house, room, set of rooms or place of any kind for purposes of homosexuality commits an offence and is liable, upon conviction, to imprisonment for seven years.*

*(2) A person being the owner or occupier of premises or having or acting or assisting in the management or control of the premises, induces or knowingly suffers any man or woman to resort to or be upon such premises for the purpose of being unlawfully and carnally known by any man or woman of the same sex whether such carnal knowledge is intended to be with any particular man or woman generally, commits a felony and is liable, upon conviction, to imprisonment for five years."<sup>23</sup>*

23. The Prohibition of Promotion of Unnatural Sexual Practices Bill, in its current draft, sets out to criminalize:

*"A person who - ... (c) leases or subleases, uses or allows to be used any premises for the purpose of unnatural sexual practices ... commits the offence of promotion of unnatural sexual practices and is liable on conviction to imprisonment not exceeding seven years."<sup>24</sup>*

24. In its General Comment No. 4, this Committee has clarified that the "right to adequate housing applies to everyone" and that "[i]n particular, enjoyment of this right must, in accordance with article 2(2) of the Covenant, not be subject to any form of discrimination". Further, the right to adequate housing should not be interpreted narrowly, but "[r]ather it should be seen as the right to live somewhere in security, peace and dignity".<sup>25</sup> The domestic legal system should provide for remedies for violations, which may include legal appeals aimed at preventing planned evictions, seeking compensation following an illegal conviction and redress for any form of discrimination in the allocation and availability of access to housing.<sup>26</sup> Further, this Committee has identified legislation against forced evictions as "an essential basis

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<sup>23</sup> Anti-Homosexuality Act 2014, S. 11.

<sup>24</sup> Prohibition of Promotion of Unnatural Sexual Practices Bill, S. 2(2).

<sup>25</sup> CESCR, General Comment No. 4: The right to adequate housing, contained in UN Doc. E/1992/23, paras. 6-7.

<sup>26</sup> CESCR, General Comment No. 4: The right to adequate housing, contained in UN Doc. E/1992/23, para. 17.

upon which to build a system of effective protection".<sup>27</sup> In order to assess "adequacy", this Committee has identified, beyond legal security of tenure, also the following aspects as relevant: availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; location; and cultural adequacy.<sup>28</sup>

25. Through the criminalization of the act of knowingly letting of premises one owns, manages or occupies to be used for "the purpose of homosexuality", the Anti-Homosexuality Act effectively encouraged, if not required homeowners, to evict tenants who may engage in consensual same-sex sexual conduct, lest incurring of criminal sanctions. Further, it also encouraged, if not required, everyone else (or at least all those who occupied a property) to inform on people whom they would suspect of engaging in consensual same-sex conduct on certain premises. With respect to this, the ICJ notes that, indeed, several domestic and international civil society organizations reported a wave of evictions upon the enactment of the law.<sup>29</sup>
26. Moreover, even without proactive enforcement, the mere existence of this provision created a situation where one could not "live somewhere in security, peace and dignity". Dignity is undermined directly through the mere criminalization of sexual orientation, whereas security and peacefulness are impossible to achieve in a situation of permanent legal uncertainty with regard to one's homeownership or tenancy, especially where such uncertainty is caused by the unlawful criminalization of a fundamental aspect of one's identity. Under these circumstances, moreover, the other aspects of adequate housing, besides legal security of tenure, have also likely been affected.
27. Further, the criminalization of homosexuality impedes access to justice for those seeking redress for unlawful discrimination and violations of their right to adequate housing motivated, in whole or in part, by prejudice against one's sexual orientation and/or gender identity. It further hampers the operation of an effective legal framework to protect against forced eviction. The lack of access to legal remedies, besides being a violation of article 11 and of article 2.1 by itself, compounds the impact of the other violations.
28. It is also worth noting that the Anti-Homosexuality Act, besides being repugnant to human dignity because of its purpose and object, was ambiguously and poorly drafted, lacking the clarity required of the criminal law. As a result, it gave rise to uncertainty as to which conduct, carried out by whom, would fall foul of the criminal provision regarding "brothels", for instance.<sup>30</sup> In light of its ambiguous drafting, it appears that the "brothel" provision may have been used against people other than just those who

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<sup>27</sup> CESCR, General Comment No. 7: The right to adequate housing: Forced evictions, contained in UN Doc. E/1998/22, annex IV, para. 9.

<sup>28</sup> CESCR, General Comment No. 4: The right to adequate housing, contained in UN Doc. E/1992/23, para. 8.

<sup>29</sup> See among others, Civil Society Coalition on Human Rights and Constitutional Law, Human Rights Awareness and Promotion Forum, Rainbow Health Foundation, Sexual Minorities Uganda & Support Initiative for Persons with Congenital Disorder, *Uganda Report of Violations Based on Sex Determination, Gender Identity, and Sexual Orientation* (October 2014), p. 27-28. <http://goo.gl/tSd9SQ> (last accessed 4 May 2015); Amnesty International & Human Rights Watch, *Uganda: Anti-Homosexuality Act's Heavy Toll* (May 2014). <http://goo.gl/2R04Jm> (last accessed 7 October 2014); Sexual Minorities Uganda (SMUG), *From torment to tyranny: Enhanced persecution in Uganda following the passage of the Anti-Homosexuality Act 2014, 20 December 2013 – 1 May 2014* (May 2014). <http://goo.gl/KQ4qN1> (last accessed 7 October 2014).

<sup>30</sup> Thus, the Act also offended the basic criminal law principles of legal certainty and specificity, as expressed in the maxims "nullum crimen, nulla poena sine lege" and "in dubio pro reo". See also ICCPR, art. 15.



kept a "brothel" (i.e., a place dedicated at least in part to the taking place of transactional sex) and, in addition to potentially being applied to the landlords of persons engaging in consensual same-sex conduct, it is not inconceivable that the first sub-section of the provision could have applied to any homeowner who engaged in such conduct on his or her own property.

29. For these reasons, the ICJ considers that the State party's enactment and enforcement of the Anti-Homosexuality Act and the extant criminalization of same-sex sexual conduct have violated and continue to violate the right to adequate housing, including the protection against forced evictions.
30. In light of the above, the ICJ invites the Committee to address the following recommendations to the Ugandan authorities:
- a. **the State party must provide remedies for violations of the right to adequate housing, including forced evictions, which were committed in the aftermath and as a consequence of the enactment of the Anti-Homosexuality Act; and**
  - b. **the State party must improve access to justice for those seeking redress for violations of their right to adequate housing that occurred on the basis of their or their family members' sexual orientation and/or gender identity.**

#### **ARTICLE 12: the right to the highest attainable standard of health**

31. The Anti-Homosexuality Act criminalized "promotion of homosexuality". The provision reads:

*"(1) A person who-*

- (a) participates in production, procuring, marketing, broadcasting, disseminating, publishing of pornographic materials for purposes of promoting homosexuality;*
  - (b) funds or sponsors homosexuality or other related activities;*
  - (c) offers premises and other related fixed or movable assets for purposes of homosexuality or promoting homosexuality;*
  - (d) uses electronic devices which include internet, films, mobile phones for purposes of homosexuality or promoting homosexuality; or*
  - (e) who acts as an accomplice or attempts to promote or in any way abets homosexuality and related practices;*
- commits an offence and is 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.*

*(2) 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, proprietor or promoter shall be liable, on conviction, to imprisonment for seven years."<sup>31</sup>*

32. The Anti-Homosexuality Act also criminalized "aiding and abetting homosexuality":

*"A person who aids, abets, counsels or procures another to engage in acts of*

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<sup>31</sup> Anti-Homosexuality Act 2014, s. 13.

*homosexuality commits an offence and is liable, on conviction, to imprisonment for seven years.*<sup>32</sup>

33. The Prohibition of Promotion of Unnatural Sexual Practices Bill makes those convicted liable to imprisonment of up to seven years for the offence of "promotion of unnatural sexual practices",

"A person who:

- (a) *advertises, publishes, prints, broadcasts, distributes or causes the advertisement, publication, printing, broadcasting or distribution of any document or information intended or likely to facilitate engaging in unnatural sexual practices;*
- (b) *participates in producing, procuring, marketing, broadcasting, disseminating or publishing materials for the purposes of promoting the performance of unnatural sexual practices;*
- (c) *leases or subleases, uses or allows to be used any premises for the purpose of engaging in unnatural sexual practices;*
- (d) *uses information technology; including the internet, films or mobile phones for purpose of promoting unnatural sexual practices;*
- (e) *introduces or matches any person to another for purposes of engaging in unnatural sexual practices;*
- (f) *confines a person for purposes of engaging that person in the promotion of unnatural sexual practices;*
- (g) *adopts or facilitates the adoption of a child for purposes of engaging that child in unnatural sexual practices;*
- (h) *attempts to solemnize or solemnize a same sex marriage; or*
- (i) *recruits, transports, transfers, harbors, provides or receives a person for domestic or overseas employment or training or apprenticeship with the intention of introducing that person to unnatural sexual practices.*<sup>33</sup>

34. In addition, acting as an accomplice to, or attempting to engage in, any of the above activities can lead to criminal liability.<sup>34</sup>

35. Further, the Prohibition of Promotion of Unnatural Sexual Practices Bill also sets out to hold criminally liable "[a] person who makes a representation through publication, exhibition, cinematography, information technology or by whatever means, of a person engaged in real or fictitious unnatural sexual practices".<sup>35</sup>

36. As this Committee has clarified in its General Comment No. 14, the right to health contains a number of interrelated and essential elements, which include, among other things, non-discrimination (i.e., "health facilities, goods and services must be accessible to all, especially the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds") and "information accessibility" (i.e., "the right to seek, receive and impart information and ideas concerning health issues").<sup>36</sup>

37. As pointed out by the Committee, "[b]y virtue of article 2.2 and article 3, the Covenant proscribes any discrimination in access to health care and underlying

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<sup>32</sup> Anti-Homosexuality Act 2014, s. 7.

<sup>33</sup> Prohibition of Promotion of Unnatural Sexual Practices Bill, S. 2(2).

<sup>34</sup> Prohibition of Promotion of Unnatural Sexual Practices Bill, S. 2(3).

<sup>35</sup> Prohibition of Promotion of Unnatural Sexual Practices Bill, S. 4.

<sup>36</sup> CESCR, General Comment No. 14: The right to the highest attainable standard of health, UN Doc. E/C.12/2000/4, para. 12.

determinants of health, as well as to means and entitlements for their procurement, on the grounds of ... sexual orientation ..., which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health".<sup>37</sup>

38. Furthermore, the following core obligations under article 12, as identified by this Committee, are of particular relevance for present purposes,

- (a) *To ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups;*
- (b) *To provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs;*
- (c) *To ensure equitable distribution of all health facilities;*
- (d) *To adopt and implement a national public health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the whole population; the strategy and plan of action shall be devised, and periodically reviewed, on the basis of a participatory and transparent process; they shall include methods, such as right to health indicators and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all vulnerable or marginalized groups.*"<sup>38</sup>

39. Guaranteeing that the right to health will be exercised without discrimination of any kind constitutes an immediate obligation for the State party.<sup>39</sup> Further, the Committee has identified "a strong presumption that retrogressive measures taken in relation to the right to health are not permissible".<sup>40</sup>

40. In its General Comment No. 14, this Committee identified a number of specific legal obligations stemming from the provision, including, among other things, "refraining from denying or limiting equal access for all persons"; "abstaining from enforcing discriminatory practices as a State policy"; refraining "from limiting access to contraceptives and other means of maintaining sexual and reproductive health, from censoring, withholding or intentionally misrepresenting health-related information, including sexual education and information"; establishing a public health infrastructure that provides for sexual and reproductive health services; and "supporting people in making informed choices about their health".<sup>41</sup>

41. As the Special Rapporteur on the right of everyone to the enjoyment of the highest

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<sup>37</sup> CESCR, General Comment No. 14: The right to the highest attainable standard of health, UN Doc. E/C.12/2000/4, para. 18.

<sup>38</sup> CESCR, General Comment No. 14: The right to the highest attainable standard of health, UN Doc. E/C.12/2000/4, para. 43. Furthermore, "obligations of comparable priority" are:

- (a) *To ensure reproductive, maternal (pre-natal as well as post-natal) and child health care;*
- (b) *To provide immunization against the major infectious diseases occurring in the community;*
- (c) *To take measures to prevent, treat and control epidemic and endemic diseases;*
- (d) *To provide education and access to information concerning the main health problems in the community, including methods of preventing and controlling them;*
- (e) *To provide appropriate training for health personnel, including education on health and human rights."*

CESCR, General Comment No. 14, para. 44.

<sup>39</sup> CESCR, General Comment No. 14: The right to the highest attainable standard of health, UN Doc. E/C.12/2000/4, para. 30.

<sup>40</sup> CESCR, General Comment No. 14: The right to the highest attainable standard of health, UN Doc. E/C.12/2000/4, para. 32.

<sup>41</sup> CESCR, General Comment No. 14: The right to the highest attainable standard of health, UN Doc. E/C.12/2000/4, paras. 34-37.

attainable standard of physical and mental health has affirmed, the "health-related impact of discrimination based on sexual conduct and orientation is far-reaching, and prevents affected individuals from gaining access to other economic, social and cultural rights. In turn, the infringement of other human rights impacts on the realization of the right to health, such as by impeding access to employment or housing". The Special Rapporteur stated that "[t]hese infringements ultimately undermine the inherent dignity of persons upon which the international human rights framework is based".<sup>42</sup>

42. The Anti-Homosexuality Act violated the right to the highest attainable standard of health of persons who engage in consensual same-sex sexual conduct, as it impeded their access to health facilities, goods and services on a non-discriminatory basis. The criminalization of "aiding and abetting" of homosexuality jeopardized the relationship between doctor and patient, as the provision of scientific, relevant medical information could lead to charges under this section. The same will be true for the Prohibition of Promotion of Unnatural Sexual Practices Bill if it were to pass into law. In jurisdictions in which consensual same-sex sexual conduct is criminalized, such as Uganda, affected individuals are much more likely to be unable to gain access to effective health services, and preventive health measures that should be tailored to these communities are suppressed.<sup>43</sup>
43. Furthermore, the criminalization of homosexuality prevents the elaboration and operation of a health strategy that addresses the specific needs of persons who engage in consensual same-sex sexual conduct. It also violates the right to housing (as addressed separately in this submission, above), which is of paramount importance to the realization of the right to health.
44. The Anti-Homosexuality Act violated the right to health not just of those who engage in consensual same-sex sexual conduct but also of the population in general, in restricting access to information about sexuality, as providing such services could be classified as "promoting homosexuality". The Act thus caused the withholding of health-related information and, as a result of this, the State party failed to comply with its duty to support people in making informed choices. In this regard, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health has also affirmed that "[l]aws restricting information about sexual and reproductive health and which censor discussions of homosexuality in the classroom fuel stigma and discrimination".<sup>44</sup> (See also below, on the impact of the Act on the right to comprehensive sexuality education.)
45. The criminalization of consensual same-sex sexual conduct and the Anti-Homosexuality Act have also undermined Uganda's fight against HIV/AIDS. Men who have sex with men (MSM) have been identified as one of the categories of the population that is "most at risk" of HIV.<sup>45</sup> However, as stated by the Uganda AIDS

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<sup>42</sup> Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health to the Human Rights Council, UN Doc. A/HRC/14/20, para. 6-7.

<sup>43</sup> Mahon, 'Sexual orientation, gender identity and the right to health' in Clapham & Robinson (eds.), *Swiss Human Rights Book*, vol. 3, *Realizing the right to health*, p. 238, cited at A/HRC/14/20, para. 18.

<sup>44</sup> Interim report of the Special Rapporteur on the right of everyone to the highest attainable standard of physical and mental health to the General Assembly, UN Doc. A/66/254, para. 59.

<sup>45</sup> Uganda AIDS Commission, *Global AIDS response progress report: Country progress report Uganda* (April 2012), p. 9.

Commission, the criminalization of consensual same-sex sexual conduct in Uganda has meant that there are "virtually no tailored services available for MSM", and that "the minimal services such as sensitization and awareness are mainly provided by CSOs [civil society organizations] and no direct service at all for MSM is provided by government facilities".<sup>46</sup> The fact that MSM are highly marginalized in Uganda precludes them from easy access to HIV/AIDS services, which leads to a heightened risk of HIV transmission and infection.<sup>47</sup> Although the AIDS Commission's assessment pertains to the period prior to the entry into force of the Anti-Homosexuality Act, the latter compounded these problems, as it built on and added to pre-existing discrimination, stigma and prejudice.

46. In addition, the Act also criminalized the provision of information and outreach such as teaching and promoting safe consensual same-sex conduct among men. It is generally recognized that "stigma, discrimination and violations of other human rights are major barriers to effective national responses to HIV" and that "[t]he criminalization of people who are at a higher risk of infection, such as men who have sex with men ... drives them underground and away from HIV services", which "increases their vulnerability to HIV, as well as to stigma, discrimination, marginalization and violence".<sup>48</sup> On the other hand, quality HIV and AIDS education embodies a number of crosscutting principles, including being rights-based, inclusive and scientifically accurate. Further, "[i]t is delivered in safe and secure learning environments that are free from stigma, discrimination ... [and] homophobia".<sup>49</sup>
47. Furthermore, the Anti-Homosexuality Act specifically stigmatized those living with HIV, by characterizing HIV-positive status as an aggravating circumstance in the commission of the offence.<sup>50</sup> The Act also mandated forced HIV testing.<sup>51</sup>
48. More generally, when consensual same-sex sexual conduct is criminalized -- as it was under the 2014 Act and remains the case under the Penal Code 1950 -- patients may feel inhibited to share their sexual history with their doctor, which, in turn, may hinder their ability to recount their medical history and ultimately accurate diagnoses. Thus in general criminalization of consensual same-sex conduct detrimentally affects access to appropriate and adequate treatment and care.
49. The persecutory nature of the Anti-Homosexuality Act, of the continued criminalization of same-sex sexual conduct and of the introduction of the Prohibition of Promotion of Unnatural Sexual Practices Bill have had negative consequences for mental health too, as criminalization perpetuates stigma, through the reinforcement of existing prejudices and stereotypes.<sup>52</sup> This can have a severe negative impact on the self-regard and mental well-being of persons who engage in consensual same-sex

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[http://www.unaids.org/en/dataanalysis/knownyourresponse/countryprogressreports/2012countries/c\\_e\\_UG\\_Narrative\\_Report\[1\].pdf](http://www.unaids.org/en/dataanalysis/knownyourresponse/countryprogressreports/2012countries/c_e_UG_Narrative_Report[1].pdf) (last accessed 25 September 2014).

<sup>46</sup> Uganda AIDS Commission, Global AIDS response progress report: Country progress report Uganda (April 2012), p. 27.

<sup>47</sup> Uganda AIDS Commission, Global AIDS response progress report: Country progress report Uganda (April 2012), p. 45.

<sup>48</sup> UNAIDS, Guidance Note: Key programmes to reduce stigma and discrimination and increase access to justice in national HIV responses (2012), p. 5.

<sup>49</sup> EDUCAIDS, Framework for Action (January 2008 - 2nd edition), p. 10. EDUCAIDS, the Global Initiative on Education and HIV & AIDS, is a UNAIDS initiative led by UNESCO.

<sup>50</sup> Anti-Homosexuality Act, s. 3(1)(b).

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

<sup>52</sup> See e.g., Constitutional Court of South Africa, National Coalition for Gay and Lesbian Equality and Others v. Minister of Home Affairs and Others (2 December 1999), para. 54.

sexual conduct.<sup>53</sup>

50. For these reasons, the ICJ considers that the State party's enactment and enforcement of the Anti-Homosexuality Act and the extant criminalization of consensual same-sex sexual conduct have contributed to unequal access to health services and have violated the right to the highest attainable standard of health, including by restricting access to relevant health-related information, in particular for those who engage in consensual same-sex sexual conduct.

51. In light of the above, the ICJ invites the Committee to address the following recommendations to the Ugandan authorities:

- a. **the State party must take tailored measures in order to ensure the right to the highest attainable standard of health for persons who engage in consensual same-sex sexual conduct; and**
- b. **the State party must take measures to improve access to HIV/AIDS services, including by ensuring access to and the provision of health-related information to those who engage in consensual same-sex conduct.**

#### **ARTICLE 12 and 13: the right to comprehensive sexuality education**

52. This Committee has interpreted the right to the highest attainable standard of health as an inclusive right "extending not only to timely and appropriate health care but also to underlying determinants of health", including "access to health-related education and information, including on sexual and reproductive health".<sup>54</sup>

53. This Committee has also stated that the right to health and the right to information require States to refrain from censoring, withholding or intentionally misrepresenting information relating to health, including sex education and sexual information.<sup>55</sup> Furthermore, as regards the implementation of article 12 and children, including adolescent children, "State parties should provide a safe and supportive environment for adolescents, that ensures the opportunity... to acquire appropriate information, to receive counselling and to negotiate the health-behaviour choices they make. The realization of the right to health of adolescents is dependent on the development of youth-friendly health care, which respects confidentiality and privacy and includes appropriate sexual and reproductive health services."<sup>56</sup>

54. The Committee on the Rights of the Child has further recommended that States include sexual education in the official programmes of primary and secondary education.<sup>57</sup> The Committee on the Elimination of Discrimination against Women has

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<sup>53</sup> On the negative health impact of the phenomenon of "minority stress", see Ilan H. Meyer, Declaration in the cases of Bayev v. Russia (No. 67667/09), Kiselev v. Russia (No. 44092/12), and Alekseyev v. Russia (No. 56717/12). <http://goo.gl/PnKhzp> (last accessed 25 September 2014).

<sup>54</sup> CESCR, General Comment No. 14: The right to the highest attainable standard of health, UN Doc. E/C.12/2000/4, para. 11.

<sup>55</sup> CESCR, General Comment No. 14: The right to the highest attainable standard of health, UN Doc. E/C.12/2000/4, para. 34.

<sup>56</sup> CESCR, General Comment No. 14: The right to the highest attainable standard of health, UN Doc. E/C.12/2000/4, para. 23.

<sup>57</sup> Committee on the Rights of the Child, Concluding Observations on Antigua and Barbuda, UN Doc. CRC/C/15/Add.247, para. 54; Committee on the Rights of the Child, Concluding Observations on Trinidad and Tobago, UN Doc. CRC/C/TTO/CO/2, para. 54.

called upon States to provide sexual education in a compulsory and systematic manner in schools.<sup>58</sup> Such education should be comprehensive, non-discriminatory, evidence-based, scientifically accurate and age appropriate.<sup>59</sup>

55. As affirmed by the Special Rapporteur on the right to education, "[t]he right to education includes the right to sexual education, which is both a human right in itself and an indispensable means of realizing other human rights, such as the right to health, the right to information and sexual and reproductive rights".<sup>60</sup> And further, "[i]n order to be comprehensive, sexual education must pay special attention to diversity, since everyone has the right to deal with his or her own sexuality without being discriminated against on grounds of sexual education or gender identity". The Special Rapporteur also "fully endorses the precepts of Principle 16" of the Yogyakarta Principles.<sup>61</sup>
56. Among other things, Principle 16 of the Yogyakarta Principles enjoins States to ensure that "education methods, curricula and resources serve to enhance understanding of and respect for, *inter alia*, diverse sexual orientations and gender identities, including the particular needs of students, their parents and family members related to these grounds"; and that "laws and policies provide adequate protection for students, staff and teachers of different sexual orientations and gender identities against all forms of social exclusion and violence within the school environment, including bullying and harassment".
57. More generally, beyond comprehensive sexuality education, education is a fundamental vehicle to combat discrimination and realize human rights. This Committee identified, as part of the strategies, policies, and plans of action that should be in place and implemented in order to address both formal and substantive discrimination, among other things, "teaching on the principles of equality and non-discrimination" that should be "integrated in formal and non-formal inclusive and multi-cultural education, with a view to dismantling notions of superiority or inferiority based on prohibited grounds and to promote dialogue and tolerance between different groups in society".<sup>62</sup>
58. The Anti-Homosexuality Act's prohibition of the "promotion of homosexuality" made teaching comprehensive sexual and reproductive education in schools impossible, let alone in a manner that serves to enhance understanding of and respect for diverse sexual orientations and gender identity; it thus violated the right to education of children and adolescents specifically. In addition, the Anti-Homosexuality Act's prohibition of the "promotion of homosexuality" has impeded the realization of the aspect of the right to health for adolescents that relates to the provision of appropriate sexual health services, comprising counselling regarding health-behaviour choices. The ICJ is concerned that the same remains true today as a result of the continued criminalization of consensual same-sex sexual conduct and the introduction

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<sup>58</sup> Committee on the Elimination of Discrimination against Women, Concluding Observations on the Republic of Moldova, UN Doc. CEDAW/C/MDA/CO/3, para. 31; Committee on the Elimination of Discrimination against Women, Concluding Observations on Turkmenistan, UN Doc. CEDAW/C/TKM/CO/2, para. 31.

<sup>59</sup> UNESCO, International Technical Guidance on Sexuality Education (2009).

<sup>60</sup> Report of the Special Rapporteur on the right to education to the General Assembly, UN Doc. A/65/162, para. 19.

<sup>61</sup> Report of the Special Rapporteur on the right to education to the General Assembly, UN Doc. A/65/162, para. 23.

<sup>62</sup> CESCR, General Comment No. 20: Non-discrimination in economic, social and cultural rights, UN Doc. E/C.12/GC/20 (2009), para. 38.

of the Prohibition of Promotion of Unnatural Sexual Practices Bill, and the atmosphere of stigma and prejudice that, in turn, they sanction.

59. Finally, while not addressed in depth in this submission, the Anti-Homosexuality Act likely also violated other aspects of the right to education. This Committee has identified "by way of illustration", among many others, the introduction of discriminatory legislation and the failure to take measures that address *de facto* educational discrimination as violations of article 13.<sup>63</sup>
60. For these reasons, the ICJ considers that the State party's criminalization of consensual same-sex sexual conduct undermines access to education, including comprehensive sexuality education, on a non-discriminatory basis.
61. In light of the above, the ICJ invites the Committee to address the following recommendations to the Ugandan authorities:

- a. the State party must remedy violations of these aspects of the right to health and to education;**
- b. the State party must put in place an effective policy to tackle homo- and transphobic bullying and harassment in schools; and**
- c. the State party should provide education on sexuality that is age-appropriate, evidence-based and scientifically accurate, and that emphasizes the importance of non-discrimination and gender-equality.**

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<sup>63</sup> CESCR, General Comment No. 13: The right to education, UN Doc. E/C.12/1999/10, para. 59.