

EXPLORING THE FEASIBILITY OF THE AFRICAN COMMISSION AS AN APPROPRIATE AVENUE FOR THE ADVOCACY OF LGBTIQ+ RIGHTS

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Abstract

Arguments of ‘un-African’ and non-legal recognition of sexual minority rights have been used to deny observer status to organisations advocating for sexual orientation and gender identity (SOGI) rights by the African Commission on Human and Peoples’ Rights (African Commission). Audiences before the African Commission provide a crucial platform for organisations to advocate for niche rights, especially for the most vulnerable in society. This stance has stark implications for advocacy for the rights of lesbian, bisexual, transgender, intersex, queer, questioning, and asexual women (LBTIQ+ or diverse women), particularly in a regional context that is in a perpetual struggle to address homophobia, transphobia, and violence and discrimination against women. The denial of observer status for organisations advocating for the rights of sexual minorities presents another hurdle in the institutional barriers faced by women human rights defenders and diverse women in engaging with the African Commission. This article unpacks the justifications advanced by the African Commission and assesses them against the mandate of the African Commission, relevant jurisprudence, and the normative human rights framework set by the African Charter on Human and People’s Rights, the Protocol to The African Charter on Human and Peoples’ Rights on The Rights of Women in Africa, and soft law instruments on the protection of sexual minorities. The article argues that despite the tension between the African Commission’s gradual jurisprudential and normative protection of the rights of sexual minorities and the refusal to grant observer status to sexual minority organisations, the Commission still holds considerable potential to advance the rights of sexual and gender minorities generally and LBTIQ+ women specifically.

Keywords: *African Commission, observer status, sexual minorities, discrimination and women’s rights*

1 Introduction

An assessment of the attitudes, approaches and normative frameworks on sexual orientation and gender identity (SOGI) by the African Commission on Human and Peoples’ Rights (African Commission) depicts a trend of inconsistency. African continent human rights

defenders (HRDs) working on SOGI issues generally, as well as niche issues affecting lesbian, bisexual, transgender, intersex, queer, questioning, and asexual women (LBTIQ+ or diverse women) particularly on the African continent, are uncertain about the potential of the African Commission as an avenue to protect and promote the rights of sexual minorities in Africa.

On the one hand, the past decade or so has witnessed a gradual recognition of the need for normative protection of the lesbian, gay, bisexual, transgender, queer, and intersex (LGBTQI+) community under the African human rights systems. This has primarily happened under the ambit of the African Commission, more so than any other body of the African human rights system.¹ Soft laws have largely shaped this protective framework, most notable of which are the Resolution on the Protection against Violence and Other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity (Resolution 275),² and the Resolution on the Promotion and Protection of the Rights of Intersex Persons in Africa (Intersex Resolution).³ These resolutions seek to address human rights violations and abuses experienced by sexual minorities and enjoin states to undertake their duties to respect, protect, promote and fulfil the rights of this vulnerable minority group. Reference to the provisions of Resolution 275 in activity reports, concluding observations, guidelines, and principles developed by the African Commission enlivens the substance of these resolutions and enhances the contextualised discourse and advocacy of SOGI rights in Africa.⁴ This provides a springboard to further dissect diverse women's experiences and protect their rights.

In light of this normative advancement, the dissonance that emerges from the African Commission's reluctance to grant observer status to organisations that work on SOGI rights is sharply defined and has

1 AMSHeR & Synergía 'Application of Resolution 275 by the African Commission on Human and People's Rights: A six-year assessment', September 2022, <https://resolution275.org/wp-content/uploads/2022/09/Report-2020.pdf> (accessed 18 August 2024).

2 Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity ACHPR/Res.275(LV)2014.

3 Resolution on the Promotion and Protection of the Rights of Intersex Persons in Africa ACHPR/Res.552 (LXXIV)2023.

4 AMSHeR & Synergía (n 1) 30.

drawn criticism from civil society and other quarters.⁵ In 2022, the Commission rejected the applications for observer status of Alternative Côte d'Ivoire, Human Rights First Rwanda, and Synergía – Initiatives for Human Rights on the basis that 'sexual orientation is not an expressly recognised right or freedom under the African Charter, and contrary to the virtues of African values, as envisaged by the African Charter'.⁶ The grounds for rejection read similar to the flawed 2010 justification for rejecting the application for observer status by the Coalition for African Lesbians (CAL) because the organisation did not promote or protect any of the rights in the African Charter.⁷ The perplexing events that unfolded saw the Commission accept CAL's 2015 application after sustained advocacy by Civil Society Organisations (CSOs), delay in formally listing this status until 2018, and then, shortly thereafter, succumb to political pressure from the Executive Council of the African Union (AU), that had been building since 2015, and reverse its decision to grant CAL observer status.⁸

Critics have pointed out the incongruity between the decision by the African Commission and its own human rights jurisprudence and normative standards.⁹ The reversal in the gains made towards regional

5 AU Watch and others 'African Commission's rejection of observer status applications by three human rights organizations threatens its ability to discharge its mandate to promote and protect human rights for all' (2023) https://www.chr.up.ac.za/images/researchunits/sogie/documents/English_-_JOINT_STATEMENT_ON_DECISION_OF_ACHPR_AT_THE_73RD_SESSION_OF_ACHPR.pdf (accessed 19 August 2023).

6 African Commission on Human and Peoples' Rights Final Communiqué of the 73rd Ordinary Session of the African Commission on Human and Peoples' Rights 20 October – 9 November 2022, Banjul, The Gambia <https://achpr.au.int/index.php/en/news/final-communicues/2022-11-18/final-communicue-73rd-ordinary-session> (accessed 11 December 2024); African Commission on Human and Peoples' Rights 52nd and 53rd Combined Activity Reports <https://achpr.au.int/index.php/en/documents/2023-06-08/52nd-and-53rd-combined-activity-reports> (accessed 19 August 2024).

7 IJRC 'African Commission bows to political pressure, withdraws NGO's observer status' <https://ijrcenter.org/2018/08/28/achpr-strips-the-coalition-of-african-lesbians-of-its-observer-status/> (accessed 19 August 2024).

8 IJRC (n 7). Also see F Viljoen & A Sogunro 'The promotion and protection of sexual and gender minorities under the African regional human rights system' in AR Ziegler, ML Fremuth & BE Hernández-Trujol (eds) *The Oxford handbook of LGBTI law* (2024); LM Mute 'Sexual minorities and African human rights mechanisms: reflections on contexts and considerations for addressing discrimination' (2023) 7 *African Human Rights Yearbook* 203-204.

9 AU Watch & others (n 5); Mute (n 8) 204-205; A Rudman 'The protection against discrimination based on sexual orientation under the African human rights

protection of the rights of a minority group that struggles to exist in a context perverse with discrimination, criminalisation and stigmatisation of sexual orientation is disappointing. The intersecting challenges of women who identify as LGBTIQ+ women and/or advocate for LGBTIQ+ rights as women human rights defenders (WHRDs) are exacerbated when the opportunities for participation, expression, and association at the national and regional level are obstructed. However, to pre-empt throwing out the baby with the bath water, recent developments should not dissuade advocates from engaging with the African Commission. Rather, this provides a crucial opportunity for CSOs and WHRDs to reflect on approaches to interacting with the African Commission on the rights of sexual minorities and better support the Commission in fulfilling its mandate under the African Charter on Human and Peoples' Rights (African Charter).

In exploring the feasibility of the African Commission as an appropriate avenue for the advocacy of LGBTIQ+ rights, this chapter is divided into eight sections. Section one is the introduction. Section two challenges the myth of un-Africanism and non-recognition of sexual minority rights as advanced by the African Commission. Section three discusses the situation of sexual minorities in Africa to justify the recognition and protection of lesbian, gay, bisexual, transgender, intersex, queer, asexual and other sexually or gender diverse (LGBTIQ+) rights in the African human rights system. Section four charts the evolution of the perspectives, approaches, and normative frameworks for LGBTIQ+ rights in the African Commission to assess its potential as a promotional, protective and advocacy platform for diverse women. Section 5 zeros in on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) as a basis for protecting the rights of diverse women. Sections six and seven discuss the appropriate forum for interpreting the Maputo Protocol and how to overcome challenges of access. Section 8 presents the conclusions of the analysis undertaken in sections 2-7.

system' (2015) 15 *African Human Rights Law Journal* 23; Viljoen & Sogunro (n 8) 15-16.

2 Debunking the myth of un-Africanism and non-recognition of sexual rights in Africa

The African Commission reasoned the rejection of the applications for observer status on the non-recognition of sexual orientation as a right or freedom under the African Charter and its contradiction with African values as envisaged in the African Charter. The below section assesses the veracity of these justifications while situating the place of LGBTIQ+ rights in the African human rights system.

2.1 Non-recognition of sexual minority rights

It is uncontested that the African Charter does not expressly mention sexual rights. In retrospect, the protection of sexual minorities did not feature as an underlying drive for the adoption of a foundational human rights framework in 1986 since the continent was grappling with the ravages of corruption and bad governance, dictatorships and authoritarian rule that took priority.¹⁰ In the broader scheme of international human rights, the absence of sexual rights is not unique. These rights are not expressly mentioned in other seminal instruments such as the United Nations' (UN) Universal Declaration of Human Rights (Universal Declaration) or the International Covenant on Civil and Political Rights (ICCPR). Similarly, at the regional level, the European Convention on Human Rights, the American Declaration on Human Rights and the American Convention on Human Rights (American Convention) are silent on sexual rights. However, as Jjuuko and Rudman have argued, this has not prevented the human rights bodies charged with protecting and promoting the rights under these instruments from interpreting the provisions in light of the evolving nature of human rights and developing normative instruments that realise the rights of sexual minorities.¹¹

According to Viljoen, the African Charter, like other international instruments, is a living document crafted to adapt to future developments.¹² As such, its interpretation should reflect the evolving

10 A Jjuuko 'The protection and promotion of LGBTI rights in the African regional human rights system: Opportunities and challenges' in S Namwase & A Jjuuko (eds) *Protecting the human rights of sexual minorities in contemporary Africa* (2017) 271.

11 Jjuuko (n 10) 284-292 and Rudman (n 9) 25-27.

12 F Viljoen *International human rights law in Africa* (2012) 267.

social, economic, and political realities that impact human rights. Jjuuko argues that African human rights instruments have already proven to be progressive and adaptive in light of developments in the socio-political and economic milieu.¹³ Instruments such as the Maputo Protocol, the African Charter on the Rights and Welfare of the Child (African Children's Charter) and the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (African Court Protocol) all emerged to address existing gaps in protecting group rights and to reinforce the protection of human rights. It is, therefore, feasible that the system can adapt to recognise and protect the rights of sexual minorities.¹⁴

By virtue of their humanity, sexual minorities are guaranteed the rights contained in the African Charter. The universality, indivisibility and inseparability of human rights is an indisputable underlying principle of international law.¹⁵ In itself, the parlance of the African Charter is universalist as it guarantees human rights to 'every individual' and 'every human', extending the rights therein to everyone, including sexual minorities. Accordingly, sexual minorities, including LGBTIQ+ women, have equal claim to the rights in the African Charter.

Precedence exists of the African Commission adopting innovative approaches to interpret the Charter towards the redress of human rights violations that exceed the literal interpretation of the African Charter's provisions.¹⁶ As two examples, in the *Centre for Minority Rights Development (Kenya) on behalf of the Endorois Welfare Council v Kenya* case,¹⁷ the Commission made a finding for indigenous rights as well as the right to shelter and food in the *Social and Economic Rights Action Centre (SERAC) v Nigeria* case.¹⁸ This occurred despite the fact that these rights are not expressly articulated in the African Charter. By determining that these rights are implied within the African Charter, the

13 Jjuuko (n 10) 292.

14 As above.

15 Preamble Universal Declaration & Vienna Declaration and Programme of Action para 5 <https://www.ohchr.org/en/instruments-mechanisms/instruments/vienna-declaration-and-programme-action> (accessed 19 August 2024).

16 Jjuuko (n 10) 271.

17 (2009) AHRLR 75 (ACHPR 2009).

18 (2001) AHRLR 60 (ACHPR 2001).

Commission expanded the protective bounds of the instrument.¹⁹ What is more, the adoption of Resolution 275 by the African Commission recognised that SOGI persons are entitled to the equal enjoyment of human rights and protection from human rights violations and abuses. For that reason, the potential of extending the purview of these rights to sexual minorities presents itself.

2.2 The un-African myth

Regarding the second contentious reason, there has been a growing field of research debunking the argument that homosexuality is un-African or contradictory to African values as proffered by the African Commission.²⁰ Studies have pointed to evidence of homosexuality in traditional African societies, albeit hidden as opposed to openly displayed or claimed as an identity.²¹ Msibi writes that:

[T]he rejection of homosexuality in Africa represents something deeper than a simple rejection of Western imposition. It is a rejection of the visible, political, and personified “gay” identity, allowing people to live “out” lives: an identity that troubles the pretense of heteronormativity.²²

Although lacking a sexual component, woman-to-woman marriages that were organised for procreation purposes to ensure the continuation of lineages for women with reproductive challenges were more openly practised and recognised in African societies.²³ Some authors have countered that what is un-African is homophobia and the criminalisation

19 R Murray & F Vijoer ‘Towards non-discrimination on the basis of sexual orientation: The normative basis and procedural possibilities before the African Commission on Human and Peoples’ Rights and the African Union’ (2007) 29 *Human Rights Quarterly* 89-90.

20 B Dlamini ‘Homosexuality in the African context’ (2006) 20d *Agenda* 128-136; BS Pincheon ‘An ethnography of silences: Race, (homo)sexualities, and a discourse of Africa’ (2000) 43 *African Studies Review* 39; ER Moberly *Homosexuality: A new Christian ethic* (1983); M Epprecht *Hungochani: The history of a dissident sexuality in Southern Africa* (2004); SO Murray & W Roscoe *Boy-wives and female husbands: Studies in African homosexualities* (1998) and WN Eskridge Jr ‘A history of same-sex marriage’ (1993) 79 *Virginia Law Review* 1419.

21 As above.

22 T Msibi ‘The lies we have been told: On (homo) sexuality in Africa’ (2011) 58 *Africa Today* 69.

23 RJ Cadigan ‘Woman-to-woman marriage: Practices and benefits in Sub-Saharan Africa’ (1998) 29 *Journal of Comparative Family Studies* 89-98.

of homosexuality.²⁴ These were Western imports introduced by colonialists through punitive laws and Christian teachings. The role of conservative religious beliefs, particularly within Christianity and Islam, features prominently as a driver of homophobia in Africa.²⁵

3 The situation of sexual minorities in Africa: Finding the place of LBTIQ+ rights in the African human rights system

Political leaders in Africa have derogatively trumpeted Afrocentric and religious arguments to justify punishment, discrimination and stigmatisation of sexual minorities.²⁶ Scholars have also reflected on the exploitation of homophobia for political expediency and to deflect public discontent and anger from bad governance, corruption, cost of living, and human rights violations in countries such as Uganda, Nigeria, and Zimbabwe.²⁷ As of 2024, at least 33 African countries have punitive laws criminalising consensual same-sex relationships, the highest number worldwide.²⁸ Extreme punishments such as the death penalty (Nigeria, Mauritania, and Somalia) and life imprisonment (Uganda, Sudan, Tanzania, Sierra Leone, and Zambia) depict the heavy-handed approach

24 Jjuko (n 10) 264-265; K Ward 'Religious institutions and actors and religious attitudes to homosexual rights: South Africa and Uganda' in C Lennox & M Waites (eds) *Human rights, sexual orientation and gender identity in the Commonwealth: Struggles for decriminalization and change* (2013); Murray & Roscoe (n 20) and O Phillips 'Constituting the global gay: Issues of individual subjectivity and sexuality in Southern Africa, in D Herman & C Stychin (eds) *Sexuality in the legal arena* (2000) 17.

25 AV Klinken & E Chitando 'Introduction: Public religion, homophobia and the politics of homosexuality in Africa' in AV Klinken & E Chitando (eds) *Public religion and the politics of homosexuality in Africa* (2016) 1-16 and A Ojilere 'Discrimination on grounds of sexual orientation and gender identity: The limits of human rights in Africa' (2022) *Journal of Homosexuality* 1-25.

26 R Schäfer & E Range *The political use of homophobia: Human rights and persecution of LGBTI activists in Africa* (2014) 1 <https://library.fes.de/pdf-files/iez/10610.pdf> (accessed 18 August 2024).

27 A Sogunro 'An analysis of political homophobia, elitism and social exclusion in the colonial origins of anti-gay laws in Nigeria' (2022) 22 *African Human Rights Law Journal* 493-519; Schäfer & Range (n 26) and T Moyo 'Sexuality as a tool to gain political power: An introspection of Zimbabwean elections of 2013' (2020) 18 *African Identities* 421-434.

28 Human Dignity Trust 'Map of countries that criminalise LGBT people' <https://www.humandignitytrust.org/lgbt-the-law/map-of-criminalisation/> (accessed 18 August 2023).

adopted by some African governments to curtail the rights of minorities in the name of morality.²⁹

In 2023, Uganda passed the Anti-Homosexuality Act, 2023, arguably the most draconian law yet, that not only criminalises consensual same-sex conduct but also the promotion of homosexuality.³⁰ Nigeria's Same-Sex Marriage (Prohibition) Act, 2013 prohibits the registration of LGBT organisations and prescribes a ten-year imprisonment term on anyone who 'registers, operates or participates in gay clubs, societies and organisation' or 'supports' the activities of such organisations.³¹ In February 2024, Ghana's Parliament passed the Promotion of Proper Human Sexual Rights and Ghanaian Family Values Bill that, in addition to criminalising same-sex conduct and LGBTQI+ identities, outlaws SOGI advocacy and imposes reporting duties on the public against SOGI persons.³²

An emerging trend in state-perpetuated lawfare against sexual minority rights in countries such as Uganda, Nigeria and Ghana is not only the proscription of consensual same-sex conduct but also advocacy for SOGI rights. The implications on public sensitisation and education on sexual minority rights are severe, given the prevalence of myths, misconceptions and ignorance that have perpetuated homophobia in Africa. Further, it offends the importance of human rights advocacy, which has historically been a source of norm creation. Social mobilisation movements against tyranny and injustice during the second half of the 20th century gave the impetus for the recognition of the rights of disadvantaged, vulnerable and minority groups, including sexual minorities.³³ Advocacy by SOGI rights advocates has been crucial to confronting injustices, human rights violations, and abuses against the community. Jjuuko and others identify social advocacy, strategic litigation and legislative and policy reform as prominent strategies for

29 As above.

30 See secs 11 and 14.

31 Secs 4(1), 5(2) and 5(3).

32 See, Promotion of Proper Human Sexual Rights and Ghanaian Famil Values Bill, 2021 <https://www.parliament.gh/epanel/docs/bills/Promotion%20of%20Proper%20Human%20Sexual%20Rights%20and%20Ghanaian%20Family%20Values%20Bill,%202021.pdf> (accessed 2 June 2024).

33 S Marks 'Human rights: A brief introduction' (2014) *Working Paper Harvard School of Public Health* 4.

championing SOGI rights in Africa.³⁴ Therefore, banning advocacy for SOGI rights is not only an affront to the foundations of human rights but seals a key avenue for affirming and protecting the rights of SOGI persons in Africa. Progressive jurisprudence in countries such as Botswana,³⁵ Eswatini,³⁶ and Kenya³⁷ declaring the refusal to register LGBTIQ+ organisations as unconstitutional is further testament to the vanguard role of strategic litigation and advocacy in the fight for SOGI rights.

The penchant for criminalising conduct is another vestige of colonialism that persists to date as an approach to regulating individual and public conduct.³⁸ There are no records of penal institutions or imprisonment sanctions in pre-colonial Africa.³⁹ Evidently, structural decolonisation did not transform the cultural, social and political influences of colonialism.⁴⁰ Extant approaches to criminology and punishment in many African countries are still deeply rooted in coloniality. This is seen in the imposition of harsh, disproportionate sanctions for criminal conduct. Although homosexuality was not openly displayed in pre-colonial Africa, where it was discovered, some communities would subject the person to cleansing rituals as opposed to punishment.⁴¹ While the science is still out on whether homosexuality is a matter of nature or nurture,⁴² it is unnecessary and inappropriate in a democratic society to criminalise sexual orientation, defined as a person's 'capacity for profound emotional, affectional and sexual attraction to,

34 A Jjuuko and others 'Conclusion: The kaleidoscope of queer lawfare in Africa' in A Jjuuko, S Gloppen, A Msosa & Frans Viljoen (eds) *Queer lawfare in Africa: Legal strategies in contexts of LGBTIQ+ criminalisation and politicisation* (2022) 438.

35 *Attorney General of Botswana v Thuto Rammoge* [2016] CACGB-128-14.

36 *Melusi Simelane v Minister for Commerce and Industry* [2023] Civil Case No 34 of 2022.

37 *NGOs Co-ordination Board v EG; Katiba Institute (Amicus Curiae)* (Petition 16 of 2019) [2023] KESC 17 (KLR).

38 M Brown *Penal power and colonial rule* (2014) and W Clifford *An introduction to African criminology* (1974) 186.

39 D Branch 'Imprisonment and colonialism in Kenya, c.1930-1952: Escaping the carceral archipelago' (2005) 38 *The International Journal of African Historical Studies* 239-265.

40 A Aliverti, H Carvalho & M Sozzo 'Decolonizing the criminal question' (2021) 23 *Punishment & Society* 297-316.

41 Jjuuko (n 10) 264.

42 A Rinaldi 'I was born this way' (2022) 23 *EMBO Reports* <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9171406/pdf/EMBR-23-e55290.pdf> (accessed 19 August 2023).

and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.’⁴³

When examined through the prism of the overall state of human rights and freedoms in Africa, research studies have revealed that non-governmental organisations (NGOs) are increasingly operating in a shrinking civic space.⁴⁴ Freedom of association and assembly, freedom of expression and public participation are under assault, contributing to the decline of democracy. HRDs working on issues such as women’s rights and sexual minority rights are particularly vulnerable to human rights violations and abuses that are legitimised by restrictive laws.⁴⁵ Few countries, including South Africa, Angola, and Botswana, foster an enabling legislative environment for registering LGBTQ+ organisations.⁴⁶

The proscription of same-sex conduct has legitimised state-sponsored violence against sexual minorities and increased public intolerance towards the community.⁴⁷ Members of the LGBTIQ+ community experience death threats, humiliation, assault, rape and sexual assault,

43 Introduction and preamble The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, Augustus 2016, http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf (accessed 19 August 2024). Also see The Yogyakarta Principles Plus 10 Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf (accessed 19 August 2024).

44 CIVICUS ‘People power under attack 2021’ (2022) <https://findings2021.monitor.civicus.org/africa.html> (accessed 19 August 2024); Freedom House ‘Freedom in the world 2023’, March 2023, https://freedomhouse.org/sites/default/files/2023-03/FIW_World_2023_DigitalPDF.pdf (accessed 19 August 2024); ICNL ‘Civic freedom monitor’ <https://www.icnl.org/resources/civic-freedom-monitor> (accessed 19 August 2024) and Pan-African Human Rights Defenders Network ‘State of African Human Rights Defenders 2016’ (2017) <https://africandefenders.org/wp-content/uploads/2018/12/StateofHRD2016EnglishFinal-2.pdf> (accessed 19 August 2024).

45 OHCHR ‘Ending violence and other human rights violations based on sexual orientation and gender identity: A joint dialogue of the African Commission on Human and Peoples’ Rights, Inter-American Commission on Human Rights and United Nations’ 18 https://www.ohchr.org/sites/default/files/Documents/Issues/Discrimination/Endingviolence_ACHPR_IACHR_UN_SOGI_dialogue_EN.pdf (accessed 19 August 2024).

46 G Reid ‘Progress and setbacks on LGBT rights in Africa — An overview of the last year’ *HRW* 22 June 2022 <https://www.hrw.org/news/2022/06/22/progress-and-setbacks-lgbt-rights-africa-overview-last-year> (accessed 19 August 2024).

47 Schäfer & Range (n 26) 1.

arbitrary arrest and detention, harassment, and forced medical examinations due to their sexual choices.⁴⁸ The UN has stated that this may constitute torture or other cruel, inhuman or degrading treatment or punishment in situations where a state actor is involved.⁴⁹ Under international law, torture or cruel, inhuman or degrading treatment or punishment and the right to recognition everywhere as a person before the law are regarded as peremptory norms in which no derogation is permitted.⁵⁰

For LBTQ+ women, intersecting vulnerabilities emerge from their identity as women and diverse women. Gendered violence manifests in conversation therapy, including corrective rape, forced marriages, female genital mutilation (FGM), forcible impregnation, and acid attacks.⁵¹ Corrective rape is defined as ‘the use of rape against women because of their real or alleged homosexuality supposedly in order to “cure” them of this sexual orientation.’⁵² In South Africa, research has illuminated the vulnerability of lesbians living in townships as well as vocal and highly visible lesbians to what is commonly referred to as corrective rape.⁵³ Other documented cases in Kenya, Malawi, and Nigeria unveil the need for a wider examination of a form of sexual violence that may be prevalent or under-reported due to social stigma and victimisation.⁵⁴

48 Human Rights Council ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity’, 11 May 2018, UN Doc A/HRC/38/43 para 28 and Human Rights Council ‘Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez’, 11 February 2013, UN Doc A/HRC/22/53.

49 As above

50 ICCPR art 4.

51 Report of the Independent Expert on protection against violence and discrimination (n 48) para 45.

52 Section 3.2 of the African Commission on Human and Peoples’ Rights Guidelines on Combating Sexual Violence and its Consequences in Africa adopted during its 60th ordinary session held in Niamey, Niger from 8-22 May 2017 (Niamey Guidelines).

53 JA Nel & M Judge ‘Exploring homophobic victimisation in Gauteng, South Africa: Issues, impacts and responses’ (2008) 21 *Acta Criminologica* 23-24; Msibi (n 22) 61 and P Strudwick ‘Crisis in South Africa: The shocking practice of ‘corrective rape’ – aimed at ‘curing’ lesbians’ *Independent* 4 January 2014 <https://www.independent.co.uk/news/world/africa/crisis-in-south-africa-the-shocking-practice-of-corrective-rape-aimed-at-curing-lesbians-9033224.html> (accessed 19 August 2024).

54 HRW “‘This is why we became activists’: Violence against lesbian, bisexual, and queer women and non-binary people” (14 February 2023) <https://www.hrw.org/report/2023/02/14/why-we-became-activists/violence-against-lesbian->

As Victor Madrigal-Borloz, the UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, noted misogyny, patriarchy, and gender inequalities drive violence against lesbian and bisexual women.⁵⁵

Corrective rape and other conversion therapies as forms of sexual violence are also intricately linked with homophobic tendencies since LBTQ+ women threaten conventional gender roles and behaviours.⁵⁶ Female WHRDs may also be vulnerable to corrective rape due to imputed SOGI characteristics by the nature of their advocacy work.⁵⁷ The prevalence of corrective rape and social intolerance towards lesbians and the broader LGBTIQ+ community in South Africa is reflective of the inadequacy of strong legal frameworks in the absence of broader and sustained public sensitisation and education for enhanced societal tolerance. South Africa was the first country to prohibit unfair discrimination on the basis of sexual orientation in the Constitution of the Republic of South Africa Act 200 of 1993 ('interim Constitution of South Africa') and the Constitution of the Republic of South Africa, 1996 ('Constitution of South Africa'), respectively,⁵⁸ and has since reinforced the protection of minority rights in its legislative framework.⁵⁹

Societal and state-sanctioned discrimination of sexual minorities also has implications on access to health. Research has underscored that homophobia impedes efforts to address the scourge of HIV/AIDs that is prevalent in the African continent.⁶⁰ Men who have sex with men are particularly vulnerable.⁶¹ Anecdotal evidence of discrimination within health facilities and from health practitioners has revealed the negative experiences of sexual minorities in health setups that dissuade them from

bisexual-and-queer-women-and-non#_fn179 (accessed 19 August 2024) and OutRight 'Harmful treatment: The global reach of so-called conversion therapy' (2019) https://outrightinternational.org/sites/default/files/2022-09/ConversionFINAL_Web_0.pdf (accessed 19 August 2024).

55 Report of the Independent Expert on protection against violence and discrimination (n 54) para 45.

56 As above.

57 OHCHR (n 51) para 18.

58 Section 8(2) of the interim Constitution and sec 9 of the final Constitution.

59 See for example the Civil Union Act 17 2006.

60 OHCHR (n 51) para 20.

61 T Lane & Others 'High HIV prevalence among men who have sex with men in Soweto, South Africa: Results from the Soweto Men's study' (2011) 15 *AIDS and Behavior* 626-634.

seeking health services.⁶² Reported incidents include denial of medical services, verbal abuse and public humiliation.⁶³ State-sanctioned, unnecessary and forced invasive procedures such as anal examinations and virginity examinations have been conducted by both health professionals and police officers as a precursor to homosexuality charges and prosecution.⁶⁴ In response to this, courts such as the Kenyan Court of Appeal in *COI v Chief Magistrate Ukunda Law Courts* declared that forced anal examinations on suspected gay men was unconstitutional and a violation of the rights to privacy, human dignity, and freedom from torture and degrading treatment.⁶⁵ Health professionals have also been complicit in forced hormone therapy and genital normalising surgeries that have led to lasting physical and mental health implications.⁶⁶

Forms of violence and discrimination experienced by sexual minorities generally and LBTQ+ women specifically are, therefore, complex and multi-faceted.⁶⁷ The violations and abuses offend human rights and fundamental freedoms in the African Charter, including the right to life, equality and freedom from discrimination, physical integrity, torture and cruel, inhuman and degrading treatment, and dignity. In arguing for the respect of the right to dignity for sexual minorities, Songuro writes:

[H]uman dignity is not just a consequence of human rights, to be ascribed only where rights have been recognised by the state. Instead, human dignity has been conceived both as a claim against the state for the protection of individuals even where no specific rights have been legally recognised, and as an underlying principle in the protection and promotion of existing rights.⁶⁸

62 Report of the Independent Expert on protection against violence and discrimination (n 48) paras 29 and 47.

63 Report of the Independent Expert on protection against violence and discrimination (n 48) para 76 and Human Rights Council 'Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity', 17 November 2011, UN Doc A/HRC/19/41.

64 Report of the Independent Expert on protection against violence and discrimination (n 48) paras 29 and 47.

65 Para 27 [2018] Court of Appeal at Mombasa Civil Appeal 56 of 2016 <http://kenyalaw.org/caselaw/cases/view/171200/> (accessed 2 June 2024).

66 Human Rights Council 'Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (right to health and criminalization of same-sex conduct and sexual orientation, sex work and HIV transmission)' UN Doc A/HRC/14/20 para 23 and Discriminatory laws and practices (n 58) para 56.

67 Report of the Independent Expert on protection against violence and discrimination (n 48) paras 26-28.

68 A Songuro 'Dignity for the queer African: How the right to dignity in international human rights law imposes obligations on all states to protect sexual minorities'

The right to dignity has been affirmed by the jurisprudence of the African Commission and is linked with the right to live a full and normal life.⁶⁹ Authors such as Steinmann have argued that it is an absolute right and should not be subject to limitations.⁷⁰ Murray and Viljoen have also argued that the experiences of sexual minorities constitute violations of the right to privacy and can be implied in the context of the African Charter, given the close link with dignity and personal integrity rights.⁷¹ While the right to privacy is not articulated in the African Charter, offshoots of the Charter, including article 10 of the African Children's Charter and principle 40 of the Declaration of Principles on Freedom of Expression and Access to Information in Africa, enunciate the right to privacy. Further, in the South African case *National Coalition of Gay and Lesbian Equality v The Minister of Justice*, the Constitutional Court stated that the criminalisation of consensual sexual acts between adults was a violation of the rights to privacy and dignity.⁷²

Morality is a favoured justification for the limitation of the rights of sexual minorities. The general limitations clause under article 27(2) of the African Charter requires that individuals exercise their rights and freedoms with due regard to the rights of others, collective security, morality and common interest. Article 17 of the African Charter mandates states to promote and protect recognised morals and traditional values but fails to provide guiding principles that ensure equality and non-discrimination. International law is cognisant of the potential of overreach in the margin of appreciation given to states in prescribing the bounds of morality. It, therefore, requires that states be guided by the principles of universality of human rights and non-discrimination rather than the dictates of a single tradition.⁷³ International law has further elaborated on the limitations of rights and established a three-part test: provided by law; serve a legitimate aim (protection of the rights of others, public order, health and morals, and national security);

(2022) *Southern African Public Law* 18.

69 *Purohit v the Gambia* (2003) AHRLR (ACHPR 2003); *Modise v Botswana* (2000) AHRLR 30 (ACHPR 2000).

70 R Steinmann 'The core meaning of human dignity' (2016) *Potchefstroom Electronic Law Journal* 1.

71 Murray & Viljoen (n 19) 89-90.

72 1999 (1) SA 6 (CC).

73 Human Rights Committee, General Comment 34, Article 19: Freedoms of opinion and expression, 12 September 2011, UN Doc CCPR/C/GC/34 para 30.

and necessity and proportionality in a democratic society.⁷⁴ Importantly, the morality of the majority cannot be the basis for the obfuscation of the rights of minorities. In *Legal Resources Foundation v Zambia*, the African Commission stated that:

[T]he Charter cannot be used to justify violations of sections of it. The Charter must be interpreted holistically and all clauses must reinforce each other. The purpose or effect of any limitation must also be examined, as the limitation of the right cannot be used to subvert rights already enjoyed. Justification, therefore, cannot be derived solely from popular will, as such cannot be used to limit the responsibilities of State Parties in terms of the Charter.⁷⁵

Also noteworthy is the African Charter's deviation from international law tradition by introducing the language of duties. Article 29 calls for, among other things, the preservation and strengthening of positive African cultural values in the spirit of tolerance, dialogue and consultation towards enhanced moral well-being of the society. Arguably, the elements of cultural positivity, tolerance, and meaningful dialogue and consultation have been missing in the approaches to sexual minority rights, especially at the state level.

In light of this milieu, the decision of the African Commission, a custodian of the protection and promotion of human rights in the African Charter, to deny observer status to LGBTIQ+ organisations implicitly sanctions the continued violations of the right to freedom of association and assembly, public participation, and expression of sexual minority groups and HRDs at the state level. The pushback against the visibility of and efforts to recognise sexual minorities and combat human rights violations is exacerbated when they are denied access to avenues for expression and participation. The decision further reverses the gains made by the African Commission in extending the Charter protections to sexual minorities. It also weakens the recommendations to states to respect, protect and fulfil the rights of sexual minorities.

⁷⁴ ICCPR arts 12, 14, 18, 19, 21 & 22. Also see General Comment 34 (n 73).

⁷⁵ (2001) AHRLR 84 (ACHPR 2001) 70.

4 The evolution of perspectives, approaches and normative frameworks for LGBTIQ+ rights in the African Commission

The African Commission derives its protective and promotional mandate from article 45 of the African Charter. As part of its promotional mandate, the Commission shall cooperate with African and international institutions working on human rights.⁷⁶ Towards this end, at least 477 NGOs had gained observer status before the Commission in 2023.⁷⁷ The public sessions of the Commission are also widely attended by NGOs (with or without observer status) and HRDs. Further, pursuant to its promotional mandate, the Commission develops rules and principles on human rights, such as Resolution 275 and the Intersex Resolution, to guide governments in the development of national legislation. Pundits have hailed the adoption of Resolution 275 in 2014 as a watershed moment in the normative development of sexual minority rights in Africa.⁷⁸ It followed strategic CSO engagement with the Commission from back in 2006 on sexual minority rights.⁷⁹ Although a soft law instrument with no autonomous binding force, resolutions and other soft law instruments are crucial for articulating state obligations and implementing the promotional and protective mandate of the Commission.⁸⁰ Further, it is a laudable norm-setting move by the Commission that contrasts with state resistance to affirming sexual minority rights in Africa.⁸¹

The gradual reception to situating the discourse of sexual minority rights in the African human rights system has been more visible within

76 African Charter art 41(1).

77 NGOs with observer status: <https://web.archive.org/web/20180115201505/http://www.achpr.org/network/ngo/by-name/> (accessed 20 August 2024).

78 AMSHer & Synergia (n 1) and Centre for Human Rights 'The Centre for Human Rights launches Resolution 275 Guidelines at the 63rd session of the African Commission on Human and Peoples' Rights' <https://www.chr.up.ac.za/news-archive/2018/1018-the-centre-for-human-rights-launches-resolution-275-guidelines-at-the-63rd-session-of-the-african-commission-on-human-and-peoples-rights> (accessed 20 August 2024).

79 S Ndashe 'Seeking the protection of LGBTI rights at the African Commission on Human and Peoples' Rights' (2015) *Feminist Africa* 17.

80 Viljoen (n 12) 379-380.

81 BD Nibogora 'Advancing the rights of sexual and gender minorities under the African Charter on Human and Peoples' Rights: The journey to Resolution 275' in E Durojaye, G Mirugi-Mukundi & C Ngweni (eds) *Advancing sexual and reproductive health and rights in Africa* (2021) 182.

the African Commission. Initially, this emerged from questions posed to state parties on the treatment of sexual minorities within their territories during state reporting procedures at the Commission and in the observations and recommendations in the concluding observations on the state reports.⁸² Article 62 of the African Charter tasks state parties to report on legislative and other measures that give effect to the rights and freedoms recognised and guaranteed in the African Charter. Given the penchant of states to highlight positive developments only or primarily, the Commission has increasingly relied on NGOs with observer status to complement state reports by submitting shadow or parallel reports that provide a more holistic picture of the national state of human rights.⁸³ This collaboration facilitates more constructive dialogue during the state reporting process. The plight of sexual minorities in Africa, therefore, made an appearance on the African Commission's agenda through statements by NGOs, shadow reports, and engagement and lobbying with receptive commissioners.⁸⁴

In the concluding observations on the state reports submitted by Cameroon (2006 and 2013), Liberia (2015), Nigeria (2015), South Africa (2016), Sierra Leone (2016), and Namibia (2017), the Commission raised concern about the intolerance, discrimination, stigmatisation, criminalisation, and harassment including judicial harassment towards members of the LGBT community as well as HRDs working on issues of sexual orientation.⁸⁵ In doing so, the African Commission drew inspiration from the principle of universality of human rights, pointing to the right to equality and freedom from discrimination, the right to life and physical integrity, and the right to health, which rights are articulated under articles 2, 3, 4, and 16 of the African Charter.⁸⁶ Post-2014, the Commission has linked the lawfare against sexual minorities with increased incidences of human rights violations and abuses against sexual minorities and HRDs in calling

82 AMSHer & Synergía (n 1) and Ndashe (n 79).

83 African Commission on Human and Peoples' Rights Resolution on the Cooperation between the African Commission on Human and Peoples' Rights and NGOs having Observer Status with the Commission ACHPR/Res.30(XXIV)98.

84 Ndashe (n 86).

85 AMSHer & Synergía (n 1) 34-37.

86 As above.

for the decriminalisation of such laws.⁸⁷ Countries such as Nigeria, Liberia and Sierra Leone have been called to consider Resolution 275 in their treatment of sexual minorities.⁸⁸ States such as Gabon, which decriminalised same-sex relations, and Sudan, which repealed the death penalty for the offence of homosexuality, received commendations from the African Commission.⁸⁹ Also noteworthy is the evolving lexicon by the African Commission with reference to sexual minority rights by considering the niche challenges and vulnerabilities of the different categories of sexual minorities.⁹⁰

The import of Resolution 275 in providing a normative reference for the recognition of the protection of the rights of sexual minorities cannot be downplayed. This Resolution appreciates the universality of human rights as articulated in the African Charter and links it to the protection of the rights of sexual minorities. It refers to article 2 of the African Charter prohibiting discrimination on various grounds, including sex and other status; article 3 on equality before the law; and articles 4 and 5 on the respect of the right to life and personal integrity and the prohibition against torture. In *Toonen v Australia*, the Human Rights Council interpreted sex to also include sexual orientation.⁹¹ Murray and Viljoen have argued along similar lines, noting that the adoption of the African Charter preceded terms such as gender and sexual orientation.⁹² Therefore, 'sex', as a prohibited ground of discrimination, should naturally extend to sexual orientation⁹³ and analogous concepts, including gender identity, gender expression and sex characteristics.⁹⁴

Further, the open-ended wording of article 2 that includes 'other status' allows for the expansion of prohibited grounds of discrimination in line with contemporary needs. The African Court has affirmed this view in *The African Court in African Commission on Human and Peoples'*

87 As above.

88 As above.

89 Combined 48th and 49th Activity Reports of the African Commission on Human and Peoples' Rights 23-24 <https://achpr.au.int/index.php/en/documents/2021-04-21/48th-and-49th-activity-reports-combined> (accessed 19 August 2024).

90 AMSHer & Synergía (n 1) 36.

91 Para 8.7 UN Doc CCPR/C/50/D/488/1992 (1994).

92 Murray & Viljoen (n 19) 88-89.

93 Murray & Viljoen (n 19) 91-92.

94 AMSHer & Synergía (n 1) 11.

Rights v Kenya.⁹⁵ Additionally, in the case of,⁹⁶ the African Commission interpreted article 2 of the *Zimbabwe Human Rights NGO Forum v Zimbabwe* Charter on prohibited grounds of discrimination broadly to incorporate sexual minorities. The Commission stated *obiter*:

Together with equality before the law and equal protection of the law, the principle of non-discrimination provided under Article 2 of the Charter provides the foundation for the enjoyment of all human rights ... The aim of this principle is to ensure equality of treatment for individuals irrespective of nationality, sex, racial or ethnic origin, political opinion, religion or belief, disability, age or sexual orientation.⁹⁷

In noting the acts of violence experienced by SOGI persons, Resolution 275 refers to 'corrective' rape in addition to 'physical assaults, torture, murder, arbitrary arrests, detentions, extra-judicial killings and executions, forced disappearances, extortion and blackmail'. The African Commission can draw inspiration from its UN counterpart and research the prevalence of such sexual violence against LBTQ+ women in Africa, reinforce protective frameworks, and proffer state recommendations. Some of the Guidelines and General Comments developed by the Commission make specific mention of sex, sexual orientation, and gender identity as prohibited grounds for discrimination, as well as calling for the protection of vulnerable groups.⁹⁸ The 2011 Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter includes sexual minorities under the definition of vulnerable and disadvantaged groups. Other instruments include the 2015 Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa,⁹⁹ Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa,¹⁰⁰ Guidelines

95 (merits) (2017) 2 AfCLR 9 para 138.

96 (2006) AHRLR 128 (ACHPR 2006).

97 Para 169.

98 Para 1(e) <https://archives.au.int/handle/123456789/2063> (accessed 20 August 2023).

99 Section 30 of the Guidelines on the Conditions of Arrest, Police Custody and Pre-trial Detention in Africa adopted at the 55th ordinary session of the African Commission on Human and Peoples' Rights, held from 28 April to 12 May 2014 in Luanda, Angola.

100 See preamble and 7.2.8. Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa <https://achpr.au.int/en/soft-law/guidelines-policing-assemblies-law-enforcement-officials-africa> (accessed 20 August 2023).

on Freedom of Association and Assembly in Africa¹⁰¹ and Principles on the Declassification and Decriminalization of Petty Offences in Africa.¹⁰² Moreover, the Guidelines on Combating Sexual Violence and its Consequences in Africa,¹⁰³ not only lists sexual orientation as a prohibited ground of discrimination,¹⁰⁴ but its section 7 obligates states to:

[T]ake necessary measures to prevent all forms of sexual violence and its consequences, particularly by eliminating the root causes of that violence, including sexist and homophobic discrimination, patriarchal preconceptions and stereotypes about women and girls, and/or preconceptions and stereotypes based on gender identity, real or perceived sexual orientation, and/or certain preconceptions of masculinity and virility, irrespective of their source.

General Comment 4 on the African Charter: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment specifically calls on states to address sexual and gender-based violence against LGBTI persons.¹⁰⁵ Noteworthy, Resolution 376 on the Situation of Human Rights Defenders in Africa, 2017, is relevant for WHRDs working on sexual orientation, gender identity, gender expression and sex characteristics (SOGIESC) issues.¹⁰⁶ The Resolution calls on states to develop legislation to recognise and protect WHRDs and those working on SOGI issues and health and HIV/AIDS and reproductive health, as well as their colleagues and friends.

Beyond the promotional mandate, the Commission exercises its protective mandate through the communication procedure.¹⁰⁷ Both state and non-state actors have the right to submit communications before the Commission alleging violation of the provisions of the Charter. Communications must meet the admissibility requirements enunciated

101 Section 80 https://ishr.ch/sites/default/files/documents/guidelines_on_foaa_english.pdf (accessed 20 August 2023).

102 Part 1 <https://acjr.org.za/resource-centre/decriminalisation-of-petty-offences-web.pdf/@download/file/Decriminalisation%20of%20petty%20offences%20web.pdf> (accessed 20 August 2023).

103 Guidelines on Combating Sexual Violence and its Consequences in Africa (Niamey Guidelines), adopted during the 60th ordinary session of the African Commission held in Niamey, Niger from 8 to 22 May 2017.

104 Niamey Guidelines (n 103) sec 4.

105 Para 59 <https://ihrda.uwazi.io/api/files/15097933383701sovg69v4xh8dgiftdc9jm7vi.pdf> (accessed 20 August 2023).

106 Resolution on the Situation of Human Rights Defenders in Africa ACHPR/Res.376(LX)2017.

107 African Charter secs 47-59.

under article 56, which include compatibility with the African Charter and exhaustion of local remedies.

As of June 2024, the Commission has not exercised its protective mandate with regard to the rights of sexual minorities. While there was an opportunity to do so in *William Courson v Zimbabwe*, the applicant retracted the case before it was determined.¹⁰⁸ Given that this occurred in the mid-90s, it was ill-timed and had not followed proper consultation. It may have resulted in an unfavourable precedence on SOGI rights.¹⁰⁹

However, progress has been made to advance the human rights agenda of sexual minorities within the African context since then. It is yet to be seen whether complainants will make use of the African Commission or any other body of the African human rights system to specifically determine human rights issues affecting sexual minorities. Such a matter was tabled before the East African Court of Justice (EACJ) in 2014 following the passage of Uganda's Anti-Homosexuality Act, 2014.¹¹⁰ The case was, however, never determined on its merits because the Constitutional Court of Uganda nullified the legislation. There is speculation that the opportunity will arise again with the passage of the 2023 Act. The weight of such jurisprudence cannot be ignored as it has implications on state action. For example, in the Kenyan case *Eric Gitari v Non-Governmental Organisations Co-ordination Board*,¹¹¹ the petitioners and the High Court relied on the jurisprudence of the African Commission, the African Court, and the UN Human Rights Council in affirming the right to association for LGBT organisations.

5 Relevance of the Maputo Protocol to LGBTIQ+ rights protection and advocacy

The Maputo Protocol was borne out of the inadequacy of the African Charter and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) to transform the lives of African women by addressing the unique human rights violations and

108 (2000) AHRLR 335 (ACHPR 1995).

109 GALZ 'Courson complaint' <https://galz.org/courson-complaint/> (accessed 20 August 2024).

110 *Human Rights Awareness and Promotion Forum (HRAPF) v Attorney General of Uganda and the Secretariat of the Joint United Nations Programme on HIV/AIDS (UNAIDS)*, Reference 6 of 2014.

111 [2015] eKLR (24 April 2015).

abuses and gender inequalities experienced by African women.¹¹² As of June 2024, 44 of the 55 African countries have ratified the Maputo Protocol.¹¹³ On the part of the African Charter, other than article 18, which requires states to eliminate discrimination against women and protect the rights of women and children as stipulated by international law, it is silent on the rights of women. Scholars have criticised the placement of the right under the family provision, reinforcing stereotypical traditional perceptions that view the place and utility of women in the context of the family.¹¹⁴ Historically, the private sphere of the family was a contested space where women have experienced and continue to experience most abuses.¹¹⁵ Further, the linking of women and children reinforces the infantilisation of women.¹¹⁶ Article 17 also enjoins the state to promote and protect morals and traditional values without providing guidance on the substance of these values. Historically, ambiguous African values were the vehicle for continued discrimination and subjugation of women.¹¹⁷ This scenario has evolved to perpetrate and perpetuate hostility towards LBTIQ+ women. While CEDAW, on the other hand, was a bellwether in articulating the specific rights of women and tasking states to eliminate discrimination against women, it

112 F Banda 'Blazing a trail: The African Protocol on Women's Rights comes into force' (2006) 50 *Journal of African Law* 72; S Omondi, E Waweru & D Srinivasan 'Breathing life into Maputo Protocol: Jurisprudence on the rights of women and girls in Africa' (2018) https://d3n8a8pro7vhm.cloudfront.net/equalitynow/pages/817/attachments/original/1543482389/Breathing_Life_into_Maputo_Protocol_Case_Digest-Jurisprudence_on_the_Rights_of_Women_and_Girls_in_Africa.pdf?1543482389 (accessed 20 August 2024); Centre for Reproductive Rights 'The Protocol on the Rights of Women in Africa: An instrument for advancing reproductive and sexual rights' *Briefing Paper* (2006) 3.

113 Status list: https://au.int/sites/default/files/treaties/37077-sl-PROTOCOL_TO_THE_AFRICAN_CHARTER_ON_HUMAN_AND_PEOPLES_RIGHTS_ON_THE_RIGHTS_OF_WOMEN_IN_AFRICA.pdf (accessed 2 June 2024).

114 K Stefiszyn & A Prezanti 'The impact of the Protocol on the Rights of Women in Africa on violence against women in six selected Southern African countries: An advocacy tool' (2009) 2.

115 C Chinkin 'Gender inequality and human rights law' in A Hurrell & N Woods (eds) *Inequality, globalisation and world politics* (1999) 105.

116 N Kabira 'Monitoring compliance of African women's human rights commitments' (2021) *De Jure Law Journal* 459.

117 Banda (n 112) 75.

lacked certain context relevance to the unique challenges experienced by African women.¹¹⁸ A gap that was cured by the Maputo Protocol.

The Maputo Protocol broadly defines women as persons of the female gender, including girls. From the onset, the Protocol departs from the biological definition of women on the basis of sex, allowing for the inclusion of diverse women, such as transgender women, within the definition of woman.¹¹⁹ The Protocol proceeds to reference the concept of gender in other rights, including the elimination of discrimination against women,¹²⁰ access to justice and equality before the law,¹²¹ right to sustainable development,¹²² and right to education.¹²³ However, Snyman and Rudman flag a conceptual confusion in the Protocol, given discrimination against women under article 1(f) is based on sex and not sex and gender, positing that the terms may have been used interchangeably during the drafting of the Protocol.¹²⁴ Curiously, African Commission on Human and Peoples' Right 'General Comment 2 on Article 14.1(a), (b), (c) and (f) and Article 14.2 (a) and (c)' (General Comment 2), adopted at the 55th Ordinary Session of the African Commission, 28 April-12 May 2014 deviates from the Maputo Protocol itself by defining women as 'persons of female sex including girls, including women and girls living with a disability'.¹²⁵ There is a need to clarify this conceptual clash.

Also innovative is the elaboration on the health and reproductive rights of women and the emphasis on individual autonomy to control this right. The explicit mention of self-protection and state protection against Sexually Transmitted Infections (STIs) and HIV was another landmark binding provision under the Maputo Protocol.¹²⁶ This is in addition to enjoining states to protect female reproductive rights by permitting 'medical abortion in cases of sexual assault, rape, incest,

118 Banda (n 112) 72; Centre for Reproductive Rights (n 112) 3 and Omondi, Waweru & Srinivasan (n 112).

119 Maputo Protocol art 1. Also see T Snyman & A Rudman 'Protecting transgender women within the African human rights system through an inclusive reading of the Maputo Protocol and the proposed Southern African Development Community Gender-Based Violence Model Law' (2022) 33 *Stellenbosch Law Review* 67.

120 Maputo Protocol art 2(1)(c).

121 Maputo Protocol art 8(d).

122 Maputo Protocol art 19.

123 Maputo Protocol art 12(1)(c).

124 Snyman & Rudman (n 119) 70.

125 Para 3.

126 Maputo Protocol art 14(1).

and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.¹²⁷ The vulnerability of lesbian women to sexual assault, rape and forced marriages heightens the risk of STIs and unwanted pregnancies. Reports also reveal incidences of corrective rape may be perpetuated by close relatives leading to incestuous connotations.¹²⁸ Victims should have the option of recourse to medical abortion and other health services in the event of such violations of personal integrity and dignity.

Article 5 requires states to prohibit and condemn harmful practices that affect women and makes specific mention of FGM. Research has revealed that FGM is a form of violence experienced by diverse women and has further shown that LGBTIQ+ women are victims of harmful practices in the form of conversion therapy and corrective rape to coerce them to conform to societal perceptions of normal.¹²⁹ It is, therefore, uncontested that LGBTIQ+ women are an at-risk group from both state and non-state actors. The failure of states to protect diverse women from harmful practices and other forms of violence, abuse and intolerance is a violation of article 5(d) of the Maputo Protocol. Further, like the African Charter, the Maputo Protocol provides the right of women to live in a positive cultural context. Inasmuch as this is linked to the concept of African values, the Maputo Protocol goes beyond the African Charter by basing African values on principles of equality, peace, freedom, dignity, justice, solidarity and democracy.¹³⁰ As Rudman argues, in addressing harmful behaviours, attitudes and practices which impair the rights of women and girls and affirm the dignity of females as required under the Maputo Protocol, states have a duty to confront the patriarchy through public education.¹³¹

While impressive in contextualising the protection, fulfilment and respect of women's rights, a shortcoming of the Maputo Protocol is

127 Maputo Protocol art 14(2)(c).

128 N Bhalla 'Interview-film lifts lid on "corrective rape" in families of gays in India' *Reuters* 11 June 2015 <https://www.reuters.com/article/india-lgbt-rape-idUSL3N0YW57Z20150611> (accessed 20 August 2024).

129 Msibi (n 22) 61; Nel & Judge (n 53) 23-24 and Strudwick (n 53).

130 Maputo Protocol Preamble and art 17.

131 A Rudman 'Introduction' in A Rudman, CN Musembi & TM Makunya (eds) *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: A commentary* (2023) 2.

the disproportionate focus on reproductive rights over sexual rights.¹³² In fact, Mukasa notes that women are largely viewed through the lens of motherhood in the Protocol.¹³³ While the Protocol provides for autonomy in the reproductive rights of women, no mention is made of sexual autonomy. A number of the provisions are steeped in conventional heteronormativity norms. Case in point, the provision regarding marital union, separation, divorce and marriage, and inheritance rights of widows strictly envisions a union between a man and a woman.¹³⁴ Admittedly, same-sex unions are still contested globally, but for an instrument that was tailored for the rights of the African woman in a context that has long had evidence of woman-to-woman marriages, flexibility in the definition beyond heteronormative perceptions was warranted.

The above protective framework for women and girls is further reinforced in instruments such as the African Children's Charter and the African Youth Charter. These treaties not only underscore the rights and fundamental freedoms contained in the African Charter and other international law instruments but also eliminate age-related and gendered discrimination as well as harmful social and cultural practices.¹³⁵

6 Unravelling the uncertainty in the interpretation of the Maputo Protocol by the African Court and African Commission

As can be seen from the discussion above, the argument for the recognition and protection of the rights of LGBTIQ+ women can be best achieved through a purposive reading of the African Charter and the Maputo Protocol, as well as reliance on implied rights and universalism. The section below argues that both the African Commission and the African Court are potential avenues for strategic litigation on LGBTIQ+ rights. This is dependent on applicants with locus standi before these bodies overcoming the reluctance to approach these complaint mechanisms to

132 V Balogun & E Durojaye 'The African Commission on Human and Peoples' Rights and the promotion and protection of sexual and reproductive rights' (2011) 11 *African Human Rights Law Journal* 376.

133 RS Mukasa *The African Women's Protocol: Harnessing a potential force for positive change* (2009) 5.

134 See Maputo Protocol arts 6 7 and 21.

135 See African Youth Charter arts 23 and 25.

adjudicate over a contentious issue and aligning it with the appropriate zeitgeist for a potentially progressive determination.

The African Court has the interpretive mandate to determine matters on the application and implementation of the Maputo Protocol.¹³⁶ Before establishing the African Court, the interpretive mandate rested with the African Commission.¹³⁷ Consequently, a jurisdiction question arose with the establishment of the African Court. However, as Viljoen and Kamunyu argue, the African Commission and African Court share an interpretive mandate for the Maputo Protocol.¹³⁸ The argument is founded on article 2 of the African Court Protocol, which stipulates that the African Court complements the protective mandate of the African Commission as opposed to replacing it.

However, for the Court to exercise personal jurisdiction in a matter under the Maputo Protocol, the relevant states must have ratified both the Maputo Protocol and the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.¹³⁹ Thirty states have ratified both the African Court Protocol and the Maputo Protocol.¹⁴⁰ Individuals and NGOs seeking to access the Court may face formal access challenges that defeat the Court's viability as a platform for resolving human rights disputes in the African continent. Only the African Commission, state parties, and African intergovernmental organisations have standing

136 Maputo Protocol art 27. Also see Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights art 3.

137 Maputo Protocol art 32.

138 F Viljoen & Mariam Kamunyu 'Articles 27 and 32: The interpretative mandate under the Maputo Protocol' in Rudman and others (n 131) 558.

139 Viljoen & Kamunyu (n 138) 561.

140 See the Status list of the African Court Protocol: https://au.int/sites/default/files/treaties/36393-sl-PROTOCOL_TO_THE_AFRICAN_CHARTER_ON_HUMAN_AND_PEOPLESRIGHTS_ON_THE_ESTABLISHMENT_OF_AN_AFRICAN_COURT_ON_HUMAN_AND_PEOPLES_RIGHTS_0.pdf (accessed 2 June 2024) & the Maputo Protocol https://au.int/sites/default/files/treaties/37077-sl-PROTOCOL_TO_THE_AFRICAN_CHARTER_ON_HUMAN_AND_PEOPLES_RIGHTS_ON_THE_RIGHTS_OF_WOMEN_IN_AFRICA.pdf (accessed 2 June 2024). The 30 states are Algeria, Benin, Burkina Faso, Cameroon, Comoros, Congo, Côte d'Ivoire, DRC, Gabon, The Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Libya, Malawi, Mali, Mauritania, Mauritius, Mozambique, Nigeria, Rwanda, Senegal, South Africa, Tanzania, Togo, Tunisia and Uganda. The territory of Sahrawi Arab Democratic Republic has also ratified both Protocols.

before the Court, enabling them to submit a case.¹⁴¹ NGOs with observer status before the Commission and individuals can only institute cases before the Court if their state has made the article 34 (6) declaration accepting the competence of the Court. As of 2023, only eight countries have made and maintained such a declaration: Burkina Faso, Ghana, Guinea Bissau, Malawi, Mali, Niger, The Gambia and Tunisia.¹⁴² Consequently, the African Court remains an inaccessible platform for the majority of individuals and NGOs in Africa. Given the stance of the African Commission with regard to granting observer status to LGBTIQ+ organisations, such NGOs in the eight countries would still be obstructed from accessing the African Court.

As of 2023, the African Court has received 341 contentious applications, of which 316 are from individuals, 22 from NGOs, and three from the African Commission.¹⁴³ Only one case has been on the interpretation of the Maputo Protocol.¹⁴⁴ The absence of applications from states and the few from the Commission reveal the importance of states making the article 34(6) declaration to realise the potential of the Court as an adjudicator of human rights disputes. Better yet, the Protocol should be amended to delete the inhibitive provision to facilitate access to justice. That being said, the African Commission remains the more feasible platform for the interpretation of the Maputo Protocol as well as other human rights instruments within its protective mandate. Complaints from state parties and NGOs have contributed to its jurisprudence, including those regarding women's rights.¹⁴⁵ However, neither the Commission nor the Court have adjudicated over the reproductive and sexual rights of women.

141 Court Protocol art 5.

142 African Court 'Declarations' <https://www.african-court.org/wpafc/declarations/> (accessed 20 August 2024).

143 ACtHPR 'Statistics' <https://www.african-court.org/cpmt/statistic> (accessed 20 August 2024).

144 *Association pour le Progrès et la Défense des Droits des Femmes Maliennes and the Institute for Human Rights and Development in Africa v Mali* (merits) (2018) 2 AfCLR 380.

145 See eg *Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt*, Communication 323/06 African Commission on Human and Peoples' Rights, Combined thirty-second and thirty-third Annual Activity Report and *Equality Now and Ethiopian Women Lawyers Association (EWLA) v Federal Republic of Ethiopia (Equality Now)*, Communication 341/07 African Commission on Human and Peoples' Rights 57th Annual Activity Report (2016).

Other accessibility requirements of the Court mirror those of the Commission, as articulated in article 56 of the African Charter. They include exhaustion of local remedies, that the petition is submitted within a reasonable time after exhaustion of local remedies, and compatibility with the African Charter. As scholars have argued, the admissibility criteria for complaints before the African Commission and the African Court are blind to the reality of women's difficulties in accessing justice mechanisms not only at the domestic level but also in international bodies.¹⁴⁶ The Committee on the Elimination of all Forms of Discrimination Against Women (CEDAW Committee) lists accessibility as one of the six indicators of access to justice, together with justiciability, availability, good quality, provision of remedies for victims and accountability of justice systems.¹⁴⁷ Although sexual minority rights are not justiciable, their rights can be implied for adjudication before African human rights bodies. However, the formal and informal impediments to accessing the Court and the Commission continue to compromise access to justice for LBTIQ+ women specifically and the SOGI community generally.

7 Overcoming the politics of access to the African Commission for diverse women

The tension between the relatively slow but steady progressiveness of the normative framework of the Commission in protecting the rights of sexual minorities can be juxtaposed with its reluctance to provide observer status recognition to LBTIQ+ organisations. The overreaching hand of the political organs of the AU cannot be ignored in this discourse. The decision to withdraw CAL's observer status and subsequent decisions can be logically traced to interference by the AU political organs.¹⁴⁸ This political interference not only threatens the

146 Kabira (n 116) 466.

147 UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation No 33: on women's access to justice, 23 July 2015, CEDAW/C/GC/33.

148 Decision of the AU Executive Council on the 38th Activity Report of the African Commission, EX.CL/Dec.887 (XXVII) para 7, in EX.CL/Dec.873-897(XXVII), 27th ordinary session 7-12 June 2015, Johannesburg South Africa.

independence of the Commission but its existence as well.¹⁴⁹ There is a likelihood that the much-needed pushback against the AU's political interference in the affairs of the Commission may threaten the operation and existence of the Commission. Therefore, strategic engagement by CSOs at both the national and regional levels is key to overcoming this challenge. Clearly, more needs to be done in sensitising the public, policymakers, and political leaders on sexual minority rights through a bottom-up approach.

Ideally, rights-affirming jurisprudence from the African Commission, the African Court, or other African human rights bodies would be monumental for the protection of sexual minority rights in Africa. As noted above, strategy and timing are key.¹⁵⁰ The growing lawfare and intolerance against sexual minorities have drawn international and continental criticism.¹⁵¹ As has been seen from the normative framework of the African Commission and its statements, it is receptive to combating violence against sexual minorities. This thematic area provides the impetus for advocacy for greater redress of violations and abuses experienced by sexual minorities and their recognition. Homo-capitalism, where donor funding is denied or retracted to dissuade countries from passing repressive laws against minorities or to encourage countries to adopt rights-affirming laws, has had measured success.¹⁵² In a nutshell, a sustained, multi-stakeholder and multi-layered engagement strategy is necessary to build upon the existing work of CSOs in this regard.

Importantly, the denial of observer status to LGBTIQ+ organisations does not negate the feasibility of the African Commission as an avenue for advocacy for diverse women. Attendance of sessions at the Commission is not predicated on observer status. The sessions provide an invaluable opportunity for lobbying and advocacy, not only within the framework

149 Decision on the Report on the Joint Retreat of the Permanent Representatives' Committee (PRC) and the African Commission on Human and Peoples' Rights (ACHPR) DOC.EX.CL/1089(XXXIII) I, at EX.CL/Dec.1015(XXXIII) para. 7(iii) & IJRC (n 7).

150 AM Ibrahim 'LGBT rights in Africa and the discursive role of international human rights law' (2015) 15 *African Human Rights Law Journal* 272-273.

151 OHCHR (n 45).

152 R Rao 'Global homocapitalism' (2015) 194 *Radical Philosophy* 38-49; Ojilere (n 31) 10-11; A Ojilere 'The diplomacy of homocapitalism against Africa' (2018) 22 *World Affairs: The Journal of International Issues* 155.

of the NGO Forum that fosters ‘closer collaboration between and among NGOs and with the African Commission and other African human rights mechanisms’ but also with the Commission.¹⁵³ Through side events and informal discussions with commissioners and state representatives in the side-lines of the Commission, LGBTIQ+ women and WHRDs can educate and advocate by challenging misconceptions and presenting human rights arguments for addressing the state of human rights violations and abuses against the LGBTIQ+ community. There is also a need for research on the experiences of diverse women in Africa, specifically, and the whole community, in general, to guide advocacy actions and decision-making. The UN’s special mechanisms have made considerable headway in this regard.¹⁵⁴ CSOs can collaborate with special mechanisms on women’s rights and HRDs to develop research on the violations and abuses experienced by sexual minorities in Africa.

8 Conclusion

The incongruity between the African Commission’s gradual jurisprudential and normative protection of the rights of sexual minorities and the refusal to grant observer status to LGBTIQ+ organisations notwithstanding, the Commission holds considerable potential to advance the rights of sexual minorities generally and LGBTIQ+ women specifically. After all, the Commission holds a promotional and protective human rights mandate and has by far shown more gumption at engaging on issues of sexual minority rights than other African human rights bodies. The approach of implied rights, as well as the principle of universality of rights, anchors the protection of the rights of sexual minorities in the absence of explicit recognition in the African Charter. The African human rights framework, including the Maputo Protocol, has untapped capabilities to recognise, protect and promote the rights of sexual minorities. LGBTIQ+ women and WHRDs can build on the existing momentum of inclusive normative and jurisprudential pronouncements by the African Commission in their advocacy. The article, however, cautions that such engagement should be strategic,

153 ACDHRS ‘NGO Forum’ <https://www.acdhhs.org/ngo-forum/> (accessed 20 August 2024).

154 Report of the Independent Expert on protection against violence and discrimination (n 54).

well-timed, multi-stakeholder and sustained. It also has to integrate a bottom-up approach of sensitisation, education, and advocacy from the community, national, and regional levels to combat the multiple levels of intolerance, given their influence on the regressive stance of the Commission on observer status. The gendered connotations of violations and abuses of diverse women underscore the need for engagement from the grassroots.

Table of abbreviations

AU	African Union
CAL	Coalition for African Lesbians
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CSO	Civil Society Organisations
EACJ	East African Court of Justice
FGM	Female genital mutilation
ICCPR	International Covenant on Civil and Political Rights
LGBTQI	Lesbian, gay, bisexual, transgender, queer, and intersex
NGO	Non-governmental organisations
SERAC	Social and Economic Rights Action Centre
SOGI	Sexual orientation and gender identity
SOGIESC	Sexual orientation, gender identity, gender expression and sex characteristics
STI	Sexually Transmitted Infections
UN	United Nations
WHRD	Women human rights defenders

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