



## MEMORANDUM

**To:** Nancy Nicol, Principle Investigator, York University, Envisioning Global LGBT Human Rights (funded by the Social Science and Humanities Research Council of Canada)\*  
**From:** Atrisha Lewis (3L) & Zahra Ahmed (LL.M.), International Human Rights Clinic  
**Date:** January 13<sup>th</sup>, 2012  
**Re:** Botswana's Interactions with the UN System on the Issue of LGBT Rights

This document was prepared by law students and highlights publicly-accessible information available at the time it was prepared. It is not exhaustive, nor is it updated on a regular basis. The information provided here is not a substitute for legal advice or legal assistance, and the International Human Rights program at the University of Toronto, Faculty of Law cannot provide such advice or assistance.

### Overview of the UN System

There are two major human rights systems at the United Nations (the "UN"): the Treaty based system and the Charter based system.

The treaty-based human rights system consists of nine treaty bodies that monitor state compliance with the obligations under their respective conventions. Each treaty body is comprised of a committee of independent experts that interpret and apply the convention in reviewing and commenting on periodic state reports and individual complaints. The treaty bodies are not judicial institutions and there is debate as to the nature of the body of law that the treaty bodies produce.<sup>1</sup> Regardless of whether these normative findings are actually law, they have legal significance as they are referenced in international and domestic decisions.<sup>2</sup>

The Charter based human rights system derives its authority from the UN Charter itself. The UN Human Rights Council, the successor to the Human Rights Commission, is the main organ in this Charter based system. The mandate of the Human Rights Council is to make recommendations on situations of human rights violation, while being guided by principles of "universality, impartiality, objectivity, and non-selectivity."<sup>3</sup> This intergovernmental body, which meets in Geneva 10 weeks a year, is composed of 47 elected United Nations Member States who serve for an initial period of 3 years, and cannot be elected for more than two consecutive terms. The Human Rights Council oversees the Universal Periodic Review (UPR), which is a process that involves a review of the human rights records of all 193 UN Member States once every four years.

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<sup>1</sup> Burgenthal, *The Evolving International Human Rights System* 100 A.J.I.L. 788, 787-791

<sup>2</sup> *Ibid*

<sup>3</sup> G.A. Res. 60/251 (March 15, 2006)



While not a human rights system, the General Assembly also deals with human rights issues through its broad mandate. Established in 1945 under the Charter of the United Nations, the General Assembly is the chief deliberative, policymaking and representative organ of the United Nations. Comprising all 193 Members of the United Nations, it provides a unique forum for multilateral discussion of the full spectrum of international issues covered by the Charter.

## **BOTSWANA**

### 1. Summary

This is a summary of Botswana's interaction with UN mechanisms on Sexual Orientation and Gender Identity ("SOGI") issues.

- While there is no specific law that explicitly criminalizes homosexuality. "Unnatural Acts" are criminalized and same-sex consensual sex would fall under this heading. <sup>4</sup>
- Botswana's constitution prohibits governmental discrimination on basis on the basis of ethnicity, race, nationality, creed, sex, or social status. Section 3 provides constitutional protection of the fundamental rights and freedoms of every individual in Botswana, and section 15 provides "no law shall make any provision that is discriminatory either of itself or in its effect". In 2003, the Court of Appeal considered the constitutionality of the provisions of the criminal code that criminalize same-sex consensual sex. The Court determined that the provisions survive the challenge and held that gay men and women do not represent a group or class, which at this stage has been shown to require protection under the Constitution. (see section 6 below for details)
- There are no laws that prohibit discrimination by private persons or entities, and there is societal discrimination against women; persons with disabilities; minority ethnic groups, particularly the San; persons with HIV/AIDS; persons with albinism; and gays and lesbians.<sup>5</sup>
- Botswana has signed and ratified human rights treaties relevant to SOGI issues. See chart below.
- Botswana has submitted reports to the treaty-based bodies. Botswana has been late in reporting.
- UN bodies, such as the *Committee on the Elimination of Discrimination against Women* and the *Universal Periodic Review Committee* have expressed grave concerns about the status of LGBTI people and LGBTI activists in Botswana.
- Botswana does not support SOGI issues at the United Nations. It has voted against SOGI issues. Botswana is not vocal in the UN meetings respecting SOGI issues.
- On a positive note, in September 2010, Botswana passed an amendment to its Employment

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<sup>4</sup> Section 167 of the Penal Code. Pre-1998 amendment section 164(c).

<sup>5</sup> US Department of State Country Report of Botswana 2010  
<http://www.unhcr.org/refworld/topic.4565c22547,4565c25f569,4da56de2c.0...BWA.html>



Act that makes the dismissal of an employee on the basis of sexual orientation or HIV status illegal.

2. Treaty/ Convention Status

International Conventions are subject to ratification, acceptance or accession by States. They define rules with which the States undertake to comply.

The following chart highlights the international conventions that protect sexual orientation and gender identity rights through affirming international human rights principles such as the right to equality.

Botswana has ratified all relevant treaties except the International Covenant on Economic, Social and Cultural Rights. The chart highlights when Botswana has ratified these conventions.

<b>Treaty</b>	<b>Date of Signature</b>	<b>Date of Accession(a), Succession(s), Ratification</b>
International Convention on the Elimination of all forms of Racial Discrimination (“CERD”)		20 Feb. 1974 (a)
Article 14 of CERD		Competence of committee not accepted.
International Covenant on Civil and Political Rights (“ICCPR”)	8 Sept. 2000	8 Sept. 2000
First Optional Protocol to the ICCPR <sup>6</sup>	--	--
International Covenant on Economic, Social and Cultural Rights (“ICESCR”)	--	--
Convention on the Elimination of all forms of Discrimination Against Women (“CEDAW”)		13 Aug. 1996(a)
Optional Protocol to CEDAW <sup>7</sup>		21 Feb. 2007 (a)
Convention against Torture (“CAT”) with reservation as follows:  “The Government of the Republic of Botswana considers itself bound by Article 1 of the Convention to the extent that ‘torture’ means the torture and inhuman or degrading punishment or other treatment prohibited by	8 Sept. 2000	8 Sept. 2000

<sup>6</sup> Authorizes the Human Rights Committee to hear complaints by private persons alleging violations of their rights under the ICCPR

<sup>7</sup> Authorizes the CEDAW Committee to receive complaints from individuals alleging violations of their rights under CEDAW



Section 7 of the Constitution of the Republic of Botswana.”		
Article 22 of CAT		Competence of CAT Committee has not been accepted.
Convention on the Rights of the Child (“CRC”)		14 March 1995 (a)

In accordance with the various treaties, Botswana has an obligation to report its compliance with the treaties. The tables below set out the status of Botswana’s reporting.

#### Reporting to Human Rights Council under Universal Periodic Review

	Date of Report	Next reporting date
Universal Periodic Review <sup>8</sup>	2008 <sup>9</sup>	2013

#### Reporting to Treaty-based bodies

Treaty-based bodies	Date of Review	Comments
Human Rights Committee (CCPR)	2008	Initial periodic review
Committee on the Elimination of Racial Discrimination (“CERD”)	2006	
Committee on Economic, Social and Cultural Rights (“ICESCR”)		Botswana has not ratified so there is no obligation to report.
Committee on the Elimination of all forms of Discrimination Against Women (“CEDAW”)	2010	Combined initial, second and third periodic reports
Committee against Torture (“CAT”) with reservation as follows:  “The Government of the Republic of Botswana considers itself bound by Article 1 of the Convention to the extent that ‘torture’ means the torture and inhuman or degrading punishment or other treatment prohibited by Section 7 of the Constitution of the Republic of Botswana.”	Botswana has not provided a report for review	
Committee on the Rights of the Child (“CRC”)	2004	

<sup>8</sup> Info re Universal Periodic Review, including calendar.

<http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx>

<sup>9</sup> Complete documents relating to Botswana’s Universal Period Review at

<http://www.ohchr.org/EN/HRBodies/UPR/PAGES/BWSession3.aspx>



3. All Official State Positions on LGBT Rights as Reflected in Voting Patterns

**Human Rights Council**

The Human Rights Council is an inter-governmental body within the UN system made up of 47 States responsible for strengthening the promotion and protection of human rights around the globe. The Council was created by the UN General Assembly on 15 March 2006 with the main purpose of addressing situations of human rights violations and make recommendations on them.

Botswana has never been a member of the Human Rights Council.

Year	Resolution	Vote
2011	<p><b>Resolution 17/19 Human rights, sexual orientation and gender identity<sup>10</sup></b></p> <p>The resolution requested that the UN High Commissioner on Human Rights conduct a study on SOGI Human Rights violations in all regions of the world, convene a panel to discuss the results, and remain seized of the issue.</p> <p>Resolution adopted 23 to 19 with 3 abstentions, at the Human Rights Council on June 17, 2011</p>	Botswana was a not a member at the time.

**General Assembly Resolutions**

The votes on the draft resolutions relating to the *Special Rapporteur on Extra-judicial executions* are tracked in the following chart. The resolution relates to whether the scope of investigation should specifically include investigating extra-judicial killings on the basis of sexual orientation. The chart tracks draft resolutions because this is where the clear statements and votes relating to include or remove the explicit reference to “sexual orientation” actually occur. The final resolutions are typically passed without any discussion relating to the inclusion or removal of the words “sexual orientation.”

Final Resolution	Draft Resolution	Vote

<sup>10</sup> A/HRC/RES/17/19



57/214	2002 Draft Resolution <sup>11</sup> at Third Committee	
	New reference to "sexual orientation"	Abstain
59/197	2004 Draft resolution <sup>12</sup>	
	Retain words "sexual orientation"	Against
63/182	2009 Amendment <sup>13</sup> to Draft Resolution <sup>14</sup> at Third Committee	
	Remove words "sexual orientation"	In favour
	Vote to Adopt Draft Resolution with words "sexual orientation" in it.	In favour
65/208	2010 Amendment <sup>15</sup> to Draft Resolution <sup>16</sup> at Third Committee	
	Remove words "sexual orientation"	In Favour
	2010 Amendment <sup>17</sup> to Draft Resolution <sup>18</sup> at Plenary	
	Re-include "sexual orientation"	Against

### Other Statements

Over the years, countries have made joint statements at the Commission on Human Rights (predecessor of the Human Rights Council), the Human Rights Council and the UN General Assembly on sexual orientation and human rights seeking recognition of sexual orientation as a

<sup>11</sup> A/C.3/57/L.56/Rev.1

<sup>12</sup> A/C.3/59/L.57/Rev.1

<sup>13</sup> A/C.3/63/L.75

<sup>14</sup> A/C.3/63/L.35/Rev.1

<sup>15</sup> A/C.3/65/L.65

<sup>16</sup> A/C.3/L.29/Rev.1

<sup>17</sup> A/65/L.53

<sup>18</sup> A/C.3/L.29/Rev.1



fundamental aspect of an individual and as recognition of discrimination on the basis of sexual orientation.

<b>JOINT STATEMENTS RE SEXUAL ORIENTATION AND HUMAN RIGHTS</b>	
	Botswana
<p>March 2011 Joint Statement at Human Rights Council by 85 countries<sup>19</sup> which stated:            We call on States to take steps to end acts of violence, criminal sanctions and related human rights violations committed against individuals because of their sexual orientation or gender identity, encourage Special Procedures, treaty bodies and other stakeholders to continue to integrate these issues within their relevant mandates, and urge the Council to address these important human rights issues.</p>	Did not support
<p>Dec 2008 Joint Statement at UN General Assembly by 66 countries<sup>20</sup> in which the States called upon States and international human rights mechanisms to “commit to promote and protect human rights of all persons, regardless of sexual orientation and gender identity”.</p>	Did not support
<p>Dec 2006 Joint Statement at Human Rights Council by 54 countries<sup>21</sup> in which the countries stated:             We express deep concern at these ongoing human rights violations. The principles of universality and non-discrimination require that these issues be addressed. We therefore urge the Human Rights Council to pay due attention to human rights violations based on sexual orientation and gender identity, and request the President of the Council to provide an opportunity, at an appropriate future session of the Council, for a discussion of these important human rights issues.</p>	Did not support
<p>March 2005 Joint Statement at Commission on Human Rights by 32 countries<sup>22</sup> calling for the recognition of “Sexual orientation is a</p>	Did not support

<sup>19</sup> For the complete text of the Joint Statement go to <http://arc-international.net/global-advocacy/human-rights-council/hrc16/joint-statement>

<sup>20</sup> For the complete text of the Joint Statement go to <http://arc-international.net/global-advocacy/sogi-statements/2008-joint-statement>

<sup>21</sup> For the complete text of the Joint Statement go to <http://arc-international.net/global-advocacy/sogi-statements/2006-joint-statement>

<sup>22</sup> For the complete text of the Joint Statement go to <http://arc-international.net/global-advocacy/sogi-statements/2005-joint-statement>





fundamental aspect of every individual’s identity and an immutable part of self.”	
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4. All UN Statements on the situation of LGBT rights in Botswana

**Universal Periodic Review**

The Universal Periodic Review (UPR) is a unique state-driven process conducted under the auspices of the Human Rights Council, which involves a review of the human rights records of all 192 UN Member States once every four years. The Universal Periodic Review process began in 2006 and the first round will be completed by 2011. The documents on which the reviews are based are: 1) information provided by the State under review, which can take the form of a “national report”; 2) information contained in the reports of independent human rights experts and groups, known as the Special Procedures, human rights treaty bodies, and other UN entities; 3) information from other stakeholders including non-governmental organizations and national human rights institutions. Following the State review, a report referred to as the “outcome report” is produced. This report consists of the questions, comments and recommendations made by States to the country under review, as well as the responses by the reviewed State.

Year	National Report/Comments by Botswana during the review process	Outcome of the Review	Response by Botswana to Recommendations
2008	There was no reference to LGBT rights in the national report.  However, during the review process, delegates made comments that	<b>Recommendations/Conclusions<sup>24</sup></b>  18. Adopt the measures necessary to combat discrimination of all kinds, including those based on sexual orientation, gender, colour, religion and political opinion (France); amend the definition of discrimination in the Constitution in such a way that it covers discrimination based on descent and abolish those laws that permit discrimination on the basis of ethnicity, language and culture (Germany); review the definition of discrimination provided under the section III of the Constitution in terms of	Response as noted in Addendum 1 to the Report. <sup>25</sup>  18. Botswana does not accept the recommendations. The laws of Botswana do not allow same sex sexual activity. Section 15 of the Constitution of Botswana is comprehensive in effectively addressing

<sup>24</sup> Report of the Working Group on the Universal Review Process - UN Doc. A/HRC/10/69

<sup>25</sup> A/HRC/10/69/Add.1





	<p>were noted in the Report of the Working Group on the Universal Periodic Review.<sup>23</sup></p> <p>9. The Minister indicated that Botswana is committed to the democratic process and that it is responsive to the needs of the people and it cannot undertake initiatives that are contrary to their interests. However, he emphasized that civil society organizations are free to mobilize support and educate the people on the need for specific changes, which in its view can enhance the enjoyment of human rights. It was against this background that</p>	<p>its compatibility with the prohibition against discrimination against descent and national or ethnic origin (Canada); and abolish discrimination on the basis of ethnicity, language and culture, including de jure discrimination (Denmark);...</p> <hr/> <p>23. Decriminalize homosexual relations and practices/consensual same-sex activities between adults (Spain, Netherlands, Slovakia, Czech Republic, Canada); and outlaw discrimination on the basis of sexual orientation (Netherlands);</p> <hr/> <p>24. With regard to consensual same-sex activity between adults, adopt measures to promote tolerance and allow effective educational programmes on HIV/AIDS prevention (Czech Republic); with the support of the international community continue to fight HIV/AIDS (Bangladesh);</p>	<p>all issues relating to discrimination. The Government has no plans to amend the Constitution in line with these recommendations.</p> <hr/> <p>Botswana does not accept the recommendations. The law does not allow same sex sexual activity, a position that reflects the moral and religious norms of Botswana society.</p> <hr/> <p>Botswana does not accept the recommendation. Educational programmes and awareness campaigns on HIV/AIDS target all adults.</p>
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<sup>23</sup> Report of the Working Group on the Universal Review Process - A/HRC/10/69



	<p>the position of the Government on the death penalty, corporal punishment, gay and lesbian rights should be understood.</p> <p>19. The delegation confirmed that the law in Botswana criminalizes same-sex sexual activities; however, it allows for the registration of civil society organizations that are not set up to advocate for the rights of lesbians, gays, and bisexuals, to nonetheless advocate for the rights of such groups.</p>		
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**Human Rights Committee**

The Human Rights Committee, composed of 18 independent experts, monitors the International Covenant on Civil, and Political Rights.

In its 2008 review of Botswana, the Committee addressed the criminalization of same-sex activities in Botswana in its Concluding Observations.



Year	Report	Concluding Observations
2008	Initial Report	<p>C. Principle Areas of Concern and Recommendations</p> <p>22. The Committee notes with concern that the State party criminalizes same-sex sexual activities between consenting adults (arts 17 and 26).</p> <p>The State party should repeal these provisions of its criminal law.<sup>26</sup></p>

### Committee on the Elimination of Discrimination against Women

The Committee on the Elimination of Discrimination against Women, composed of 23 independent experts, monitors the Convention on the Elimination of All Forms of Discrimination Against Women.

In 2010, the Committee reviewed Botswana’s compliance with CEDAW and no comment was made respecting LGBT issues.

### Report of UN High Commissioner on Human Rights

In December 2011, the UN High Commission on Human Rights submitted a report to the Human Rights Council pursuant to its resolution 17/19, in which the Council requested the United Nations High Commissioner for Human Rights to commission a study documenting discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, and how international human rights law can be used to end violence and related human rights violations based on sexual orientation and gender identity.

There is no reference to Botswana in the report.

#### 5. Individual Complaints

The Human Rights Committee and five of the human rights treaty bodies (CCPR, CERD, CAT, CEDAW, and CRPD) may, if a State accepts the Committees jurisdiction, consider individual complaints or communications from individuals.

Botswana has accepted the competence of the Human Rights Committee and CEDAW Committee to consider complaints from individuals from Botswana.<sup>27</sup> There have been no individual complaints that have been presented to Human Rights Committee or the CEDAW

<sup>26</sup> CCPR/C/BWA/CO/1

<sup>27</sup> See Optional Protocol 1 to the ICCPR



Committee relating to Botswana. Botswana has not accepted the competence of any other body to consider individual complaints.

Communications and urgent appeals can be sent to Special Rapporteurs and other experts established by the Human Rights Committee. There have been no references made by the Special Rapporteurs of LGBT persons in Botswana.

## 6. Domestic Court Decisions

### *Kanane v. The State*<sup>28</sup>

In July 2003, the Court of Appeal in Botswana considered the constitutionality of section 164(c) and 167 of the Penal Code. Pre-1998 Section 164 (Offence of having carnal knowledge of another “against the order of nature”, and individuals permitting a male to have “carnal knowledge” of him or her “against the order of nature”). Post-1998 Section 164 (Offence of having carnal knowledge of another “against the order of nature”, and individuals permitting any other person to have “carnal knowledge” of him or her “against the order of nature”).

Utjiwa Kanane was charged with committing an unnatural offence, contrary to section 164(c) of the Penal Code, and committing indecent practices between males, contrary to section 167. The incident involved Graham Norrie, a British tourist, and occurred in December 1994. (Norrie pleaded guilty, paid a fine, and left the country.) Kanane pleaded not guilty, alleging that sections 164(c) and 167 both violated the Constitution. The High Court ruled that these sections of the Penal Code did not violate the Constitution. Kanane then appealed to the Court of Appeal.

The issue before the Court of Appeal was whether sexual acts between consenting adult men in private violated the Constitution.

The Constitution of Botswana provides at Sections 3 (constitutional protection of the fundamental rights and freedoms of every individual in Botswana), and 15 (“no law shall make any provision that is discriminatory either of itself or in it

The Court of Appeal held, that Section 167, prior to amendment, was: “clearly discriminatory on the basis of gender” because it “was aimed entirely at male persons ... No such bar to similar activities existed for females.” However, any need to strike down Section 167 ended when it was amended to be gender neutral in 1998.

Counsel for Kanane argued that Section 164 discriminated against gay men both pre-amendment and post-amendment. The Court considered this argument at length, quoting from South African cases, the dissent in *Bowers v. Hardwick*, *Lawrence v. Texas*, and the Wolfenden

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<sup>28</sup> 2003(2) BLR 64 (CA).



Committee Report. The Court observed that sodomy had been decriminalised in member States of the Council of Europe, as well as in Australia, New Zealand, Canada, and the United States.

The issue, as framed by the Court, was whether discrimination on the basis of sexual orientation should be prohibited by the Constitution. According to the Court, the answer lay in part in whether the circumstances in Botswana “demand the decriminalization of homosexual practices”. The Court noted: “No evidence was put before the court a quo nor before this court that public opinion in Botswana has so changed and developed that society in this country demands such decriminalization”. The Court cited the Zimbabwean case *Banana v. State*. “As to Gubbay CJ’s views on public opinion I am of the view that while courts can perhaps not be dictated to by public opinion, the courts would be loath to fly in the face of public opinion, especially if expressed through legislation passed by those elected by the public to represent them in the legislature... The public interest must therefore always be a factor in the court’s consideration of legislation particularly where such legislation reflects a public concern.”

The fact that the laws in question had been amended as recently as 1998 indicated that societal attitudes had not changed. “The legislature, in passing the 1998 Amendment Act, clearly considered its provisions and, as with the effect of the rest of the act, broadened them... I conclude therefore that so far from moving towards the liberalisation of sexual conduct by regarding homosexual practices as acceptable conduct, such indications as there are show a hardening of contrary attitude.”

The Court held: “Gay men and women do not represent a group or class which at this stage has been shown to require protection under the Constitution.” Therefore Section 164 survived the constitutional challenge.