



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 13th, 2012
Re: **Kenya'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.¹ Regardless of whether these normative findings are actually law, they have legal significance as they are referenced in international and domestic decisions.²

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."³ 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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¹ Burgenthal, *The Evolving International Human Rights System* 100 A.J.I.L. 788, 787-791

² *Ibid*

³ 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.

KENYA

1. Summary

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

- Kenya has a relatively new constitution that includes an expansive definition of discrimination but it does not include any reference to sexual orientation.
- Kenya has signed and ratified key human rights treaties. See chart below.
- Kenya has not accepted the jurisdiction of any of the Committees to hear individual complaints.
- Kenya has submitted reports to the treaty-based bodies. Kenya has been late in reporting and there are currently a number of reports that are overdue.
- Kenya does not support SOGI issues at the United Nations. Kenya will either oppose SOGI positive issues or abstain.
- The Human Rights Council and the Human Rights Committee have expressed concern regarding the continued criminalization of homosexual consensual adult sex and the discrimination of LGBTI persons in Kenya.

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.

Kenya has ratified all relevant treaties. The chart highlights when Kenya has ratified these conventions.



Convention	Date of Signature	Date of Accession(a), Succession(s), Ratification
International Convention on the Elimination of all forms of Racial Discrimination ("CERD")		13 Sept. 2001 (a)
Article 14 of CERD		--
International Covenant on Civil and Political Rights ("ICCPR")		1 May 1972 (a)
First Optional Protocol to the ICCPR ⁴		--
International Covenant on Economic, Social and Cultural Rights ("ICESCR") with reservation Art. 10(2) ³		1 May 1972 (a)
Convention on the Elimination of all forms of Discrimination Against Women ("CEDAW")		9 Mar 1984 (a)
Optional Protocol to CEDAW ⁵		--
Convention against Torture ("CAT")		21 Feb. 1997 (a)
Article 22 of CAT		--
Convention on the Rights of the Child ("CRC")	26 Jan. 1990	30 July 1990

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

Reporting to Human Rights Council under Universal Periodic Review

	Date of Report	Next reporting date
Universal Periodic Review ⁶	2010	2015

Reporting to Treaty-based bodies

Treaty-based bodies	Date of Review	Comments
Human Rights Committee (CCPR)	2005	Third report has been overdue since 2008. Next review 2012
Committee on the Elimination of Racial Discrimination ("CERD")	2011	Initial report, second and third report that

⁴ Authorizes the Human Rights Committee to hear complaints by private persons alleging violations of their rights under the ICCPR

⁵ Authorizes the CEDAW Committee to receive complaints from individuals alleging violations of their rights under CEDAW

⁶ Info re Universal Periodic Review, including calendar.
<http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx>



		had been overdue since 2002, 2004 and 2006 respectively
Committee on Economic, Social and Cultural Rights (“ICESCR”)	2008	Second to fifth reports due June 2013
Committee on the Elimination of all forms of Discrimination Against Women (“CEDAW”)	2011, 2007, 2003	
Committee against Torture (“CAT”)	2008	Second report due Nov. 2012
Committee on the Rights of the Child (“CRC”)	2007, 2001	Third, fourth and fifth report due Sept. 2012

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.

Kenya has not yet been a member of the Human Rights Council.

Year	Resolution	Vote
2011	<p>Resolution 17/19 Human rights, sexual orientation and gender identity⁷</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>	Kenya was not a member at the time of the vote.

Prior to the June 2011 resolution, in 2003, Brazil put forward a resolution pertaining to human rights and sexual orientation at the Human Rights Committee. There was no vote on the actual resolution instead the debate was postponed. In 2008, the debate respecting the resolution was further postponed.

⁷ A/HRC/RES/17/19



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
57/214	2002 Draft Resolution ⁸ at Third Committee	
	New reference to "sexual orientation"	Against
59/197	2004 Draft resolution ⁹	
	Retain words "sexual orientation"	Against
63/182	2009 Amendment ¹⁰ to Draft Resolution ¹¹ at Third Committee	
	Remove words "sexual orientation"	Abstain
	Vote to Adopt Draft Resolution with sexual orientation in it.	Against
65/208	2010 Amendment ¹² to Draft Resolution ¹³ at Third Committee	
	Remove words "sexual orientation"	In Favour
	2010 Amendment ¹⁴ to Draft Resolution ¹⁵ at Plenary	
	Re-include "sexual orientation"	Abstain

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

⁸ A/C.3/57/L.56/Rev.1

⁹ A/C.3/59/L.57/Rev.1

¹⁰ A/C.3/63/L.75

¹¹ A/C.3/63/L.35/Rev.1

¹² A/C.3/65/L.65

¹³ A/C.3/L.29/Rev.1

¹⁴ A/65/L.53

¹⁵ A/C.3/L.29/Rev.1



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

JOINT STATEMENTS RE SEXUAL ORIENTATION AND HUMAN RIGHTS	
	Kenya
<p>March 2011 Joint Statement at Human Rights Council by 85 countries¹⁶ which stated:</p> <p>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 countries¹⁷ 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 countries¹⁸ in which the countries stated:</p> <p>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 countries¹⁹ calling for the recognition of “Sexual orientation is a</p>	Did not support

¹⁶ For the complete text of the Joint Statement go to <http://arc-international.net/global-advocacy/human-rights-council/hrc16/joint-statement>

¹⁷ For the complete text of the Joint Statement go to <http://arc-international.net/global-advocacy/sogi-statements/2008-joint-statement>

¹⁸ For the complete text of the Joint Statement go to <http://arc-international.net/global-advocacy/sogi-statements/2006-joint-statement>

¹⁹ 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 Kenya

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 during the review process	Outcome of the Review
2010	<p>The National Report of Kenya submitted to the Committee did not include any information respecting the treatment of LGBT persons in Kenya.</p> <p>Advance questions were sent prior to the review relating to the criminalization of same-sex activities between consenting adults and discrimination on the basis of sexual orientation and gender identity.²⁰</p>	<p>The members of the Committee’s made recommendations relating to LGBT persons but Kenya did not support these recommendations:²¹</p> <p>103. The recommendations below did not enjoy the support of Kenya: ... 103.5. Take concrete steps to provide for the protection and equal treatment of lesbian, gay, bisexual and transgender persons (Netherlands); decriminalize same-sex activity between consenting adults (Czech Republic); repeal all legislative provisions which criminalize sexual activity between consenting adults (United States of</p>

²⁰ Advance Questions To Kenya and Advance Questions to Kenya Addendum 2. Follow links at <http://www.ohchr.org/EN/HRBodies/UPR/Pages/KESession8.aspx>

²¹ Report of the Working Group on the Universal Periodic Review Kenya. UN Doc. A/HRC/15/8



		<p>America); decriminalize homosexuality by abrogating the legal provisions currently punishing sexual relations between consenting individuals of the same sex, and subscribe to the December 2008 General Assembly Declaration on sexual orientation and human rights (France);</p> <p>...</p> <p>108. With regard to recommendations in paragraph 103.5 above, Kenya indicated that same-sex unions were culturally unacceptable in Kenya.</p>
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Human Rights Committee

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

In its 2005 review of Kenya, the Committee addressed the criminalization of same-sex activities in Kenya in its Concluding Observations.

Year	Report	Concluding Observations	Response of State
2005	<p>In the National Report submitted to the Committee, Kenya stated:²²</p> <p>182. Marriage has not been defined in our Statutes. However in Kenyan society, marriage is considered to be a union between a man and a woman. Homosexuality is considered unnatural act punishable under the penal code. Section 162 of the Penal Code provides that any person who has carnal knowledge of any</p>	<p>The Committee in its concluding observations stated:²³</p> <p>27. The Committee notes with concern that section 162 of the Penal Code continues to criminalize homosexuality (articles 17 and 26 of the Covenant).</p> <p>The State party is urged to repeal section 162 of the Penal Code.</p>	<p>In 2011, in its third periodic report Kenya responded to the recommendations of the Committee.²⁴</p> <p>Recommendation 27 - Kenya is urged to repeal section 162 of the penal code.</p> <p>86. Kenya may not decriminalize same sex unions at this stage as such acts are considered as taboo and offences against the order of nature which are repugnant to cultural values and morality. Indeed the public gave overwhelming presentations to the Committee of Experts against the inclusion</p>

²² Second Periodic Report Kenya. UN Doc. CCPR/C/KEN/2004/2

²³ Concluding Observations of Human Rights Committee UN Doc. CCPR/CO/83/KEN

²⁴ Third Periodic Report of Kenya UN Doc. CCPR/C/KEN/3



	<p>person against the order of nature, or has carnal knowledge of an animal, or permits a male person to have carnal knowledge of him or her against the order of nature is guilty of a felony and is liable to imprisonment for between fourteen and twenty one years.</p>		<p>of same sex rights under the new constitution. It must however be reiterated that the government does not discriminate against anyone in the provision of services. No one is ever required under the law to declare their sexual orientation under any circumstances.</p>
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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.

Year	Report	Concluding Observations
2011	The National Report did not include any references to the SOGI issues.	The Committee raised no question and made no observations or comments respecting LGBT rights in Kenya.

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.

The report in the section entitled “Emerging Responses” presented an example from Kenya as a initiative developed by State actors to address violence and discrimination. The report stated:

National human rights institutions can play an important role. For example, in 2011, the Kenya Human Rights Commission produced the report, “The Outlawed Amongst Us: A Study of the LGBTI Community’s Search for Equality and Non-Discrimination in Kenya”.



5. Individual Complaints

Kenya has not accepted the competence of any other human rights body to consider individual complaints.

Special procedures e.g. Special Rapporteurs are able to receive individual letters of allegations or urgent appeals relating to specific cases. There are no references to SOGI issues in Kenya in the reports.