

# Dignity for the Queer African: How the Right to Dignity in International Human Rights Law Imposes Obligations on All States to Protect Sexual Minorities

**Ayodele Sogunro**

Centre for Human Rights, University of Pretoria  
ayosogunro@gmail.com

## Abstract

The right to dignity of sexual minorities has continued to be violated across Africa, necessitating the need to deploy national, regional, and global human rights to secure its promotion and protection. Human dignity is a central value of the international human rights normative system and over the last few decades, the international human rights system has generally accepted the notion that all humans are endowed with equal dignity. Although the concept of dignity itself and the scope of its application continues to be contested by states, human rights documents acknowledge the recognition of the inherent dignity of all persons without discrimination. Unfortunately, sexual minorities in Africa continue to be stripped of their dignity through acts of public and private humiliation; criminalisation of their identities under laws that specify penalties ranging from prison terms to the death sentence, and through hate speech and acts of violence. The application of the concept of human dignity to the protection of sexual minorities in Africa remains problematic in state law and policy. This article contends that, based on the state's recognition and protection of the inherent dignity of human beings, all African states still owe obligations toward sexual minorities. To this end, this article examines the development of the concept of dignity in Western thought and its subsequent impact on international human rights law. It also teases out the meaning of dignity in international human rights law under global and regional jurisprudence with a view to highlighting the obligations of African states towards sexual minorities.

**Keywords:** sexual minorities; human rights; international law; dignity; LGBT

## Introduction\*

The right to dignity<sup>1</sup>—as articulated and recognised in various human rights instruments<sup>2</sup>—of sexual minorities has continued to be violated across Africa, necessitating the need to deploy regional and global human rights laws to secure its promotion and protection. Human dignity is a central value of the international human rights normative system and over the last few decades, international law has generally accepted the notion that all humans are endowed with equal dignity. Although the concept of dignity itself and the scope of its application continues to be contested by states, human rights law acknowledges the recognition of the inherent dignity of all persons without discrimination.<sup>3</sup>

Accordingly, the African Charter on Human and Peoples’ Rights (‘African Charter’) asserts that ‘*every human being shall have the right to the respect of the dignity inherent in a human being...*’<sup>4</sup> Ideally, this recognition imposes obligations on African states to respect the dignity of all individuals within their jurisdiction without discrimination *of any kind*. However, this assertion of inherent human dignity and the right to dignity for everyone has not been adhered to in respect of sexual minorities across the African continent. Equally disconcerting is the fact that both the global and the African human rights systems have not been successful in protecting the dignity of sexual minorities in Africa from violations by both state and non-state actors. In fact, ‘a new wave of homophobia’ has become the norm across Africa, encouraged and enforced through law.<sup>5</sup> Discriminatory laws have been wielded to deprive sexual minorities of human dignity, punishing acts of prohibited sexual orientation, gender identity, and expression.<sup>6</sup>

To date, Africans who identify as lesbian, gay, or bisexual (LGB) continue to be stripped of their dignity through acts of public and private humiliation, criminalisation of their identities under laws that specify penalties ranging from prison terms to the death sentence, and through hate speech and acts of violence by private individuals. While

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1 ‘Human dignity’, ‘dignity’ and ‘right to dignity’ are used in this research article interchangeably and generally refer to the same concept except where the context suggests otherwise.

2 The international bill of rights makes several references to the equal dignity of persons in their preambles and substantive provisions. Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (Universal Declaration) Preamble, arts 1, 22 and 23; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) Preamble, art 10; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) Preamble, art 13.

3 Universal Declaration (n 2) art 1; African Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter) art 2.

4 African Charter (n 3) art 5 [emphasis added].

5 Adrian Jjuuko, ‘The Protection and Promotion of LGBTI Rights in the African Regional Human Rights System: Opportunities and Challenges’ in Sylvie Namwase and Adrian Jjuuko (eds), *Protecting the Human Rights of Sexual Minorities in Contemporary Africa* (PULP 2017) 261.

6 Jjuuko (n 5).

there has been some limited progress in Angola, Botswana, Cape Verde, Gabon, Malawi, Mozambique, Seychelles, and South Africa, where consensual same-sex acts between adults have been decriminalised by law or by court order, other states—including most recently Ghana, Nigeria, Uganda, and Tanzania—seem to assume no obligation under international law and have not taken any measures towards ensuring that the dignity of sexual minorities is protected. In fact, many states still expressly deny sexual minorities the rights of assembly, privacy and expression, and justify such violations on grounds of preserving African values.<sup>7</sup>

The continued criminalisation of minority sexual orientation and gender identity violates state obligations under the African Charter as well as ‘soft law’ norms of the African Commission on Human and Peoples’ Rights (‘African Commission’) such as Resolution 275 on ending violence against sexual minorities in Africa and the general comments and principles issued by the African Commission.<sup>8</sup> It also contravenes other human rights treaties ratified by African states under international law. This negative attitude of several national authorities undermines democratisation and the rule of law across Africa and strikes at the integrity of the African human rights system. The consequences include the creation or aggravation of economic, social, and public health challenges capable of negatively affecting the international order.<sup>9</sup>

Although it is conceded that there is no universally recognised ‘sexual right’ within the international human rights system, this article contends that based on the state’s recognition and protection of the inherent dignity of human beings, all states—including African states—owe obligations towards sexual minorities. This argument raises several questions: what is the scope of human dignity? Is dignity a fixed universal concept or is it subject to cultural, religious, and legal contexts and interpretations? How is the concept of human dignity conceived within the international legal order and international human rights law? Is there *a right* to dignity? Not all of these questions can be answered within the scope of this article.<sup>10</sup> Instead, this article does two principal

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7 For a critical examination of African identity and values, see Charles Ngwena, *What Is Africanness? Contesting Nativism in Race, Culture and Sexualities* (PULP 2018).

8 See African Men for Sexual Health and Rights (AMSHer) and Synergía – Initiatives for Human Rights (S-IHS), ‘Application of Resolution 275 by the African Commission on Human and Peoples’ Rights: A Six-Year Assessment’ (2020) <[https://www.chr.up.ac.za/images/researchunits/sogie/documents/Report\\_2020.pdf](https://www.chr.up.ac.za/images/researchunits/sogie/documents/Report_2020.pdf)> accessed 20 April 2021.

9 Joint United Nations Programme on HIV and AIDS (UNAIDS), ‘The Economic Costs and Development Impact of Exclusion of LGBT People’ (*UNAIDS*, 14 March 2014) <<https://www.unaids.org/en/resources/presscentre/featurestories/2014/march/20140314homophobia>> accessed 21 April 2021.

10 For more questions – and answers on dignity: David Kretzmer and Eckart Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International 2002); Christopher McCrudden, ‘Human Dignity and Judicial Interpretation of Human Rights’ (2008) 19 *EJIL* 655; Marcus Düwell, ‘Human Dignity: Concepts, Discussions, Philosophical Perspectives’ in Marcus Düwell and others (eds), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (CUP 2014) <<https://doi.org/10.1093/ejil/chn043>>

things. One: it examines the development of the concept of dignity in Western thought and its subsequent impact on international human rights law. Two: it teases out the meaning of human dignity in international human rights law under global and regional jurisprudence with a view to highlighting the obligations of African states towards sexual minorities.

This first aspect of the article is undertaken in Part 2 and focuses on the various conceptualisations of dignity as it relates to international human rights law. This exercise is undertaken to show the difficulty in standardising the concept of dignity in international law and why it remains an area of contestation, thus making it easy for states to deny its application to sexual minorities. The second aspect is undertaken in Sections 3 to 5. Sections 3 and 4 focus on the global human rights system and selected regional systems respectively. Specifically, these parts of the article examine the legal norms on human dignity in global and regional jurisprudence in relation to sexual minorities. Section 5 looks at establishing dignity norms within African states and concretises the obligations of African states to protect sexual minorities.

## Conceptualising Dignity and the Right to Dignity

### Framing the Context

Conceptually, dignity—or more precisely, human dignity—is a value-laden word that is subject to diverse contextual interpretations. The term is used in ordinary language as part of everyday communication. It is, however, also used in abstracted or technical senses within religious, cultural, philosophical, and legal contexts. Consequently, the notion of dignity within the context of human rights law is subject to differing theories focused on the existence of an inherent normative value as opposed to the mere external interpretation of its value. On one hand, there are theories of dignity that conceive it as a convenient phrase, which offers a useful ground for advancing human rights but lacking in inherent normative quality and is thus subject to the imposition of external values.<sup>11</sup> On the other hand, some perspectives conceive of dignity as having near metaphysical characteristics, ‘possessed by all and only human beings, and which serves as a foundation for moral philosophy and human rights’<sup>12</sup> including every individual’s proprietary right to their body.<sup>13</sup> This article leans towards this inherently normative perspective of dignity in human rights law on the basis that this perspective is the

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11 Ruth Macklin, ‘Dignity Is a Useless Concept: It Means No More than Respect for Persons or Their Autonomy’ (2003) 327 *BMJ*: *BMJ* 1419; Charles R Beitz, ‘Human Dignity in the Theory of Human Rights: Nothing but a Phrase?’ (2013) 41 *Philosophy & Public Affairs* 259.

12 Richard E Ashcroft, ‘Making Sense of Dignity’ (2005) 31 *Journal of Medical Ethics* 679.

13 Ari Shaw, ‘From Disgust to Dignity: Criminalisation of Same-Sex Conduct as a Dignity Taking and the Human Rights Pathways to Achieve Dignity Restoration’ (2018) 18 *AHRLJ* 684 <<http://dx.doi.org/10.17159/1996-2096/2018/v18n2a12>>

meaningful and most appropriate approach suitable for the realisation of dignity, as used in international law texts.

More specifically, the conceptual understanding of dignity for the purpose of this article is derived from its usage in international and domestic human rights law. This conception requires this article to rely on the specific use of the term ‘dignity’ in legal texts, particularly treaties, reports, constitutional documents, and judicial decisions. Unfortunately, these texts do not always provide the underlying conception of their usage of the word ‘dignity’. Therefore, the historical background and philosophical influences that informed the origin and use of the term ‘dignity’ in international law are relevant. This intricate historical and philosophical background and its resulting conceptual challenges are discussed in the next paragraphs.

### **The Evolution of ‘Dignity’ in International Law**

International human rights law documents tend to invoke ‘dignity’. For example, the preamble to the Charter of the United Nations (‘UN Charter’) affirms faith ‘in the dignity and worth of the human person.’ The Universal Declaration of Human Rights (‘Universal Declaration’) commenced its journey over the last half-century by recognising ‘the inherent dignity ... of all members of the human family’. Similarly, the other two texts of the International Bill of Rights<sup>14</sup> repeat the assertion of the Universal Declaration and further recognise that the rights contained in their texts ‘derive from the inherent dignity of the human person.’ Clearly, the idea underlying ‘dignity’ (or ‘right to dignity’ or ‘human dignity’ or ‘dignity of the human person’) has a fundamental role in the conceptualisation and implementation of international human rights law.

However, the universal usage of the term does not equal a universal definition of its concept and application. The meaning and concept of human dignity remain unsettled and continue to be open to several human rights interpretations and legal possibilities.<sup>15</sup> Despite the seeming concreteness of the concept ‘dignity’ when considered at first glance, a closer look suggests it ‘suffers from an inherent vagueness at its core’.<sup>16</sup>

It is important to note that, although Western thought has ‘dominated the development of the principle of human rights and monopolised its internationalisation, the idea of dignity is universal and cannot come from one particular civilisation.’<sup>17</sup> Thus, ‘no single society can uniquely lay claim to the values of justice and the moral worth of human

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14 Universal Declaration (n 2) Preamble, arts 1, 22 and 23; International Covenant on Civil and Political Rights (ICCPR) (n 2) Preamble, art 10; International Covenant on Economic Social and Cultural Rights (ICESCR) (n 2) Preamble, art 13.

15 Rex D Glensy, ‘The Right to Dignity’ (2011) 43 *Columbia Human Rights LR* 66.

16 *ibid* 67.

17 Michelo Hansungule, ‘The Historical Development of International Human Rights’ in Azizur Rahman Chowdhury and Jahid Hossain Bhuiyan (eds), *An Introduction to International Human Rights Law* (Brill-Nijhoff 2010) 29.

beings.’<sup>18</sup> However, if we concede that the current language of international human rights law has its basis in centuries of political and cultural movements in Western Europe, then it is prudent to consider the growth of the concept of dignity in Western thought as a precursor to, and as an aid in understanding, its usage and interpretations in modern international human rights law.

### *Dignity as Status*

In Western thought, dignity originated in the narrow sense of status. In Roman law, dignity was conceived as an attribute that was conferred on a person as a privilege, arising from personal, official, or institutional status.<sup>19</sup> Thus, not everyone could legally claim a right to ‘dignity’ in a legal sense.<sup>20</sup> For example, women and slaves would have no such claim to dignity. An automatic ‘human dignity’ was meaningless. Dignity was ascribed, not inherent.

### *Dignity as Divinely Gifted Free Will*

However, even then, Cicero was already postulating a broader concept of dignity that was independent of social or political status.<sup>21</sup> Cicero’s approach to dignity was based on a consideration of the natural differences between animals and humans. ‘Cicero believed that all human beings were endowed with *dignitas*, and that therefore all mankind is worthy of respect for the sole fact of its existence.’<sup>22</sup> Catholic philosophers from Thomas Aquinas onwards would later adopt this idea.<sup>23</sup> According to this Catholic perspective, only humans could contemplate the divine, thus there was an aspect of the divine within humans that placed them on a higher metaphysical level than animals.<sup>24</sup> By the Renaissance period, this idea of an inherent separation between humans and animals had come to be represented as *free* will, that is, dignity as the ‘ability to choose to be what he wants to be and that this is a gift from God.’<sup>25</sup>

### *Dignity as Moral Autonomy*

The understanding of dignity as divine free will progressed from religious to secular philosophy under Immanuel Kant in his conception of natural law. For Kant, humans had intrinsic worth, unlike other life forms whose worth derived only from their value to humans. Humans were an end in themselves, free to decide how to apply themselves without being used non-consensually by others. This autonomy is the basis of morality

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18 Paul Gordon Lauren, ‘The Foundations of Justice and Human Rights in Early Legal Texts and Thought’ in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 164.

19 McCrudden (n 10) 657.

20 *ibid.*

21 Glensy (n 15) 74.

22 *ibid.*

23 McCrudden (n 10) 658.

24 *ibid.*

25 *ibid* 659.

in social interaction: recognition of the freedom of every individual.<sup>26</sup> However, because human behaviour was not always respectful of this freedom, laws were necessary to guarantee everyone's freedom. Laws are moral laws if they treated humans as an end in themselves, and not as a means to the ends of the state. Dignity, therefore, was a requirement in securing human autonomy: 'to treat people with dignity is to treat them as autonomous individuals able to choose their destiny.'<sup>27</sup>

### *Dignity Diversified*

The use of 'dignity' as an inherent quality started appearing in the constitutional documents of European and American countries within the first three decades of the twentieth century.<sup>28</sup> Ultimately, Kant's theorisation on dignity would become incorporated into modern international law and the United Nations corpus via the efforts of the French philosopher, Jacques Maritain.<sup>29</sup> The transition from Kantian philosophy to modern international law was triggered by the political and ideological wars and revolutions of Europe, elevating dignity as the 'focal point for remedying the colossal failures of all previous structures.'<sup>30</sup> As noted by McCrudden,<sup>31</sup> in the years since the adoption of the Universal Declaration, various groups have deployed the concept of human dignity to promote specific interests to the point that it has passed into vernacular use 'in a variety of very different contexts and circumstances.'<sup>32</sup> Schachter<sup>33</sup> identifies the scope of the Kantian conception of dignity in international law in protecting individuals and collectives, especially those that do not fit in with majority belief systems and practices.<sup>34</sup>

[G]overnments are not to use coercion to impose beliefs and attitudes on those subject to their rule or to extend their authority into areas of human life that are essentially personal and familial. ... Indeed, nothing is so clearly violative of the dignity of persons as treatment that demeans or humiliates them. This includes not only attacks on personal beliefs and ways of life but also attacks on the groups and communities with which individuals are affiliated.

Yet, despite these arguments suggesting the international interpretation of dignity as the inherent autonomy of all individuals,<sup>35</sup> there is still contestation on the application of dignity to identities such as sexual minorities. This point is McCrudden's basis for arguing that the recognition of human dignity has become context-specific, as opinion

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26 Michael DA Freeman, *Lloyd's Introduction to Jurisprudence* (Sweet & Maxwell 2008) 113.

27 McCrudden (n 10) 660.

28 Mexico, 1917; Germany and Finland, 1919; Portugal, 1933; Ireland, 1937; Cuba, 1940 as discussed in *ibid* 664.

29 *ibid* 662.

30 Glensy (n 15) 79.

31 McCrudden (n 10) 663.

32 *ibid*.

33 Oscar Schachter, 'Human Dignity as a Normative Concept' (1983) 77 AJIL 848, 850.

34 *ibid*.

35 McCrudden (n 10) 662.

on the concept varies depending on the issue and the jurisdiction, making a universal principle difficult to extract.<sup>36</sup> Thus:<sup>37</sup>

beyond a certain minimal collective understanding of what constitutes the right to dignity, opinions on the matter diverge to the point where they do not provide a universally principled basis for judicial decision making ... varying from issue to issue, and from jurisdiction to jurisdiction, resulting in widely divergent opinions.

*Dignity Concretised: is There a Minimum Core?*

The variations in the interpretation and application of dignity may seem to provide some states with the justification necessary to deny the application of the concept to sexual minorities or, indeed, any other group. However, the lack of a universal application of the concept does not preclude a recognisable ‘minimum core’ in its conceptualisation. McCrudden identifies this core as comprising, at least, three elements: the intrinsic worth of all humans, the recognition of this intrinsic worth in each individual by other individuals, and the protection of this intrinsic worth by the state.<sup>38</sup> Thus, a state may not simply escape its obligations to secure the intrinsic worth—however understood—of every individual by simply contesting the scope of this intrinsic worth as interpreted by the state.<sup>39</sup> The claim to dignity is, therefore, founded on two principles: one as *an inherent quality of human existence*; and two, as *a claim against the state’s duty to protect and respect existing rights*.<sup>40</sup> The second basis of this claim is rooted in the Kantian concept of dignity, that is, ‘the claim that recognizing the intrinsic worth of the individual requires that the state should be seen to exist for the sake of the individual human being, and not vice versa.’<sup>41</sup> Thus, a typical argument that sexual minorities do not have ‘sexual rights’ under international law<sup>42</sup> is negated by the duty of the state to protect the *other rights* of sexual minorities.

Although the suggestion of a minimum core to the concept of human dignity still suggests some agreement on the meaning of the international law usage of ‘dignity’,<sup>43</sup> some other commentators<sup>44</sup> do not agree that the international law conception of dignity is unsettled or has only a minimum core. It is argued, instead, that states only obfuscate the application of the concept because, as in the case of sexual minorities, the concept

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36 *ibid* 713.

37 Glensy (n 15) 81.

38 McCrudden (n 10) 679.

39 For example, political rhetoric often insists that homophobic laws are a reflection of majority belief and therefore have to be respected.

40 Glensy (n 15) 80.

41 McCrudden (n 10) 679.

42 As argued by the petition: ‘Say NO to African Commission on Human and Peoples’ Rights Embrace of LGBT Doctrine’ (*CitizenGO*, 19 June 2017) <<https://citizengo.org/en/fm/71504-say-no-african-commission-human-and-peoples-rights-embrace-lgbt-doctrine>> accessed 20 April 2021.

43 Glensy (n 15) 68.

44 Reva B Siegel, ‘Dignity and Sexuality: Claims on Dignity in Transnational Debates over Abortion and Same-Sex Marriage’ (2012) 10 *International Journal of Constitutional Law* 355, 379.



of dignity has not been expressly applied by international law, and states, therefore attempt to shape its application by denying the extent of its scope.<sup>45</sup>

### *Dignity Applied: from Theories to Practice*

Clearly, the theoretical conception of dignity continues to face contestation, with some commentators arguing that human dignity is a subjective concept, varying ‘temporally, chronologically, geographically, and culturally’.<sup>46</sup> However, it is beyond the scope of this article to deal with the many theoretical conceptions of dignity. Instead, this article focuses on the application of the treaty texts on human dignity from the perspective that ‘human beings as ends in themselves form the foundation for the unfolding of human dignity as a workable legal concept.’<sup>47</sup>

## International Legal Basis of Human Dignity

### **Human Dignity as a Preamble to Human Rights**

As noted in section 2.2 above, it is now usual for international human rights documents to include a reference to human dignity in their preambles.<sup>48</sup> The styling of the UN Charter<sup>49</sup> and the International Bill of Rights<sup>50</sup> are repeated in the preambles to the Convention on the Elimination of Racial Discrimination (CERD), the Convention on the Elimination of Discrimination against Women (CEDAW), and the Convention against Torture (CAT), all of which came into force between the 1940s and 1980s. As McCrudden points out:<sup>51</sup>

[b]y 1986, dignity had become so central to United Nations’ conceptions of human rights that the UN General Assembly provided, in its guidelines for new human rights instruments, that such instruments should be ‘of fundamental character and derive from the inherent dignity and worth of the human person’. Since then, not surprisingly, the major conventions on the Rights of Children (1989), the Rights of Migrant Workers (1990), Protection against Forced Disappearance, and the Rights of Disabled Persons (2007) have all included references to dignity.

In 1993, the Vienna World Conference on Human Rights took the position that dignity was foundational to human rights in general and also relevant to particular areas of human rights<sup>52</sup> including ‘the treatment of indigenous peoples, the prohibition of torture,

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45 *ibid.*

46 Glensy (n 15) 84.

47 *ibid.*

48 McCrudden (n 10) 669.

49 United Nations Charter (entered into force 24 October 1945) 1 UNTS XVI (UN Charter) Preamble.

50 See (n 14).

51 McCrudden (n 10) 669.

52 For example, as contained in the Universal Declaration on Bioethics and Human Rights (adopted 19 October 2005) UNGC 33 C/Res. 15 art 2d.

the prohibition of gender-based violence and harassment, the abolition of extreme poverty, and the issue of biomedical ethics.<sup>53</sup>

### **The Dignity of Sexual Minorities in the Global Human Rights System**

What these treaties suggest is the intention to ‘put down a non-negotiable marker against the denial of human dignity.’<sup>54</sup> The international human rights system is, thus, founded on a practical relationship between human dignity and human rights.<sup>55</sup> Although the major human rights treaty texts do not articulate the concept of human dignity substantially, a reading of the preambles and relevant provisions suggest that human dignity is, broadly, protected in two ways: one, as a generic respect for everyone’s humanity; and two, as particular protections of individual autonomy.<sup>56</sup> The first conception of human dignity protects individuals from *direct attacks* against their dignity—such as provisions against torture and slavery<sup>57</sup>—while the second protects against *indirect attacks* against dignity—such as protection of the rights to associate freely, to free expression, or to enjoy socio-economic rights.<sup>58</sup>

As such, human dignity is more than just a human right. Although protected through the assertion of certain rights, human dignity is distinct in nature from other human rights and, in principle, forms the basis for an individual’s entitlement to human rights.<sup>59</sup> Since it is possible to assert a claim of human dignity even in the absence of specific normative rights, then the protection of sexual minorities is not necessarily founded on recognising specific ‘sexual rights’ but is based on human dignity, as a source of other rights, and as an entitlement to autonomy and its ramifications.<sup>60</sup>

This crosscutting approach to dignity is illustrated in the following paragraphs from the recommendations of different human rights bodies and mechanisms<sup>61</sup> on issues affecting sexual minorities. It should be noted that these examples have been selected

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53 McCrudden (n 10) 670.

54 Roger Brownsword, ‘Human Dignity from a Legal Perspective’ in Marcus Düwell and others (eds), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (CUP 2014) 3.

55 *ibid.*

56 *ibid* 5.

57 This is the conception of dignity found in national constitutions where the right to dignity is defined as prohibition against slavery, torture and cruel, inhuman and degrading treatment. See General Comment 20 where ICCPR art 7 provisions against torture and cruel, inhuman and degrading treatment are explained in terms of human dignity. UNHRC, ‘General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)’ (1992) <<http://www1.umn.edu/humanrts/gencomm/hrcom20.htm>> accessed 20 April 2021.

58 Brownsword (n 54) 4.

59 Düwell (n 10) 29.

60 *ibid* 35.

61 Reference is not made here to Human Rights Committee (CCPR) jurisprudence on sexual minorities as it has almost always based its positions on equality and non-discrimination, which, although correlated to human dignity are different concepts. See Dominic McGoldrick, ‘The Development and Status of Sexual Orientation Discrimination under International Human Rights Law’ (2016) 16 *Human Rights LR* 613, 627–631.

as illustrations of how the concept of dignity has been utilised by human rights bodies and mechanisms. As such the instances reviewed in this article are not exhaustive and there are other similar instances of the application of dignity.

### *Human Rights Council*

In the 2012 Universal Periodic Review (UPR) of Ghana<sup>62</sup>, it was recommended by Norway that ‘the provisions in the [Ghanaian] Constitution that guarantee equality and dignity are equally applied to members of the lesbian, gay, bisexual and transgender (LGBT) community.’<sup>63</sup> Similarly, in the 2014 UPR of the Islamic Republic of Iran,<sup>64</sup> this understanding of dignity was applied by Italy in its recommendation that Iran ‘address any form of discrimination against LGBTI people and in particular to prevent any practice which can harm their dignity, such as unnecessary sex reassignment surgery, especially when carried out without duly informed consent.’<sup>65</sup> The same approach was applied by Canada during the 2016 UPR of Trinidad and Tobago<sup>66</sup> where it recommended that the latter amend its Equal Opportunity Act ‘to include sexual orientation and gender identity as prohibited grounds for discrimination, as part of a proactive strategy to promote respect for the dignity and rights of all individuals.’<sup>67</sup>

### *Committee against Torture*

In its concluding observations on Colombia’s fifth periodic report,<sup>68</sup> the Committee against Torture noted that the state should ‘safeguard the physical integrity of gays, lesbians, bisexuals and transgender persons who are in police custody and ensure that they are treated with dignity.’<sup>69</sup>

### *Committee on the Elimination of Discrimination against Women*

In 2012, the CEDAW Committee in its concluding observations on Argentina’s seventh periodic report<sup>70</sup> also touched on the interaction between dignity and sexual minorities by urging the state to: ‘[d]enounce attacks on the human dignity and integrity of lesbian,

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62 UNHRC, ‘Report of the Working Group on the Universal Periodic Review Ghana’ (13 December 2012) UN Doc A/HRC/22/6.

63 *ibid* para 126.23.

64 UNHRC, ‘Report of the Working Group on the Universal Periodic Review Islamic Republic of Iran’ (22 December 2014) UN Doc A/HRC/28/12.

65 *ibid* para 137–138.

66 UNHRC, ‘Report of the Working Group on the Universal Periodic Review Trinidad and Tobago’ (15 July 2016) UN Doc A/HRC/33/15.

67 *ibid* para 108.38.

68 UN Committee against Torture, ‘Concluding Observations on the Fifth Periodic Report of Colombia’ (29 May 2015) UN Doc CAT/C/COL/CO/5.

69 *ibid* para 27(a).

70 UN Committee on the Elimination of All Forms of Discrimination against Women, ‘Concluding Observations on the Seventh Periodic Report of Argentina’ (25 November 2016) UN Doc CEDAW/C/ARG/CO/7.

bisexual, transgender and intersex persons ... and adopt measures to prevent hate crimes and ensure investigations, prosecutions, convictions, and reparations.<sup>71</sup>

Although the preceding paragraphs have focused on ‘hard law’ obligations and the views of human rights bodies under the global human rights system, it is important to note that there are resolutions under the United Nations system that calls on states to protect the dignity of sexual minorities. For example, Resolution 17/19,<sup>72</sup> which is the first United Nations resolution affirming the rights of sexual minorities, invokes human dignity in its opening paragraphs.<sup>73</sup>

### **The Dignity of Sexual Minorities in Selected Regional Systems**

Like the global international human rights system, most of the regional human rights systems have adopted the pattern of highlighting the importance of human dignity in the preambles of their principal texts as well as in some substantive provisions.<sup>74</sup> In the spirit of Articles 60 and 61 of the African Charter which encourages drawing inspiration from wider international law treaties, the following paragraphs briefly examine relevant jurisprudence of the Inter-American, European and African human rights systems as they apply to the protection of sexual minorities.

#### *The Inter-American Human Rights System*<sup>75</sup>

Uniquely, the American Declaration of the Rights and Duties of Man<sup>76</sup> (‘American Declaration’) is the first general international human rights instrument that ascribes value to human dignity.<sup>77</sup> As would later be adopted in the Universal Declaration, the preamble to the American Declaration provides that: ‘[a]ll men are born free and equal, in dignity and in rights.’<sup>78</sup> The preamble to the American Convention on Human

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71 *ibid* para 21(g).

72 UNGA Res A/HRC/RES/17/19 (14 July 2011) <<http://arc-international.net/wp-content/uploads/2011/09/HRC-Res-17-19.pdf>> accessed 20 April 2021.

73 This was later followed by a Human Rights Council resolution acknowledging the existence of discrimination against sexual minorities. UNHRC Res A/HRC/27/L.27/Rev.1 (24 September 2014) <<https://documents-dds-ny.un.org/doc/UNDOC/LTD/G14/171/09/PDF/G1417109.pdf?OpenElement>> accessed 20 April 2021.

74 McCrudden (n 10) 671.

75 For a conceptual analysis of dignity in the inter-American system, see Viviana Bohórquez Monsalve and Javier Aguirre Román, ‘Tensions of Human Dignity: Conceptualization and Application to International Human Rights Law’ (2009) 6 *International Journal on Human Rights* 39.

76 Adopted by the Ninth International Conference of American States, Bogota, Colombia 1948.

77 McCrudden (n 10) 666.

78 American Declaration of the Rights and Duties of Man, OAS Res XXX adopted by the Ninth International Conference of American States (1948) reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System* OEA/Ser L V/II.82 Doc 6 Rev 1 at 17 (1992) (American Declaration) Preamble.

Rights<sup>79</sup> ('American Convention') references human dignity in its assertion that 'the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality.' The American Convention further emphasises dignity as a protection from torture and cruel, inhuman or degrading punishment<sup>80</sup> and freedom from forced labour,<sup>81</sup> even in the treatment of prisoners.<sup>82</sup> Also, in outlining the right to privacy, the American Convention connects dignity with freedom from interference with privacy.<sup>83</sup>

The jurisprudence of the Inter-American Court on Human Rights (IACHR) helpfully highlights these principles. In *Velásquez-Rodríguez v Honduras*<sup>84</sup> the IACHR pronounced that '[d]isrespect for human dignity cannot serve as the basis for any State action'<sup>85</sup> and noted further that 'the exercise of public authority has certain limits which derive from the fact that human rights are inherent attributes of human dignity and are, therefore, superior to the power of the State.'<sup>86</sup> Although the American Convention does not expressly refer to the rights of sexual minorities, the IACHR's articulation of the concept of human dignity has been deployed for the protection of sexual minorities. In *Karen Atala Riffo and daughters v Chile*<sup>87</sup> which involved a denial of a lesbian the custody of her three children by the Chilean Supreme Court on the grounds of her sexuality, the IACHR reiterated its statement that 'the notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual.'<sup>88</sup> Thus, treating sexual minorities with hostility or discrimination, or subjecting them to inferior treatment struck at their dignity as humans.<sup>89</sup> The IACHR has further noted that protecting the dignity of sexual minorities includes humane treatment for those deprived of liberty,<sup>90</sup> prohibition of acts of corrective rape,<sup>91</sup> freedom

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79 Signed at the Inter-American Specialised Conference on Human Rights, San Jose, Costa Rica, 22 November 1969.

80 American Convention on Human Rights (adopted 1969, entered into force 18 July 1978) 1144 UNTS 123 (American Convention) art 5.

81 *ibid* art 6.

82 *ibid* arts 5(2) and 6(2).

83 *ibid* art 11.

84 *Velásquez-Rodríguez v Honduras* Merits Judgment, Inter-American Court of Human Rights (IACHR) Series C No 4 (29 July 1988).

85 *ibid* para 154.

86 *ibid* para 165.

87 Merits, Reparations and Cost Judgement, IACHR Series C No 239 (24 February 2012). This was the first LGBT-related case heard by the court under the inter-American human rights system.

88 *ibid* para 79.

89 *ibid* paras 79–80. See also *Azul Rojas Marín et al. v Peru* (Preliminary Objections, Merits, Reparations and Cost Judgement) IACHR Series C No 402 (12 March 2020), where the IACHR noted that '[T]he case can be considered a "hate crime" because it is clear that the aggression against the victim was based on her sexual orientation; in other words, this crime not only damaged the rights of Azul Rojas Marín, but was also a message to the whole LGBTI community, a threat to the freedom and dignity of this entire social group.'

90 Inter-American Commission on Human Rights, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas* (2015) paras 146–147.

91 *ibid* para 171.

to express sexual orientation and gender identity,<sup>92</sup> prohibition and punishment of incitements to violence,<sup>93</sup> condemnation of ‘discriminatory language and harmful stereotyping by media outlets’,<sup>94</sup> and provision of special training for judges and prosecutors on the rights of sexual minorities.<sup>95</sup> The IACHR has also issued an advisory opinion on the scope of dignity to include ‘the right of individuals to define, autonomously, their own sexual and gender identity.’<sup>96</sup>

### *The European Human Rights System*

The European Convention on Human Rights (European Convention) does not make specific reference to ‘dignity’. However, the European Court of Human Rights (ECHR) has interpreted European Convention provisions in connection with human dignity<sup>97</sup> in cases dealing with corporal punishment,<sup>98</sup> fair hearing,<sup>99</sup> torture,<sup>100</sup> and privacy.<sup>101</sup> This incorporation of human dignity in the interpretation of the European Convention has also been extended to the protection of sexual minorities. *Identoba and others v Georgia*<sup>102</sup> was a case surrounding the failure of Georgian police authorities to protect homosexual demonstrators from violent attacks. In holding the state liable, the ECHR held that the treatment of the applicants by the authorities ‘must necessarily have aroused in them feelings of fear, anguish and insecurity’ and was, therefore, incompatible with respect for their human dignity.<sup>103</sup> Similarly, in *X v Turkey*,<sup>104</sup> the ECHR concluded that a homosexual prisoner who had been solitary confined because of his sexual orientation had been subjected to ‘mental and physical suffering and a feeling of profound violation of his human dignity.’<sup>105</sup>

### *The African Human Rights System*

In what can be regarded as a recognition of human dignity as the basis of human rights, the preamble to the African Charter on Human and Peoples’ Rights<sup>106</sup> (‘African Charter’) notes that ‘freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples’ and that ‘fundamental rights stem from the attributes of human beings.’ Significantly, the

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92 *ibid* paras 217–218.

93 *ibid* para 230.

94 *ibid* para 254.

95 *ibid* para 471.

96 IACHR Advisory Opinion OC-24/17 of November 24, 2017, requested by The Republic of Costa Rica.

97 McCrudden (n 10) 683.

98 *Tyrer v United Kingdom*, App 5856/72, (ECHR, 15 March 1978) para 33.

99 *Bock v Germany*, App 22051/07, (ECHR, 19 January 2010) para 48.

100 *Ribitsch v Austria*, App 42/1994/489/571, (ECHR, 21 November 1995), para 38.

101 *Goodwin v United Kingdom*, App 28957/95 (ECHR, 11 July 2002) paras 90–91.

102 App 73235/12, (ECHR, 12 May 2015).

103 *ibid* para 71.

104 *X v Turkey* App 24626/09 (ECHR, 9 October 2012).

105 *ibid* para 45.

106 Adopted on 27 June 1981 and entered into force on 21 October 1986.

preamble to the African Charter also considers the struggle for the dignity of ‘peoples’ as a rationale for eliminating ‘colonialism, neo-colonialism, apartheid, ... and all forms of discrimination, particularly those based on race, ethnic group, colour, sex, language, religion or political opinions.’ Going into the substantive text of the African Charter, Article 5 recognises that: ‘[e]very individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status.’ This principle is also expressed in the Protocol to the African Charter Human and Peoples’ Rights on the Rights of Women in Africa (‘Maputo Protocol’).<sup>107</sup> The Maputo Protocol provides, more meticulously, that ‘[e]very woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights’<sup>108</sup> while mandating state parties to ‘adopt and implement appropriate measures to ensure the protection of every woman’s right to respect for her dignity.’<sup>109</sup> Likewise, the African Charter on the Rights and Welfare of the Child emphasises respect for the ‘inherent dignity of the child’, particularly in the administration of domestic and school discipline and in the administration of juvenile criminal justice.<sup>110</sup>

The importance of recognising human dignity in the protection of diverse human rights<sup>111</sup> was underlined by the African Commission on Human and Peoples Rights (‘African Commission’) in *Purohit v Gambia*<sup>112</sup> where the African Commission, referencing *Modise v Botswana*,<sup>113</sup> reiterated that ‘personal suffering and indignity can take many forms, and will depend on the particular circumstances of each communication brought before the African Commission.’<sup>114</sup> The African Commission also stated, in the case of persons with mental illness, that using derogatory terms such as ‘idiot’ or ‘lunatic’ in legislation dehumanises the individual and deprives them of dignity in contravention of Article 5 of the African Charter.<sup>115</sup> Furthermore, the African Commission observed that the ‘right to enjoy a decent life, as normal and full as possible’ is ‘one that ‘lies at the heart of the right to human dignity’.<sup>116</sup>

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107 Adopted 11 July 2003 and entered into force on 25 November 2005.

108 Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (adopted 11 July 2003, entered into force 25 November 2005 (Maputo Protocol) art 3(1).

109 *ibid* art 3(4). The Maputo Protocol tasks states to also protect the dignity of elderly women (art 22b) and women with disabilities (art 23b).

110 African Charter on the Rights and Welfare of the Child (adopted 1990, entered into force 29 November 1999) OAU Doc. CAB/LEG/24.9/49 arts 11(5), 17(1), and 20(1)(c). This Charter also references the dignity of children with disabilities (art 13(1)) and the elimination of ‘harmful social and cultural practices’ that affect dignity (art 21(1)).

111 In *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) [65], the African Commission observed that ‘the right to food is inseparably linked to the dignity of human beings.

112 (2003) AHRLR 96 (ACHPR 2003).

113 (2000) AHRLR 25 (ACHPR 1997).

114 *Purohit* (n 112) 58.

115 *ibid* 59.

116 *ibid* 61.

Similarly, in *Curtis Doebbler v Sudan*,<sup>117</sup> the African Commission noted that:<sup>118</sup> Article 5 of the Charter prohibits not only cruel but also inhuman and degrading treatment. This includes not only actions which cause serious physical or psychological suffering, but which humiliate or *force the individual against his will or conscience*.

Although the African human rights system continues to operate under the shadow of political hostility towards sexual minorities,<sup>119</sup> the African Commission has, nevertheless, expanded the protections of the African Charter to sexual minorities under the scope of equality and freedom from discrimination.<sup>120</sup> In particular, the African Commission's 'Resolution 275'<sup>121</sup> invokes articles 2, 3, 4 and 5 of the African Charter covering the rights to freedom from discrimination, equality, life, and dignity<sup>122</sup> respectively.<sup>123</sup> While the African human rights system is yet to develop a comprehensive jurisprudence on the protection of sexual minorities, there is ample opportunity for growth in view of these developments.<sup>124</sup> The protection of sexual minorities can be securely hinged on the African Commission's articulation of human dignity and how the protection of other rights is implied from this principle.<sup>125</sup> To borrow the argument by Murray and Viljoen, a respect for human dignity 'requires that the individual be left free of state interference in the most intimate domain of sexual choice' and thus guaranteeing the protection of the right to privacy of sexual minorities<sup>126</sup> while still leaving them the freedom to express their sexuality in public.

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117 (2003) AHRLR 153 (ACHPR 2003).

118 *ibid* 36 [emphasis added].

119 Jjuuko (n 5) 262.

120 *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128 (ACHPR) [169].

121 African Commission on Human and Peoples' Rights, 'Resolution on the Protection against Violence and Other Human Rights Violations against Persons on the Basis of Their Real or Imputed Sexual Orientation or Gender Identity' adopted at the 55th Ordinary Session of the African Commission, 28 April to 12 May 2014 ACHPR/Res.275(LV)2014 <<https://www.achpr.org/sessions/resolutions?id=322>> accessed 20 April 2021.

122 Although, 'dignity' here may have been used in the narrow sense of 'freedom from torture and cruel, inhuman and degrading treatment.

123 African Commission on Human and Peoples' Rights and others, *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* (Pretoria University Law Press 2016) <[http://www.ohchr.org/Documents/Issues/Discrimination/Endingviolence\\_ACHPR\\_IACHR\\_UN\\_SOGI\\_dialogue\\_EN.pdf](http://www.ohchr.org/Documents/Issues/Discrimination/Endingviolence_ACHPR_IACHR_UN_SOGI_dialogue_EN.pdf)> accessed 20 April 2021.

124 McGoldrick (n 61) 645; AMSHeR and S-IHS (n 8).

125 Frans Viljoen, 'Minority Sexual Orientation as a Challenge to the Harmonised Interpretation of International Human Rights Law' in Carla M Buckley, Alice Donald and Philip Leach (eds), *Towards Convergence in International Human Rights Law* (Brill-Nijhoff 2017) 169.

126 Rachel Murray and Frans 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, 90.



## Realising the Dignity of Sexual Minorities in Africa

Most African states have binding human rights obligations arising from global and regional treaties. In any case, even for states that have not ratified treaties such as the ICCPR or the African Charter, there are implied obligations to recognise the dignity of every person through principles of customary international law on human dignity as expressed in the statements of global and regional treaty bodies. Unfortunately, despite these express and implied human rights obligations, many African states continue to fail to recognise the dignity of sexual minorities through criminalising laws, interference in the enjoyment of rights, and negative judicial attitudes towards homosexual acts. These state of affairs create or reinforce perceptions that sexual minorities are undeserving of dignity and the protections of the law. There is an implied suggestion that extortion, assault, or even murder is justifiable where the victim is homosexual or perceived to be homosexual.

However, this situation does not have to continue to be the case. The growth of international law norms on the dignity of sexual minorities suggests that there is legal ambit for the practical protection of the rights of sexual minorities in African states. The most critical step towards recognising the dignity of sexual minorities in Africa is, arguably, the harmonisation of domestic policies, law, and social attitudes with the international obligations signed on by different states, not just for the benefit of oppressed minorities but for the benefit of all society. Dignity—as autonomy—is intrinsic to every individual's ability to make social contributions. Thus, laws and policies that impede individual autonomy, without justification of preventing harm, detract unnecessarily from social contribution.

At a minimum, the conceptualisation of dignity as discussed in this article requires all African states to take active steps and policy measures to meet their obligations to protect sexual minorities from discrimination and targeted violence, protect against torture and cruel, inhuman, and degrading treatment, decriminalise homosexuality, and respect other fundamental freedoms of sexual minorities. Achieving these goals means that lawyers, social workers, scholars, and social activists must continue to exert advocacy pressure on their governments to adopt best practices on human dignity and implement these for everyone. Furthermore, advocates must educate citizens on the rights of sexual minorities and continue to defend these rights against violations. The effectiveness of these activities, in turn, requires a broadening of scholarly work on sexual orientation and gender identity in Africa, training and capacity building for legal professionals and social workers, and funding for the work of SOGI activists in Africa.

At the regional level, there is a need for the African human rights system to continue engaging more with issues affecting sexual minorities. Certainly, there has been an improvement in this regard over the years<sup>127</sup> but there is still more to be done. So far, the African Commission has limited its work to condemning violence and general

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127 AMShER and S-IHS (n 8).

discrimination against sexual minorities. However, this approach is not necessarily the most efficient way to tackle increasing violations against sexual minorities in Africa. Instead, the protection of sexual minorities requires a deductive approach that first establishes the dignity of sexual minorities in Africa in line with established international law principles and then applies this recognition to specific issues of human rights protections, including ending violence and protecting freedoms in private and public spaces. This approach will give a rational footing to the jurisprudence of the African Commission to protect sexual minorities, independently of whether or not states recognise ‘sexual rights’.

More broadly, the recognition of the dignity of sexual minorities cannot continue to be left to the discretion of domestic law. The classical theory of international law, which considers states as the keystone of international law, has proven inadequate for the protection of human rights.<sup>128</sup> States cannot always be trusted to protect the lives of individuals in their jurisdiction. In fact, as in the case of sexual minorities, states may aid violations against their own citizens. This attitude is worse in states where dominant groups that tend to define state policy through their own religious or cultural perspectives are in control of the government. An international human rights legal order where the protection of human rights is at the mercy of political chance or the discretion of dominant groups within each state is antithetical to the conception of human rights as universal and inalienable. The full protection of sexual minorities—and other minority groups—requires the evolution of a new model of international law.<sup>129</sup> Such a model should secure the protection of human rights in supranational rather than intergovernmental fashion. However, if international law continues to prioritise the interests of states over those of the human condition, then its principles will be little enforced at best, or widely ignored at worst by both states and humanity.

## Conclusion: Finding Dignity

The text of international human rights treaties insists on the importance of human dignity, and comments and jurisprudence by human rights bodies have indicated its importance. As shown in the preceding sections, human dignity is not just a consequence of human rights, to be ascribed only where rights have been recognised by the state. Instead, human dignity has been conceived both as a claim against the state for the protection of individuals even where no specific rights have been legally recognised, and as an underlying principle in the protection and promotion of existing rights. Thus, even where African states do not explicitly recognise sexual rights, their

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128 Michael R Lucas, *Nationalism, Sovereignty, and Supranational Organizations* (IFSH 1999) 15–16, 53 <<http://edoc.vifapol.de/opus/volltexte/2008/569/pdf/hb114.pdf>> accessed 21 April 2021.

129 Eyal Benvenisti ‘Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders’ (2013) 107 AJIL 295; and Babatunde Fagbayibo, ‘Looking Back, Thinking Forward: Understanding the Feasibility of Normative Supranationalism in the African Union’ (2013) 20 SAJIA 411 provide insights on this argument.

treaty commitments at global and regional levels impose obligations on them to recognise and secure the dignity of sexual minorities: from the respect for their autonomy to the protection of their persons from degrading treatment.

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