

# University of Pretoria Centre for Human Rights



## **The contribution of the African Commission on Human and Peoples' Rights to the promotion and protection of the human rights of lesbian, gay, bisexual and transgender persons in Africa**

Submitted in partial fulfilment of the requirements of the Master's degree  
(MPhil) in Human Rights and Democratisation in Africa

by

**Mr. Robert Akoto Amofo**

U21808857

prepared under the supervision of

**Professor Nair Monteiro Teles**

(Universidade Eduardo Mondlane, Maputo, Mozambique)

and

**Professor Frans Jacobus Viljoen**

(University of Pretoria, Pretoria, South Africa)

at the

Faculty of Law, Universidade Eduardo Mondlane

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**Dedication**

To Advocate Faith Pansy Tlakula and Madame Alapini Gansou, two formidable women who, as Commissioners of the African Commission on Human and Peoples' Rights, dedicated themselves to advancing the human rights protection of gender and sexual minorities despite the name-calling and challenges.

Also, to Sibongile Ndashe for her phenomenal work and commitment to advancing human rights protection of gender and sexual minorities throughout the region.

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**Abbreviations**

|        |   |
|--------|---|
| AHSG   | Assembly of Heads of States and Governments |
| AMShER | African Men for Sexual Health and Rights    |
| AU     | African Union                               |
| CAL    | Coalition of African Lesbians               |
| LGBT   | lesbian, gay, bisexual and transgender      |
| LB     | lesbian and bisexual                        |
| NHRI   | national human rights institution           |
| NGO    | non-governmental organisation               |
| UN     | United Nations                              |

## Table of contents

|  |            |
|--|------------|
| <b>Declaration .....</b>   | <b>i</b>   |
| <b>Dedication .....</b>  | <b>ii</b>  |
| <b>Acknowledgement .....</b>   | <b>iii</b> |
| <b>Abbreviations .....</b>   | <b>iv</b>  |
| <b>Chapter 1: Introduction .....</b>   | <b>1</b>   |
| <b>1.1 Background and context.....</b>   | <b>1</b>   |
| <b>1.2 Problem statement .....</b>   | <b>2</b>   |
| <b>1.3 Definition of key terms .....</b>   | <b>3</b>   |
| <b>1.4 Research objective and questions.....</b>   | <b>3</b>   |
| <b>1.5 Methodology.....</b>  | <b>4</b>   |
| <b>1.6 Literature review .....</b>   | <b>4</b>   |
| <b>1.7 Limitations of the study .....</b>  | <b>6</b>   |
| <b>1.8 Structure .....</b>   | <b>7</b>   |
| <b>Chapter 2: Avenues the African Commission can explore to promote and protect the human rights of LGBT persons .....</b>                         | <b>8</b>   |
| <b>2.1 Introduction .....</b>  | <b>8</b>   |
| <b>2.2 Potential avenues to protect LGBT persons under the African Charter.....</b>  | <b>8</b>   |
| 2.2.1 Making of the African Charter and inception of the protection of LGBT persons' human rights .....  | 8          |
| 2.2.2 Mandate of the Commission per the African Charter.....   | 10         |
| 2.2.3 Substantive provisions of the African Charter that provide avenues for the African Commission to protect LGBT persons' rights .....          | 11         |
| <b>2.3 Key substantive provisions of the Maputo Protocol that provide avenues for the African Commission to protect LGBT persons' rights .....</b> | <b>13</b>  |
| <b>2.4 Mechanism and procedures that provide avenues for the African Commission to protect LGBT persons' rights .....</b>                          | <b>14</b>  |
| 2.4.1 Special mechanisms .....   | 14         |
| 2.4.2 State reporting.....   | 15         |
| 2.4.3 Granting of observer or affiliation status to NGOs and affiliate status to NHRIs   | 15         |
| 2.4.4 Adoption of soft-law standards such as General Comments, guidelines and thematic resolutions .....   | 16         |
| 2.4.5 Requests for advisory opinions from the African Human Rights Court.....  | 16         |
| <b>2.5 Conclusion.....</b>   | <b>17</b>  |
| <b>Chapter 3: A chronological overview of the work of the African Commission on promoting and protecting the rights of LGBT persons .....</b>      | <b>18</b>  |
| <b>3.1 Introduction .....</b>  | <b>18</b>  |
| <b>3.2 Phase one: Contradiction and animosity (1987 to 2013).....</b>  | <b>18</b>  |
| 3.2.1 Start of phase one: The establishment of the Commission (1987) .....   | 18         |
| 3.2.2 Phase one: Promotional mandate.....  | 19         |
| 3.2.3 Phase one: Protective mandate .....  | 20         |
| 3.2.4 Phase one: Interpretative mandate .....  | 25         |
| 3.2.5 Phase one: Other tasks.....  | 27         |
| <b>3.3 Phase two: Phase of advances and acceptance (2014-2017) .....</b>   | <b>27</b>  |

|   |  |           |
|---|--|-----------|
| 3.3.1   | Phase two: Promotional mandate .....   | 27        |
| 3.3.3   | Phase two: Interpretative mandate .....  | 37        |
| 3.3.4   | Phase two: Other tasks .....   | 38        |
| <b>3.4</b>  | <b>Phase three: Phase of ambiguity and opportunity (2018 to present) .....</b>                       | <b>38</b> |
| 3.4.1   | Phase three: Promotional mandate.....  | 38        |
| 3.4.2   | Phase three: Protective mandate.....   | 39        |
| 3.4.2   | Phase three: Interpretative mandate.....   | 41        |
| 3.4.3   | Phase three: Other tasks .....   | 41        |
| <b>3.5</b>  | <b>Conclusion .....</b>  | <b>42</b> |
| <b>Chapter 4: Conclusion on the factors that have contributed to the current state of LGBTI human rights protection at the Commission and recommendations .....</b> |  | <b>43</b> |
| <b>4.1</b>  | <b>Introduction .....</b>  | <b>43</b> |
| <b>4.2</b>  | <b>Factors that influenced the work of the Commission from 1987 to 2021.....</b>                     | <b>43</b> |
| 4.2.1   | The adoption of an incrementalist approach to including LGBTI in its work .....                      | 43        |
| 4.2.2   | Use of pragmatism in dealing with the AU organs .....  | 47        |
| 4.2.3   | Contributions and influence of NGOs, advocates and activists .....                                   | 48        |
| 4.2.4   | The role of individual Commissioners .....   | 50        |
| <b>4.3</b>  | <b>Recommendations .....</b>   | <b>51</b> |
| 4.3.1   | To the Commission .....  | 51        |
| 4.3.2   | To states .....  | 52        |
| 4.3.3   | To civil society.....  | 52        |
| 4.3.4   | A joint effort to ensure greater awareness of the Charter's possibilities and Commission's work..... | 53        |
| <b>4.4</b>  | <b>Avenue for further research opened.....</b>   | <b>53</b> |
| <b>Bibliography.....</b>  |  | <b>54</b> |

## Chapter 1: Introduction

### 1.1 Background and context

The predecessor of the African Union (AU), the Organisation of African Unity (OAU), in 1981 adopted the African Charter on Human and Peoples' Rights (African Charter), which provides for the establishment of a continental body, the African Commission on Human and Peoples' Rights (the Commission), to promote and protect the human and peoples' rights of Africans.<sup>1</sup>

Established in 1987,<sup>2</sup> and headquartered in Banjul, The Gambia, since 1989,<sup>3</sup> the Commission's mandate of promoting and protecting human rights is set out in Article 45 of the African Charter. The mandates are set in four ways; to promote human rights, protect human rights, interpret human rights provisions and execute other tasks as may be handed over to them from the Assembly of Heads of States and Governments (AHSO).

In executing its mandate, the Commission has adopted innovative ways to meet the changing times and demands for human rights protection. However, one area of human rights that the Commission seem not to have explored in great depth is the rights of lesbian, gay, bisexual, and transgender (LGBT) persons.<sup>4</sup> In the meantime, the Commission has taken a number of measures. In 2014, the Commission adopted Resolution 275, which is on Protection against Violence and other Human Rights Violations against Persons based on their actual or imputed sexual orientation or gender identity (Resolution 275). This happened after strong advocacy from various non-governmental organisations (NGOs) at the Commission.<sup>5</sup> Another significant step the Commission took towards recognising LGBT persons' human rights is the approval of the observer status of the Coalition

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<sup>1</sup> Adopted on 27 June 1981, OAU Doc. CAB/LEG/67/3 Rev.5 (entered into force 21 October 1986), reprinted in 21 *International Legal Materials* 58 (1982), art 30.

<sup>2</sup> The African Commission on Human and Peoples' Rights is provided for under art 30 of the African Charter; the first Commissioners were inaugurated on 2 November 1987, when its first session took place in Addis Ababa, Ethiopia.

<sup>3</sup> The African Commission's secretariat has a secretary who is appointed by the Chairperson of the AU Commission. The Commission's secretariat has support staff available to the Commission to ensure effective discharge of the Commission's mandate. The Secretariat provides administrative, technical and logistical support to the Commission.

<sup>4</sup> R Murray & F Viljoen '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* 86 at 89.

<sup>5</sup> Resolution 275 expresses grave concern about increasing violence and other human rights violations, including murder, rape, assault, in respect of persons based on their real or perceived sexual orientation or gender identity. It calls upon states to take action for stopping such violence, to ensure that human rights defenders working on the human rights of sexual minorities are free from reprisals and take appropriate measures to ensure adequate remedies are ensured to victims of such violence.



of African Lesbians (CAL) in 2015.<sup>6</sup> However, not long after CAL's observer status was granted, the African Commission received the decision (Decision 1015)<sup>7</sup> of the Executive Council of the African Union (AU) to withdraw CAL's observer status.<sup>8</sup>

The Commission is expected to ensure that the principles of human rights, which are universality, interdependence, inalienable, indivisible and equality, are applied in protecting the human rights of all persons, including LGBT persons. Article 19 of the Charter<sup>9</sup> requires that "all peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another."<sup>10</sup> It further stipulates that "every individual" should be entitled to the rights and freedoms of the African Charter. Therefore, under its mandate, the African Commission is expected to make these rights a reality for the LGBT community in Africa. Notwithstanding the clarity of its mandate in the Charter, there are questions about the Commission's independence to carry out its mandate if the Executive Council makes decisions that interfere with the work of the Commission.

## 1.2 Problem statement

Notwithstanding the strides made by the Commission in promoting the rights of LGBT persons, they continue to face violence and human rights abuse in various parts of Africa.<sup>11</sup> Thirty-three countries still either totally criminalise or have laws that criminalise same-sex activities in several different ways.<sup>12</sup> Nigeria in 2013 passed the Same-Sex Marriage (Prohibition) Act, which criminalises same-sex marriage, same-sex sexual activities, organisations, clubs and individuals who fail to report instances of same-sex activities they are aware of.<sup>13</sup> Uganda passed the Anti-Homosexuality Act in 2014 to make any act of homosexuality an offence punishable by life imprisonment.<sup>14</sup> Although this Act was repealed based on a

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<sup>6</sup> African Human Rights Journal 'Editorial' (2018) 18 *African Human Rights Journal* <http://www.ahrj.up.ac.za/images/ahrj/2018/AHRLJ%20of%202018.pdf> (accessed 10 August 2021).

<sup>7</sup> Decision by the Executive Council of the African Union on the Joint Retreat of the Permanent Representatives' Committee (PRC) and the African Commission on Human and Peoples' Rights (ACHPR). Doc.EX.CL/1015(XXXII).

<sup>8</sup> As above iv-v.

<sup>9</sup> African Charter (n1) Article 19.

<sup>10</sup> As above Article 19.

<sup>11</sup> G Reid 'Global trends in LGBT rights during the COVID-19 pandemic' (14 February 2021) Human Rights Watch <https://www.hrw.org/news/2021/02/24/global-trends-lgbt-rights-during-covid-19-pandemic> (accessed on 20 July 2021).

<sup>12</sup> International Lesbian, Gay, Bisexual, Trans and Intersex Association 'State-sponsored homophobia: global legislation overview' (2020) at 113.

<sup>13</sup> Same Sex Marriage (Prohibition) Act 2013 Nigeria <https://www.refworld.org/pdfid/52f4d9cc4.pdf> (accessed on 21 August 2021).

<sup>14</sup> Anti-Homosexuality Act 2014.

parliamentary technicality in 2015,<sup>15</sup> the Ugandan Parliament passed another law criminalising same-sex relationships in 2021.<sup>16</sup>

A group of eight Ghanaian Members of Parliament (MPs) recently initiated anti-LGBT draft legislation through a Private Member's Bill titled 'Promotion of Proper Sexual Rights and Ghanaian Family Values', which is expected to criminalise same-sex activities and any activity that seeks to promote or advance the protection of LGBT people in Ghana.<sup>17</sup> The Bill has gone through a first reading. It has been referred to the Constitutional, Legal and Parliamentary Affairs Committee for investigations and a report to facilitate its second reading in Parliament, during which MPs will debate the Bill. In all, states are making attempts to control sexualities through instruments of state control and dominance.<sup>18</sup>

With the current state of LGBT issues in Africa, the Africa Commission, as the regional human rights body, has to show the way through the outcome of its work. The Commission's effectiveness is what can provide a platform for change for LGBT persons in various countries.

### **1.3 Definition of key terms**

The term LGBT in this study is used as a representation of all sexual and gender minorities. Further definitions of each group can be found in the appendix.

### **1.4 Research objective and questions**

The objective of the research is to examine the contribution of the Commission, since its establishment, towards the promotion and protection of the rights of LGBT persons and to identify the factors that influence its work. This examination invites the following sub-questions:

- Do the existing regional human rights instruments provide avenues for the Commission to execute its mandate for LGBT persons?
- To what extent has the Commission contributed to the promotion and protection of the rights of LGBT persons from 1987 to date?

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<sup>15</sup> BBC News 'Uganda Court annuls anti homosexuality law' (1 August 2014).

<sup>16</sup> See section 11 Sexual Offences Act 2019 (Uganda) <http://parliamentwatch.ug/wp-content/uploads/2019/11/The-Sexual-Offences-Bill-2019.pdf> (accessed on 21 August 2021).

<sup>17</sup> E Akinwotu 'Ghana: anti-gay bill proposing 10-year prison sentences sparks outrage' (23 July 2021) <https://www.theguardian.com/global-development/2021/jul/23/ghana-anti-gay-bill-proposing-10-year-prison-sentences-sparks-outrage> (accessed on 10 August 2021).

<sup>18</sup> S Tamale (ed) *African sexualities: a reader* (2011) page 3.

- What factors influenced the work of the Commission, and what are the recommendations to enable it to improve on its position towards LGBT persons in Africa?

### **1.5 Methodology**

This research adopts a qualitative approach informed by a desktop review that focused on a historical (chronological) review of the work of the Commission since its establishment till 2021. The study methodology also includes a review of regional human rights laws, activity reports of the Commission, media reports, journals and public statements on LGBT issues. Other documents that were consulted include Concluding Observations of the Commission, soft-law instruments, resolutions and audio-visual recordings of the work of the Commission.

### **1.6 Literature review**

Various authors have studied the work of the Commission. Two of such authors are Murray and Viljoen. In the 2012 journal article *Towards non-discrimination on the basis of sexual orientation; the normative basis and procedural possibilities before the African Commission on Human and Peoples Rights*, they examined the African Charter. They identified provisions within the charter that provides opportunities for advocates to advance the protection and promotion of human rights as of 2012.<sup>19</sup> They also wrote in the same article about the work of the Commission and how the Commission's work has evolved over the years when it comes to the protection and promotion of the human rights of LGBT persons. In looking at the commission's work, they identified that the Commission had paid little attention to the issues of LGBT persons.<sup>20</sup> They also assert that there is some reluctance on the part of the individual commissioners to discuss issues on LGBT persons.<sup>21</sup> This indicates the level of contribution one can expect from the Commission considering their work since its establishment.

Murray and Viljoen's Article also indicate that, at the time of writing their article, the Commission had not decided on a communication that raised human rights protection of LGBT persons as an issue. They highlighted the International

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<sup>19</sup> Murray and Viljoen (n4) page 87.

<sup>20</sup> Murray and Viljoen (n4) page 100.

<sup>21</sup> As above.

Gay and Lesbian Human Rights Commission (IGLHRC) recommendation to organisations and individuals to avoid sending a communication to the Commission. They believed that, when they made the recommendation, the Commission was not ready. An attempt to send a communication could have made them make a devastating decision that could have gone against the community. This study will look at what has changed since Murry and Viljoen wrote this Article.

Another human rights expert, Sibongile Ndashe, has studied civil society's role in advancing human rights protection for LGBT persons at the Commission in her work *Seeking the protection of LGBT rights at the Africa Commission on Human and Peoples*.<sup>22</sup> She gives a historical account of how NGOs have worked with the Commission on LGBT rights protection. She identifies in her work that the Commission is the ideal venue for advancing the human rights protection of LGBT persons. Adrain Jjuuko in his work *The protection and promotion of LGBTI rights in the African regional human rights system: opportunities and challenges* discusses the work that African human rights system has done to promote and protect LGBTI rights and compares it with work done at the UN level and other regional levels. He looks at the legal instruments at each level and examines the work of key mechanisms. One of the issues he highlights is the double standards of the Commission when it comes to granting observer status to CAL.

In the 2018 Editorial of the *African Human Rights Journal*,<sup>23</sup> the Editor discussed how the Commission first granted CAL observer status in 2015 and withdrew it in 2018 because the Executive Council of the AU called on the Commission to withdraw the observer status. The Editorial observed that the Executive Council's Decision 1015 pulled the carpet from under the Commission by not only providing a deadline for the withdrawal of CAL's observer status but by further questioning critical aspects of the Commission's functioning as the decision also requested a review of the interpretative mandate of the Commission. This incident has brought into question the real reason for the establishment of the Commission if the political organ that established it cannot let it do its work independently without interference.

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<sup>22</sup> S Ndashe 'Seeking the protection of LGBT rights at the Africa Commission on Human and Peoples' Rights' (2011) 15 *Feminist Africa Journal* pages 17 to at 17.  
[http://www.health.uct.ac.za/sites/default/files/image\\_tool/images/429/feminist\\_africa\\_journals/archive/15/2\\_c ase\\_study\\_sibongile\\_ndashe.pdf](http://www.health.uct.ac.za/sites/default/files/image_tool/images/429/feminist_africa_journals/archive/15/2_c ase_study_sibongile_ndashe.pdf) (accessed 21 August 2021).

<sup>23</sup> *African Human Rights Journal* (n6).

Biegon views the directives in Decision 1015 about the African Commission as seemingly noble or harmless.<sup>24</sup> However, he notes that the underlying motive and impact dovetail into the broader backlash against human rights bodies in Africa. He asserts that the decisions of the Executive Council are based on a misconception about the nature of ACHPR's independence.

In their analysis of Decision 1015,<sup>25</sup> the Coalition for the Independence of the African Commission<sup>26</sup> observed that Decision 1015 threatens the existence of a supra-national, independent regional system, which has been established to oversee compliance with human and peoples' rights. They believe that the Decision is based on unfounded assumptions that are untrue and delegitimise the very nature, existence, independence and functioning of the African Commission. Additionally, it contravenes the African Charter.

Therefore, this research critically examines the Commission's work to understand if it can effectively contribute to the human rights protection of LGBT persons, notwithstanding the various challenges it faces. It also explores factors that affect the work of the Commission and identifies recommendations that can help improve its commitment to advancing human rights protection of LGBT persons.

### **1.7 Limitations of the study**

The study would have potentially benefited more from interviewing experts who have worked with the Commission, including NGOs and current and past Commissioners of the Commission, to obtain their perspectives on some of the issues this study seeks to analyse. The study did not benefit from one-on-one interviews because it requires an ethical clearance, which demands more time to acquire. This study is therefore limited to desktop review and assessing reports about the subject of study.

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<sup>24</sup>J Biegon 'The rise and rise of political backlash: African Union Executive Council's decision to review the mandate and working methods of the African Commission'(2018) EJIL:TALK <https://www.ejiltalk.org/the-rise-and-rise-of-political-backlash-african-union-executive-councils-decision-to-review-the-mandate-and-working-methods-of-the-african-commission/> (accessed 21 August 2021).

<sup>25</sup> Coalition for the Independence of the African Commission 'Summary analysis of Decision 1015'(2018) page 1 <https://achprindependence.org/wp-content/uploads/2020/07/Decision-1015-Analysis-Summary.pdf> (accessed 21 August 2021).

<sup>26</sup> Coalition for the Independence of the African Commission is a collective of organizations and individuals who seek to protect and defend the independence of the ACHPR. Our efforts are based on the premise that both regional and international human rights bodies and civil society play an essential role in holding states accountable for commitments made through ratifying human rights treaties. <https://achprindependence.org>

### **1.8 Structure**

There are four chapters: the first chapter is the introduction of the study, which covers the background, states the research problem, identifies the research objectives and questions. It also looks at the literature review and limitations of the study. The second chapter looks at the regional human rights instruments and how they provide avenues for the Commission's human rights protection of LGBT persons. The third chapter recounts the Commission's contribution to the protection the of human rights of LGBT persons. The fourth chapter will conclude the study by identifying the factors that influenced the work of the African Commission and making recommendations.

## **Chapter 2: Avenues the African Commission can explore to promote and protect the human rights of LGBT persons**

### **2.1 Introduction**

This chapter examines the avenues available to the Commission to promote and protect the rights of LGBT persons. The chapter first traces the adoption of the African Charter and what that means to LGBT human rights protection. It looks at avenues in the substantive provisions of the Charter, other regional human rights instruments and the available mechanisms for human rights protection and promotion. As identified in the earlier chapter, the Commission has always found ways to adapt the existing legal frameworks and mechanisms to address new human rights challenges it is faced with.<sup>27</sup> This is not new to the Commission, as it has done this in the case of indigenous people in Africa.<sup>28</sup> By adapting regional laws and mechanisms to include LGBT persons, the Commission can easily engage states on LGBT issues and create opportunities for human rights advocates to engage states.

### **2.2 Potential avenues to protect LGBT persons under the African Charter**

#### **2.2.1 Making of the African Charter and inception of the protection of LGBT persons' human rights**

The African Charter is the primary human rights instrument from which most of Africa's other regional human rights instruments emanate. It lays down the fundamental human rights and mechanisms for protecting and promoting human rights in Africa. It establishes the Commission as the main institution mandated to promote and protect human rights.

The Charter is broad in its inclusion of both civil and political rights and economic, social and cultural rights.<sup>29</sup> The Charter, during its development, benefited from already existing international human rights instruments like the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR). Other regional human rights instruments such as the European Convention on Human Rights (ECHR) and the American Convention on Human Rights (ACHR) all served as references for the drafters of the African Charter.

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<sup>27</sup> As above page 8 para 3.

<sup>28</sup> See African Commission Working Group on Indigenous Populations/Communities in Africa <https://www.achpr.org/specialmechanisms/detailmech?id=10> (accessed 20 October 2021). Also see Resolution 51 on the Rights of Indigenous Peoples' Communities in Africa - ACHPR/Res.51(XXVIII)00 and <https://www.achpr.org/specialmechanisms/detail?id=10> (accessed 24 October).

<sup>29</sup> Murray and Viljoen (n4) page 88.

Although the African Charter takes inspiration from many of these international and other regional instruments, the drafters were guided by the needs of the African people, which answers human rights questions relevant to the African people.<sup>30</sup> One of the outcomes of this approach is the inclusion of the “peoples’ rights”, which also makes the African Charter unique from other regional human rights instruments like the European Convention on Human Rights or the American Convention on Human Rights. By suggesting that all Africans have a similar culture and needs in developing the African Charter, the drafters have assumed that all Africans are the same and have similar issues and cultural experiences.

The African Charter does not explicitly mention the rights of LGBT persons.<sup>31</sup> LGBT is not mentioned in any of the other regional and UN documents from which it drew inspiration when it was being developed.<sup>32</sup> Notwithstanding, it is essential to note that, like all other persons, LGBT persons are entitled to all the rights enshrined in the African Charter. Also, although LGBT rights are not incorporated in international documents from which the African Charter was developed, institutions established to implement these documents have found that international human rights instruments like the ICCPR and regional instruments like the European Convention do protect the rights of LGBT persons as individuals.<sup>33</sup>

International human rights instruments and regional human rights instruments that do not specifically mention human rights protection for LGBT persons have granted protection under the broad and purposive understanding of the right to privacy.<sup>34</sup> The African Charter draws from these international documents. It is, therefore, reasonable to assert that for the African Charter to remain relevant and adapt to changing times and human rights needs of the African people, it must align to changes observed by these international and regional instruments. The African Charter can therefore be used as a tool for protecting LGBT persons if the African Commission is willing to give purposive meaning to the provisions of the African Charter.<sup>35</sup>

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<sup>30</sup> VOO Nmehielle *The African human rights system; its laws, practice and institutions* (2001) page 83.

<sup>31</sup> Murray & Viljoen (n4) page 89.

<sup>32</sup> A Jjuuko ‘The protection and promotion of LGBTI rights in 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) at 268.

<sup>33</sup> See Human Rights Committee Communication No. 488/1992 (*Toonen v Australia*).

<sup>34</sup> Murrey and Viljoen (n4) page 89

<sup>35</sup> As above page 90.



The African Charter was adopted following the end of colonialism.<sup>36</sup> Colonisation “portrayed Africans as inferior to their European colonisers, and the African Charter was adopted in part to ensure equality of all persons”.<sup>37</sup> The African Charter was adopted at the end of dictatorship in Uganda, Equatorial Guinea, and the Central African Republic, where citizens were disempowered.<sup>38</sup> Therefore, the African Charter was adopted out of the need to empower disempowered Africans and grant them an avenue at the regional level to protect human rights, especially for vulnerable people, including LGBT persons.

### 2.2.2 Mandate of the Commission per the African Charter

The African Commission has 4 mandates according to the African Charter.<sup>39</sup> First is its promotional mandate, as stipulated in Article 45(1) of the African Charter. Under this mandate, the Commission carries out sensitisation activities, public mobilisation and information dissemination through seminars, symposia, conferences and missions.<sup>40</sup> Second is its protection mandate, where it ensures the protection of human and peoples’ rights through its communication procedure, friendly settlement of disputes, state reporting (including consideration of NGOs’ shadow reports), urgent appeals, and special rapporteurs working activities groups and missions.<sup>41</sup> Next is its interpretation mandate, where it interprets the provisions of the Charter upon a request by a state party, organs of the AU or individuals. Finally, Article 45(4) of the African Charter stipulates that the AHSG could give the Commission any tasks. Below is a table to show what groups of activities fall under each mandate.

| Mandate     | Task   | Provision  |
|-------------|--|--|
| Promotional | <ol style="list-style-type: none"> <li>1. Sensitisation</li> <li>2. Public mobilisation</li> <li>3. Information dissemination               <ul style="list-style-type: none"> <li>○ Seminars</li> <li>○ Conferences</li> <li>○ Missions</li> </ul> </li> <li>4. To formulate and lay down principles and rules:               <ul style="list-style-type: none"> <li>○ Resolutions</li> </ul> </li> </ol> | <ol style="list-style-type: none"> <li>1. Article 45 (1)(1)</li> <li>2. Article 45 (1)(1)</li> <li>3. Article 45(1)(1)</li> <li>4. Article 45(1)(2)</li> </ol> |

<sup>36</sup> Jjuuko (n32) page 267.

<sup>37</sup> As above.

<sup>38</sup> As above.

<sup>39</sup> Nmehielle (n30) page 157-183.

<sup>40</sup> African Charter (n1) Article 45(1).

<sup>41</sup> African Charter (n1) Article 45(2).

|                |  |                |
|----------------|--|----------------|
|                | <ul style="list-style-type: none"> <li>○ Concluding observations</li> <li>○ General Comments</li> </ul>  |                |
| Protection     | <ul style="list-style-type: none"> <li>• Communications procedure</li> <li>• Settlement of Disputes</li> <li>• State reporting (Shadow reporting from NGOs)</li> <li>• Activities of special rapporteurs and working groups</li> <li>• Observer status for NGOs and</li> </ul> | Article 45 (2) |
| Interpretation | <ul style="list-style-type: none"> <li>• interpret the provisions of the Charter through; <ul style="list-style-type: none"> <li>○ interpretation of provisions in various concluding observations, general comments and resolutions.</li> </ul> </li> </ul>                   | Article 24 (3) |
| Other tasks    | Decided by the AHSG  | Article 45 (4) |

*This table is a matrix of the mandate of the Commission and what the Commission does to execute each of its mandates (Source Article 45 African Charter on Human and Peoples' Rights)*

### **2.2.3 Substantive provisions of the African Charter that provide avenues for the African Commission to protect the human rights of LGBT persons**

There are provisions in the African Charter that can be used by the African Commission to advance the rights of LGBT persons. However, it must be understood that LGBT persons are entitled to all the rights in the African Charter.

First, the language used in some of these provisions of the African creates an opportunity for the Commission to advance human rights protection for LGBT persons. The African Charter uses universalist language. This reflects how universal the rights in the African Charter are. It also shows that groups of people

may not have been mentioned when the African Charter was being drafted. The use of universal language creates an opportunity for the African Commission to give interpretations, make decisions, and make soft law that protects these groups. For instance, the African Charter does not contain the word indigenous, but the African Commission has made decisions on the rights of indigenous people in the *Ogiek case*.

The consistent use of words like “every individual”<sup>42</sup>, “no one”,<sup>43</sup> “every human being”,<sup>44</sup> and “every citizen” in 12 of the provisions of the African Charter gives us an indication that the Charter covers every individual in Africa and therefore the African Commission can use this as a tool to advance the need for the protection of the human rights of LGBT people.

Article 2 states that every individual is entitled to the rights recognised and guaranteed in the African Charter.<sup>45</sup> This provision grants every individual all these rights without distinction of any kind. The Article lists “race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status” as the basis for which no person should be denied any of the rights which are listed in the African Charter. The first element identified by legal experts that presents an opportunity for the Commission is the use of “every individual” in Article 2 as specified above. This provision means that no one is exempt from enjoying the fundamental rights as could be identified in the African Charter. It is, therefore, reasonable to conclude that LGBT persons are also included as Africans who are part of the “every individual” mentioned in this provision and therefore are also entitled to the rights in the African Charter. Thus, the African Commission is responsible for providing equal protection to LGBT persons as may be provided to any group of persons or individuals.

Another element of Article 2 is the use of “without distinction”. This gives the Commission an obligation to ensure that LGBT persons’ human rights as granted in the African Charter are given to them without any limitations, difference, or discrimination because of sexual orientation or gender identity. The other element in this provision is the use of “other status”. This gives the African Commission an open-ended opportunity to use the African Charter to protect various groups of people as they may find necessary, including LGBT persons.

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<sup>42</sup> African Charter (n1) Article 2.

<sup>43</sup> African Charter (n1) Article 7 (2).

<sup>44</sup> African Charter (n1) Article 4.

<sup>45</sup> Africa Charter (n1) Article 2.

Article 3 of the African Charter also requires that every individual be equal before the law and be entitled to equal protection of the law.<sup>46</sup> This means that LGBT persons cannot be treated differently by the African Commission in the application of the African Charter. They are required to view “every individual” equally when applying the law.

Also, Articles 4 and 5 of the African Charter recognise the invaluable nature of life for all individuals and how dignity is inherent in all human beings. This provision does not exclude LGBT persons. Excluding them would mean they do not have intrinsic dignity, as mentioned in Article 5. Therefore, the African Commission has an opportunity to advance this argument in ensuring they foster the protection of LGBT persons under the African Charter.

### **2.3 Key substantive provisions of the Maputo Protocol that provide avenues for the African Commission to protect LGBT persons’ rights**

Like all other protocols, guidelines, and resolutions of the African Commission, the Maputo Protocol, which expands on women’s human rights protection in Africa, has its source from the African Charter. The Protocol covers all aspects of rights, which are to ensure that women’s rights are promoted, realised and protected.<sup>47</sup>

The first avenue in the Maputo Protocol for the protection of LGBT persons in Africa is the definition of women in the Protocol. Article 1(k) of the Protocol defines women as “persons of the female gender, including girls”.<sup>48</sup> This, like the universal approach in the African Charter, also creates an opportunity to include Lesbian and Bisexual (LB) women.

Article 2 encourages states to eliminate all forms of discrimination against women.<sup>49</sup> With the definition of women being open for “persons of all-female gender,” it can be inferred that this Article also protects LB women. Therefore, states must take steps to eliminate all forms of discrimination against them. Other Articles like Article 3<sup>50</sup>, which grants “all women” the right to dignity, are significant in advancing LBT women’s rights in this regard. There are other provisions on the right to life, integrity and the security of the person;<sup>51</sup> elimination of all forms of

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<sup>46</sup> African Charter Article 3.

<sup>47</sup> Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa Article 2.

<sup>48</sup> As above Article 1(k).

<sup>49</sup> African Women Protocol (n46) Article 22.

<sup>50</sup> African Women Protocol (n46) Article 3.

<sup>51</sup> African Women Protocol (n46) Article 4.

harmful practices against women;<sup>52</sup> access to justice and equal protection of the law for all women;<sup>53</sup> right to peace;<sup>54</sup> right to separate, divorce and annul marriages;<sup>55</sup> economic and social welfare rights;<sup>56</sup> health and reproductive health rights;<sup>57</sup> and the right to sustainable development<sup>58</sup>. The African Commission can use these provisions in various guidelines, general comments and resolutions they develop to advance the human rights protection of LB women.

## **2.4 Mechanism and procedures that provide avenues for the African Commission to protect LGBT persons' rights**

The African Charter provides the African Commission with various mechanisms to ensure the practical realisation of its mandate. Only an overview of these mechanisms will be looked at in this chapter. In the next chapter, a historical review will be undertaken to analyse the extent to which the Commission has used these mechanisms.

### **2.4.1 Special mechanisms**

The Charter mandates the Commission to employ any appropriate method of investigation in carrying out its responsibilities as prescribed under Article 46. Over the years, the Commission has established special mechanisms comprising special rapporteurs and working groups.

Special mechanisms established by the African Commission investigate human rights violations, research human rights issues and undertake promotional activities through country visits. Their reports form the basis of some of the Commission's resolutions. Special rapporteurs are appointed from among the Commission members while working groups include members of the Commission and may also include other independent experts. Although all Rapporteurs and Working groups established under the special mechanism can advance the rights of LGBT persons, some are in a more critical position to do so. Those who are in this position include the Special Rapporteur on the Rights of Women, Special Rapporteur on Human Rights Defenders and Focal Point on Reprisals, Committee for the Prevention of Torture in Africa and the Committee on the Protection of the

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<sup>52</sup> African Women Protocol (n46) Article 5.

<sup>53</sup> African Women Protocol (n46) Article 8.

<sup>54</sup> African Women Protocol (n46) Article 10.

<sup>55</sup> African Women Protocol (n46) Article 7.

<sup>56</sup> African Women Protocol (n46) Article 13.

<sup>57</sup> African Women Protocol (n46) Article 14.

<sup>58</sup> African Women Protocol (n46) Article 19.

Rights of People Living with HIV (PLHIV) and those at risk, vulnerable to and affected by HIV.

These mechanisms (that allow the Commission to put in place methods for human rights investigations) create a platform for the Commission to initiate a special rapporteur on violence against LGBT persons or enact resolutions that can be used as soft-law in advancing human rights protections LGBT persons in Africa. Through their country visits and investigations, they can also include issues of LGBT situations in the country. For instance, the Special Rapporteur on Human Rights Defenders and Focal Point on Reprisals in Africa have in the past raised issues of LGBT persons in their reports.

#### **2.4.2 State reporting**

All state parties to the African Charter are expected to present their National Periodical Reports to the Commission every two years.<sup>59</sup> This allows the African Commission to review and ensure that states comply with their obligations under the African Charter. Therefore, the Commission can use this process to question states about its use of the African Charter to protect the human rights of LGBT persons and raise concerns in the state's concluding observations, to which the African Commission can follow up to ensure states are complying. The Commission can also include recommendations on LGBT persons in its Concluding Observation.

#### **2.4.3 Granting of observer or affiliation status to NGOs and affiliate status to NHRIs**

The African Commission has the capacity to grant observer status to non-governmental organisations (NGOs) and national human rights institutions (NHRI). This enables NGOs and NHRIs to engage with the Commission officially. NGOs provide technical assistance and support to the Commission to enable it to execute its mandate.

The Commission could grant LGBT organisations and other human rights organisations that work on LGBT issues observer status to enable them officially engage with the Commission. There are a number of such NGOs that are willing and ready to provide the needed technical support to the Commission. The formation of the Coalition for the Independence of the Commission is evidence of

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<sup>59</sup> African Charter (n1) Article 62.

the willingness of NGOs to provide the necessary support to the Commission.<sup>60</sup> Also, the NHRIs have been an excellent tool for the Commission to advance various issues in countries. The Network of African National Human Rights Institutions has also been a critical network that does provide support to the Commission.<sup>61</sup>

#### **2.4.4 Adoption of soft-law standards such as General Comments, guidelines and thematic resolutions**

Under the unique mechanisms of the Commission, it makes General Comments on key provisions on issues and some provisions of the African Charter. They also adopt resolutions on matters to contribute to addressing these issues that are brought to their attention. The African Commission can take advantage of the General Comments and the development of resolutions to address issues affecting LGBT persons. Some of the general comments they have made which directly or indirectly contribute to the protection of the right of LGBT persons will be discussed further in the next chapter.

#### **2.4.5 Requests for advisory opinions from the African Human Rights Court**

The Protocol on the African Court establishes the African Court on Human and Peoples' Rights. The Protocol gives the court jurisdiction over cases and disputes submitted to it concerning the interpretation and application of the Charter, the Protocol on the African Court and any other relevant human rights instrument ratified by the state parties.<sup>62</sup> The Court over international human rights instruments to which state parties to the African Charter have ratified.

According to Article 4 of the African Human Rights Court Protocol, the African Court can give an advisory opinion to “a member state of the OAU, the OAU, any of its organs, or any African organisation recognised by the OAU”.<sup>63</sup> The Protocol further mandates the Court to

Provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission.<sup>64</sup>

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<sup>60</sup>The Independent Coalition on the African Commission on Human Rights <https://achprindependence.org/> (accessed 14 September 2021).

<sup>61</sup> The Network of African Human Rights Institutions <https://www.nanhri.org> (accessed 26 October 2021).

<sup>62</sup> Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights Article 3 (1).

<sup>63</sup> Protocol of African Court Article 4.

<sup>64</sup> As above.

The African Commission, in this regard, can send questions on LGBT issues in the African Charter to the Court for advisory opinion where it may be needed. The Commission can also engage the Court for other legal views regarding the protection of human rights of LGBT persons under other legal instruments, including those at the sub-regional and international levels.

## **2.5 Conclusion**

All the regional human rights instruments and mechanisms reviewed in this chapter show avenues for the Commission to advance the human rights promotion and protection of LGBT persons. The African Charter presents an opportunity for the Commission to use many of its provisions through its universal language to protect the human rights of LGBT persons. The responsibility now lies on the African Commission to take advantage of these avenues to provide the needed protection for LGBT people under these regional human rights instruments and systems. The next chapter looks at how the African Commission has used these avenues so far by reviewing their work from the time of its establishment to date under each mandate of the Commission. Although there may be various understandings of the mandates of the Commission, the above explanation of the mandate and categorisation of the mandates of Commission in this chapter will be the basis for analysing the work of the Commission in the next chapter.



## **Chapter 3: A chronological overview of the work of the African Commission on promoting and protecting the rights of LGBT persons**

### **3.1 Introduction**

As established in the previous chapter, the African Commission has various avenues to execute its mandate to promote and protect the rights of LGBT persons. The avenues available were examined, and it was determined that each of the aspects of the mandate of the Commission provides an opportunity to advance human rights protection for LGBT persons.

This chapter examines the Commission's work with regard to the rights of LGBT persons in phases. The examination explores how it has ensured justice, equality, and non-discrimination for LGBT persons as critical measures for the practical realisation of human rights. Each phase is determined by outcomes and turns of events within specific periods. It is also determined by the reaction and responses of individual Commissioners to LGBT issues as they were brought up in their work. The first phase is from 1987 to 2013, which was a period of contradiction and animosity. The second phase is from 2014 to 2017, which brought in acceptance and advancement and finally, the current phase from 2018 to the present, characterised by ambiguity and opportunities.

### **3.2 Phase one: Contradiction and animosity (1987 to 2013)**

This phase of the work of the Commission marked an era where the Commission was not actively involved in advancing the rights of LGBT persons. There were instances where some Commission members showed apparent disregard and animosity towards any attempt to present LGBT issues as human rights issues. There were also instances where other Commissioners showed concern, made concretions and raised questions on discrimination against LGBT persons.

#### **3.2.1 Start of phase one: The establishment of the Commission (1987)**

In so many ways, the coming into force of the African Charter marked the beginning of a new era of human rights protection and promotion for the African region. The Charter was adopted when Africa was just coming out of some of the bloodiest struggles against colonialism.<sup>65</sup> Some countries were still dealing with coup d'états, apartheid (in South Africa) and dictatorships. These issues influenced the manner of human rights issues any established regional body was expected to focus on.

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<sup>65</sup> Jjuuko (n32) page 267.

The second and third preambles of the African Charter indicate the focus of human rights protection in that period. It states:<sup>66</sup>

Considering the Charter of the Organization of African Unity, which stipulates that 'freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples;

Reaffirming the pledge, they solemnly made in Article 2 of the said Charter to eradicate all forms of colonialism from Africa, to co-ordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa and to promote international cooperation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights.

The Commission was officially inaugurated on 2 November 1987 in Addis Ababa, Ethiopia, after its members had been elected in July of the same year by the OAU 23<sup>rd</sup> Assembly of Heads of State and Government.<sup>67</sup> In its first Activity Report, which covered the period of 1987 to 1988, the Commission's focus was more on administrative matters regarding how it was going to do its work.<sup>68</sup>

Most of the human rights situations the Commission was dealing with from 1987 to 1992 were primarily issues regarding democracy, governance and protection of civilians from the abuse of governments.<sup>69</sup> Subsequently, from 1993 onwards, various human rights issues, including the right to education, women's rights, and indigenous persons' rights, took centre stage of the Commission's work.

### **3.2.2 Phase one: Promotional mandate**

In 2001, on a mission to Namibia, one Commissioner asked the Namibian authorities what the legal status was of LGBT persons in Namibia.<sup>70</sup> A review of the Commission's report shows that the Commission had no intention of finding out about the situation of LGBT persons. This instant means that the Commissioner who asked this question did it on their account, which was not one of the focus of

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<sup>66</sup> African Charter Preamble paras 2 and 3.

<sup>67</sup> CE Welch 'The African Commission on Human and Peoples' Rights: five years report and assessment' (1992) 14 *Human Rights Quarterly* at 44 page 50  
<https://www.jstor.org/stable/pdf/762551.pdf?refreqid=excelsior%3Acd195515d6cf8ea4d7afaaaca6568bae> (accessed 4 October 2021).

<sup>68</sup> African Commission on Human and Peoples' Rights '1<sup>st</sup> Activity Report of the Commission on Human and Peoples' Rights' adopted 28 April 1988 Covering November 1987 through April 1988 (1st and Second Sessions).

<sup>69</sup> Welch (n67) page 54.

<sup>70</sup> Report of the promotional mission to the Republic of Namibia, 2 to 6 July 2001, DOC/OSS(XXX)244 page 7 [http://www.achpr.org/files/sessions/30th/mission-reports/namibia/achpr30\\_misrep\\_promo\\_namibia\\_2001\\_eng.pdf](http://www.achpr.org/files/sessions/30th/mission-reports/namibia/achpr30_misrep_promo_namibia_2001_eng.pdf) (accessed 4 October 2021).

the visit, and therefore the response to the inquiry is not stated in the report for the visit

### **3.2.3 Phase one: Protective mandate**

The first instance where the Commission came into contact with LGBT rights issues under its protection mandate was in 1994 when William Courson instituted proceedings against Zimbabwe to criminalise consensual same-sex activities between consenting adults.<sup>71</sup> The communication sought to ask the Commission to consider the legal status of homosexuals in Zimbabwe. The complainant asserted that the prohibition of same-sex sexual activity in Zimbabwe was against various provisions of the African Charter. The communication was withdrawn after GALZ<sup>72</sup> had asked Courson to withdraw the application, feeling that it might jeopardise the association's tentative moves to win acceptance by the government.<sup>73</sup> The communication was withdrawn, and the Commission decided not to pursue the matter.<sup>74</sup> This was the first opportunity for the Commission to declare a stance on the LGBT issue but was missed because the complainant withdrew the communication. It would have initiated a discussion at that time, but one question is worth asking is if the Commission was ready and if Africa was prepared to confront such issues?

In 1995, the then Chair of the Commission argued that discrimination based on sexual orientation was not protected under the Charter.<sup>75</sup> The dismissal of sexual orientation as a basis for non-discrimination by the Chair of the Commission was based on a narrow interpretation of Article 2 of the African Charter. As already argued in the previous chapter, the open nature of the African Charter presents an opportunity for the Commission to use its interpretation mandate to give further meaning to the provisions of the Charter. This would mean that the Chair of the Commission then had just decided to interpret Article 2 on non-discrimination, not to include sexual orientation.

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<sup>71</sup> A Rudman 'The protection against discrimination based on sexual orientation under the African human rights system' (2015) 15 *African Human Rights Law Journal* 7 <http://dx.doi.org/10.17159/19962096/2015/v15n1a1> (accessed 4 October 2021).

<sup>72</sup> GALZ is a universitas, voluntary membership-based organisation established in 1990 to serve the needs of the Lesbians, Gays, Bisexual, Transgender and Intersex [LGBTI] community in Zimbabwe. It is constituted primarily to provide a service to Lesbian women, Gay men, Bisexual, Transgender and Intersex persons (LGBTI Persons) and is not formed for the purposes of coercing or persuading anyone to lead the lifestyle of any particular sexual orientation or preference or gender identity. <https://galz.org/about/what-is-galz/> (accessed 4 October 2021).

<sup>73</sup> GALZ 'Courson complaint' (nd) <https://galz.org/courson-complaint/> (4 October 2021).

<sup>74</sup> *William A Courson v Zimbabwe* (2000) AHRLR 335 (ACHPR 1995) para 3.

<sup>75</sup> Ndashe (n22) page 34.

The next period when the question of LGBT rights came on the radar of the Commission was in 2006 when Cameroon's country report was up for review. NGOs with a mandate to ensure the protection and promotion of LGBT persons' rights at the session drafted a statement on the situation of LGBT persons in Cameroon. They presented it to the Commission for consideration. The statement which served as the shadow report on Cameroon was shared with the Commissioners at the session.<sup>76</sup> The report informed the Commission about the arrest and detention of 11 persons alleged to be LGBT persons detained in Cameroon.<sup>77</sup>

Based on the report, some Commissioners raised questions to the delegation from Cameroon. At the session, Commissioner Faith Pansy Tlakula mentioned the issue of discrimination against LGBT persons and drew the delegation's attention to Cameroon's Penal Code,<sup>78</sup> which criminalised consensual same-sex practices. She identified that it was incompatible with Article 2 of the Charter.<sup>79</sup> She also asked if the Penal Code of Cameroon was in line with the constitution of Cameroon. Commissioner Mumba Malila also questioned the delegation on the compatibility of the length of detention for the 11 persons to Article 7 of the African Charter. Commissioner Reine Alapini-Gansou also requested more information on the law criminalising sodomy in Cameroon. The interest of the Commissioners at this stage was only sparked by the report from the NGOs who were at the session. It started to raise curiosity among the Commissioners. They initiated the process of raising aspects of the African Charter to test the human rights status of LGBT persons, but it was not an active gesture that showed promise.

Again, in the same year, Uganda presented its National Periodic Report to the Commission. Armed with information from the shadow report from NGOs, Commissioner Malila asked questions pertaining to the continuous existence of Uganda's Penal Code, which criminalises consensual same-sex conduct.<sup>80</sup> On the one hand, the questions and concerns raised by the Commissioners during the examination of Cameroon's National Periodic Report are reflected in the concluding observations.<sup>81</sup> On the other hand, even though the Commission recognised that they received reports on the issues of LGBT from the International

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<sup>76</sup> Ndashe (n22) page 18.

<sup>77</sup> Ndashe (n22) page 18.

<sup>78</sup> Cameroon C Pen. 347(a). Whoever has sexual relations with a person of the same sex shall be punished with imprisonment for from six months to five years and a fine of from 20,000 to 200,000 francs.

<sup>79</sup> Ndashe (n22) page 18.

<sup>80</sup> Ndashe (n22) page 34

<sup>81</sup> Concluding Observations on the first periodic report of Cameroon, African Commission on Human and Peoples' Rights, adopted at the Commission's 39<sup>th</sup> ordinary session, 11-25 May 2005 para 14.

Gay and Lesbians Commission and Sexual Minorities Uganda, it did not reflect in its Concluding Observations.<sup>82</sup>

Without the information from NGOs on these issues in Cameroon, for instance, there was a minimal tendency that the issue of LGBT persons would have been raised as the delegation from Cameroon did not include the situation of LGBT persons in their report. Without the reports and information from the NGOs, the Commissioners may not have questioned the human rights situation of LGBT persons in both Cameroon and Uganda.

It is also worth noting that, as mentioned above, the Commission, in its Concluding Observations for Uganda, commended Uganda for investigating the murder of LGBT rights advocate David Kato.<sup>83</sup> It congratulated Mauritius on putting in place the Equal Opportunities Act of 2008, which recognised sexual orientation as the basis for non-discrimination.<sup>84</sup>

In 2008, CAL made its first attempt to apply for observer status with the Commission.<sup>85</sup> At their 45<sup>th</sup> Ordinary Session in 2009, the Commission deferred its decision to grant observer status to CAL.<sup>86</sup> Its 26<sup>th</sup> Activity Report stated that it was waiting to consider “a draft paper on Lesbians, Gays, Bisexuals and Trans-Sexual Persons’ (LGBT) Rights.”<sup>87</sup> The Commission again deferred their decision at the 46<sup>th</sup> Ordinary Session, held in Banjul, The Gambia, in November 2009.<sup>88</sup> It stated that their decision was on hold pending “finalisation of their consideration of the position paper on —Sexual Orientation in Africa”.<sup>89</sup> The Commission finally decided, after a vote, not to grant observer status to the CAL after deferring their decision several times. It stated that the reason for the denial was because the activities of CAL does not promote and protect any of the rights enshrined in the African Charter.<sup>90</sup>

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<sup>82</sup> Concluding Observations on the second periodic report of the Republic of Uganda, African Commission on Human and Peoples’ Rights, adopted at the Commission’s 40th ordinary session, 15-29 November 2006

<sup>83</sup> As above para 11.

<sup>84</sup> Concluding Observations and Recommendations on the 2nd, 3rd, 4th and 5th fourth periodic reports of the Republic of Mauritius, African Commission on Human and Peoples’ Rights, adopted at the Commission’s 45<sup>th</sup> ordinary session 13-17 May 2009, para 15.

<sup>85</sup> Ndashe (n22) page 19.

<sup>86</sup> African Commission on Human and Peoples’ Rights ‘26th Activity report of the Commission on Human and People’s Rights’ (December 2008 to May 2009) para 13.

<sup>87</sup> As above.

<sup>88</sup> African Commission on Human and Peoples’ Rights ‘27<sup>th</sup> Activity Report of the African Commission on Human and Peoples’ Rights’ (2009) page 9.

<sup>89</sup> As above para 28 page 9.

<sup>90</sup> African Commission on Human and Peoples’ Rights ‘28<sup>th</sup> Activity report of the Commission on Human and Peoples’ Rights’ (November 2009 to May 2010) para 33.

The decision not to grant CAL an observer status started a conversation among advocates and activists. They were questioning the basis for the conclusion of the Commission. First, the decision was contrary to its earlier decision to grant another LGBT organisation, *Alternative Cameroon*, observer status.<sup>91</sup> Some activists and advocates have suggested that the decision could be attributed to the fact that CAL has the word “lesbians” in its name compared to *Alternative Cameroon*.<sup>92</sup> Was the Commission serving justice if they decided that one group’s activities are acceptable, so they granted observer status while denying another? Also, the Commission here was not clear on which activities of CAL they were referring to. Although this remains vague, it is possible to infer that the focus of the Commission was more on the sexual orientation identified with the organisation than its activities because the activities of CAL do protect the rights of women.

Resolution 361 on the Criteria for Granting and Maintaining Observer Status to Non-Governmental Organisations working on Human and Peoples’ Rights in Africa sets out the requirements for an organisation to be granted observer status. Article 2 (a) and (b) requires organisations applying for observer status to have objectives in line with the AU Constitutive Act, the preamble of the African Charter and the Protocol on women's rights. With such objectives, it is expected that organisations seeking observer status with the Commission will carry out activities that support its objectives and ultimately contribute to the attainment of the objectives set out in the documents listed in the resolution.

As stated on their website, CAL’s main objective is to advance freedom, justice, and bodily autonomy for all women on the African continent and beyond.<sup>93</sup> This objective of CAL is in line with one of the objectives stated in the AU’s Constitutive Act, which is to ensure the effective participation of women in decision-making, particularly in the political, economic and socio-cultural areas.<sup>94</sup> Preamble 5 of the African Charter recognise that fundamental human rights stem from the attributes of human beings, which justifies their international protection and that the reality and respect of peoples’ rights should necessarily guarantee human rights. This objective is also in line with CAL’s aim to advance women's human rights and work towards its realisation. The Maputo Protocol remains the most relevant and critical

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<sup>91</sup> African Commission on Human and Peoples’ Rights ‘28<sup>th</sup> Activity Report of the African Commission on Human Rights’ (December 2008 to May 2009) para 11xi.

<sup>92</sup> Jjuuko (n32) page 280.

<sup>93</sup> Coalition of African Lesbians <https://www.cal.org.za> (accessed 8 October 2021).

<sup>94</sup> Constitutive Act of the African Union, adopted in Lomé, Togo, on 11 July 2000 and entered into force on 26 May 2001. The Assembly of the AU held its inaugural meeting in Durban, South Africa in July 2002 Article 3 (i).

instrument that has similar objectives to CAL. In its preamble, the Maputo Protocol states:

Reaffirming the principle of promoting gender equality as enshrined in the Constitutive Act of the African Union as well as the New Partnership for Africa's Development, relevant declarations, resolutions and decisions, which underline the commitment of the African states to ensure the full participation of African women as equal partners in Africa's development....

One then still wonders what the Commission was referring to when it stated that its decision is based on CAL's activities. A further review of the work of CAL shows that it groups its work under 4 main activities. First is advocacy; here, CAL states that their advocacy work is with movements. They believe that change happens through collective action, passion, and commitment to transformative ideas and building friendship and solidarity between peoples and across geographic spaces and multiple locations. Another activity is communication and campaigns. Under this, they hold conversations and drive discussions to change the conversation and provoke and encourage public discussion and debate. They articulate, assert demands and claims to social justice to decision-makers from the household and family through communities and workplaces and into media and social services institutions such as health, welfare and education. They also promote feminist media by pushing for the proper and effective representation of women in the media. Research and knowledge production is also another activity of CAL. Here it conducts research that is used on feminist principles to produce knowledge that advances their objectives.

The denial of observer status on the grounds stated by the Commission could therefore be viewed as prejudicial and has no standing in law. It fosters the violation of human rights as enshrined in the African Charter and other protocols established under the AU and international human rights law.

In 2010 the Committee on the protection of the rights of People Living with HIV (PLHIV) and those at Risk, Vulnerable to and Affected by HIV (Committee on HIV) expanded its mandate to include men who have sex with men (MSM).<sup>95</sup> The Commission calculated this because many countries had already accepted MSMs as part of the HIV intervention programmes. This was a practical way for the Commission to avoid possible backlash from the states and the AU.

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<sup>95</sup> Resolution on the establishment of a Committee on the Protection of the rights of people living with HIV and those at risk, vulnerable to and affected by HIV, 26 May 2010.

On their 2012 visit to Cameroon, the Committee on HIV and the Special Rapporteur on the Rights of Women raised questions about LGBT persons. They asked questions on the status of sexual minorities regarding access to services, the status of the law, and its impact on access to services.<sup>96</sup>

One of the most used avenues by the Commission to advance the rights of LGBT persons is the questioning by Commissioners to country delegations during the review of the periodic reports. In Cameroon's 3<sup>rd</sup> periodic report, the African Commission expressed its displeasure regarding how Cameroon was treating its human rights defenders whose work included the protection and promotion of the rights of LGBT persons.<sup>97</sup> The Commission also identified "[t]he judicial harassment, offences against life and other violations of the rights of human rights defenders, in particular the rights of defenders working in the area of sexual orientation."<sup>98</sup> Further, in their Concluding Observations, the Commission also mentioned "discrimination, stigma and violation of the right to life and physical and mental integrity of individuals based on their sexual orientation."<sup>99</sup> The Commission, therefore, recommended that the Commission should

[t]ake appropriate measures to ensure all persons' safety and physical integrity irrespective of their sexual orientation and maintain an atmosphere of tolerance towards sexual minorities in the country.<sup>100</sup>

### **3.2.4 Phase one: Interpretative mandate**

At the 40<sup>th</sup> Ordinary Sessions, the Commission did not adopt the report of the NGO Forum, which focused on human rights defenders.<sup>101</sup> The report referenced the Same-Same Marriage Prohibition Act, which has been enacted in Nigeria. The Commission refused to adopt the NGO forum's resolution because of language that they were not comfortable with.<sup>102</sup> The resolution condemned the criminalisation of LGBT persons in Nigeria and called on states to decriminalise all

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<sup>96</sup> Report of the joint mission of the mechanisms of the special rapporteur on the rights of women in Africa and the Committee on the Rights of People living with HIV, and those at risk, vulnerable to, and affected by HIV to the republic of Cameroon paras 25 and 30 [http://www.achpr.org/files/sessions/53rd/mission-reports/cameroonpromo-2012/misrep\\_promo\\_cameroon\\_2012\\_eng.pdf](http://www.achpr.org/files/sessions/53rd/mission-reports/cameroonpromo-2012/misrep_promo_cameroon_2012_eng.pdf) (accessed 4 October 2021).

<sup>97</sup> African Commission on Human and Peoples' Rights 'Concluding Observations on the 3rd Periodic Report of the Republic of Cameroon' at the 15th Extraordinary Session from the 7 to 14 March 2014, Banjul, The Gambia page 9 para 84

<sup>98</sup> As above.

<sup>99</sup> As above page 9 para 85.

<sup>100</sup> As above page 12 (xxxvii).

<sup>101</sup> African Commission on Human and Peoples' Rights '21<sup>st</sup> Activity Report of the African Commission on Human and Peoples' Rights' (May – November 2006) Page 1 para 4.

<sup>102</sup> Ndashe (n22) page 19.



such laws. The refusal of the Commission to adopt such a resolution because it was not comfortable with the progressive nature of the language used signified the lack of willingness of the Commission to accept the need to bring LGBT issues to the fore at that time. Adopting a resolution at that time could have meant an acceptance of the proclamation from the NGO forum condemning the anti-LGBT law in Nigeria, which did not look politically convenient and pragmatic to the Commission.

In November 2010, at its 48<sup>th</sup> Ordinary Session,<sup>103</sup> the Commission adopted the *Guidelines and Principles for the implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights*.<sup>104</sup> The guidelines were adopted to fill the gap they left in realising economic, social and cultural rights granted to Africans in the African Charter. The Commission in the guidelines included sexual orientation and gender identity as grounds for non-discrimination to realise economic, social, and cultural rights.<sup>105</sup> It also identified LGBT persons as part of vulnerable and disadvantaged groups.<sup>106</sup> Understanding that the guidelines are part of the Commission's interpretative mandate, it passively asserted its intention to include LGBTI persons in the rights espoused by the guidelines and the African Charter. The Commission in this regard seemed more comfortable to include sexual orientation as a basis for non-discrimination compared to the adoption of a report to condemn anti-LGBT laws.

The Commission also included sexual orientation and gender identity as a basis for non-discrimination in its General Comment on Article 14(1)(d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women<sup>107</sup> at its 52<sup>nd</sup> Ordinary Session in October 2012 in Yamoussoukro, Côte d'Ivoire.<sup>108</sup> In paragraph 4 of the General Comments, it states that:

According to the African Commission, there are multiple forms of discrimination based on various grounds such as race, sex, sexuality, sexual orientation, age, pregnancy, marital status, HIV status, social and economic status, disability, harmful customary practices and or religion. In addition, the African Commission

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<sup>103</sup> African Commission on Human and Peoples' Rights '29<sup>th</sup> Activity Report of the African Commission on Human and Peoples' Rights' (May-November 2010) page 20 para 106.

<sup>104</sup> African Commission 'Guidelines and principles on economic, social and cultural rights in the African charter on human and peoples' rights' [http://www.achpr.org/files/instruments/economic-social-cultural/achpr\\_instr\\_guide\\_draft\\_esc\\_rights\\_eng.pdf](http://www.achpr.org/files/instruments/economic-social-cultural/achpr_instr_guide_draft_esc_rights_eng.pdf) (accessed 5 October 2021).

<sup>105</sup> As above para 1e.

<sup>106</sup> As above para 59k.

<sup>107</sup> General Comment on art 14(1)(d) and (e) of Maputo Protocol para 4 <http://www.achpr.org/instruments/general-comments-rights-women/> (accessed 5 October 2021).

<sup>108</sup> African Commission on Human and Peoples' Rights '32<sup>nd</sup> and 33<sup>rd</sup> Combined Activity Reports of the African Commission on Human and Peoples' Rights' (February-October 2012).

recognises that these forms of discrimination, individually or collectively, prevent women from realising their right to self-protection and being protected.

### **3.2.5 Phase one: Other tasks**

Within the period under review, there was no specific task assigned to the Commission from the AHSG in relation to LGBT rights.

### **3.3 Phase two: Phase of advances and acceptance (2014-2017)**

This phase featured a period when the Commission became more open to working towards promoting and protecting the rights of LGBT persons. Critical milestones for the rights of LGBT persons were realised in this period, including the adoption of a revolutionary resolution and granting observer status to CAL.

#### **3.3.1 Phase two: Promotional mandate**

Resolution 275 on Protection against Violence and other Human Rights Violations against Persons based on their real or imputed Sexual Orientation or Gender Identity<sup>109</sup> is one of the most significant accomplishments of the Commission for the promotion and protection of the rights of LGBT persons in Africa.<sup>110</sup> The Resolution, in its preamble, acknowledges the violence sexual and gender minorities face. It calls on states to ensure the protection of sexual and gender minorities to be protected from violence and human rights abuse. The Resolution is historic because most of the workaround LGBT persons was never the Commission's primary focus.<sup>111</sup> The adoption of the resolution also indicates the Commission's intentions to push towards making LGBT a mainstream issue of the Commission. With the resolution available, many organisations and institutions can make references and include them in their discussions with states on LGBT issues. The Resolution clarifies the scope of the African Charter in relation to and in the context of violence based on a real or imputed sexual orientation or gender identity.<sup>112</sup> This is also a way the Commission seeks to attain justice for LGBT persons who are denied their right to dignity and equality before the law because of the real or imputed sexual orientation or gender identity.

The adoption of Resolution 275 by the Commission was the outcome of consistent advocacy by NGOs at the level of the Commission. First, the production of the *Violence based on perceived or real sexual orientation and gender identity*

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<sup>109</sup> African Commission (n5).

<sup>110</sup> Jjuuko (n32) page 279.

<sup>111</sup> As above.

<sup>112</sup> The Network of African Human Rights Institutions 'A guide for African National Human Rights Institutions for implementing Resolution 275' (2020) page 1.

report,<sup>113</sup> which documented the various incidents of violence against LGBT persons in several countries across Africa. The report also highlighted critical human rights concerns that LGBTI persons in Africa's face and state parties' obligation to African human rights instruments to address the widespread violence against persons based on their perceived or actual sexual orientation and gender identity. Secondly, the active engagement of Commissioners to understand the situation of LGBT people in Africa through workshops, conferences and one-on-one conversations with activists and advocates.<sup>114</sup>

In the adoption of *General Comments 2 to Article 14(1)(a), (b), (c) and (f) and Article 14(2)(a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* in 2014 in Luanda, Angola the Commission again acknowledges the following in paragraph 12:

In Africa, the persistence of several forms of discrimination based on, but not limited to, ethnicity, race, sex, gender, age, marital status, HIV status, sexual orientation, socioeconomic status, disability, geographic residence, legal residence and or traditional, religious and cultural beliefs prevents women from exercising and enjoying their sexual and reproductive rights.<sup>115</sup>

On 3 November 2015, a joint dialogue on sexual orientation and gender identity was held between the Commission, Inter-American Commission on Human Rights (Inter-American Commission or IACHR), and United Nations (UN) human rights mechanisms in Banjul, The Gambia, ahead of the 57<sup>th</sup> Ordinary Session of the African Commission.<sup>116</sup> The Commission hosted the dialogue and was supported and organised by the Office of the High Commissioner for Human Rights (OHCHR) and the Joint United Nations Programme on HIV/AIDS (UNAIDS). The joint dialogue aimed to take the opportunity to exchange information and share experiences and lessons learned in this area. To support this, a dialogue on sexual

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<sup>113</sup> AMSHeR & Coalition of African Lesbians 'Violence based on perceived or real sexual orientation or gender identity' (2013).

[https://www.chr.up.ac.za/images/researchunits/sogie/documents/Violence\\_based\\_on\\_SOGIE/violence\\_based\\_on\\_real\\_or\\_perceivedgender\\_identity\\_en.pdf](https://www.chr.up.ac.za/images/researchunits/sogie/documents/Violence_based_on_SOGIE/violence_based_on_real_or_perceivedgender_identity_en.pdf) (accessed 5 October 2021).

<sup>114</sup> Coalition of African Lesbians 'The Commission-From silence to resistance' (13 November 2017)

YouTube Video 35:10-37:45 <https://www.youtube.com/watch?v=q97-g6PbqJY> (accessed 5 October 2021).

<sup>115</sup> General Comment No 2 on art 14(1)(a), (b), (c) and (f) and art 14(2)(a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, para 12

<http://www.achpr.org/instruments/general-comment-two-rights-women/> (accessed 5 October 2021).

<sup>116</sup> African Commission on Human and Peoples' Rights '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' (2016) page 10.

orientation and gender identity was agreed upon between the Commission, IACHR and UN human rights systems, with the support of OHCHR and UNAIDS.<sup>117</sup>

At the joint dialogue, it was highlighted that no ‘new’ or specific rights were being advanced in any of the three systems in relation to LGBT persons, but rather the application and elaboration of existing fundamental human rights standards in relation to a specific group. This dialogue was a necessary step in furthering the commitment of the Commission to strengthen its work in advancing LGBT human rights protection after the adoption of Resolution 275 in 2014. It signified a willingness by the Commission to learn and improve on its work by learning from other jurisdictions as well as affirming the connectedness of LGBT issues in other regions.

During this period, the Commission also adopted the *Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa*, also known as the *Luanda Guidelines*, in 2015. The Commission under clause 30(a) identifies ‘gender identity’ as a possible reason for discrimination and, therefore, the need for states to put in place measures to ensure protection due to the particular potential need for persons due to such status. The Commission has covered intersex, transgender and non-binary people through this provision. It also, in the *Guidelines on Freedom of Association and Assembly* which was adopted in May 2017. It mentioned in clause 80 that

...state shall not discriminate against assemblies based on other illegitimate grounds, including sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any different opinion, membership of a national minority, migration status, property, socio-economic status, birth, disability, age, sexual orientation or gender identity.

The Commission, through this guideline, was directly responding to incidents in some African countries where LGBT persons are not allowed to register their organisations or their congregation in any way is criminalised. For instance, the Same-Sex Marriage (Prohibition) Act in Nigeria prohibits the registration of organisations and the establishment of gay clubs.<sup>118</sup>

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<sup>117</sup> As above page 11.

<sup>118</sup> The Same-Sex Marriage (Prohibition) Act, 2013 which was signed into law by President Goodluck Jonathan on 7 January 2014.

Another one is *Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa, 2017*, which mentioned: “that particular individuals and groups are especially vulnerable to experiencing limitations on their right to freedom of assembly and to other human rights violations in the context of policing assemblies due to their... sexual orientation and gender identity.” This furthers the Commission's call for states to ensure LGBT persons are also protected from human rights abuse during the protests, meetings and other gatherings. The guideline directly responds to incidents in some African countries where gay people have faced abuse and violence when congregating. For instance, in Ghana, police rounded up 21 persons perceived to be LGBT and kept them in custody for over 21 days, charging the unlawful assembly to propagate LGBT ideals in Ghana. The guideline goes further to call for training for law enforcement officers and others.

The Commission in 2017 adopted the *Guidelines on Combating Sexual Violence and its Consequences in Africa*. In this guideline, the Commission mentioned that “factors other than a person’s sex can increase the vulnerability of individuals or groups of individuals to sexual violence. These include race, colour, national origin... sexual orientation, identity or gender expression”.<sup>119</sup> It, therefore, called on states to “...take the 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.”<sup>120</sup>

In 2017 the Commission adopted *Resolution 376 on the Situation of Human Rights Defenders in Africa*. The resolution calls on African governments to provide the needed protection for human rights defenders to do their work with no interference. In its 13<sup>th</sup> preambulatory clause, it mentioned that groups of human rights defended it is concerned about and identify defenders working on sexual orientation and gender identity. It states:

Concerned about new challenges, in particular, the increased threats against defenders working on issues including the right to health, the fight against HIV/AIDS, reproductive health, sexual orientation and gender, extractive

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<sup>119</sup> African Commission on Human and Peoples’ Rights ‘Guidelines on Combating Sexual Violence and its Consequences in Africa’ (2010) page 16-17

<sup>120</sup> As above.

industries, promotion of democracy and peace, and women rights defenders irrespective of their area of activity<sup>121</sup>

By identifying human rights defenders who work on sexual orientation and gender identity, the Commission continued to show its commitment to furthering its work on protecting and promoting LGBT persons in Africa. This was an efficient response to the growing violence against LGBT human rights defenders.<sup>122</sup> Human rights defenders are also refused registration and thereby denied the right to association in some African countries.<sup>123</sup>

In 2017, the Commission adopted General Comment 4 on the African Charter: *The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (2017)*. The resolution addresses the issue of torture and notes that anyone, regardless of their gender, maybe a victim of sexual and gender-based violence that amounts to torture or ill-treatment. And in this regard, “lesbian, gay, bisexual, transgender and intersex persons are of equal concern.”<sup>124</sup> Adopting such a General Comment that acknowledges the violence LGBT people go through and categorising it is the Commission’s contribution towards addressing the torture, inhumane and ill-treatment LGBT people face because of their imputed or real sexual orientation and gender identity. The general comment can be used as a tool for advocacy with state parties to the African Charter.

### **3.3.2 Phase two: Protective mandate**

In 2014 the Special Rapporteur on Human Rights Defenders in Africa released a statement on the Implications of the Anti-Homosexuality Act on the work of the Human Rights Defenders in Uganda.<sup>125</sup> In the statement, the Special Rapporteur showed concern that

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<sup>121</sup> Resolution 376 on the Situation of Human Rights Defenders in Africa para 13.

<sup>122</sup> AMSHeR & Synergia Initiative for Human Rights ‘Application of Resolution 275 by the African Commission on Human and Peoples’ Rights: A six-year assessment’ (2020) page 9.

<sup>123</sup> For instance, in Kenya (*Eric Gitari v Nongovernmental Organizations Coordination Board and 4 Others* (2015) eKLR); in Nigeria (*Pamela Adie v Corporate Affairs Commission* (2018) Suit No FHC/ABJ/CS/827/2018); and in Botswana (*Letsweletse Motshidiemang v Attorney General* (2019) MAHGB-000591-16).

<sup>124</sup> African Commission on Human and Peoples’ Rights ‘General Comment No. 4 on the African Charter on Human and Peoples’ Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5)’ para 59 <https://www.achpr.org/legalinstruments/detail?id=60> (accessed 8 October 2021).

<sup>125</sup> Press Release on the implications of the Anti-Homosexuality Act on the work of Human Rights Defenders in the Republic of Uganda <https://www.achpr.org/pressrelease/detail?id=228> (accessed 4 October 2021).

[s]uch a law is likely to endanger the life and safety of persons alleged to belong to sexual minorities, as well as human rights defenders working on this issue, since it undermines their activities and freedom of expression, association and assembly, all of which are rights guaranteed by the Ugandan Constitution, and the African Charter on Human and People's Rights, in particular Article s 2, 9, 10 and 11.<sup>126</sup>

The Special Rapporteur on Human Rights Defenders again released another statement<sup>127</sup> to condemn the Same-Sex Marriage Prohibition Act, Nigeria's Parliament enacted. It stated that:

...concerned by some provisions of the Act, in particular Sections 4(1) and 5(2), which prohibit and provide for penalties against defenders of the rights of lesbian, gay, bisexual and transgender (LGBT) people. These provisions undermine the work of human rights defenders and are against any public debate on this crucial issue.<sup>128</sup>

These statements were a strong stance the Commission took through the activities of the Rapporteurs to send a strong message to states on their commitment to human rights protection of LGBT persons and also reminding states of their obligation to respect the rights of LGBT persons in the Charter as they quote in each of their statements.

In 2015, CAL reapplied for observer status following the adoption of Resolution 275. Earlier, the Commission delayed in deciding to grant CAL an observer status. It had requested for a paper to be drafted for the Commissioners to learn about the situation of LGBT persons since they did not have enough information about LGBT persons. Several LGBT organisations and partners came together to draft a paper for the Commission.<sup>129</sup> The Commission on receiving the paper invited the organisations for a presentation and conversation on the form.<sup>130</sup> Notwithstanding the discussion and information presented to the Commission, it still did not grant CAL the status of observer.

At its 56<sup>th</sup> Ordinary Session in Banjul Gambia in April 2015, the Commission, after intense discussion and deliberations, voted to grant CAL observer status in a public session marked by an apparent show of division among the Commissioners

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<sup>126</sup> As above.

<sup>127</sup> Press Release on the Implication of the Same-Sex Marriage (Prohibition) Act 2013 on Human Rights Defenders in Nigeria <http://www.achpr.org/press/2014/02/d190/> (accessed 11 October 2021).

<sup>128</sup> As above.

<sup>129</sup> Ndashe (n22) page 28.

<sup>130</sup> As above.

on the issue.<sup>131</sup> This was after it had already given the observer status to CAL in a private session. It was an unusual turn of events as this process was not the Commission's practice; once it decided to grant an organisation observer status in its private session, it was final. Other organisations were also granted observer status in the same session of the Commission. Still, it was only the decision to grant CAL observer status brought to the public session for another discussion and voting. It finally granted CAL the observer status after more Commissioners voted in favour.

The Commission's decision to grant CAL observer status was met by civil society with jubilation, pride and praise. This significant feat was not just an observer status for many LGBT organisations and individuals but also an affirmation of the gradual full recognition of LGBT persons as meriting the rights in the African Charter.

At their June 2015 Summit, the Executive Council directed the Commission to withdraw CAL's observer status because it considered CAL's work to be an affront to "African values".<sup>132</sup> The Executive Council further instructed the Commission to review its criteria for granting observer status to NGOs by aligning them with those African Values.<sup>133</sup> This decision by the Executive Council of the AU started a conversation about the independence of the Commission as a human rights body. It also placed the Commission in a position where it had to decide which side it belonged to, whether it would succumb to the demands of the political body or assert its position as an independent body. However, it is essential to remember that the AU established the Commission, where they report and receive their budget allocations.<sup>134</sup> The Commission delayed in making its decision to withdraw CAL's status. The Commission was faced with a decision to defend its position as an independent body and a legal question of the withdrawal of the observer status of an NGO. This was going to be the first time the body would deal with such a situation where they had no legal guidance.

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<sup>131</sup> Although the said meeting granted CAL the observer status, it is not in any activity report confirming the granting of observer status to CAL.

<sup>132</sup> Decision on the Thirty-Eighth Activity Report of the African Commission on Human and Peoples' Rights - Doc.EX.CL/921(XXVII).

<sup>133</sup> As above.

<sup>134</sup> Coalition of African Lesbians 'Women and Sexual Minorities Denied a Seat at the Table by the African Commission on Human and Peoples' Rights' (17 August 2018) <https://www.cal.org.za/2018/08/17/women-and-sexual-minorities-denied-a-seat-at-the-table-by-the-african-commission-on-human-and-peoples-rights/> (accessed 10 August 2021).



In November 2015, CAL partnered with the Centre for Human Rights (University of Pretoria) to request an advisory opinion from the African Court on the legality of the Executive Council directive.<sup>135</sup> In September 2017, the African Court delivered its opinion, focusing on the legal standing of the applicants to file the request rather than on its merits. The Court held that it could not render a substantive opinion because the applicants lacked *locus standi*.<sup>136</sup>

Since 2015, after the adoption of Resolution 275 in 2014, there has been a significant surge of the Commission's attention to issues of LGBT persons when reviewing periodic reports and making concluding observations. In seven of the reviews of periodic reports, they commended some states for making efforts towards human rights protection of LGBT people, condemned violations of rights and made recommendations for improvements. The table below lists the countries and the period of the Concluding Observations:

| Country                  | Report   | Year |
|--------------------------|--|------|
| Liberia                  | 1 <sup>st</sup> Periodic Report                    | 2015 |
| Malawi                   | Initial and Combined Reports                       | 2015 |
| Nigeria                  | 5 <sup>th</sup> Periodic Report                    | 2015 |
| Republic of South Africa | 2 <sup>nd</sup> Periodic Report                    | 2016 |
| Sierra Leone             | Initial and Combined Report                        | 2016 |
| Namibia                  | 6 <sup>th</sup> Periodic Report                    | 2016 |
| Republic of Mauritius    | 6 <sup>th</sup> to 8 <sup>th</sup> Combined Report | 2017 |

*Table of countries that had the Commission enquire about LGBT issues in their Concluding Observations (information gathered from <https://www.achpr.org/statereportsandconcludingobservations>)*

In the concluding observations of Liberia's 1<sup>st</sup> periodic report, the African Commission recommended to Liberia to

<sup>135</sup> African Court on Human and Peoples' Rights 'Request for advisory opinion by the Centre for Human Rights of University of Pretoria and the Coalition of African Lesbians' (28 September 2017) No. 002/2015 <http://www.african-court.org/en/images/Cases/Judgment/002-2015-African%20Lesbians-%20Advisory%20Opinion-28%20September%202017.pdf> (accessed 7 October 2021).

<sup>136</sup> As above para 57.

[e]nsure the equal rights of all Liberians without discrimination, including based on sexual orientation or gender identity. It should, in particular, take account of Resolution 275 of the African Commission, which urged all States to enact and apply appropriate laws prohibiting and punishing all forms of violence, including those targeting persons based on their imputed or real sexual orientation or gender identity.<sup>137</sup>

This was the first time the Commission was making direct reference to Resolution 275 in a concluding observation. By referring to the resolution, the commission showed their commitment to enact such resolutions and affect them.

In the concluding observation of Malawi's periodic report in 2015, the Commission drew the attention of the government of Malawi to challenges LGBT persons in Malawi were facing. It also commended Malawi to investigate claims of violations of the right to access healthcare by LGBT persons.<sup>138</sup> The commendation of Malawi was a good way to show examples of countries making efforts to ensure the protection of LGBT peoples and not only pointing out the negative issues of states.

In the Concluding Observation of Nigeria's 5<sup>th</sup> periodic report in 2015 at the 57<sup>th</sup> Ordinary Session, the Commission noted the passage into law the Same-Sex Prohibition Bill by the Nigerian Parliament.<sup>139</sup> It raised concerns about the negative effect of the law on the LGBT community in Nigeria and therefore recommended that Nigeria

[r]eview the Same-Sex Marriage Prohibition Act to prohibit violence and discrimination in access to HIV prevention, treatment and care services, and to ensure the protection of other human rights of sexual minorities guaranteed under the African Charter other international instruments to which Nigeria is a party.<sup>140</sup>

The Commission also noted that

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<sup>137</sup> Concluding Observations and Recommendations on the Initial Periodic Report of the Republic of Liberia on the African Charter on Human and Peoples' Rights adopted at the 17<sup>th</sup> Extraordinary Session 19-28 February 2015, Banjul, Gambia Page 10 para 49 (iv)

<https://www.achpr.org/sessions/concludingobservation?id=57> (accessed 10 October 2021).

<sup>138</sup> Concluding observations and recommendations on the initial combined periodic report of the Republic of Malawi on the implementation of the African Charter on Human and Peoples' Rights (1995-2015) adopted at the 57<sup>th</sup> Ordinary Session 4-18 November 2015 Banjul Gambia page 5 para 28

<https://www.achpr.org/states/statereport?id=96> (accessed 10 October 2021).

<sup>139</sup> Concluding observations and recommendations on the 5<sup>th</sup> periodic report of the Federal Republic of Nigeria on the implementation of the African Charter on Human and Peoples' Rights (2011-2014) adopted at the 57<sup>th</sup> Ordinary Session 4-18 November 2015 Banjul Gambia page 13 para 81

<https://www.achpr.org/sessions/concludingobservation?id=93> (accessed 10 October 2021).

<sup>140</sup> As above page 18 para 126.

enactment of a law criminalizing homosexuality has the potential to engender violence against persons on the grounds of their actual or imputed sexual orientation, and also to drive this group of persons vulnerable to HIV/AIDS underground, thereby creating an environment that makes it impossible to address the HIV pandemic in the State effectively.<sup>141</sup>

South African in 2016 received a commendation from the Commission for the “enactment of legislation to rule out discrimination and ensure equality in a variety of areas such as race, colour, ethnic origin, gender, sex, sexual orientation, religion, disability etc.”<sup>142</sup> The Commission, however, also raised concerns on the level of widespread “discrimination, homophobia, and prejudice against homosexuals resulting in murder and violence against homosexuals despite the existence of legal frameworks.”<sup>143</sup>

Sierra Leone also received a recommendation from the Commission in 2015 during the review of their initial and combined report to

effective and concrete measures to end all acts of violence and abuse, whether committed by State or non-state actors, including by enacting and effectively applying appropriate laws prohibiting and punishing all forms of violence, including those targeting persons based on their imputed or real sexual orientation or gender identities, ensuring proper investigation and diligent prosecution of perpetrators, and establishing judicial procedures responsive to the needs of victims.<sup>144</sup>

This is a reflection of what the Commission had already requested of states in Resolution 275. This means the Commission continually reminds states of their obligations to protect LGBT persons in their countries.

The Commission mentioned in the concluding observation of Namibia’s 6<sup>th</sup> periodic report the incidents of “discrimination and stigmatisation practices that limit health care access for vulnerable groups, particularly the lesbian, gay, bisexual

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<sup>141</sup> As above page.

<sup>142</sup> Concluding observations and recommendations on the combined second periodic report of the under the African Charter on Human and Peoples’ Rights and initial report under the Protocol to the African Charter on the Rights of women in Africa of the Republic of South Africa adopted at the 20<sup>th</sup> extra-ordinary Session 9-18 June 2016 Banjul Gambia page 13 para 81 <https://www.achpr.org/sessions/concludingobservation?id=97> (accessed 10 October 2021).

<sup>143</sup> As above page 18 para 32(ii).

<sup>144</sup> Concluding Observations and Recommendations on the Initial and Combined Periodic Report of the Republic of Sierra Leone on the Implementation of the African Charter on Human and Peoples’ Rights adopted at the 19<sup>th</sup> extraordinary session of the African Commission on Human and Peoples’ Rights 16-25 February 2016 Banjul Islamic Republic of The Gambia page 10 para 85 <https://www.achpr.org/sessions/concludingobservation?id=87> (accessed 10 October 2021).

and transgender (LGBT) community, commercial sex workers and other vulnerable groups.”<sup>145</sup>

Through their activities for the Commission, Individual Commissioners also made significant contributions as rapporteurs and in participating in activities in Africa and abroad. For instance, in 2015, Commissioner Reine Alapini-Gansou reported in the 56<sup>th</sup> Ordinary Session Activity Report their participation in a Global Donor’s Conference on the Rights of LGBT persons where they informed partners of the work of the Commission, especially the adoption of Resolution 275.<sup>146</sup> This, in a way, provide an opportunity for funding of LGBT work in Africa as the information given by the Commissioner to the donors at that conference can serve as a foundation for work in Africa. In his report to the Commission, Commissioner Lawrence Mute as the Chairperson on the Committee on Torture and Other Ill-Treatment in Africa drew the attention of the Commission to allegations of attacks on LGBT persons in the Gambia, therefore, seeking that the state provides the needed protection for the LGBT persons in the Gambia.<sup>147</sup>

As of 2017, the Commission had not received any communication or decided on any LGBT specific issue. Notwithstanding, in 2015, it included sexual orientation among the protected grounds for non-discrimination in its decision in the *Zimbabwe Human Rights NGO Forum v Zimbabwe case*.<sup>148</sup> This case presented the Commission an opportunity to give further meaning to non-discrimination, and they used their interpretation mandate to expand the definition of non-discrimination in Article 2. This is further discussed under the interpretation mandate.

### **3.3.3 Phase two: Interpretative mandate**

The interpretation on the grounds of non-discrimination to include sexual orientation in 2015 in the *Zimbabwe Human Rights NGO Forum case*.<sup>149</sup> The Commission, in this case, gave further interpretation to Article 2 of the African Charter. It put all doubts to rest when they declared that this provision applies to every individual.<sup>150</sup> The Commission expressly stated in paragraph 169 that,

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<sup>145</sup>Concluding Observation Observations and Recommendations on 6th Periodic Report of the Republic of Namibia on the Implementation of the African Charter on Human and Peoples’ Rights’ (2016) para 32.

<sup>146</sup> African Commission on Human and Peoples’ Rights “38<sup>th</sup> Activity Report of the African Commission on Human and Peoples’ Rights’ (2015)

<sup>147</sup> As above.

<sup>148</sup> *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128 (ACHPR 2006) para 169.

<sup>149</sup> As above page 6.

<sup>150</sup> Jjuuko (n31) page 279.

[t]ogether 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" it was therefore not out of place when they concluded on the issue of the principle of non-discrimination that "this principle aims 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."<sup>151</sup>

### **3.3.4 Phase two: Other tasks**

The Executive Council of the AU requested the African Commission to withdraw the observer status it granted CAL. This was a request which was new to the Commission. By the end of this phase, the Commission had not taken any action on the request from the Executive Council.

### **3.4 Phase three: Phase of ambiguity and opportunity (2018 to present)**

In the advance and acceptance phase of the Commission's work, we observed a greater involvement of the Commission in advancing LGBT human rights protection in the various avenues available to them. They showed an acceptance of the need to promote and protect the rights of LGBT persons. In this phase, we realise an interception of their advancement, which leaves a lot of questions for the commission on the way forward; ambiguity. Their response to the Executive Council's Decision to withdraw CAL's observer status has brought into question their independence. At the same time, the creation of Resolution 275 and all the other soft-laws and concluding observations still create opportunities for the way forward.

#### **3.4.1 Phase three: Promotional mandate**

Niger received the Commission's appreciation for "the educational and sensitization programmes aimed at promoting equality, non-discrimination and respect for human dignity to facilitate the access by the people to HIV-related health services, particularly the programme to combat HIV/AIDS among sex workers and men who have sex with other men as well as programmes aimed at removing the legal obstacles linked to HIV-related health services."<sup>152</sup>

In 2018, the Commission adopted the *Principles on the Declassification of Petty Offences in Africa*. The Commission recognised in this document that laws

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<sup>151</sup> *Zimbabwe Human Rights NGO Forum* case (n148).

<sup>152</sup> Concluding Observation Observations and Recommendations on 14th Periodic Report of Niger (2014 - 2016) on the Implementation of the African Charter on Human and Peoples' Rights, para 45.

criminalising petty offences do not target persons based on their social origin, social status or fortune, noting that petty offences “can threaten the fundamental rights and freedoms of poor and other marginalised persons,” which they identified to include men who have sex with men, transgender persons, sex workers and prisoners. They also included persons marginalised based on sexual or gender identity.

The Commission conducted a study on *HIV, the Law and Human Rights in the African Human Rights System: Key Challenges and Opportunities for Rights-Based Responses* in 2018. The report identified that “Criminalization, violence, discrimination and other human rights violations based on sexual orientation are contrary to international human rights law. They also have significant negative consequences on the HIV epidemic and public health, contributing to an environment of fear that drives LGBTI people away from HIV services.”<sup>153</sup>

### **3.4.2 Phase three: Protective mandate**

In its May 2018 decision, reported in the 44th Activity Report, the Commission emphasised that it would deal with the request for withdrawal of observer status in a judicial manner, guided by due process, legality and the African Charter.<sup>154</sup> This gesture of the Commission suggested it was ready to work with the existing process as stipulated in the Protocol of the African Court, which was to seek interpretation of its mandate from the African Court, to work towards defending its independence. Many civil society organisations rallied around the Commission, supporting its resistance to political pressure from the Executive Council.<sup>155</sup>

To drum home further its already communicated decision on their call for the Commission to withdraw the observer status of CAL, the Executive Committee adopted Decision EX.CL/Dec.1015(XXIII)<sup>156</sup> in 2018. By adopting this Decision, the recommendation it earlier made now become binding AU decisions or directives.<sup>157</sup> Decision 1015 was adopted following a 'retreat' between the African Commission and the AU Permanent Representatives Committee (PRC). Decision 1015 does not only request the withdrawal of CAL's status but also includes the revision of

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<sup>153</sup> HIV, the Law and Human Rights in the African Human Rights System: Key Challenges and Opportunities for Rights- Based Responses (2018) para 118 page 87.  
[https://www.unaids.org/sites/default/files/media\\_asset/HIV\\_Law\\_AfricanHumanRightsSystem\\_en.pdf](https://www.unaids.org/sites/default/files/media_asset/HIV_Law_AfricanHumanRightsSystem_en.pdf)  
(accessed on 9 October 2021).

<sup>154</sup> African Human Rights Journal (n6) page v.

<sup>155</sup> African Human Rights Journal (n6) page v.

<sup>156</sup> African Union Executive Council Decision by the Executive Council of the African Union on the Joint Retreat of the Permanent Representatives' Committee (PRC) and the African Commission on Human and Peoples' Rights (ACHPR). Doc.EX.CL/1015(XXXII).

<sup>157</sup> see Executive Council Rules of Procedure, Rule 34 and Art. 23(2) of the Constitutive Act of the AU.

the interpretative mandate of the Commission “in light of similar mandate exercised by the African Court and potential for conflicting jurisprudence,”<sup>158</sup> the directive to the Commission to align its guidelines for granting observer status to NGOs with “the already existing criteria on the accreditation of NGOs to the AU”<sup>159</sup>; and a directive to the Commission to formulate a code of conduct, in consultation with the AU Legal Counsel.<sup>160</sup>

In 2018, the African Commission withdrew the decision it took to grant observer status to CAL.<sup>161</sup> The view among activists is that it yielded to political pressure from the African Union when it took away the observer status of CAL.<sup>162</sup> Viljoen has described the withdrawal of CAL’s observer status as illogical and hypocritical.<sup>163</sup> By withdrawing CAL’s observer status, the Commission has now left its work to advance the human rights of LGBT people in significant ambiguity. With all the advancement it has achieved, the commission was set to making LGBT human rights protection an “African thing” as against the argument from many African governments that LGBT issues are Western and not African.

A number of countries have submitted their periodic reports and have addressed the issue of LGBT persons and how they are making efforts to protect their rights. Angola mentioned in its 6<sup>th</sup> and 7<sup>th</sup> Combined Periodic report in 2018 that it had decriminalized same-sex relations. In its 2<sup>nd</sup> and 3<sup>rd</sup> periodic report, Botswana also reported that “[w]here persons are of the opinion that their right to enjoy the freedom of association is being infringed upon, they can take the matter to the courts. The Lesbians, Gays, & Bisexuals of Botswana (LEGABIBO) recently sued the Government for refusing to register it as an association of homosexuals.”<sup>164</sup> Also, in the Commission 9<sup>th</sup> and 10<sup>th</sup> Combined Periodic Report, Mauritius noted that it had enacted an Equal Opportunity Act that prohibits “discrimination in employment, education, qualifications for a profession, trade or occupation, the provision of goods, services, facilities or accommodation, the disposal of property, companies, partnerships, “sociétés”, registered associations, sports, clubs and access to premises which the public may enter or use. The

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<sup>158</sup> Executive Council (n70) para 6(a).

<sup>159</sup> As above para 8 (iv).

<sup>160</sup> As above para 8 (ii).

<sup>161</sup> *African Human Rights Journal* (n6).

<sup>162</sup> F Viljoen ‘Africa’s rights commission can – and should – do more for sexual minorities’ (8 May 2019) *The Conversation* <https://theconversation.com/africas-rights-commission-can-and-should-do-more-for-sexual-minorities-116601> (accessed 7 October 2021).

<sup>163</sup> As above.

<sup>164</sup> The Republic of Botswana Second and Third Report to the African Commission on Human and People’s Rights Implementation of the African Charter on Human and People’s Rights- 2018.

grounds of discrimination extend beyond those provided in the Constitution, notably age, ethnic origin, sexual orientation, impairment, and marital status".<sup>165</sup>

At the time this dissertation was being written, there was no record of communication to the Commission asking a specific question on LGBT rights.

In the 66<sup>th</sup> Ordinary Session Intersession Activity report in 2020, Commissioner Hatem Essiem and Annual Report on the Situation of Torture and other ill Treatment in Africa noted that LGBT persons continue to face

killings, torture, threats, harassment, arbitrary detention and widespread discrimination in access to health care, education, employment and housing".<sup>166</sup>

The report also noted the continuous use of anal examinations to obtain physical evidence of homosexuality which the report mentions that "amounts to torture and ill-treatment, and has been found 'medically worthless'.<sup>167</sup>

The release of such a report exposes the challenges LGBT people are facing. It sends a message to state parties to the African Charter that Commissioners are watching.

In June 2021, the Commission made a press statement condemning the arrest and detention of 21 LGBT advocates in Ghana who were arrested and detained on the charge of the unlawful gathering. The Commission called on the Ghanaian Government to unconditionally release the 21 persons.<sup>168</sup>

### **3.4.2 Phase three: Interpretative mandate**

In this face, there was no record of the Commission's work that focused on interpretation as required in its mandate at the time of drafting this dissertation.

### **3.4.3 Phase three: Other tasks**

As observed earlier, the Executive Council's demands for the Commission to withdraw the Status of CAL is an "other" task with no legal standing. Since this mandate exist, one can argue that the Commission was instructed under this

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<sup>165</sup> The Republic of Mauritius 9<sup>th</sup> and 10<sup>th</sup> combined periodic report of the Republic of Mauritius on the implementation of the African Charter on Human and Peoples' Rights (January 2016-August 2019) page 31 para 70 and 71.

<sup>166</sup> 66th Ordinary Session Intersession Activity Report, Commissioner Hatem Essiem and Annual Report on the Situation of Torture and Other Ill- Treatment in Africa (2020).

<sup>167</sup> As above.

<sup>168</sup> Press release on the arbitrary arrest and detention of 21 LGBT human rights defenders in Ghana (9 June 2021) <https://www.achpr.org/pressrelease/detail?id=584> (accessed 25 October 2021).



mandate. Also, the directive in Decision 1015 is all possible qualifications for this mandate.

### **3.5 Conclusion**

In each of the phases of the Commission's work, from contradiction and animosity through advancement and acceptance to ambiguity and opportunity, there was a growing phenomenon of support for the human rights protection of LGBT persons. Although it seemed slow initially, the Commission appeared picked up and ran with its agenda for LGBT human rights. It is important to note the role NGOs played in supporting the Commission's work by the information they provided at each level, technical support and negotiations they had to do to get the commission to make favourable decisions.

The Commission has therefore made progress towards advancing the rights of LGBT persons. It was on track and showed its commitment by adopting Resolution 275, which became its foundational document to engage states. It is also clear that the AU policy organs are and will continue to be a stumbling block in the way of the Commission as the Commission has shown that it can be influenced by the AU when it withdrew CAL's observer status under their direction. At this stage, the Commission's work remains ambiguous toward the LGBT community in Africa. The next chapter will conclude this research by identifying the factors that influenced the outcomes discussed with some key recommendations.

## **Chapter 4: Conclusion on the factors that have contributed to the current state of LGBTI human rights protection at the Commission and recommendations**

### **4.1 Introduction**

This research has interrogated the work of the African Commission regarding its contribution to the human rights protection of LGBT persons in Africa. Chapter 2 examined the existing legal and policy frameworks that create avenues for the Commission to work on protecting and promoting the human rights of LGBT persons. That chapter identified that there are indeed avenues for the Commission to execute its mandate in the current legal and policy framework to protect LGBT persons. Chapter 3 took a deep dive into the work of the Commission, distinguishing phases of the work of the Commission and discussing what contribution it made in each phase of its work on LGBT human rights. In that chapter, it was concluded that the Commission has contributed in diverse ways to protecting LGBT persons, notwithstanding the challenges it comes with.

This concluding chapter draws out the factors that influenced the work of the Commission over the period that this research examines. The factors are identified by a close look at the various actions of the Commission itself and others who influence at or around the Commission. A set of recommendations and a suggestion for future research then follow.

### **4.2 Factors that influenced the work of the Commission from 1987 to 2021**

The Commission has had a pendular movement regarding its work on the human rights protection of LGBT persons in Africa. From the phase of animosity and contradiction to the phase of ambiguity and opportunity, one sees a back-and-forth movement. From observing the work over the period, one would see key factors contributing to this pendular movement of its work. Below are four key factors this research identifies in the analysis of the work of the Commission:

#### **4.2.1 The adoption of an incrementalist approach to including LGBTI in its work**

One of the significant factors that has informed the current state of the Commission's work is the incrementalist approach adopted by the Commission to include LGBTI issues in its work. A review of the Commission's work from 1987 to 2021, as done in the previous chapter, shows how the Commission has gradually

advanced LGBT human rights protection and promotion through the various avenues available to it progressively.

In the earlier days of its work, the Commission was marked with more homophobic views towards LGBT issues.<sup>169</sup> Over time, the Commission seems to be warming up gradually to the idea that the African Charter protects the rights of LGBT people.

In 2005 Commissioner El Hassan was reported to have referred to possible marriage between people of the same sex during the oral examination of South Africa's state report.<sup>170</sup> He is said to have questioned South Africa's progressive position and whether it is not against Article 18(1) of the Charter, which states that "the family shall be the natural basis of society". This interpretation suggested by the Commissioner was to imply that South Africa, in granting constitutional rights to LGBT persons, seem to be encouraging possible same-sex marriage, which in his understanding (of the charter provision he quoted) was to be the preserve of heterosexuals as it is only heterosexuals who can make a family which the Charter protects.

In 2006, there was a realisation of a progressive approach to the issue of LGBT human rights during the examination of Cameroon's periodic report by the Commission.<sup>171</sup> During the review, Commissioners Taklula (from South Africa) and Commissioner Malila asked questions that departed from Commissioner El Hassan's position. They both requested progressive questions with regards to discrimination against LGBTI persons and whether the action of the Government of Cameroon with regards to a medical examination conducted on the people they arrested was not against Article 5 of the Charter, which is against the prohibition of torture cruel, inhuman and degrading treatment. Commissioner Alapini-Gansou also raised concerns about the intolerance of Cameroon based on the sexual orientation of people.<sup>172</sup> These Commissioners' reference to the Charter shows the progression in its attempt to include LGBTI issues in its work.

From 2006 onward, the Commission increased its inclusion of sexual orientation and gender identity in soft-law resolutions and asked questions on the state of LGBT persons in examining state reports. One significant way we see this

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<sup>169</sup> Murray and Viljoen (n4) page 100.

<sup>170</sup> Murray and Viljoen (n4) page 12

<sup>171</sup> Ndashe (n22) page 24.

<sup>172</sup> Murray and Viljoen (n4) page 35.

incremental approach is when the Commission waited on a paper on LGBT persons lived experience to ensure they understood the issues before granting CAL observer status in CAL's first attempt in 2008. Although they did not grant the observer status to CAL then, they moved to the adoption of Resolution 275 in 2014. This was a significant step as they used the adoption of the resolution as a step towards granting CAL the observer status in 2015. By adopting this approach, the Commission can gradually bring along states who focus on its work. Also, since the adoption of Resolution 275, the Commission has included it in various general comments, guidelines and concluding observations.<sup>173</sup>

Before the passage of Resolution 257, the Commission had already included sexual orientation to the list of grounds for non-discrimination in the *Zimbabwe Human Rights NGO Forum v Zimbabwe*.<sup>174</sup> Although this approach has not provided the space LGBT persons need at the Commission to advance human rights protection and promotion, it has produced significant milestones that have prepared the grounds for further engagement and possible work on LGBT issues. The adoption of Resolution 275, granting observer status to CAL, and the inclusion of LGBT persons in the various soft law instruments have provided the tools for further engagement.

The diagram below shows how the incremental approach adopted by the Commission has influenced the outcome of its work on LGBT human rights protection and promotion before and after the adoption of Resolution 275. It shows how the Commission is gradually including LGBT human rights more and more in its work.

The diagram below gives a picture of the Commission's work on LGBT since the adoption of Resolution 275. It lists the number of actions taken by the Commission before and after the adoption in 2014 to 2020. As of 2020, there are 2 resolutions that mention or makes reference to sexual orientation and gender identity. The Commission has not made any decision on Communication since the *Curson* communication was withdrawn in 1995. Two General Comments adopted by the Commission have made mention of LGBT persons, and they have referred to LGBT issues in 8 Concluding Observations. The Commission has also included LGBT or sexual orientation and gender identity in 5 guidelines and principles. In

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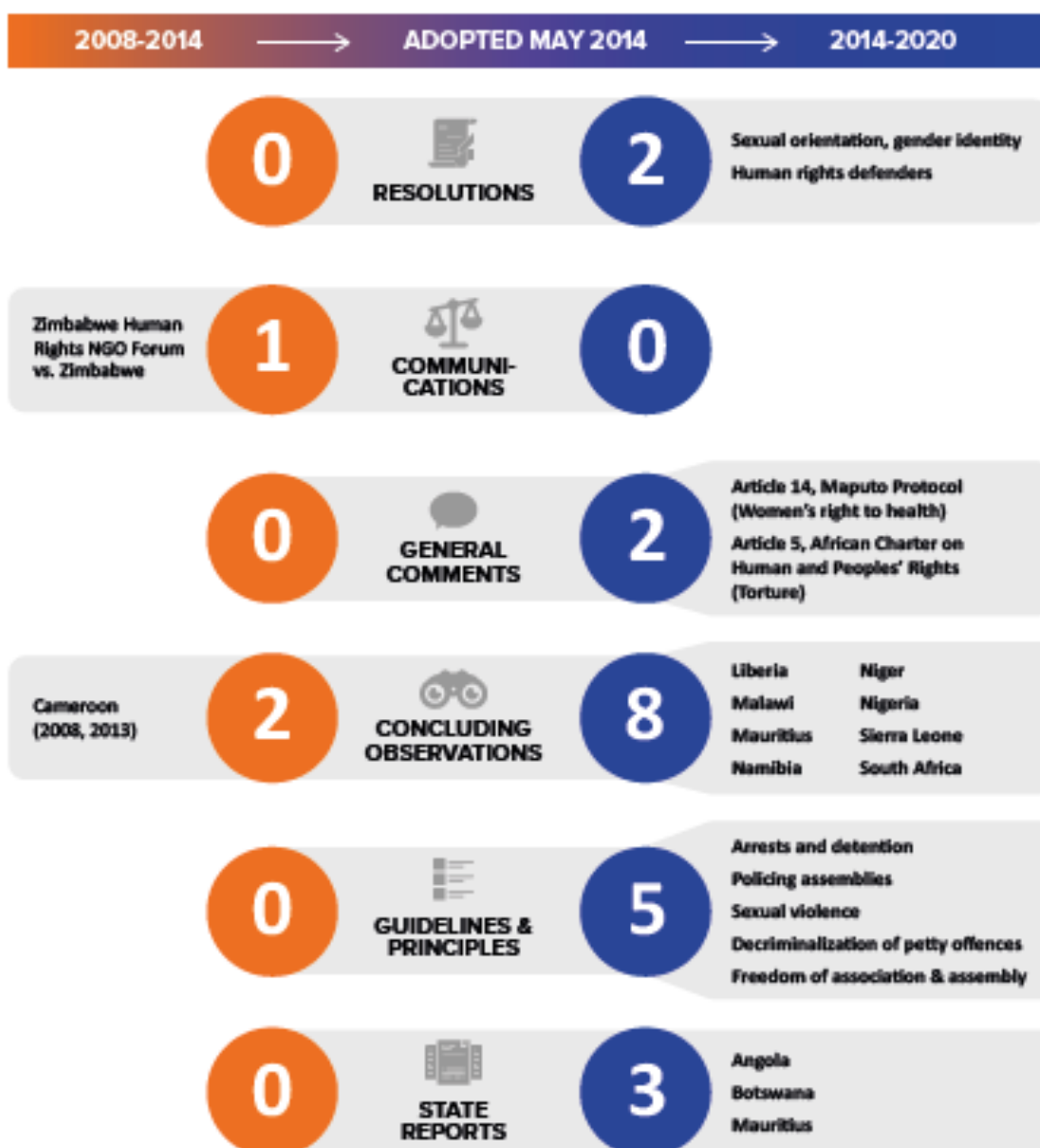
<sup>173</sup> BD Nibogora 'Advancing the rights of sexual and gender minorities under the African Charter on Human and Peoples' Rights; the journey to resolution 275' in E Durojaye, G Mirugi-Mukundi & C Ngwenya (eds) *Advancing sexual and reproductive health and rights in Africa* (2021) at 182.

<sup>174</sup> *Zimbabwe Human Rights NGO Forum v Zimbabwe* (n148).

2018 3 countries reported on the status of LGBT people in their periodic reports; a significant step that can encourage other states to start reporting on LGBT persons.

# Resolution 275 Effects on the African System for the Protection of Human Rights

SOGI/ESG references in the African Commission's soft law and documents following the adoption of Resolution 275/2014 (September 2020)



*Source of diagram; Application of Resolution 275 by the African Commission on Human and Peoples' Rights: A six-year assessment Report by AMSHER and Syneria for Human Rights*

#### 4.2.2 Use of pragmatism in dealing with the AU organs

The Commission is an institution of the AU, which is a political body.<sup>175</sup> In previous times, heads of states which form the AHSG have stated their abhorrence emphatically to LGBT issues.<sup>176</sup> For the Commission to bring LGBT issues into its work, it had adopted a pragmatic approach to avoid attempts by the political bodies to temper with its mandate. As a quasi-judicial body without the power to make binding decisions, it encourages states through its decisions, concluding observations and soft-law instruments. It also commends and condemns the actions of states towards LGBT persons only as a measure to raise awareness and attention to those issues.

This is exemplified in the recent exchange the Commission had with the AU Executive Council. After the Commission granted CAL observer status in 2015, the Executive Council directed the Commission through its decision 887<sup>177</sup> to withdraw CAL's observer status in 2015. CAL and the Centre for Human Rights (University of Pretoria) sent a request to the African Court for advisory opinion on whether or not the directives from the Executive Council was legal. The African Court did not give its advisory opinion because the applicants do not have *locus standi*.

In its 43<sup>rd</sup> Activity Report in 2018, the Commission stated that it could not withdraw CAL's observer status because it was properly granted and as a body, it did what is within its mandate, which is to grant observer status to NGOs that meets its set criteria.<sup>178</sup> The Executive Council again demanded the withdrawal of CAL's observer status in its decision 995.<sup>179</sup> The Executive Council requested the Commission to hold a retreat with the Permanent Representatives' Committee "to resolve various concerns expressed about the relationship between the ACHPR and the Policy Organs and Member States".<sup>180</sup> The retreat was also to "improve their dialogue and resolve outstanding issues and recommends appropriate measures to this end in respect of the full authority of the Organs."<sup>181</sup> The outcome of the retreat was the recommendations which were adopted at the AU Summit in Nouakchott, Mauritania, and became a binding AU decision.<sup>182</sup>

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<sup>175</sup> F Viljoen *International human rights law in Africa* (2012) page 151.

<sup>176</sup> Jjuuko (n31) Page 263.

<sup>177</sup> Decisions of the Executive Council of the African Union adopted at the 27<sup>th</sup> Ordinary Session from 7-12 June 2015 in Johannesburg, South Africa EX.CL/Dec.873-897 (XXVII)

<sup>178</sup> African Commission on Human and Peoples' Rights '43<sup>rd</sup> Activity Report of the African Commission on Human and Peoples' Rights' (June-November 2017) page 18-19 para 48, 49 and 50.

<sup>179</sup> Decisions of the Executive Council of the African Union adopted at the 32<sup>nd</sup> Ordinary Session from 25-26 January 2018 in Addis Ababa, Ethiopia EX.CL/Dec.986-1007 (XXVII).

<sup>180</sup> As above para 4.

<sup>181</sup> As above.

<sup>182</sup> See Executive Council Rules of Procedure Rule 34 and Article 23(2) of the Consultative Act of the AU.

Decision 1015 has elements that, according to Biegon, severely undermine the Commission. The Decision gives directives for review of the interpretative mandate of the Commission, requires the Commission to align its guidelines for granting observer status to that of the AU and directs the Commission to formulate a code of conduct in consultation with the AU Legal Counsel.<sup>183</sup>

The Commission receives its mandate and budget directly from the AU, which is the body (in the form of its predecessor the OAU) that had established it. It reminded the Commission of this position in Decision 1015 when it stated the Commission in its “function in nature and not independent from the same organs that created the body”.<sup>184</sup> Any attempt to override the decision of the AU’s political organ could result in reviews that could adversely affect the mandate of the Commission. Decision 1015 is an example of how the AU political organs (Executive Council specifically) could temper with the mandate of the Commission. This has made the Commission’s independence questioned and made the Commission look like a sham of a regional human rights institution to fulfil an international requirement but still under the control, whims and caprice of the AU’s political organs.

#### **4.2.3 Contributions and influence of NGOs, advocates and activists**

NGOs play a significant role in the work of the Commission. They draw the Commission’s attention to critical human rights issues that need their attention and fall within the Commission’s mandate.<sup>185</sup> Since the establishment of the Commission in 1987, the role of NGOs have grown more significant and more prominent in the Commission’s work.<sup>186</sup> Currently, there is an NGO Forum that is held ahead of every session. The communique of the NGO Forum is read at the Commission’s public session Sometimes. The Commission may take up an issue from NGO Forum and adopt a resolution over that issue. That is how vital NGOs are now in the work of the Commission. The Commission reported in its latest activity report that 528 NGOs have observer status with the Commission.<sup>187</sup>

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<sup>183</sup> Biegon (n24).

<sup>184</sup> Beigon (n24).

<sup>185</sup> African Commission on Human and Peoples’ Rights ‘Non-governmental organisations’(nd) <https://www.achpr.org/ngos> (accessed 15 October)

<sup>186</sup> H Shire ‘Good practices for CSO participation at the African Commission on Human and Peoples’ Rights’(nd) page 125

<sup>187</sup> African Commission on Human and Peoples’ Rights ‘Combined 48<sup>th</sup> and 49<sup>th</sup> Activity Reports of the African Commission on Human and Peoples’ Rights’ (11 November 2019-03 December 2020) page 15 para 40.

NGOs, advocates and activists that work on LGBT issues in no short terms have influenced the work of the Commission on LGBT issues in significant ways. Coordination of NGOs work around the Commission on LGBT issues started in May 2006 when organisations like International Gay and Lesbian Human Rights Commission (IGLHRC), Coalition of African Lesbians (CAL), Behind the Mask and All-Africa Rights Initiative began to identify ways to advance human rights protection of LGBTI persons at the Commission.<sup>188</sup> Since then, LGBT NGOs, advocates and activists have provided information, technical assistance and support to Commissioners at the individual level and the level of the Commission as a whole. Most of the information the Commission received to do its work comes from reports, side events and conferences by NGOs on LGBT.

CAL's application of observer status has also been a significant issue that has influenced the work of the Commission. CAL applied for observer status that made the Commission request a paper on LGBT issues in Africa to learn more to influence their decision. Although the Commission requested the information and it was given, it still did not grant CAL's observer status. There has also been an increment in the number of soft laws, questions to states during the examination of state reports, and recommendations of the Commission's Concluding Observations.

Another significant outcome from the push from CSOs is Resolution 275, which was a result of a report<sup>189</sup> produced by AMSHER and CAL, supported by the Centre for Human Rights, the University of Pretoria on the violence and discrimination of LGBT people face from various countries in Africa. The report collected stories of violence which informed the Commission on how LGBT people are being abused because of the perceived or actual sexual orientation or gender identity.

During the period when the Executive Council decided to demand the withdrawal of the observer status of CAL, LGBT rights advocates, activists and organisations stood firm and provided support to the Commission. This saw the formation of the Coalition for the Independence of the African Commission.<sup>190</sup> The group aims to defend the independence of the Commission. Although the Commission gave in to the decision of the Executive Council, the formation of this

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<sup>188</sup> Ndashe (n22) page 1.

<sup>189</sup> CAL & AMSHER 'Violence based on perceived or real sexual orientation and gender identity in Africa' (2013).

<sup>190</sup> Coalition for the Independence of the African Commission <https://achprindependence.org/>



Coalition shows how significant NGOs are to the work of the Commission in advancing LGBT human rights.

Other human rights organisations that are not necessarily LGBT focused organisations also provide support to the Commission and the LGBTI activists in their work with the Commission. For instance, in a joint statement to react to the decision of the African Commission to withdraw CAL's observer status, various organisations which are not LGBT organisations joined in condemning the withdrawal.<sup>191</sup> Also, members of the Coalition for the independence of the African Commission are not only LGBTI organisations, although the situation that brought about the need for the coalition was LGBTI.<sup>192</sup>

#### 4.2.4 The role of individual Commissioners

The individual position of Commissioners on the issue of LGBT cannot be overlooked as a significant factor that has influenced the work of the African Commission on LGBT rights. Although the selection of Commissioners is based on specific criteria and human rights is a basis, they are individuals with their own religious, cultural and other beliefs, which in some instances has been realised. Others have stayed on human rights principles and have drawn their colleagues' attention to the demands of their role as a human rights body.<sup>193</sup>

There have been instances where Commissioners have shown signs of homophobia.<sup>194</sup> For instance, in the Special Rapporteur report on the status of prisons in Africa, one can see the sense of homophobia in the concerns raised by some commissioners about homosexuality in prisons.<sup>195</sup> In 2015 at the session to consider the observer status of CAL, Commissioner Mohamed Bechir stated as follows: "The state has an obligation to assist the family in its mission as guardian of moral and traditional values for the community".<sup>196</sup> A reaction to the discussion

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<sup>191</sup> See Joint Statement: The Executive Council of the African Union moves towards dismantling the main body tasked with the protection of human rights in Africa (17 September, 2018) <https://www.omct.org/en/resources/statements/joint-statement-the-executive-council-of-the-african-union-moves-towards-dismantling-the-main-body-tasked-with-the-protection-of-human-rights-in-africa> (accessed 19 October 2019).

<sup>192</sup> Coalition for the Independence of the African Commission <https://achprindependence.org/our-members/>

<sup>193</sup> CAL (n114) 42:07-43:35.

<sup>194</sup> AM Ibrahim 'LGBT rights in Africa and the discursive role of international human rights law' (2015) 15 *African Human Rights Law Journal* 263-281 at page 273 <http://dx.doi.org/10.17159/1996-2096/2015/v15n2a2> (accessed 16 October 2021).

<sup>195</sup> Detention, Prisons in Malawi: Report on a Visit 17 to 28 June 2001 (Series IV No 9); Dr Vera Mlangazuwa Chirwa Special Rapporteur on Prisons and Conditions of Detention, Prisons in Mozambique: Report on a Visit 4-14 April 2001 (Series IV No 8). (While these reports do connect homosexual acts and relationships in connection with health concerns and sexual abuse, one nonetheless senses an independent concern over male homosexuality).

<sup>196</sup> CAL (n114) 40:32-40:46.

that has no human rights basis seems clear to come from the Commissioner's own beliefs. He went further to describe LGBT as a new virus and has been brought to divide Africa.<sup>197</sup> There were other negative comments from other Commissioners all against granting observer status to CAL.

In contrast, others have continued to use their position to support the advancement of the right of LGBT persons as Commissioners. Other Commissioners have used their position as Commissioners to ensure the human rights protection of LGBT persons. In her time as Commissioner, Commissioner Tlakula is observed at every moment either asking questions on discrimination of LGBTI persons during the examination of state reports, defending human rights stands for advancing LGBT issues and reprimanding colleagues who make homophobic statements as Commissioners.<sup>198</sup> Another Commissioner with noting is Commissioner Alapini-Gansou, in her time as a member of the Commission, used her role as special rapporteur in various capacities to highlight the discrimination LGBTI people face.<sup>199</sup>

### **4.3 Recommendations**

All persons are entitled to the fundamental human rights enshrined in the African Charter. The Commission, which is charged with the mandate to protect and promote the human rights of all persons, must ensure justice for all and must not leave anyone behind in the process of doing their work. This research has shown that the Commission is making significant progress in its work. The Commission is currently faced with a challenge regarding its independence to do its work without interference from the AU.

The following are recommendations to support the continuous advancement of human rights protection and promotion of LGBTI persons at the Commission:

#### **4.3.1 To the Commission**

The Commission should continuously receive technical and other support from NGOs to ensure it can address LGBTI issues effectively. Although many Commissioners may have human rights work experience, they may not have experience or information on LGBT issues and why they are to be included in the regional human rights issues.

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<sup>197</sup> CAL (n114) 42:34-42-52.

<sup>198</sup> Adv. Faith Pansy Tlakula <https://www.achpr.org/sessions/intersession?id=233> (accessed 19 October 2021).

<sup>199</sup> Madame Reine Alapini-Gansou <https://www.achpr.org/commissioner?id=24> (accessed 19 October 2021).

#### **4.3.2 To states**

States are expected to submit their periodic reports every 2 years. 18 countries are late on up to three or more reports, while 19 states are late by 1 or 2 reports.<sup>200</sup> This is one of the ways, as shown in this report, that Commission can engage states on LGBTI issues. NGOs and the Commission itself should launch a campaign that shames countries that have not reported. Also, workshops, training, and webinars should be organised for human rights advocates in countries with overdue reports to pressure their states to report in-country.

#### **4.3.3 To civil society**

More LGBTI organisations should seek observer status to increase the number of NGOs that can meaningfully engage and participate in the public and open sessions of the Commission. With more LGBTI organisations with observer status, there will be pressure on it to deliver.

Advocacy by NGOs on the independence of the Commission should continue. Dialogues, symposia, online actions and other advocacy activities should be undertaken to raise the concerns of the involvement of the political bodies in the work of the Commission. This will help create spaces for engagement to find the best way forward to prevent the continuous involvement of the political bodies in the work of the Commission

Soft law instruments developed by the Commission should be used in human rights advocacy by LGBT NGOs, advocates, activists and allies, especially when engaging with states. For instance, when NGOs organise side events at the Commission, they can invite state officials and include them in their budget to encourage them to be at the sessions where they can be engaged and participate in the sessions.

Civil society should lobby at the domestic level for nomination or appointment of rights persons to the Commission. Civil Society can do this by engaging governments at the local levels and providing support in identifying, assessing and nominating Commissioners.

More human rights organisations that do not specifically work on LGBT rights must get involved in advancing the discussion on LGBT rights at the Commission to

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<sup>200</sup> State Reports and Concluding Observations <https://www.achpr.org/statereportsandconcludingobservations> (accessed 19 October 2021).

underscore the point that the question of sexuality is an intrinsic part of the democratic struggle on the continent and not peripheral to it.<sup>201</sup>

#### **4.3.4 A joint effort to ensure greater awareness of the Charter's possibilities and Commission's work**

There is little awareness of the work of the Commission in various states. Although NGOs know and work with the Commission, very little is known of the Commission and its work beyond its sessions, meetings in countries and state visits. The Commission needs to partner with local NGOs to publicise its work and existence at the local level. States need to support the Commission's effort by creating space to conduct its public education at the state level.

#### **4.4 Avenue for further research opened**

This research has laid out the frameworks for further research into the impact of the contributions of the Commission at the state level. This research does not interrogate the actual changes that have occurred in the lives and realities of LGBT persons. Future research may explore the actual impact and effect of the soft-law standards and other interventions that the Commission has taken for the protection and promotion of the rights of LGBT persons.

**Word Count: 19538**

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<sup>201</sup> S Tamale 'Confronting the politics of nonconforming sexualities in Africa' (2013) 56 *African Studies Review* 31-45 at page 42.

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## Appendix A

### Glossary Of LGBTI, gender and sexuality related terms<sup>ii</sup>

**Biological Sex:** The biological and physiological characteristics that are socially agreed upon as informing the classification of a person as male or female.

**Bisexual:** A person who is capable of having sexual, romantic and intimate feelings for or a love relationship with someone of the same gender and/or with someone of other genders. Such an attraction to different genders is not necessarily simultaneous or equal in intensity.

**Gay:** A man who has sexual, romantic and intimate feelings for or a love relationship with another man (or men).

**Gender:** The socially constructed roles, behaviour, activities and attributes that a particular society considers appropriate for either men or women.

**Gender identity:** A person's private sense of being male, female or another gender. This may or may not match the biological sex a person was assigned at birth.

**Gender NON-conformity:** Displaying gender traits that are not normatively associated with a person's biological sex. "Feminine" behaviour or appearance in a male is considered gender non-conforming, as is "masculine" behaviour or appearance in a female.

**Hate crime:** A criminal offence perceived as being motivated by prejudice or hate. The perpetrators seek to demean and dehumanise their victims, whom they consider different from them based on their actual or perceived race, ethnicity, gender, gender identity, age, sexual orientation, disability, health status, nationality, social origin, religious convictions, culture, language or other characteristic.

**Heteronormativity:** Related to "heterosexism", it refers to the privileged position associated with heterosexuality based on the normative assumptions that there are only two genders, that gender always reflects the person's biological sex as assigned at birth, and that only sexual attraction between these "opposite" genders is considered normal or natural. The influence of heteronormativity extends beyond

sexuality to also determine what is regarded as viable or socially valued masculine and feminine identities, *i.e.* it serves to regulate not only sexuality but also gender.

**Heterosexism:** A system of beliefs that privileges heterosexuality and discriminates against other sexual orientations. It assumes that heterosexuality is the only normal or natural option for human relationships and posits that all other sexual relationships are either subordinate to or perversions of heterosexual relationships. In everyday life, this manifests as the assumption that everyone is heterosexual until proven otherwise.

**Heterosexual:** Having sexual, romantic and intimate feelings for or a love relationship with a person or persons of a gender other than your own.

**Homophobia:** Also termed “homoprejudice”, it refers to an irrational fear of and or hostility towards lesbian women and gay men, or same-sex sexuality more generally.

**Intersectionality:** The interaction of different axes of identity, such as gender, race, sexual orientation, ability and socio-economic status, in multiple and intersecting ways, resulting in different forms of oppression impacting on a person in interrelated ways.

**Intersex:** A term referring to a variety of conditions (genetic, physiological or anatomical) in which a person’s sexual and or reproductive features and organs do not conform to dominant and typical definitions of “female” or “male”. Such diversity in sex characteristics is also referred to as “biological variance” – a term which risks reinforcing a pathologising treatment of differences among individuals, but is used with caution in this document to indicate an inclusive grouping of diversity in sex characteristics, including, but not limited to, intersex individuals.

**Lesbian:** A woman who has sexual, romantic and intimate feelings for or a love relationship with another woman (or women).

**LGBTI:** An abbreviation referring to lesbian, gay, bisexual, transgender and intersex persons. “LGB” are sexual orientations, while “T” is a gender identity and “I” is a biological variant. They are clustered together in one abbreviation due to similarities in experiences of marginalisation, exclusion, discrimination and victimisation in a heteronormative and heterosexist society, in an effort to ensure equality before the law and equal protection by the law. However, the possible differences between persons who claim these labels or to whom these labels may



be assigned ought not to be trivialised. Their respective issues, experiences and needs may in fact differ significantly and in several respects. In solidarity with the activist position regarding this matter, however, in this document, reference is made to LGBTI and distinctions among the diversity of identities that exist are minimised.

**Sexual orientation:** A person's lasting emotional, romantic, sexual or affectional attraction to others (heterosexual, homosexual or same-sex sexual orientation, bisexual or asexual).

**Transgender:** A term for people who have a gender identity, and often a gender expression, that is different to the sex they were assigned at birth by default of their primary sexual characteristics. It is also used to refer to people who challenge society's view of gender as fixed, unmoving, dichotomous, and inextricably linked to one's biological sex. Gender is more accurately viewed as a spectrum, rather than a polarised, dichotomous construct. Transgender people can be heterosexual, bisexual, homosexual or asexual.

Adapted from PsySSA. (2013). Sexual and gender diversity position statement: Introduction, rationale and context. ([www.psyssa.com](http://www.psyssa.com))