

July 4, 2023

On behalf of Health GAP, kindly accept these comments in response to the request for public comments by the African Growth and Opportunity Act (AGOA) Implementation Subcommittee of the Trade Policy Staff Committee, chaired by the Office of the U.S. Trade Representative.

I. Description of Health GAP

Health Global Access Project (GAP) is an organization dedicated to ensuring that all people with HIV have access to affordable, life-saving medicines. We collaborate with people living with HIV around the world.

Health GAP is a member of the Council for Global Equality (CGE) and developed these comments in collaboration with their team, as well as CGE's pro bono counsel for international trade matters.

II. LGBTQI+ Rights in Kenya

LGBTQI+ persons in Kenya currently experience discrimination in several different forms. According to the U.S. Department of State 2022 Human Rights Report on Kenya, the Kenyan penal code criminalizes “carnal knowledge against the order of nature,” which is interpreted to prohibit consensual same-sex conduct and specifies a maximum penalty of 14 years’ imprisonment if convicted, and seven years for “attempting” such conduct.ⁱ The law also criminalizes acts of “gross indecency” between men, whether in public or in private, with five years’ imprisonment.ⁱⁱ Additionally, Kenyan police reportedly targeted LGBTQI+ individuals with arrest or harassment under general public-order laws, and “frequently harassed, intimidated, or physically abused LGBTQI+ individuals in custody.”ⁱⁱⁱ LGBTQI+ individuals have also experienced widespread violence and discrimination at the hands of non-state actors.^{iv}

The Kenyan constitution does not explicitly protect LGBTQI+ persons from discrimination based on sexual orientation, gender identity or expression, or sex characteristics.^v Current Kenyan law also does not specifically recognize the rights of LGBTQI+ persons within the areas of housing, employment, education, or healthcare. Additionally, although Kenyan authorities permit LGBTQI+ advocacy organizations to register and conduct certain activities, in practice local police systematically harass and intimidate sexual- and gender-identity activists that are exercising their legal right to lawfully assemble and speak on issues facing the LGBTQI+ community in the country.^{vi}

Of particular concern is the “Family Protection Bill, 2023,” which is currently pending in Kenya’s National Assembly and threatens to codify harsh new criminal penalties – including the death penalty – for anyone identifying as LGBTQI+.^{vii} The bill also prescribes severe penalties, including life imprisonment, for anyone who “promotes” LGBTQI+ rights or acceptance of LGBTQI+ persons in Kenya.^{viii}

Although the “Family Protection Bill” has not yet been enacted into law, even its consideration in the Kenyan National Assembly is cause for grave concern considering its draconian treatment of LBGTQI+ individuals. Indeed, reports suggest that violence and harassment of the LBGTQI+ community has increased substantially since the bill was introduced, even though it has not yet been enacted.^{ix} Earlier this year, the Kenya National Commission on Human Rights has registered over 400 violations against people perceived as LBGTQI+ in Kenya. More than 10 LBGTQI+ serving organizations and clinics have been shut down.”^x

This legislation not only threatens human rights but also jeopardizes public health. Overwhelmingly, studies have shown that laws that criminalize the LBGTQI+ community undermine the HIV response.^{xi}

Health GAP and partners have previously expressed concerns regarding this proposed law in a letter to Ambassador Katherine Tai, in the context of the ongoing U.S.-Kenya Strategic Trade and Investment Partnership negotiations.^{xii}

III. AGOA Eligibility

Section 104 of the AGOA defines several eligibility criteria that Sub-Saharan African countries must meet in order to receive trade preferences. Among such criteria, a country may “not engage in gross violations of internationally recognized human rights.” The pending “Family Protection Bill, 2023” bill, if enacted into law, would constitute a violation of this AGOA eligibility criterion.

International human rights law is guided by the fundamental principles of universality, equality, and non-discrimination. Kenya’s “Family Protection Bill, 2023” would violate these fundamental principles and the instruments that enshrine them through criminalizing consensual same-sex conduct, perpetuating violence against and marginalizing LBGTQI+ individuals, and denying LBGTQI+ individuals and organizations the freedom of association and expression. In particular:

- by criminalizing consensual same-sex conduct, Kenya would, through the “Family Protection Bill, 2023” violate individuals’ rights to be free from discrimination^{xiii}, of equality and equal protection under the law^{xiv}, and rights to be protected against arbitrary detention and unreasonable interference with privacy.^{xv} By applying the death penalty to such conduct, Kenya would also, through the “Family Protection Bill, 2023,” violate individuals’ right to life.^{xvi}
- by perpetuating violence against LBGTQI+ individuals, including by failing to investigate and punish this form of violence, Kenya would, through the “Family Protection Bill, 2023,” fail to protect individuals’ rights to life, liberty, and security of person.^{xvii}
- by denying LBGTQI+ individuals and organizations the freedom of association and expression, Kenya would, through the “Family Protection Bill, 2023,” violate the rights to freedom of expression, association, and peaceful assembly, without discrimination.^{xviii}

IV. Conclusion

The “Family Protection Bill, 2023,” as currently drafted, would unequivocally render Kenya ineligible for AGOA benefits if enacted. Should Kenya enact this bill into law during the current AGOA eligibility review cycle, Kenya would no longer meet AGOA’s eligibility criteria and its benefits under AGOA must be revoked. Accordingly, Health GAP urges USTR to closely monitor the status of the “Family Protection Bill, 2023” during the current review period in reaching its determination on Kenya’s AGOA eligibility.

Thank you for the opportunity to comment on this very important issue and your consideration of these comments. If you have any questions or would like additional information, please do not hesitate to contact me.

Sincerely,

Alyson Bancroft
Associate Director, US Policy & Advocacy

ⁱ U.S. Department of State, “2022 Country Report on Human Rights Practices: Kenya 2022”, at 40, https://www.state.gov/wp-content/uploads/2023/02/415610_KENYA-2022-HUMAN-RIGHTS-REPORT.pdf

ⁱⁱ *Id.*

ⁱⁱⁱ *Id.*

^{iv} *Id.*

^v *Id.* at 40-41.

^{vi} *Id.* at 41-42.

^{vii} The Family Protection Bill, 2023, Part V, paragraph 32.

^{viii} The Family Protection Bill, 2023, Part V, paragraph 38.

^{ix} [‘Nowhere to hide’: Anti-gay crackdown grips East Africa.](#)

^x *Id.*

^{xi} Law, criminalisation and HIV in the world: have countries that criminalise achieved more or less successful pandemic response? BMJ Global Health, 2021, <https://gh.bmj.com/content/6/8/e006315>

^{xii} Letter to Ambassador Katherine Tai, available at [06.08.23 US NGO letter to USTR on STIP \(healthgap.org\)](#).

^{xiii} UDHR, Article 2; International Covenant on Civil and Political Rights (ICCPR), Articles 2(1), 26.

^{xiv} UDHR, Articles 2, 7; ICCPR, Articles 2(1), 26.

^{xv} UDHR, Articles 2, 9, 12; ICCPR, Articles 2(1), 9, 17.

^{xvi} UDHR, Articles 2, 3; ICCPR, Articles 2(1), 6(1)-(2).

^{xvii} UDHR, Articles 3, 14(1); ICCPR, Articles 6, 9.

^{xviii} UDHR, Articles 19, 20(1); ICCPR, Articles 19(2), 21, 22(1).