

ROLE OF THE UNITED NATIONS HUMAN RIGHTS COMMITTEE ON THE LEGALISATION OF GAY RIGHTS IN AFRICA*

Abstract

Homosexuality is a crime in most African states; however, the UN and some western states have been putting pressure on African states, with even threats of withdrawing financial aid if they fail to decriminalise gay rights within their territories, despite it not falling under the scope of any treaty. The HRC which oversees the implementation of the ICCPR within the territories of its state parties is selected to gauge the success or otherwise of discharging its mandate as it relates to gay rights. In the course of the study, the relevant literature and the jurisprudence of the HRC were analysed in highlighting the status of the level of compliance with the ICCPR by state parties, as it affects the legalisation of gay rights. The paper concludes that the HRC has not had much success in convincing African state parties to decriminalise homosexuality. Consequently, it is recommended that the HRC should focus more on encouraging state parties to uphold the individual rights contained in the treaty, rather than focusing on gay rights, as it further aggravates hostility towards those who practice homosexuality by the individual communities in which they live in.

Keywords: African States, Gay Rights, Human Rights Committee, ICCPR

1. Introduction

‘Gay’ is a word used to describe people that engage in homosexuality,¹ consequently, gay rights is the advocacy that individuals that practice homosexuality should ‘have the same legal and political rights as everyone else’.² For instance, Joseph argues that the exercise of gay rights in public, for instance, the holding of hands and kissing each other in public by gay couples should be allowed and protected by domestic laws of states.³ Recently, there is a consistent call for the accommodation of persons that practice homosexuality by United Nations (UN) member states to afford them the ‘freedoms, immunities and benefits according to modern values (especially at the international level) they should be able to claim all human rights as a matter of right in the society they live, without discrimination’.⁴ It is further argued that all human rights are supposed to be universal, indivisible, interdependent and interrelated. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of states, regardless of their political, economic and cultural systems, to promote and protect all human rights.⁵ However, the implementation of international human rights by states tends to be hindered by customs and traditional practices which are viewed as contravening the provisions of human rights treaties, especially among African states, where traditional practices are prevalent. Consequently, homosexuality was identified by African leaders as ‘un African’.⁶ Also, not only cultures and traditions, but also religion has played a considerable role in the repression of gay rights⁷ in some African states such as Nigeria,⁸ Uganda, and Rwanda. Legislation has been enacted (or proposed) to increase the criminal penalties placed upon homosexuals,⁹ although there is an argument that the recognition of same-sex relationships is overwhelmingly a western phenomenon.¹⁰

***Aliyu IBRAHIM**, Faculty of Law, Umaru Musa Yar’adua University, Katsina, Katsina State, Nigeria. aliyudanmusa@gmail.com. +2348033800853.

¹ M Robinson & G Davidson, *Chambers 21st Century Dictionary* (Edinburgh: Chambers Harrap Publishers, 1999) p. 553.

² Gay Rights < <https://dictionary.cambridge.org/dictionary/english/gay-rights> > accessed on 11 February 2019.

³ S Joseph, ‘Gay Rights under the ICCPR-Commentary on *Toonen v. Australia*’ (1994) 13 *University of Tasmania Law Review*, 400.

⁴ B A Garner *et al* (eds), *Black’s Law Dictionary* (9th Ed, St Paul: Thomas Reuters, 2009) p.355.

⁵ United Nations ‘Vienna Declaration and Programme of Action’ adopted on 25 June after the World Conference on Human Rights, 14-15 June 1993, Vienna, Austria, UN DOC. CONF.157/23 (157/23) (July, 1993) Sec.1, para 5.

⁶ V Reddy, ‘Homophobia, Human Rights and Gay and Lesbian Equality in Africa’ (2001) 16(50) *Agenda*, 83.

⁷ J Rehman & E Polymenopoulou, ‘Is Green a Part of the Rainbow? Sharia, Homosexuality, and LGBT Rights in the Muslim World’ (2013-2014) 37 (1) *Fordham International Law Journal*, 5.

⁸ Same Sex Marriage (Prohibition) Act 2014.

⁹ M Kirby, ‘Law, human rights and religion-of genocide, sexuality and apostasy’ (2009) 9 *Macquarie Law Journal*, 13.

¹⁰ N Crombie, ‘A Harmonious Union? The Relationship between States and the Human Rights Committee on the Same-Sex Issue’ (2012-2013) 51 *Columbia Journal of Transnational Law*, 734.

This article will examine the success or otherwise of the bid by the UN to influence the decriminalisation of gay rights and its increased protection within the territories of states in Africa. The work of the United Nations Human Rights Committee (HRC) will be explored in the paper relating to its bid to promote gay rights, the HRC is chosen because it is mandated to oversee the implementation of the International Covenant on Civil and Political Rights 1966 (ICCPR),¹¹ by its state parties.¹² This treaty is viewed as one of the most important UN human rights treaties due to the fact that it was the first post Second World War treaty that member states of the UN agreed to ensure that uniform individual human rights were protected within their territories.¹³ Also, the HRC, is viewed as the most active and result oriented of all the UN treaty bodies mechanisms.¹⁴ To appreciate the effect of its work in its bid for states to protect gay rights, two African state parties to the ICCPR have been chosen for consideration, they are: South Africa¹⁵ and Cameroon,¹⁶ These state parties were chosen because they appeared before the HRC recently. The role of the HRC in some other African states will be discussed briefly in the article.

2. Gay Rights and the ICCPR

While there is no doubt that there is no express provision of any treaty that provide for the protection of gay rights, however, the provision of article 2 (1) ICCPR,¹⁷ is the basis for which the advocates of gay rights rely on for justifying the extension of its protection. The provision provides that ‘Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’.¹⁸ In addition, article 26 of the treaty prohibits discrimination and all individuals in the territories of state parties are entitled to equal protection of the law irrespective of ‘race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’.¹⁹ Paladini argues that article 26 can be invoked in the protection of gay rights, as it is an independent provision in the treaty, which extend the protection enjoyed by individuals, to homosexuals.²⁰ Equally, regarding the implementation of ICCPR all parties to the treaty are mandated to ‘take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant’.²¹ Also, it is observed by Seibert-Fohr that state parties have been given the choice of how to implement the provisions of the ICCPR within their territories.²² However, Nowak pointed out that each individual within the territories of state parties to the ICCPR enjoys the protection offers by the ICCPR without distinction.²³

Despite the arguments advanced that gay rights are protected by the provisions of the ICCPR. Majority of the 53 African state parties to the ICCPR,²⁴ oppose this assertion. Recently, African UN member states in opposition to

¹¹ Entry into force in 1976.

¹² Status as at 11 December, 2018 < https://treaties.un.org/Pages/ViewsDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en accessed on 11 December 2018.

¹³ A S Zilli, ‘Approaching the Extraterritoriality Debate: The Human Rights Committee, the US and the ICCPR’ (2011) 9 *Santa Clara Journal of International Law*, 421.

¹⁴ C Cohn, ‘Who’s Listening? Modest Suggestions for the Human Rights Committee’ (1990) 59 *Nordic Journal of International Law*, 321.

¹⁵ Submitted its Initial Report on 7 March, 2016’ UN DOC NO.: CCPR/C/SR.3234.

¹⁶ Submitted its Fifth Periodic Report on 11 October, 2016 UN DOC NO: CCPR/C/CMR/5.

¹⁷ Entry into force in 1976.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ L Paladini, ‘Same-Sex Couples Before *Quasi*-Jurisdictional Bodies: The Case of the UN Human Rights Committee’ in D. Gallo *et al* (eds) *Same-Sex Couples before National, Supranational and International Jurisdictions* (Berlin: Springer, 2014) p.533.

²¹ ICCPR (n 11) article 2 (2).

²² A Seibert-Fohr, ‘Domestic Implementation of the ICCPR Pursuant to its Article 2 (2)’ (2001) 5 *Max Planck Yearbook of United Nations Law*, 427.

²³ M Nowak, ‘The Implementation of the International Covenant on Civil and Political Rights’ (2012) 2 (2) *Taiwan Human Rights Journal*, 89.

²⁴ Status as at 11 December, 2018 (n 12).

gay rights, made an unsuccessful attempt to block the appointment of an independent investigator with a three year mandate to investigate the violations of the human rights of gays.²⁵ The Botswanan UN Ambassador on behalf of the other members stated that ‘The African states were concerned that non-internationally agreed notions such as sexual orientation... to the detriment of issues of paramount importance such as the right to development and the racism agenda’.²⁶ He further asserted that ‘sexual orientation and gender identity are not, and should not be linked to existing international human rights instruments’.²⁷ After the failure of the resolution to be accepted, Egypt on behalf of 57 member states of the UN, informed it that they did not recognise the investigator, and therefore would not cooperate with it in carrying out its mandate.²⁸ Same-sex relationships are a controversial issue in most parts of Africa, persons that engage in these relationships are ostracised by their communities, and in some cases they are killed. The former Zimbabwean President, Robert Mugabe, in his condemnation of homosexuality said ‘it degrades humanity, it is unnatural, and there is no question ever of allowing these people to behave worse than dogs and pigs’.²⁹

The opposition of African states to gay rights has made the continent a battle ground for those that oppose and support gay rights, for example, the American Centre for Law and Justice (ACLJ) has offices in Kenya and Zimbabwe, and uses these offices as bases to reach out to nearby Rwanda, Uganda, Tanzania and South Sudan with the sole aim to lobby the governments of the states not to allow the legalisation of gay rights.³⁰ While western states, which are credited with an overwhelming support of gay rights,³¹ have been threatening African states with stoppage of financial grants, developmental loans and entering into trade agreements if they do not decriminalise gay rights.³² For instance, when Uganda passed its anti-gay law, the United States of America (USA) discontinued funding some programmes involving the Ugandan Ministry of Health and its Police Force. It also cancelled a planned USA sponsored Military aviation exercise in the State. Equally, the World Bank suspended a \$90 Million loan to the African state, with other western states such as Denmark, Norway, the Netherlands and Sweden cutting aid, all in opposition of the anti-gay rights law promulgated by Uganda.³³ However, Van Klinken warned that putting aggressive pressure on African states to legalise gay rights is counterproductive, as it could increase violent conduct towards homosexuals within the territories of African states that are oppose to gay rights.³⁴ Kaoma agrees with this assertion, as he warned that the support of gay rights advocacy by the Western states and European Union (EU) and the UN in African states has further provoked ‘militant response’ by African states against individuals and organisations that are promoting the protection of gay rights.³⁵ He further pointed out that despite the attempt to secularise Africa, majority of Africans identify with religion and Islam and Christianity oppose gay rights, hence, its ‘advocacy will continue to be a hard sell among the people’.³⁶ For instance, it is observed that majority of Nigerians, irrespective of religious beliefs, support the criminalisation of gay rights.³⁷ Equally, the Independent Permanent Human Rights Commission (IPHRC)

²⁵ M Nichols, ‘African states fail to stop work of U.N. gay rights investigator’ *Reuters* November 21, 2016 <<http://www.reuters.com/article/us-un-rights-lgbt-idUSKBN13G20P>> accessed on 23 November 2016

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ African states fail to stop work of U.N. Gay rights investigator, 21 November 2016 <<http://www.reuters.com/article/us-un-rights-lgbt-idUSKBN13G20P>> accessed on 23 November 2016.

²⁹ J Moyo, ‘Worse than dogs and pigs: Life as a gay man in Zimbabwe’ *Reuters* September 4, 2017 <<http://www.reuters.com/article/us-zimbabwe-rights-lgbt/worse-than-dogs-and-pigs-life-as-a-gay-man-in-zimbabwe-idUSKCN1BF03Z>> accessed on 14 September 2017.

³⁰ J Kalb, ‘Human Rights Proxy Wars’ (2017) (XIII) 53 *Stanford Journal of Civil Rights & Civil Liberties*, 73.

³¹ N Crombie (n 10), 734.

³² E Voeten, ‘Competition and Complementarity between Global and Regional Human Rights Institutions’ (2017) 8 (1) *Global Policy*, 119.

³³ BBC: US Imposes Sanctions on Uganda for Anti-Gay Law <www.bbc.com/news/world-us-canada-27933051> accessed on 11 January, 2019.

³⁴ A Van Klinken, ‘Sexual Orientation (anti-) Discrimination and Human Rights in a “Christian Nation”: The Politicization of Homosexuality in Zambia’ (2017) 9 (1) *Critical African Study*, 18.

³⁵ K Kaoma, *Christianity, Globalisation, and Protective Homophobia: Democratic Contestation of Sexuality in Sub-Saharan Africa* (Cham: Pelgrave Macmillan, 2018) p. 3.

³⁶ *Ibid* p. 9.

³⁷ B B Oludairo & M K Imam-Tamim, ‘Same-Sex Marriage, Civil Marriage and Cohabitation: The Law, The Rights and Responsibilities’ (2018) 9 (1) *Nnamdi Azikiwe University Journal of International Law and Jurisprudence*, 183.

which was setup by the Organisation of Islamic Conference (OIC) has this to say on gay rights: ‘If the tendency to redefine the concept of traditional (heterosexual) marriage is not resisted and fallacies of ‘*sexual orientation*’ are not exposed, there is a real danger that other groups citing genetic (predisposition) claims, would also be encouraged to demand legalising incest, bestiality and other such deviant sexual behaviours...as a matter of human right’.³⁸ Blitt condemned the position of the IPHRC, and asserts that it poses a threat to international human rights law, and call for it to be ‘sanctioned’ and all UN organs should suspend cooperation with it until it ‘fully endorses the protection of gay rights’.³⁹ While the tug-of-war continue on the legalisation of gay rights, it has been pointed out that international law has tremendous influence on the shaping of domestic laws of UN member states. Hence, it is through this channel that gay rights can be exported to African states.⁴⁰ Consequently, the role of the protection of gay rights by the HRC will now be analysed.

3. Functions of the HRC

Article 28 (1) of the ICCPR established the HRC with the sole aim of overseeing the implementation of the provisions of the treaty by its state parties. The committee comprises of 18 members.⁴¹ The membership of the committee is composed of nationals of state parties to the ICCPR whose members are required to possess the following qualities: They must be persons of high moral character; they must be persons with legal experience; and they must have sufficient experience in the field of human rights.⁴² The HRC is tasked with four responsibilities. First, it examines reports submitted by state parties to the ICCPR on the measures they have taken in the implementation of the ICCPR within their territories.⁴³ These reports should outline the successes and challenges states encounter in the course of implementing the ICCPR.⁴⁴ Secondly, the HRC has jurisdiction to receive inter-state complaints of breaches of the ICCPR.⁴⁵ Thirdly, the individual complaints mechanism, where persons allege that any of their rights contained in the ICCPR have been violated by any State party to the First Optional Protocol to the ICCPR (OP1),⁴⁶ which allows an individuals to submit ‘communications’ (complaints) to the HRC against that State party on allege violations of any of their rights contained in the ICCPR.⁴⁷ Finally, the HRC issues general comments, which are commentaries on the scope of rights contained in the ICCPR.⁴⁸ The HRC has, over the years, influenced some states parties into changing their laws or practices so as to conform to the ICCPR.⁴⁹ In discharging its supervisory role, it has been noted by McGoldrick that the failure of the HRC to have an independent fact finding mechanism within the territories of state parties to verify the claims of state parties on the level of their compliance with the provisions of the ICCPR is a setback to the work of the HRC,⁵⁰ Joseph observed that despite this shortcoming of the HRC, the fear of public condemnation arising from the findings of the HRC, spurs states into improving their human rights record, hence there is the need to have an independent and impartial body that can assess the human rights records of states.⁵¹ Consequently, to remedy this defect, the HRC invites Non-Governmental Organisations (NGOs),⁵² who play a

³⁸ OIC-IPHRC Study on Sexual Orientation and Gender Identity in the Light of Islamic Interpretations and International Human Rights Framework (2017) <www.oic-iphrc.org/en/data/docs/studies/46202.pdf> accessed 18 December 2018 para 6.

³⁹ R Blitt, ‘Leveraging Regional Human Rights Mechanisms against Universal Human Rights: The OIC Independent Human Rights Commission Study on Sexual Orientation’ (2018) 60 (1) *William & Mary Law Review Online*, 43.

⁴⁰ J Kalb (n 30) 68.

⁴¹ ICCPR (n 11) article 28 (1).

⁴² *Ibid* article 28 (2).

⁴³ *Ibid* Article 40(1).

⁴⁴ *Ibid* Article 40(2).

⁴⁵ *Ibid* article 41.

⁴⁶ Entry into force in 1976.

⁴⁷ *Ibid* article 1.

⁴⁸ ICCPR (n 11) article 40 (4).

⁴⁹ Joseph S, Schultz J,& Castan M, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2000) p.14.

⁵⁰ McGoldrick D, *The Human Rights Committee: It's Role in the Development of the International Covenant on Civil and Political Rights* (New York: Oxford University Press, 1994) p. 79.

⁵¹ S Joseph (n 3) 67.

⁵² ‘The Relationship of the Human Rights Committee with Non-Governmental Organisations’ 4 June, 2012 UN DOC NO: CCPR/C/104/3.

prominent role in the work of the HRC by also submitting a shadow report to the HRC and engaging the members in discussing the performance of the State party before the review of the report.⁵³ After the review of state parties' reports, they are mandated by the HRC to submit reports on the progress made by state parties on the level of implementation of the concluding observations issued by the HRC at the conclusion of the review.⁵⁴ This adds more pressure to the state parties to improve their human rights records.⁵⁵

Regarding the promotion of gay rights, the Australian communication of *Toonen v Australia*,⁵⁶ is seen as groundbreaking in the protection of the rights of homosexuals by the HRC. In the communication, the author alleged the violations of his rights contained in articles 2, 17, 26 of the ICCPR,⁵⁷ because sections 122 & 123 of the Tasmanian Criminal Code prohibit sexual relations between men in private.⁵⁸ The HRC ruled that acts of consensual homosexuality in private are 'covered by the concept of privacy' and therefore the laws are not in compliance with the ICCPR.⁵⁹ The decision of the HRC in the *Toonen* case was commended by Dondoli, as he asserted that it led to the decriminalisation of gay rights in many states.⁶⁰ However, this decision of the HRC was condemned on the ground that the decision should have been based on article 2 that prohibits discrimination, which would have promoted the equality of homosexuals with every individual, not on right to privacy as provided by article 17 of the ICCPR. It is also argued that an individual cannot exploit his full potential without 'recognising the right to live freely and openly without fear of harm'.⁶¹ Equally, Joseph wondered if the HRC would have reached the same decision if the communication originated from a state party that is hostile to same-sex relations on grounds of cultural and religious practices.⁶² While application for the protection of individual gay rights protection before the HRC are few, it is in its review of state parties reports that it's more evident.

4. South Africa: Haven for Gay Rights?

South Africa is the first State in Africa to legalise same-sex relationships,⁶³ and the second to legalise gay marriages in the world.⁶⁴ Also, protection of gay rights was incorporated in Section 9 (3) of the South African Constitution,⁶⁵ which provides that 'The State may not unfairly discriminate directly or indirectly against anyone on moral grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, *sexual orientation* (emphasis mine), age, disability, religion, conscience, belief, culture, language and birth'. Pursuant to this provision, in the case of *National Coalition for Gay and Lesbian Equality & Anor v Minister of Justice & Ors*,⁶⁶ it was held that the offence of sodomy is 'inconsistent with the Constitution of South Africa, and therefore invalid'.⁶⁷ As pointed earlier, same-sex marriage is legal in South Africa, as the South African Civil Union Act,⁶⁸ made it lawful for the 'voluntary union of any two persons who are both 18 years and older'.⁶⁹ This legislation was made sequel to the ruling of the Constitutional Court of South Africa, which in its judgement in *Ministry of Home Affairs & 1 Or V Marie Fourie &*

⁵³ *Ibid* para 1.

⁵⁴ *Ibid* para 11.

⁵⁵ N Ntlama, 'Monitoring the Implementation of Socio-Economic Rights in South Africa: Some Lessons from the International Community' (2004) 8 *Law Democracy and Development*, 211.

⁵⁶ Communication No: 488/1992.

⁵⁷ *Ibid* para 1.

⁵⁸ *Ibid* para 2.1.

⁵⁹ *Ibid* para 8.2.

⁶⁰ G Dondoli, 'LGBTI Activism Influencing Foreign Legislation' (2015) 16 *Melbourne Journal of International Law*, 2.

⁶¹ M Bordeux, 'Living a Lie: Why "Don't Ask Don't Tell" Presents an Unworkable View of Personhood' (2011) 31 *Boston College Third World Law Journal*, 2.

⁶² S Joseph (n 3) 405.

⁶³ B Thomas, 'South Africa's Gay Revolution: The Development of Gay and Lesbian Rights in South Africa's Constitution and the Lingering Societal Stigma Towards the Country's Homosexuals' (2014) 6 *Elon Law Review*, 472.

⁶⁴ J A Kretz, "'From Killing the Gays" to "Kill the Gay Rights Movement": The Future of Homosexuality Legislation in Africa' (2013) 11 (2) *North-Western Journal of International Human Rights*, 209.

⁶⁵ Act 108 of 1996.

⁶⁶ 1998 (12) BCLR 1517 (Constitutional Court).

⁶⁷ *Ibid* para 106.

⁶⁸ No 17 of 2006.

⁶⁹ *Ibid* section 1.

I Or,⁷⁰ legalised same-sex marriage within the territory of the State.⁷¹ The legalisation of gay rights was opposed by the South African House of Traditional Leaders,⁷² as they made an unsuccessful attempt for the removal of the protection of ‘sexual orientation’ as contained in section 9 (3) of the South African Constitution in its submission to the Parliamentary Constitution Review Committee.⁷³ The opposition of the South African House of Traditional Leaders to gay rights is evidenced by its Eastern Cape Provincial Secretary, who asserts that ‘Gays and lesbians need not fear traditional courts since traditional leaders wanted nothing to do with homosexuality because the latter does not exist. This sexual orientation is uncustomary, un-African, ungodly and non-existent. We apologise if this view makes people misjudge us as not operating within the Constitution. But it should be understood that we are custodians of customs and culture’.⁷⁴ Ntlama condemned the position of the council, as she argues that it goes against the traditional values of *Ubuntu* which ‘encapsulate the collective respect of, for all rights, for all people without distinction’.⁷⁵ She further asserted that traditional leaders by their submission on gay rights are promoting discrimination and violation of gay rights in South Africa.⁷⁶ However, despite the removal of these impediments to gay rights, South Africa is not a safe haven for gays, as they face a high level of ‘harassment, intimidation and violence which is motivated by sexual orientation or gender identity bias’, equally, those who advocate for gay rights are subjected to violence and in some cases killed.⁷⁷ In the case of lesbians, they are subjected to ‘corrective rapes’ in South Africa, where they are raped by men to cure them of their ‘unnatural sexual orientation’ which many members of the communities condone, furthermore, the response of the police to crime against homosexuals is slow and sometimes non-existent.⁷⁸

South Africa ratified the ICCPR on 10 December, 1998⁷⁹ and submitted its initial report to the HRC for review in 2014,⁸⁰ At the initial review of South Africa’s report, the HRC raised the issue of the discrimination homosexuals face in trying to access public health facilities, and failure of its legal system to offer them legal remedies in cases of their rights being violated.⁸¹ The delegation of the State party admitted that homosexuals face discrimination in accessing services they are entitled to, but the government continues to take measures to tackle these problems by, for instance, developing a basic guide and distributing it among its service providers on the rights and responsibilities towards assisting the minority group on the rights they are entitled to.⁸² On the issue of corrective rape of lesbians, it informed the HRC that its rape laws cover the rape of lesbians without any discrimination,⁸³ and also, it had mounted a campaign in its schools to create awareness regarding gay rights, so as to promote tolerance within the society.⁸⁴ The HRC commended the State party on the steps it had taken to ensure the rights of homosexuality are protected,

⁷⁰ CCT 60/04.

⁷¹ *Ibid* para 162 (1).

⁷² Established by Section 2 of National House of Traditional Leaders Act 22 of 2009.

⁷³ Report No 49 of 2012, Submission 5, Fourth Session, Fourth Parliament of the Constitution Review Committee, 26 April, 2012, p.1055.

⁷⁴ L Feni, ‘Traditional Leaders Won’t Touch Gay Cases’ *Daily Dispatch* May 2, 2012, p.4.

⁷⁵ N Ntlama, ‘Reflections on the Rejection of the Right to Sexual Orientation by the Institution of Traditional Leadership: Lessons from South Africa’ (2014) 18 *Law Democracy & Development*, 81.

⁷⁶ *Ibid*.

⁷⁷ B Thomas (n 63) 472.

⁷⁸ R Brown, ‘Corrective Rape in South Africa: A Continuing Plight Despite an International Human Rights Response’ (2012) 18 *Annual Survey of International and Comparative Law*, 46.

⁷⁹ Reporting Status of South Africa <tbineternet.ohchr.org/layouts/TreatyBodyExternal/Countries.aspx?CountryCode=ZAF&Lang=en> assessed 9 March, 2019.

⁸⁰ Initial Report of South Africa (n 14).

⁸¹ Summary of Record of the 3234th Meeting of the HRC Where it Considered the Initial Report of South Africa 7 March, 2016 UN DOC NO: CCPR/C/SR.3234 para 12.

⁸² Summary of Record of the 3235th Meeting of the HRC Where it Considered the Initial Report of South Africa 8 March, 2016 UN DOC NO.: CCPR/C/SR.3235 para 7.

⁸³ Summary of Record of the 3234th Meeting of the HRC Where it Considered the Initial Report of South Africa 7 March, 2016 UN DOC NO.: CCPR/C/SR.3234 para 26.

⁸⁴ *Ibid* para 40.

especially with the creation of a national team to counter the discrimination against gay rights.⁸⁵ But more efforts should be made by the government to ensure the prevention of the discrimination against homosexuality from enjoying the protection offered by the ICCPR.⁸⁶ It is submitted that as long as majority of South Africans do not accept the legitimacy of gay rights, the State will not be able to effectively enforce gay friendly laws within its territory.

5. Cameroon: Homosexuality as a Criminal Offence

Unlike South Africa, in Cameroon same sex relations is a criminal offence, article 347-1 of the Cameroonian Penal Code provides for a 6 months to five-year prison sentence and a fine of 20,000 to 200,000 CFA fine to ‘any person who has sexual relations with a person of the same sex’.⁸⁷ Consequently, persons accused of engaging in same-sex relationships are either prosecuted by the State or even killed by mobs that are not called to account for the killings.⁸⁸ Cameroon became a party to the ICCPR on the 27 June, 1984,⁸⁹ prelude to the examination of Cameroon’s fifth periodic report by the HRC, NGOs submitted shadow reports on the status of gay rights within the territory of the State party. For instance, it was reported that religious leaders, public servants and the press, promote the rejection of gay rights, as it is associated with ‘Satanism’.⁹⁰ Even those who promote gay rights are prosecuted by the authorities, and the State authorities do not register NGOs that seek to defend gay rights.⁹¹ Also, due to the widespread hostility against homosexuals in the State, the authorities sometimes hide behind the persecution of gays in order to divert attention of the public from the State’s economic problems.⁹² The HRC has been consistent in making inquiries from Cameroon on its protection of gay rights. During the review of its fourth periodic report,⁹³ it made enquiries from the delegation of Cameroon on steps taken by the State to legalise gay rights within its territory.⁹⁴ The State party asserts that it was contrary to the ‘customs and values’ of Cameroonian society, hence, its legalisation was not possible at that particular point in time, as there was strong opposition from all strata of the society.⁹⁵ At the end of the review, the HRC enjoined the State party to decriminalise same-sex relations among consenting adults, as refusal to do so, violates the right to privacy and freedom from discrimination.⁹⁶

At the review of Cameroon’s fifth periodic report, inquiries were made on the improvement made on the protection of gay rights by the HRC.⁹⁷ The Cameroonian delegation reaffirmed the State party’s position not to decriminalise gay rights, as it continues to prosecute cases of persons caught engaging in homosexuality.⁹⁸ At the end of the review, the HRC urged the State party to repeal article 347 of the Penal Code that penalises acts of homosexuality, and enact

⁸⁵ Concluding Observations of the Human Rights Committee on South Africa 23 March, 2016 UN DOC NO.: CCPR/C/ZAF/CO/1 para 3 (e).

⁸⁶ *Ibid* para 21.

⁸⁷ Cameroon Penal Code Amendment Ordinance, 1972.

⁸⁸ E Nordberg, ‘Ignoring human rights for homosexuals: Gross violations of international obligations in Cameroon’ (2012) 27 (2) *American University International Law Review*, 441.

⁸⁹ Reporting Status of Cameroon <<http://internet.ohchr.org/layouts/TreatyBodyExternal/Countries.aspx?CountryCode=CMR&Lang=LangEN>> accessed 12 February, 2019.

⁹⁰ Joint Submission by NGOs on the Violations of the Rights of Lesbians, Gays, Bisexual, and Transgender (LGBT) Individuals in Cameroon: Submitted for Consideration by the Human Rights Committee (October, 2017) UN DOC NO: INT/FCSS/CMR/29079 p.5.

⁹¹ Cameroon: Homophobia and Violence against Defenders of the Rights of LGBTI Persons UN DOC NO: INT/CCPR/FCSS/CMR/2771 p. 11.

⁹² *Ibid* p. 9.

⁹³ Summary of Record of the 2725th Meeting of the Human Rights Committee on the review of the 4th Periodic Report of Cameroon on 19 August, 2010, UN DOC NO: CCPR/C/SR.2725.

⁹⁴ *Ibid* para 25.

⁹⁵ *Ibid* para 45.

⁹⁶ Concluding Observations of the Human Rights Committee on Cameroon’s 4th Periodic Report, 29 July, 2010 UN DOC NO: CCPR/C/CMR/CO/4 para 13.

⁹⁷ Summary of Record of the 3426th Meeting of the Human Rights Committee on the review of the 5th Periodic Report of Cameroon on 24 October, 2017, UN DOC NO: CCPR/C/SR.3426 para 18.

⁹⁸ *Ibid* para 33.

laws that guarantee gay rights protection within its territory.⁹⁹ While the HRC's insistence that Cameroon decriminalises gay rights is supported by Norberg, as she is of the opinion that it will bring immediate relief to homosexuals,¹⁰⁰ although, she concedes that there is 'deep rooted' hatred for homosexuality in Cameroon.¹⁰¹ Consequently, it is submitted that the decriminalisation of gay rights in Cameroon will only increase violence against those that practice homosexuality, as it is seen as a deviant behaviour among most Africans.

Status of Gay Rights in Other African State parties to the ICCPR

The HRC as pointed earlier, continue to champion the cause of gay rights. Vera in support of the work of the HRC on gay rights, asserts that there is a consensus on virtually all the provisions of the ICCPR, consequently, the protection they provide should be extended to 'important individual rights' like gay rights.¹⁰² However, looking at African state parties like Sudan and Mauritania; their laws prescribe the death penalty for homosexuals.¹⁰³ It is said that some states resort to criminalisation of same-sex relationships because of the high incidence of violence homosexuals are subjected to by their communities.¹⁰⁴ It is submitted that the campaigns for the criminalisation of same-sex relationships raises the popular ratings of political office holders among the general public because of the large scale disapproval of the practice among the majority of Africans.¹⁰⁵ In Rwanda same-sex relations are not criminalised and therefore they were not discriminated upon according to the State party.¹⁰⁶ The request of the HRC for the State party to enact a law that specifically protects gay rights was declined because it was argued that the provision of the law that protects everyone within its territory is extended to them without exception.¹⁰⁷ Morocco, on its own part, has adopted an official religion,¹⁰⁸ and therefore criminalises same-sex relationships.¹⁰⁹ This law has continuously been applied with the recent conviction of two men for engaging in homosexuality. All efforts by NGOs recently to convince the State party to decriminalise the act in its ongoing review of the Penal Code was rebuffed.¹¹⁰ During its sixth periodic review of its State report, the Moroccan delegation failed to respond to the HRC's request for information on gay rights within its territory.¹¹¹ Namibia, like Morocco, rejected same-sex relations on religious grounds, as it referred to itself as a 'Christian state'.¹¹² It informed the HRC that its efforts to legalise gay relations will be resisted by religious leaders within its territory.¹¹³ However, when members of the HRC paid a working visit to Namibia, the State party was amenable to all the suggestions made by the HRC on how they can improve the protection of ICCPR rights. It was only the issue of the decriminalisation of gay rights that it resisted, and they raised

⁹⁹ Concluding Observations of the Human Rights Committee on Cameroon's 5th Periodic Report, 6 November, 2017 UN DOC NO: CCPR/C/CMR/CO/5 para 14.

¹⁰⁰ E Nordberg (n 88) 467.

¹⁰¹ *Ibid* 469.

¹⁰² Vera Shikelman, 'Geopolitics and Culture in the United Nations Human Rights Committee' (2015) *ssrn* < <http://ssrn.com/abstract=2616026> > accessed 3 August, 2015.

¹⁰³ J A Kretz (n 64) 210.

¹⁰⁴ T A Adebajo, 'Culture, Morality and the Law: Nigeria's Anti-Gay Law in Perspective' (2015) 15 (4) *International Journal of Discrimination and the Law*, 264.

¹⁰⁵ J A Kretz (n 64) 244.

¹⁰⁶ Summary of Record of the 3250th Meeting of the HRC where it Considered the 4th Periodic Report of Rwanda Submitted under article 40 ICCPR on 17 March, 2016 UN DOC NO.: CCPR/C/SR. 3250 para 36.

¹⁰⁷ Summary of Record of the 2603rd Meeting of the HRC Where it considered the 3rd Periodic Report of Rwanda Submitted under article 40 ICCPR on 18 March, 2009 (Continued) UN DOC NO.: CCPR/C/SR. 2603 para 34.

¹⁰⁸ Morocco: Situation of LGBT Persons (2017) <https://www.nyidanmark.dk/NR/rdonlyres/90FC4C64-BAB6-403B-8CC4-DAE8F94A5B70/0/Marokko_LGBT_FFMrapport06032017.pdf> accessed 20 September, 2017.

¹⁰⁹ Article 489 Morocco Penal Code 1962 provides that 'any person who commits lewd acts or acts against the nature together with an individual of the same sex is liable to a penalty of imprisonment ranging from six months to three years and a fine ranging from 200 to 1,000 Moroccan dirhams'.

¹¹⁰ 'Morocco: 2 jailed for homosexuality, Parliament should decriminalise same-sex acts' 28 July, 2016 <<https://www.hrw.org/news/2016/07/28/morocco-2-jailed-homosexuality>> accessed 22 September, 2017.

¹¹¹ Summary of Record of the 3319th Meeting of the HRC Where it Considered the 6th Periodic Report of Morocco Submitted under article 40 ICCPR on 24 October 2016 UN DOC NO.: CCPR/C/SR 3319 para 7.

¹¹² Summary of Record of the 2201th Meeting of the HRC Where it Considered the Initial Report of Namibia (Continued) Submitted under article 40 ICCPR on 14 July, 2004 UN DOC NO.: CCPR/C/SR. 2201 para 75.

¹¹³ Summary of Record of the 3237th Meeting of the HRC Where it Considered the Second Periodic Report of Namibia (Continued) Submitted under article 40 ICCPR on 9 March, 2016 UN DOC NO.: CCPR/C/SR.3237 para 31.

the issue of cultural, religious and traditional values of the State party as prohibiting the recognition of gay rights in its laws.¹¹⁴ Nigeria has not made its position on gay rights known to the HRC because its report has been overdue for the past 18 years, and despite various requests by the HRC to submit same for consideration, it has refused to do so.¹¹⁵ The opponents of same-sex relations assert that the ICCPR's protection cannot be extended to same-sex relationships, as it is not included in the treaty nor any other treaty at the UN level,¹¹⁶ while its advocates are of the view that article 23 (2) ICCPR should be interpreted widely so that it incorporates same-sex relations.¹¹⁷ The HRC has not determined any communication that originated from African state parties concerning gay rights.¹¹⁸ As pointed earlier, western states and the UN continue to pressure African states to legitimise gay rights, to the point of threatening to deny financial grants if they fail to do so.¹¹⁹ However, Ojilare is of the opinion that the threat to deny African states financial aid will not result in the decriminalisation of gay rights, he suggests that states should be encouraged to carry out referendum on the issue of gay rights among their citizens to finally put the matter to bed.¹²⁰ Crombie is also of the view that the HRC needs to be cautious in promoting gay rights, so that it is not viewed as trying to impose western values on non-western states, which may lead to its reputation as one of the most vibrant charter bodies being eroded.¹²¹

7. Conclusion

There is a high rate of violence and hostility against homosexuality in all African states (including South Africa that has legalised same-sex relationships). The threat by western states to cut financial aid to African states if they refuse to legalise gay rights has not been successful. The HRC on its part continue to encourage state parties to promote gay rights. It is also credited with issuing a ruling in the *Toonen's* case, which has led to some states decriminalise homosexuality. However, its efforts to convince African states to decriminalise homosexuality have largely been unsuccessful. It is also submitted that it is uncertain if the recommendation of the HRC for the introduction of special laws to protect gay rights will provide homosexuals with more protection, as they may not be enforced due to the lack of acceptance by both the majority of citizens and the enforcement agencies. Also, at the UN level, as a result of the lack of consensus on gay rights, caution is exercised in introducing new agreements that protect gay rights so that it does not lead to 'splintering of human rights into groups and sub-groups',¹²² due to fierce resistance from anti-gay rights states, which majority of African states belong to. HRC has also been cautioned not to promote same-sex relationships without the acceptance of the majority of ICCPR state parties, because it could lead to it losing credibility as non-western state parties might view it as trying to impose western values on them.¹²³ The continuous 'push' for gay rights protection is counter-productive to international human rights, as extending the scope to cover homosexuality on a global scale, is opposed by most African states. The HRC should focus more on encouraging state parties to uphold their obligations to the treaty, by better implementation of the provisions of the ICCPR, which their application to all individuals in the territories of state parties will improve human rights protection generally. The aggressive promotion of gay rights will only increase hostility towards those that practice it, and encourage the violations of their ICCPR rights.

¹¹⁴ 'Follow-Up Visit to Namibia' <ccprcentre.org/ccprpages/un-human-rights-committee-members-visit-namibia> accessed 11 January, 2017.

¹¹⁵ Report of the United Nations Human Rights Committee (2018) p.7.

¹¹⁶ G Dondoli (n 60) 8.

¹¹⁷ O Roos & A Mackay 'The Evolutionary Interpretation of Treaties and the Right to Marry: Why Article 23 (2) of ICCPR Should be Reinterpreted to Encompass Same Sex Marriage' (2016) *Deakin Law School Legal Studies Research*, 1.

¹¹⁸ S Joseph (n 3) 405.

¹¹⁹ E Voeten (n 32) 119.

¹²⁰ A Ojilare, 'The Diplomacy of Homo-Capitalism against Africa: Same-Sex Marriage and the West's Promotion of Homosexuality' (2018) 22 (1) *World Affairs*, 159.

¹²¹ N Crombie (n 10) 734.

¹²² D McGoldrick, 'The Development and Status of Sexual Orientation Discrimination under International Law' (2016) 16 *Human Rights Law Review*, 621.

¹²³ N Crombie (n 10) 734.