



# **A Guide for African National Human Rights Institutions for Implementing Resolution 275**

*By the Network of African National Human Rights  
Institutions (NANHRI)*



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

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# **A Guide for African National Human Rights Institutions for Implementing Resolution 275 in Africa**

*By the Network of African National Human Rights  
Institutions (NANHRI)*

## **About the Network of African National Human Rights Institutions**

The Network of African National Human Rights Institutions (NANHRI) is a not-for-profit-organisation that brings together 46 National Human Rights Institutions (NHRIs) in Africa. The Secretariat of the Network has its headquarters in Nairobi, Kenya.

NANHRI supports the establishment and strengthening of the NHRIs across the continent in addition to facilitating coordination, cooperation amongst members and linking them to other key human rights actors at the regional and international level.

### **Vision**

A continent with effective NHRIs; contributing to an enhanced human rights culture and justice for every African.

### **Mission**

To support, through national, regional and international co-operation, the establishment and strengthening of NHRIs to more effectively undertake their mandate of human rights promotion, protection, monitoring and advocacy.

### **Values and Guiding Principles**

To achieve its mission and vision, NANHRI is committed to the following: -

- Transparency
- Accountability
- Openness
- Cooperation
- Professionalism and
- Gender Equality

## ACKNOWLEDGEMENT

In 2016, NANHRI developed *Our Love is our Freedom* toolkit as an internal institutional guide to strengthen the capacity of African NHRIs to protect the rights of people of diverse sexual orientation, gender identity or expression and sex characteristics (SOGIESC). The toolkit provides a framework of activities to be undertaken by NHRIs and addressed a minimum set of formal democratic rights in relation to SOGIESC issues. It aims to introduce discussions within NHRIs on acts, identities and arbitrary criminalisation of persons for their perceived or actual identity. This Guide, based on *Our Love is our Freedom* toolkit, focuses on the narrower aspect of Resolution 275 of the African Commission on Human and Peoples' Rights (ACHPR) and how African NHRIs can utilise the aims of the Resolution to strengthen their programming.

This Guide was prepared with the advice and assistance of the Centre for Human Rights of the Faculty of Law, University of Pretoria. The Centre for Human Rights is an academic department and a human rights organisation focusing on research, education, advocacy and publication in the field of human rights law in Africa. The principal drafting of this guide was done by Ayodele Sogunro (Senior Project Associate, SOGIESC Unit). Additional contributions were also made by Professor Frans Viljoen (Director, Centre for Human Rights) and Geoffrey Ogwaro (Manager, SOGIESC Unit) with the assistance of Thiruna Naidoo (Intern, SOGIESC Unit) and Louise Kroon (Intern, SOGIESC Unit). Additional input was provided by Marie Ramtu, Program Officer at the NANHRI Secretariat, with support from James Kasombo, the Operations Manager.

In a validation workshop hosted by the NANHRI Secretariat on November 25-29, 2019 in Lilongwe, Malawi, input was also received from the following NHRIs representatives: Maxwell Mvula and Peter Chisi (Malawi Human Rights Commission); Mavis Akua Ando and Michael Osei-Koranteng (Commission on Human Rights and Administrative Justice, Ghana); George Morara, Faizah Sidi and Jacqueline Kyenze (Kenya National Commission on Human Rights); Victor Mavhidula and Gushwell Brooks (South African Human Rights Commission). Further, input from the following CSO representatives is also appreciated: Gift Trapence (Centre for the Development of People) Lelei Cheruto (National Gay and Lesbian Human Rights Commission); Benjamin Baiden (Centre for Popular Education and Human Rights); Diane Sydney (Sexual Minorities Uganda) and Pearl Magashula (Coalition of African Lesbians).

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## FOREWORD

The adoption of Resolution 275 by the African Commission on Human and Peoples' Rights has contributed positively to the human rights discourse for protecting sexual and gender minorities in Africa. In spite of this, individuals across the continent continue to face violence because of their real or assumed sexual or gender identities. This violence continues to occur, and indeed to be tolerated by some states, despite the ratification and domestication of key global and continental human rights instruments.

The NHRI Guide for Implementing Resolution 275 in Africa is a timely and welcome intervention for supporting the realisation of human rights for all on the continent. NHRIs play important roles in mediating State obligations with the rights of citizens, including by ensuring that all appropriate actions are taken to protect individuals from discrimination and violence driven by homophobia or transphobia.

The multidimensional approaches suggested in this guide are consistent with the NHRIs promotion and protection mandates as stipulated in the Paris Principles. This Guide provides an opportunity for NHRIs and other stakeholders to affirm their roles and responsibilities in ensuring that the human rights for sexual and gender minorities are realized. It also offers timely opportunity for these organisations to build relevant capacities.

This Guide also profiles the affirmations in Resolution 275 on States and indeed all policy organs of the African Union about their hallowed responsibilities of protecting the human rights of all individuals in Africa in conformity with the African Charter on Human and Peoples' Rights.

Finally, I wish to acknowledge and commend those who worked to develop this Guide.

**Lawrence Murugu Mute**

*Commissioner, African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression and Access to Information in Africa.*

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## **LIST OF ACRONYMS**

|         |   |
|---------|---|
| ACHPR   | African Commission on Human and Peoples' Rights                             |
| AHRLR   | African Human Rights Law Report   |
| ICCPR   | International Covenant on Civil and Political Rights                        |
| ICESCR  | International Covenant on Economic, Social and Cultural Rights              |
| LGBTIQ+ | Lesbian, Gay, Bisexual, Transgender, Intersex, Queer, Plus                  |
| NHRI    | National Human Rights Institution   |
| NANHRI  | Network of African National Human Rights Institutions                       |
| OHCHR   | Office of the United Nations High Commissioner for Human Rights             |
| SOGIE   | Sexual Orientation, Gender Identity and Expression                          |
| SOGIESC | Sexual Orientation, Gender Identity and Expression, and Sex Characteristics |
| UDHR    | Universal Declaration of Human Rights                                       |
| UN      | United Nations  |
| UNDP    | United Nations Development Programme  |
| UNHRC   | United Nations Human Rights Council   |
| UPR     | Universal Periodic Review   |

## **BACKGROUND**

The Network of African National Human Rights Institutions (NANHRI) is a regional umbrella body that brings together National Human Rights Institutions (NHRIs) in Africa. Current membership is 46. The NANHRI Secretariat is based in Nairobi, Kenya, and is registered under Kenyan law as an independent legal entity. NANHRI has been operational since 2007. Through the Secretariat, NANHRI seeks to support and strengthen NHRIs in Africa to comply with the Paris Principles. It also seeks to facilitate coordination and cooperation amongst and between them, and other key human rights actors at the regional and international level.

In recognition of the fact that violence toward persons in Africa based on their real or perceived sexual orientation, gender identity and expression, and sex characteristics poses a threat to the realisation of human rights in Africa, the NANHRI Secretariat, in 2016 initiated a Sexual Orientation, Gender Identity and Expression (SOGIE) Project. The SOGIE Project is founded on Resolution 275 of the African Commission on Human and Peoples' Rights (the 'African Commission') passed during its 55<sup>th</sup> Ordinary Session of April 28 - May 12, 2014. The project aims at strengthening the capacity of African NHRIs to respond effectively to violence and discrimination against persons based upon their real or perceived sexual orientation, gender identity and expression and sex characteristics.

Resolution 275 clarifies the scope of the African Charter on Human and Peoples' Rights (the 'African Charter') in relation to and in the context of violence based on a real or imputed sexual orientation or gender identity. It condemns the increase of violence on the basis of real or imputed sexual orientation or gender identity. It notes the obligation of States to ensure that all acts of violence stemming from real or imputed sexual orientation or gender identity (whether or not the perpetrator is a State or non-State actor) must be effectively covered by legislation. Similarly, States must ensure that perpetrators are investigated, prosecuted and brought to justice.

Specifically, the SOGIE project is in line with NANHRI's strategic objective 4 under the 2015-2019 Strategic Plan. The project is concerned with the freedom of people in Africa from discrimination and violence on the basis of distinctions of any kind. This includes their right to the equal protection of the law, their right to life, their right to bodily integrity and autonomy, their freedom from torture and other cruel, inhuman and degrading treatment or punishment as guaranteed under the African human rights system, and all of which are threatened by continuing violence against LGBTIQ+ people.

## Who is this Guide for?

This Guide primarily targets NHRIs in Africa and their staff who have little or no knowledge and skills to respond to SOGIESC issues, especially as it relates to Resolution 275. It is intended to broaden their understanding and recommends practical steps for the implementation of Resolution 275 in country settings through NHRI programming. A secondary audience also include general law enforcement agencies such as court officials, prison authorities, civil society and other stakeholders who are interested in a better understanding of SOGIESC issues in Africa and how best to end violence and discrimination against persons on the basis of their sexual orientation and gender identity. Alternatively, practitioners in the field of human rights can use the guide as a training and capacity building tool.

## Structure of the Guide

The Guide is divided into two modules. Each module has chapters corresponding to independent, though related issues.

Each module starts with a summary of the module, followed by the aims and objectives of the module. At the end of each chapter, a set of activities relating to the content of the chapters are suggested, along with a list of **resources**. In some chapters, **case studies** have also been provided to give practical examples of the issues discussed. At the end of the Guide, there are annexes of extra resources and documents.

**Module One, ‘Defining and understanding SOGIESC issues in Africa’**, reviews theoretical and foundational issues and is targeted at audiences who are having first contact with SOGIESC themes. The module has four sections.

Section 1 reiterates and explains the key concepts and terminologies.

Section 2 reviews the protection of LGBTIQ+ persons under the global human rights system while Section 3 discusses this under the African human rights system.

Section 4 concludes the module by highlighting the critical issues that constitute violations of the rights of LGBTIQ+ persons in Africa.

**Module Two, ‘African NHRIs and the protection of LGBTIQ+ persons’**, is directed at those who already have a foundational knowledge of SOGIESC issues. The module captures the core of the Guide and offers practical steps for NHRIs in their programming. This module has 3 sections.

Section 5 reiterates the importance of NHRIs in the protection of the rights of LGBTIQ+ persons in Africa.

Section 6 provides suggestions for the use of Resolution 275 at the national level under the protection and promotion mandates of NHRIs.

Section 7 provides suggestions for interfacing with the African Commission.

## MODULE ONE

### DEFINING AND UNDERSTANDING SOGIESC ISSUES IN AFRICA

Module One is introductory in nature and is designed to provide an overview of foundational SOGIESC issues from a theoretical perspective.

#### Objectives

##### **Section 1: Understanding key concepts and terminology**

Define the key terminology pertaining to sexual orientation, gender identity, expression, and sex characteristics and highlight the importance of using the right terminology.

##### **Section 2: The protection of LGBTIQ+ persons in the global human rights system**

An overview of the global human rights framework and its importance in the protection of the rights of LGBTIQ+ persons.

##### **Section 3: The protection of LGBTIQ+ persons in the African human rights system**

An overview of the African regional human rights framework and its importance in the protection of the rights of LGBTIQ+ persons.

##### **Section 4: Lived realities of LGBTIQ+ persons in Africa**

Set out the challenges of being LGBTIQ+ in Africa including the human rights violations against LGBTIQ+ persons across African countries.

## Section 1

### Understanding key concepts and terminologies

The task of ending violence and discrimination against persons in Africa on the basis of their real or imputed sexual orientation and gender identity requires that staff of human rights institutions understand the concepts of sexual orientation, gender identity and expression, and sex characteristics.

The use of stigmatising words and negative stereotypes against LGBTIQ+ persons in everyday language (including local dialect) can contribute to human rights violations against them. Using inclusive terminology, human rights workers can empower affected individuals and give them the needed visibility on the violations they face. Human rights workers ought to be aware that every individual has the right to choose what terms best describe their sexual orientation, gender identity and expression, or their sex characteristics.

In the joint dialogue report on ‘Ending violence and other human rights violations based on sexual orientation and gender identity’, the African Commission recommends that it is important to ‘use and respect the names, terms and pronouns that people use to refer to themselves’.

Terminology of gender and sexuality may vary and change depending on context. The following are definitions of some key concepts and terminology as used in this Guide:

**Biphobia:** an irrational fear, hatred or aversion towards bisexual people.

**Bisexual:** a person who is emotionally, romantically, sexually, or relationally attracted to both men and women, though not necessarily at the same time.

**Cisgender:** a person whose assigned sex at birth aligns with their gender identity.

**Gay:** describes a man who is emotionally, romantically, sexually, or relationally attracted to other men.

**Gender binary:** a system of dividing gender into two distinct categories of female and male.

**Gender expression:** is a person’s external ways of communicating masculinity or femininity, both or neither, through physical appearance and mannerisms.

**Gender identity:** reflects a deeply felt and experienced sense of one’s own gender which may not correspond with the sex assigned at birth.

**Gender non-conforming:** stipulates a broader, more flexible range of gender identities and/or expressions than the binary gender system.

**Gender:** socially constructed roles, behaviours, activities and attributes considered appropriate for men and women at a given time.

**Heterosexual:** describes a person who, broadly, is emotionally, romantically, sexually, or relationally attracted to a person of another sex or gender.

**Homophobia:** an irrational fear of, hatred or aversion towards homosexuals or homosexuality.

**Homosexual:** a person whose predominant attraction is to the same sex or gender.

**Intersex:** a person born with sex characteristics that do not fit the typical definition of male or female. This may be apparent at birth or later in life.

**Lesbian:** describes a woman who is emotionally, romantically, sexually, or relationally attracted to other women.

**LGBTIQ+:** an acronym for the terms- lesbian, gay, bisexual, transgender, intersex, queer and other non-binary identities.

**Non-binary:** a system that recognises the existence of more gender categories beyond female and male.

**Queer:** an umbrella term used by some LGBTIQ+ persons to describe themselves. It is valued because of its inclusiveness. In some contexts, it is offensive. Avoid using it unless it is clearly not offensive.

**Sex characteristics:** refers to the chromosomal, gonadal and anatomical features of a person. These include primary characteristics such as reproductive organs and secondary characteristics such as chromosome patterns.

**Sex:** a category assigned at birth based upon body parts and other physical characteristics. The categories are male, female and intersex.

**Sexual orientation:** refers to a person's physical, romantic and emotional attraction towards other people. Everyone has a sexual orientation, which is integral to a person's identity. Homosexuality, bisexuality and heterosexuality are some categories of sexual orientation.

**Sexuality:** describes a broad spectrum and individual erotic feelings, thoughts, attractions and behaviours towards other people at a given time.

**Transgender:** (sometimes shortened to ‘trans’) is an umbrella term used to describe a wide range of identities of persons whose gender identity does not correspond with the sex they were assigned at birth. Some transgender people seek surgery or take hormones to bring their body into alignment with their gender identity; others do not.

**Transmen:** persons who identify as male, but were classified as female at birth.

**Transphobia:** an irrational fear, hatred or aversion towards transgender people.

**Transsexual:** describes a person who has taken some measures to alter their sex to match their gender identity. These may include sex reassignment surgery, implants, hormonal intake among others.

**Transwomen:** persons who identify as female, but were classified as male at birth.

# The Genderbread Person

by [www.ItsPronouncedMetrosexual.com](http://www.ItsPronouncedMetrosexual.com)

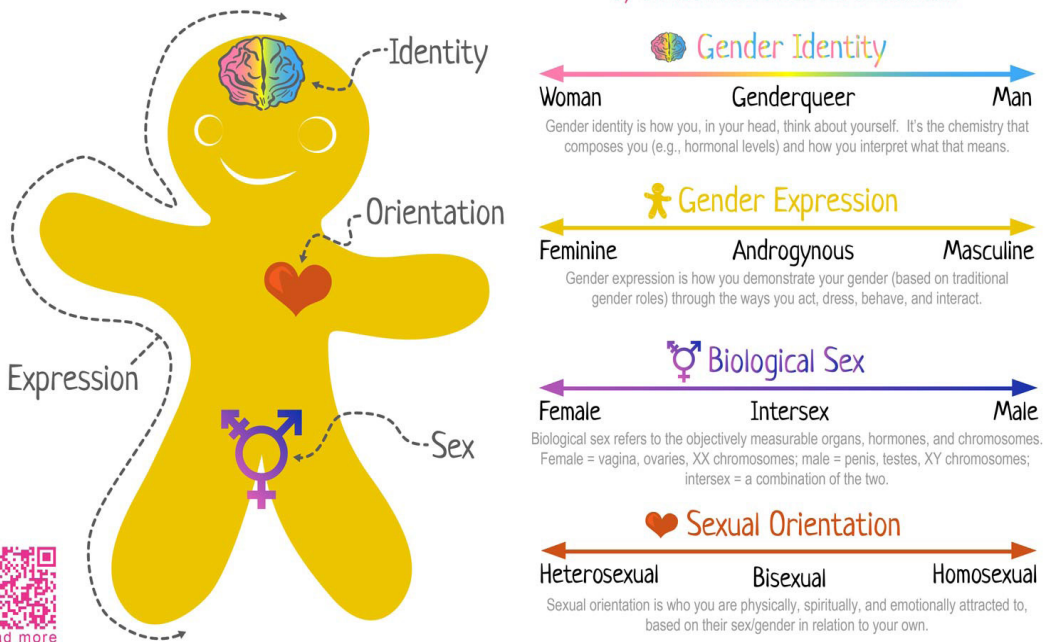


Figure 1: <https://www.genderbread.org/wp-content/uploads/2017/01/1600-Genderbread-Person.jpg>



### Activities



- i. Biological sex is distinct from sexual orientation, gender identity and expression. Explain.
- ii. How are these terms referred to in local languages? What are the implications of these terms?

### References

1. Asia Pacific Forum 'Part of our Everyday Work: NHRI Guidelines for Mainstreaming SOGISC Work' (2017) available at <https://www.asiapacificforum.net/resources/guidelines-mainstreaming-sexual-orientation-gender-identity-and-sex-characteristics-work/>.
2. 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) available at <http://www.pulp.up.ac.za/component/edocman/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>.
3. Genderbread Person Version 1 - <https://www.genderbread.org/resource/genderbread-person-v1>.

## Section 2

### The protection of LGBTIQ+ persons in the global human rights system

#### 2.1 United Nations human rights Treaty Bodies

The global human rights system and the legal framework deriving from it are universally applicable to all, including LGBTIQ+ people. The legal framework of the global human rights system is principally derived from the core treaties of the United Nations, as well as declarations, resolutions, and statements by the United Nations or any of its constituent bodies. A list of the core treaties and other instruments is provided in Annexure 2.

The Universal Declaration of Human Rights (UDHR), along with the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Social, Economic and Cultural Rights (ICESCR) constitute the foundational documents of the global human rights system. These documents continue to be the most important basis for the protection of human rights universally. The universality of human rights is emphasised in Article 2 of the UDHR which states:

*Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

**Similarly, Article 2(1) of the ICCPR affirms:**

*Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

**Article 2(2) of the ICESCR also states:**

*The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

Although not specifically referred to in the UDHR or other core treaties as part of ‘everyone’, LGBTIQ+ people are included – but this is not done explicitly – in the universality of human rights by the use of the phrase ‘other status’. This phrase shows

that the categories of discrimination are not exhaustive and should not be limited to the items listed in the provision. These provisions emphasise the necessity of equality, universality, and non-discrimination in the application of human rights to all people, including LGBTIQ+ persons.

UN Treaty Bodies have also consistently interpreted treaty provisions in favour of the rights of LGBTIQ+ persons, to prevent discrimination and discriminatory laws against LGBTIQ+ persons. This has reflected in Treaty Body observations, general comments, and decisions on individual communications.

In the 1992 case of *Toonen v Australia*, the Human Rights Committee (HRC) held that the use of ‘sex’ as a ground for non-discrimination by ICCPR extends to sexual orientation. As such, laws that discriminated on the basis of sexual orientation or private consensual same-sex sexual acts were found to be in contravention of that treaty. Similarly, in *Young v Australia*, decided in 1999, the HRC ruled that Australia’s law, which did not allow for same-sex couples benefits as heterosexual couples was, discriminatory and in violation of Article 26 of the ICCPR. General Comment 20 (1993) by the Committee on Economic, Social and Cultural Rights has also expressed the universality of the term ‘other status’ as applicable to sexual orientation.

## 2.2 United Nations Human Rights Council and Universal Periodic Review

On June 25, 1993, representatives of 171 States at the World Conference on Human Rights concluded that all humans are entitled to human rights irrespective of domestic, legal and cultural differences.

In furtherance of these principles, the United Nations Human Rights Council (UNHRC) adopted two resolutions in 2011 and 2014 expressing ‘grave concern at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity’.

*Resolution 17/19, A/HRC/17/L.9/Rev.1, adopted June 17, 2011; and Resolution 27/32, A/HRC/27/L.27/Rev.1, adopted September 26, 2014.*

The 2011 resolution requested the United Nations High Commissioner for Human Rights to commission a study documenting discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, in all regions of the world, and how international human rights law can be used to end violence and related human rights violations based on sexual orientation and gender identity. Similarly, the 2014 resolution requested United Nations High Commissioner for Human Rights to update the report from the 2011 resolution “with a view to sharing good practices and ways to overcome violence and discrimination, in application of existing international human rights law and standards.”

In 2016, the UNHRC adopted Resolution 32/2 condemning acts of violence and discrimination ‘in all regions of the world’ against individuals because of their sexual orientation or gender identity and, within the same resolution, appointed an Independent Expert on Sexual Orientation and Gender Identity (IE SOGI) to, amongst other things:

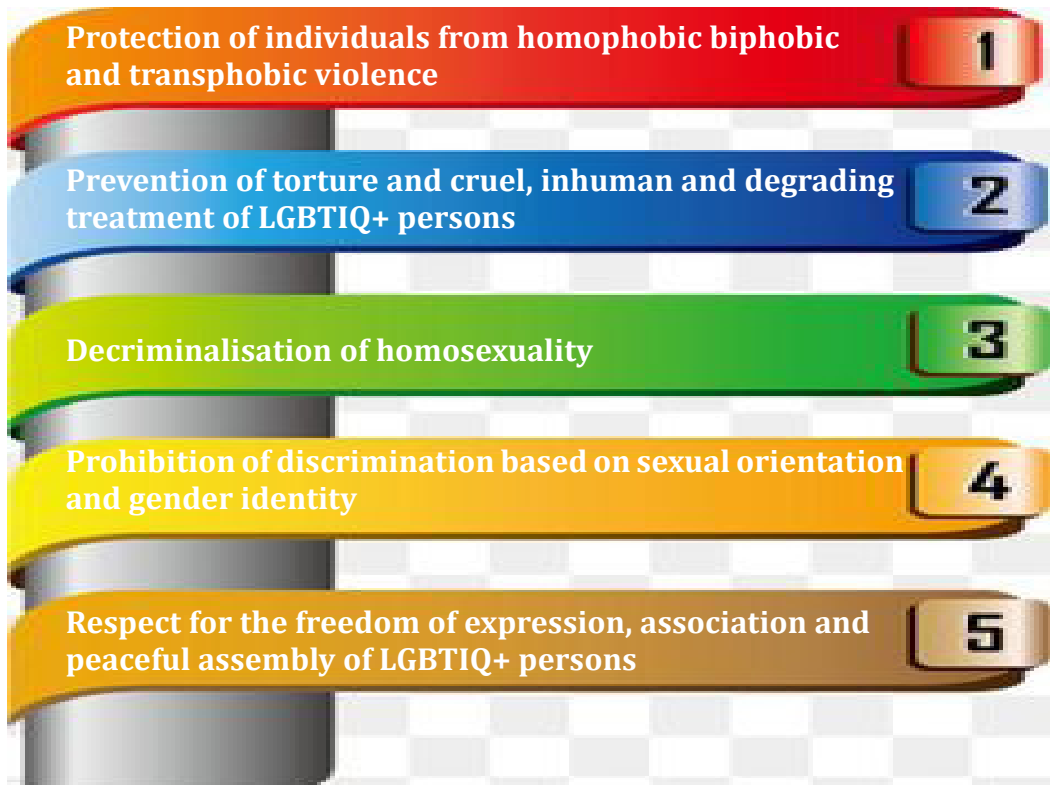
- assess the implementation of existing international human rights instruments with regard to ways to overcome violence and discrimination against persons on the basis of their sexual orientation or gender identity, while identifying best practices and gaps;
- raise awareness on violence and discrimination against persons on the basis of their sexual orientation or gender identity and to identify and address the root causes of violence and discrimination;
- engage in dialogue and to consult with States and other relevant stakeholders, including United Nations agencies, programmes and funds, regional human rights mechanisms, NHRIs, civil society organisations and academic institutions;
- work in cooperation with States to foster the implementation of measures that contribute to the protection of all persons against violence and discrimination based on sexual orientation and gender identity;
- address the multiple, intersecting and aggravated forms of violence and discrimination faced by persons based on their sexual orientation and gender identity; and
- conduct, facilitate and support the provision of advisory services, technical assistance, capacity-building and international cooperation in support of national efforts to combat violence and discrimination against persons on the basis of their sexual orientation or gender identity.

In July 2019, the UNHRC renewed the mandate of the Independent Expert, demonstrating the continuing necessity of dealing with issues of discrimination against LGBTIQ+ persons.

These resolutions by the UNHRC have also been supported by resolutions of the General Assembly calling on States to effectively protect the right to life of all under their jurisdiction, and ‘to investigate promptly and thoroughly all killings, including those targeted at specific groups of persons, such as ...killings of persons... because of their sexual orientation or gender identity’.

*UN General Assembly Resolution A/RES/67/168 (2012); A/RES/69/182 (2014); A/RES/65/208 (2010); and A/RES/63/182 (2008)*

Also, in the report *Born free and equal: Sexual orientation and gender identity in international human rights law*, the Office of the High Commissioner for Human Rights (OHCHR) set out five core obligations by States, interpreting the existing obligations of states under international human rights treaties as it applies to the protection of LGBTIQ+ persons. These five core obligations are:



In addition to its resolutions, the UNHCR has also utilised the Universal Periodic Review (UPR) mechanism to review the human rights records of States on SOGIESC issues. For example, at the 2012 UPR of Ghana, it was advised that the provisions in the Ghanaian Constitution that guarantee equality and dignity should be equally applied to LGBTIQ+ persons. Malawi in 2015 accepted a recommendation to take effective measures to protect LGBTIQ+ persons from violence and prosecute the perpetrators of violent attacks. It also accepted to guarantee that LGBTIQ+ individuals have effective access to health services, including treatment for HIV/AIDS. At the 2018 UPR, Burundi was urged to ‘take the necessary measures’ to decriminalise same-sex relationships and to ensure legal protections against discrimination based on sexual orientation or gender identity. Similarly, Burkina Faso and Nigeria were advised to review and repeal existing laws criminalising sexual minorities and ensure that acts of discrimination against these groups are investigated and punished.

### 2.3 The Yogyakarta Principles

The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity (the ‘Yogyakarta Principles’) is the text of a set of legal principles on the application of international law to human rights violations based on sexual orientation and gender identity and formulated by experts from 25 countries in November 2006. Although the Yogyakarta Principles is not a treaty, it is considered as ‘soft law’ and universally acknowledged as the definitive framework on the application of international human rights law to issues of sexual orientation and gender identity.

The preamble to the principles recognises that international human rights law affirms that all persons, regardless of sexual orientation or gender identity, are entitled to the full enjoyment of all human rights, and that the application of existing human rights entitlements should take account of the specific situations and experiences of people of diverse sexual orientations and gender identities.

The Yogyakarta Principles cover the right to universal enjoyment of human rights, non-discrimination and recognition before the law, right to human and personal security, economic, social and cultural rights, rights to expression, opinion and association, freedom of movement and asylum, right of participation in cultural and family life, and the rights of human rights defenders.

Significant developments, both in the field of international human rights law and in the understanding of violations affecting persons of ‘diverse sexual orientations and gender identities’ including the understanding of sex characteristics, led to the release of additional principles and State obligations in a document known as Yogyakarta Principles plus 10 (YP+10) in November 2017.





The additional State obligations focus on creating an environment where States support the realisation of the principles developed. These include taking measures to ensure the realisation of rights to equality and non-discrimination, privacy, treatment with humanity while in detention, freedom from torture and cruel, inhuman or degrading treatment or punishment, education, the highest attainable standard of health, freedom of opinion and expression, freedom of peaceful assembly and association, freedom to seek asylum; freedom to found a family, freedom to participate in public life and freedom to promote human rights.

### Activities



1. Discuss how engagements between your country's government and international human rights bodies such as the Human Rights Council have influenced, either positively or negatively, the situation of persons of diverse sexual orientations and gender identities in the country?
2. Have any specific recommendations been made to the government?
3. How has the government responded?
4. What has resulted from those engagements?
5. What has been your role as the country's national human rights institution?

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1. *Toonen v. Australia*, communication 488/1992, UN Doc CPR/C/50/D/488/1992 (1994).
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8. Committee on Economic, Social and Cultural Rights, General Comment No. 20 (E/C.12/GC/20), para. 32.
9. Committee on the Rights of the Child, General Comment No. 13 (CRC/C/GC/13), paras. 60 and 72(g). Committee against Torture, General Comment No. 2 (CAT/C/GC/2), para. 21.
10. Committee on the Elimination of Discrimination against Women, General Recommendation No. 28 (CEDAW/C/GC/28), para. 18.
11. Human Rights Council 'Report of the working group on the Universal Periodic Review Burundi' A/HRC/38/10 (19 April 2018).
12. Human Rights Council 'Report of the working group on the Universal Periodic Review Burkina Faso' A/HRC/39/4 (6 July 2018).
13. Human Rights Council 'Report of the working group on the Universal Periodic Review Nigeria' A/HRC/40/7 (26 December 2018).

## Additional resources

1. OHCHR Status of Ratification Interactive Dashboard: <http://indicators.ohchr.org/>.
2. *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) available at <http://www.pulp.up.ac.za/component/edocman/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>.



## Section 3

### The protection of LGBTIQ+ persons in the African human rights system

#### 3.1 The African Charter on Human and Peoples' Rights

The norms of the African human rights system are principally governed by the provisions of the African Charter on Human and Peoples' Rights (the African Charter). The African Charter was adopted on June 27, 1981 and entered into effect on October 21, 1986. Other norms are set out in the Protocol on the Rights of Women and the African Children's Charter. The African Commission interprets and monitors the implementation of the African Charter.

The preamble of the African Charter provides 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'.

Articles 2 and 3 of the African Charter guarantee all individuals freedom from discrimination and the equal protection and equality of individuals under the law respectively. In particular, Article 2 states:

*Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without the distinction of any kind; such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status*

In various communications, the African Commission has expressed the view that 'other status' as used in the African Charter includes grounds other than those stated in the text of the African Charter. Even though 'sexual orientation' is not expressly stated, the use of the phrase 'other status' indicates that the grounds on which discrimination is prohibited should not be limited to those set out in the text. The rights and freedoms in the African Charter are for the enjoyment of all individuals. In this vein, the African Commission in the case of *Zimbabwe Human Rights NGO Forum v Zimbabwe* noted that the aim of Article 2 of the African Charter is 'to ensure equality of treatment for individuals irrespective of nationality, sex, racial or ethnic origin, political opinion, religion or belief, disability, age or sexual orientation.'

#### 3.2 Resolution 275 of the African Commission on Human and Peoples' Rights

The African Commission granted Observer Status to the Coalition of African Lesbians in 2015. However, in 2018, the decision was reversed as per directive of the Executive Council of the African Union. The African Commission's autonomy and independence has continued to be threatened by political arms and processes. As part of their

protection and promotion mandates, there is a critical need for NHRIs in Africa to support the African Commission and strengthen its independence.

Despite these challenges, the views of the African Commission on the protection of LGBTIQ+ persons have progressed significantly in the last 10 years; the African Commission has often called on States to revoke discriminatory laws targeting LGBTIQ+ persons in compliance with State obligations under the African Charter.

Crucially, Resolution 275 of the African Commission, '*Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity*' was adopted at the 55<sup>th</sup> Ordinary Session of the African Commission, which was held from April 28 to May 12, 2014. Resolution 275 utilises Articles 2, 3, 4 and 5 of the African Charter on the rights to freedom from discrimination, equality, life, and dignity respectively. Further discussion on Resolution 275 takes place in Module Two. A full text of the Resolution is set out in Annexure 1.

The protection of LGBTIQ+ persons is also inherent in the African Commission's approach to the interpretation of human dignity, which expects that States will not interfere in the private lives of citizens.

### 3.3 Other Resolutions and Statements that apply to SOGIESC

Since the adoption of Resolution 275, the African Commission has increasingly incorporated SOGIESC issues into its standard-setting activities. For instance, in 2017, the African Commission adopted Resolution 376 on 'the Situation of Human Rights Defenders in Africa', where it explicitly recognised both the added vulnerability and the need for specific legislation to protect LGBTIQ+ human rights defenders.

The Committee on the Prevention of Torture in Africa in General Comment 4 (2017) on 'the Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Article 5)' lists sexual orientation and gender identity as one of the grounds of non-discrimination for victims to seek redress.

The 2015 *Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa* (Luanda Guidelines), provides in Guideline 30(a) (Special measures are not discriminatory) that certain measures, including those 'designed to protect the rights of persons *on the basis of gender identity*' are not to be considered as 'discriminatory or applied in a manner that is discriminatory'.

In the 2017 *Guidelines on Freedom of Association and Assembly in Africa*, sexual orientation or gender identity are included alongside other explicit grounds for non-discrimination such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, property, socio-economic status, birth, disability and age.

The 2017 *Guidelines for Policing Assemblies by Law Enforcement Officials in Africa* recognise the vulnerability of individuals who, due to their status including sexual orientation and gender identity, may face limitations on their right to freedom of assembly and be subject to other human rights violations in the context of policing assemblies.

The 2017 *Guidelines on Combating Sexual Violence and its Consequences in Africa* defines 'sexual violence' as including 'corrective rape'. Corrective rape is a homophobic practice where women are raped because of their real or imputed homosexuality, supposedly to 'cure' them of this sexual orientation.

Regarding access to reproductive and sexual health care, the African Commission established a Committee on the Protection of the Rights of People Living with HIV ('HIV Committee') in 2010, which was mandated to 'integrate a gender perspective and give special attention to persons belonging to vulnerable groups, including women, children, sex workers, migrants, men having sex with men, intravenous drugs users and prisoners'.

In its 2018 report, *'HIV, the Law and Human Rights in the African Human Rights System: Key challenges and Opportunities for Rights-Based Responses to HIV'*, the African Commission defines 'key populations' as: 'gay men and other men who have sex with men, male and female sex workers and their clients, transgender people, prisoners and people who inject drugs'. The report highlights the disproportionate effect of HIV on these already marginalised groups and underscores the negative effect of criminalisation on access to health care. It also points out that 'transgender women are one of the most vulnerable groups in relation to HIV, being 49 times more likely to be living with HIV than other adults of reproductive age'.

### 3.4 Concluding Observations by the African Commission

The African Commission also issues concluding observations to protect the rights of LGBTIQ+ persons, raise awareness of SOGIESC issues in Africa, and also highlight positive outcomes on SOGIESC issues in national systems. Some of these are considered in the following examples.

#### **Mauritius**

In its Concluding Observations on the 2<sup>nd</sup> to 5<sup>th</sup> reports of Mauritius, covering 1995 to 2008, the African Commission commended the State for 'adopting the Equal Opportunities Act 2008, which prohibits discrimination on the grounds of age, caste, colour, creed, ethnic origin, impairment, marital status, place of origin, political opinion, race, sex and sexual orientation'.

### **Cameroon**

In its Concluding Observations on Cameroon's 3<sup>rd</sup> periodic report, adopted in 2014, the African Commission identified, among the factors restricting the enjoyment of rights guaranteed by the African Charter, the following: 'The 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'. The African Commission then called on the Government of Cameroon to 'take appropriate measures to ensure the safety and physical integrity of all persons irrespective of their sexual orientation and maintain an atmosphere of tolerance towards sexual minorities in the country'.

### **Uganda**

In its Concluding Observations adopted after the consideration of Uganda's 4<sup>th</sup> periodic report, the African Commission commended the State for investigating and prosecuting the perpetrator of the murder of David Kato, an activist for the rights of LGBTIQ+ persons.

### **Nigeria**

In its Concluding Observations to Nigeria's 5<sup>th</sup> periodic report, the African Commission raised concerns with and urged the State to review the Same-Sex Marriage (Prohibition) Act 2013 to prohibit violence and discrimination in access to HIV prevention, treatment and care services, as well as to ensure the protection of other human rights of sexual minorities guaranteed under the African Charter and other international instruments to which Nigeria is a party.

### **Namibia**

In its Concluding Observations to Namibia's 6<sup>th</sup> periodic report, the African Commission urged Namibia to end discrimination and stigmatisation limiting access to health care for vulnerable groups including the LGBTIQ+ community.

### **Liberia**

With respect to Liberia's initial periodic report, the African Commission recommended that Liberia ensures equal rights to all its citizens without discrimination on the basis of their sexual orientation or gender identity and urged the state to apply appropriate laws prohibiting and punishing all forms of violence including those targeting persons based on their real or imputed sexual orientation or gender identity.

## **3.4 Protection by National Human Rights Institutions**

NHRIs in some countries have also taken steps to protect the rights of LGBTIQ+ persons in their jurisdictions. For example, the NHRIs of Kenya, Uganda, Malawi, South Africa and Ghana have taken various steps by employing judicial and non-judicial measures to expand the protection space for LGBTIQ+ persons.

## Activities



1. What specific challenges hinder your NHRI from responding to human rights violations against LGBTIQ+ persons?
2. Review the 'Ending Violence' joint dialogue report by the African Commission and discuss the debate on diversity in African sexuality

## References

1. *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128.
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5. *Guidelines for Policing Assemblies by Law Enforcement Officials in Africa* (2017).
6. *Draft Guidelines on the Declassification of Petty Offences* (2017).
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14. NANHRI, *The role of National Human Rights Institutions in Implementing Resolution 275* available at <https://www.nanhri.org/2019/12/13/nanhri-sexual-orientation-gender-identity-expression-project-assessment-report/>

## Additional resources

1. S Namwase & A Jjuuko *Protecting the human rights of sexual minorities in contemporary Africa* (2017).
2. A Jjuuko 'The protection and promotion of LGBTI rights in the African regional human rights system: Opportunities and challenges' in S Namwase & A Jjuuko (eds) *Protecting the human rights of sexual minorities in contemporary Africa* (2017) 261.
3. F Viljoen 'Minority sexual orientation as a challenge to the harmonised interpretation of international human rights law' in CM Buckley, A Donald & P Leach (eds) *Towards convergence in international human rights law: Approaches of regional and international systems* (2017).

## Section 4

### Lived realities of LGBTIQ+ persons in Africa

#### 4.1 Introduction

Many people in Africa continue to suffer all forms of discrimination on the basis of the sexual orientation, gender identity and expression, and sex characteristics. A number of these people may identify publicly or privately as 'LGBTIQ+' but in many cases they do not. While some significant legal progress to protect LGBTIQ+ persons or decriminalise homosexuality has been made in countries such as South Africa, Angola, Botswana, and Mozambique, it still remains generally unsafe for most Africans to expressly disclose that they are in same-sex consensual relationships or are attracted to other persons of the same sex/gender. These challenges and violations will be considered under the following headings:

- Criminalising and discriminatory laws
- Violence
- Arbitrary arrest and detention
- Blackmail and extortion
- Attacks on SOGIESC human rights defenders

#### 4.2 Criminalising and discriminatory laws

According to the *State Sponsored Homophobia Report*, as of December 2019, 32 out of 55 African countries (as per the African Union) continue to criminalise private consensual same-sex acts (ILGA, 2019). A majority of these are criminal laws from the colonial era. Some countries have since repealed these laws, others have re-enacted or attempted to re-enact new criminalising laws.

In criminalising countries, the laws often prohibit 'sodomy' or 'carnal knowledge against the order of nature'. The laws may also criminalise consensual same-sex relationships and same-sex marriages. In a few instances, the laws go as far as criminalising the provision of aid and support to LGBTIQ+ persons. Criminalising laws may stipulate imprisonment of up to 30 years or even the death penalty. Politicians often justify criminalisation on the grounds that consensual same-sex relationships are 'unAfrican' even though there is ample contradictory historical evidence.

Criminalising laws violate the right to privacy and encourage discrimination. The existence of criminalising laws also enables politicians and influential people to make dehumanising statements about LGBTIQ+ persons. This increases the risks and further removes LGBTIQ+ persons from legal protection. The lack of legal protection means State authorities often treat LGBTIQ+ persons prejudicially. In such cases, LGBTIQ+ persons are not allowed due legal process and are often subjected to torture or cruel,

inhuman, and degrading treatment. This is contrary to the right of equal protection under the law.

Even when unenforced, the effect of these laws is the existence of a constant threat to LGBTIQ+ persons that causes social alienation, and often leads to depression, internal displacement or forced migration. LGBTIQ+ persons are unable to associate and form organisations for the protection of their interests, express themselves and interact with others freely, or receive personalised health care.

Beyond the existence of criminalising laws, there is also lack of non-discrimination legislation or the existence of laws that do not acknowledge SOGIESC diversity. This situation also has an impact on the dignity of LGBTIQ+ persons in their day to day existence.

### Case study 1

#### **Petition 51 of 2015: Freedom from Cruel, Inhuman and Degrading Treatment**

##### **Under Article 25 of the Constitution of Kenya (2010)**

**Issues:** Right to dignity, right to a fair trial.

**Facts:** Two males from Kwale County were arrested on suspicion that they might have engaged in ‘carnal knowledge against the order of nature and indecent acts between adults’ (in violation of the Sexual Offences Act of the Laws of Kenya). The two were subjected to forced HIV testing and anal examination under a magistrate’s order to ascertain whether they might have engaged in anal sex, consensually and in private. They were later charged with ‘carnal knowledge against the order of nature and indecent acts between adults’.

**Decision:** The petition sought to question whether it was constitutional to subject the two males to anal examination and whether the results of the examination can be admitted as evidence when constitutional rights to dignity, fair trial among others were breached in acquiring that evidence. The trial court ruled that the use of anal testing to determine sexual orientation was in line with the law of the land and hence the evidence was constitutional. This decision was overturned by the Court of Appeal, but the applicants were not awarded their claims because it was held by the court that they had consented to the examination.

**Potential opportunities:** NHRIs should educate health and medical bodies on stopping practices like anal testing as part of police investigations into sexual activity.

### 4.3 Violence

Violence by State and non-state actors continues to be one of the most serious threats to the rights of LGBTIQ+ persons in Africa. This kind of violence amounts to hate-crime perpetrated against persons for their actual or imputed sexual orientation and gender identity. Violence of this nature can range from private attacks to public lynching. It can be generalised or specific to certain groups. Further, violence against LGBTIQ+ persons can also take many forms, including but not limited to murder, physical assault, kidnaping, rape, and sexual assault.

In majority of these cases, perpetrators are not investigated and punished, thereby constituting a kind of State approval or protection of such violent acts and a breach of the obligation of the state to protect life.

#### Case study 2

*Kasha Jacqueline, Pepe Onziema & David Kato v. Giles Muhame and the Rolling Stone Publication Ltd, Misc. Cause No. 163 of 2010*

**Issues:** Rights to privacy, freedom from discrimination

**Facts:** The 2<sup>nd</sup> defendant, a weekly tabloid newspaper published in Uganda with the sole purpose of fighting homosexuality published the identities and contacts of people based on their real and perceived sexual orientation with the plaintiffs being the first victims of such publication.

**Decision:** The applicants sued the defendants alleging a violation of their right to privacy and also sought an injunction against the defendants to stop the publication of the identities of persons and homes of the applicants. They argued that the said publication was not only a violation of their right to privacy, but also a threat to their security in light of the homophobia which the Ugandan society holds against gays and lesbians. The injunction was granted.

**Potential opportunities:** NHRIs should undertake public education on the right to privacy and engagement with the press on responsible journalism.



### Case study 3

#### *Nare Mphela/Frans Manamela (LP/1415/0047)*

**Issues:** Freedom from discrimination; freedom from inhuman and degrading treatment

**Facts:** This case was instituted in the Equality Court of South Africa in which evidence indicated that the complainant was continually harassed at the instruction of the respondent, including asking students to determine what was beneath her dress. She was further allegedly excluded from activities and punished severely for transgressions other children were not punished for. She failed to complete her schooling as she felt that she was in a hostile environment. She further suffered emotionally. Expert evidence was also provided by clinical psychologists indicating the trauma the transgender communities' experience, and the victimisation the complainant had to face from her school and community.

**Decision:** The court found in the favour of the complainant and the South African Human Rights Commission and indicated that the complainant in fact experienced harassment and hate speech at the hands of the respondent, and secondary at the hands of the education department. The court then ordered damages in favour of the complainant.

**Potential opportunities:** NHRIs should facilitate sexuality and gender diversity training for teachers and other education sector workers.

#### 4.4 Arbitrary arrest and detention

Often, LGBTIQ+ persons in criminalising countries are arrested or detained even though there is no evidence that they have committed any criminal or prohibited conduct and often without following due process. Such arbitrary arrests and detention constitute threats to the liberty and dignity of LGBTIQ+ persons in Africa. In criminalising countries, security personnel profile individuals and target them for their sexual orientation or gender identity. Security personnel often arbitrarily search personal effects of people who have been profiled and then detain them at will either to subject the victim to torture or extort money.

There have also been instances of mass arrests where as many as 20 or 30 people are arrested after a raid by security personnel and detained on account of their sexual orientation or gender identity.

#### Case study 4

In the case of *Victor Juliet Mukasa & Yvonne Oyo v. Attorney General*, Misc. Cause No. 247 of 2006

**Issues:** Right to privacy; right to dignity

**Facts:** Agents of the state broke into the residence of the plaintiffs in search of evidence of suspected 'lesbianism'. The second applicant was arrested without any charges and then sexually assaulted while in custody. The applicants sued for unlawful confiscation of their property, correspondence and trespass to their home.

**Decision:** The High Court found the agents of the State to be liable for violating Article 27 of the Constitution of Uganda (1995) in respect of the plaintiffs.

**Potential opportunities:** NHRIs should educate police officials on the unlawfulness of arbitrary raids and arrests, particularly on the basis of SOGIESC.

#### 4.5 Blackmail and extortion

Both in criminalised and non-criminalised legal systems, LGBTIQ+ persons in Africa continue to face blackmail and extortion to avoid being outed by perpetrators. The process of coming out as an LGBTIQ+ person is personal. In many cases, it is also a security risk. Perpetrators often take advantage of this position to extort money or personal favours from LGBTIQ+ persons with threats to publicise their sexuality to their families, employers, law enforcement agencies, or the public.

Blackmailers may pose as LGBTIQ+ persons themselves and connect with potential victims on social media, gaining their trust. When a connection is established and the victim reveals some intimate information, the blackmailer then proceeds to use the threat of violence or exposure or both. To avoid the risks or other damage that may come with the unwanted publicity, LGBTIQ+ persons may comply with the blackmail, migrate, or even self-harm.

Reporting the blackmail and extortion to the police is often not an option in this scenario as some officers become more interested in interrogating the sexual orientation, gender identity or expression and sex characteristic of the complainant.

## 4.6 Attacks on SOGIESC human rights defenders

In addition to direct threats, LGBTIQ+ persons in Africa also experience challenges through attacks on human rights defenders working on the protection of the rights of LGBTIQ+ persons. In some countries, it is illegal or against public policy to advocate for the rights of LGBTIQ+ persons. In a number of places, SOGIESC human rights defenders are often the target of hate crimes intended to disrupt their work and frustrate their attempts to ensure the protection of LGBTIQ+ rights. They may also risk social exclusion and other forms of stigmatising attitudes in the course of their work.

Human rights defenders for LGBTIQ+ persons may also face hostility and State violence. In many countries, because it is illegal to publicise their work, they have to work underground and carry out their interventions secretly. They may also become targets for extortion by the police and they often comply to continue with their work.

In countries where they cannot operate legally, SOGIESC human rights defenders cannot access funding for their work as they cannot register and meet operational and accountability guidelines set by donors.

### Case study 5

#### *Eric Gitari v. Nongovernmental Organisations Coordination Board and 4 Others (2015) eKLR*

**Facts:** Right to freedom of association; right to freedom from discrimination

**Issues:** The petitioner's case was that the NGO Coordination Board had declined to register his proposed NGO in violation of his right to freedom of association and freedom from discrimination, whose core objective was the advancement of human rights, including seeking to address the violence and human rights abuses suffered by gay and lesbian people. The Board contended that the refusal to register the organisation was justified.

**Decision:** The refusal by the Minister to register the organisation because its objectives included the protection of sexual minorities was considered an unconstitutional act.

**Potential opportunities:** NHRIs should work with other governmental bodies on ensuring non-discrimination on the basis of SOGIESC, and to facilitate sexuality and gender diversity trainings for public officials.

## Activities



1. What are the specific human rights violations faced by LGBTIQ+ persons in your country?
2. Reflect on the impact of criminalisation on both LGBTIQ+ persons and the wider society; for instance, are there socioeconomic impacts?

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4. *Same Sex Marriage (Prohibition) Act of Nigeria* (2014)
5. *Section 151 of the Criminal Act of Sudan* (1991)
6. *Letsweletse Motshidiemang v Attorney General* MAHGB-000591-16 (High Court of Botswana) Decision of June 11, 2019, [https://www.chr.up.ac.za/images/researchunits/sogje/documents/LM\\_vs\\_The\\_Attorney\\_General\\_judgment\\_June\\_2019\\_complete.pdf](https://www.chr.up.ac.za/images/researchunits/sogje/documents/LM_vs_The_Attorney_General_judgment_June_2019_complete.pdf)
7. *Eric Gitari v Attorney General & Another* (Petition 440 of 2013 [2015] eKLR) <http://kenyalaw.org/caselaw/cases/view/108412/>

## Additional resources

1. *S Namwase & A Jjuuko Protecting the human rights of sexual minorities in contemporary Africa* (2017).
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## MODULE TWO

### AFRICAN NHRIs AND THE PROTECTION OF LGBTIQ+ PERSONS

Module Two assumes foundational knowledge of SOGIESC issues and goes into the core of the Guide by offering practical steps for NHRIs programming.

#### Objectives

##### **Section 5: The function of NHRIs**

Describes the basis of NHRI interventions, the minimum standards required of NHRIs, and the content of their promotion and protection mandates.

##### **Section 6: Implementing Resolution 275 at the national level**

Explains how NHRIs can ensure the implementation of Resolution 275 in their national jurisdictions and identify the key principles of the Resolution to guide SOGIESC programming.

##### **Section 7: Applying Resolution 275 at the African Commission**

Explains how NHRIs can take advantage of African Commission mechanisms to contribute to the implementation of Resolution 275.

#### Section 5

#### The function of NHRIs

##### 5.1 Standards for NHRIs

NHRIs have a core role in the protection and promotion of human rights within their respective States. Recognising the value of NHRIs towards the protection and promotion of human rights, the United Nations Office General Assembly in 1993 adopted the 'Principles Relating to the Status of National Institutions' (the Paris Principles).

The Paris Principles are generally regarded as the principal international standards on the establishment, powers, and collaborations of NHRIs with various stakeholders. According to the Paris Principles, it is the duty of NHRIs to receive, investigate, and resolve complaints on human rights issues. NHRIs also educate, publicise, train, advise the public and the government on human rights.

## 5.2 The role of NHRIs

| Protection  | Promotion                                       |
|---|---|
| Receiving individual complaints   | Media engagement                                |
| Investigations  | Public awareness, education and training        |
| Monitoring and documentation  | Stakeholder dialogue                            |
| Public hearings and inquiries   | Local and international cooperation             |
| Alternative dispute resolution  | Publications such as annual and special reports |
| Seeking redress or remedies through the courts or specialised tribunals | Advising government                             |

Advising government is central to the work of NHRIs. NHRIs should ensure the protection of democratic governance and human rights domestically. They should also take the responsibility of ensuring that States implement their international and regional human rights obligations.

To fulfil these roles, an NHRI must be founded on a broad constitutional or legislative mandate, it must be independent and have autonomy from executive or legislative influence. It also must be provided with the resources and powers needed to fulfil its mandates.

Pluralism in composition and programming is a requirement of NHRIs under the Paris Principles. Specifically, under programming, pluralism means that NHRIs have an obligation to collaborate with CSOs and affected communities to realise their mandate of promotion and protection. It also entails protecting the rights of specific vulnerable groups that are often marginalised and excluded.

Article 26 of the African Charter calls on States to establish NHRIs.

***African Charter, Article 26***

*State parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.*

NHRIs in Africa have the duty of ensuring states implement their international human rights commitments. These include collaborating with the international human rights community to address discrimination and persecution of people living in Africa on the basis of their real or imputed sexual orientation, gender identity and expression, and sex characteristics.

### As key actors of a strong national human rights system:

1. NHRIs act as the bridge between civil society and governments by providing a neutral meeting point that facilitates dialogue and cooperation. NHRIs link the responsibilities of the State to the rights of citizens by providing a normative message on the rights that people should enjoy. Critical is that NHRIs do not have other interests than to protect the public.
2. NHRIs connect national laws to regional and international human rights systems by ensuring that all appropriate actions are taken by the State and their obligations are implemented at the national level.

### Activities



1. Reflect on the extent to which your NHRI complies with the Paris Principles
2. Discuss how the principle of equality and non-discrimination as enunciated in the constitution of your country may be used to ensure equality and non-discrimination for LGBTIQ+ persons.

### References

1. 'Principles Relating to the Status of National Institutions' (the Paris Principles).
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### Additional resources

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2. Asia Pacific Forum 'Part of our Everyday Work: NHRI Guidelines for Mainstreaming SOGISC Work' (2017) available at <https://www.asiapacificforum.net/resources/guidelines-mainstreaming-sexual-orientation-gender-identity-and-sex-characteristics-work/>.

## Section 6

### Implementing Resolution 275 at the national level

#### 6.1 Introduction

Like other regional and United Nations treaties, the African Charter does not explicitly make provisions on the prohibition of violence against persons based on their real or imputed sexual orientation and gender identity and expression and sex characteristics. However, within the mandate of the African Commission to interpret the rights in the Charter, on May 12, 2014, the African Commission adopted Resolution 275 titled *'Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity'*. Resolution 275 draws a strong conclusion that **every person**, including LGBTIQ+ persons, is entitled to equal protection under the African Charter. In particular, Resolution 275 emphasises the non-discrimination principle under Article 2 of the African Charter, which prohibits discrimination of the individual on the basis of distinctions of any kind including race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

Resolution 275 also expresses concern over the continuing acts of violence, discrimination and other human rights violations committed against individuals based on their actual or imputed sexual orientation or gender identity by both State and non-State actors. It further raises concern over the fact that States have failed to investigate and prosecute the perpetrators of these violations and it calls on States to:

- a. ensure that human rights defenders work in an enabling environment that is free of stigma, reprisals or criminal prosecution as a result of their human rights protection activities for sexual and gender minorities;
- b. end all acts of violence and abuse, whether committed by State or non-state actors, targeting persons on the basis of their imputed or real sexual orientation or gender identities;
- c. enact and effectively apply appropriate laws prohibiting and punishing violence targeting persons on the basis of their imputed or real sexual orientation or gender identities;
- d. ensure proper investigation and diligent prosecution of perpetrators; and
- e. establish judicial procedures responsive to the needs of victims.

However, as discussed in section 4, LGBTIQ+ persons in Africa continue to face violence and discrimination. NHRIs have the role of ensuring that States implement existing



international human rights instruments to end violence and discrimination against persons based on their sexual orientation or gender identity. It is, therefore, important that NHRIs develop and implement programmes and activities that are directed at ensuring equality for sexual and gender minorities towards the implementation of Resolution 275.

## 6.2 Key principles of Resolution 275

### *The non-discrimination principle*

NHRIs must ensure that the State takes all the necessary measures guaranteeing the rights of all individuals irrespective of their race, colour, nationality, citizenship, ethnicity, profession, political opinions, sex, sexual orientation, gender identity, gender expression or any other factor that could lead to discrimination against them.

### *The due diligence principle*

NHRIs must ensure that the State and non-state actors refrain from committing acts of violence against persons who identify as LGBTIQ+ either by omission or by action. The NHRI must ensure that the State: acts with due diligence to prevent and investigate acts of violence committed by State and non-State actors, prosecutes and punishes perpetrators, and provides remedies to victims in timely and effective manner.

### *The 'do no harm' principle*

NHRIs must ensure that the State takes legislative and all other necessary measures to guarantee the wellbeing and security of victims and witnesses of violence. It must also ensure that the State takes steps to minimise the negative impact that actions to combat violence and its consequences can have on victims, their families, and witnesses.

## 6.3 Protection mandate

Under their protection mandate, NHRIs in Africa have the duty of ensuring that the responsibilities of States to end all acts of violence under Resolution 275 are implemented.

The UNDP-OHCHR Toolkit for collaboration with National Human Rights Institutions requires NHRIs to ensure 'the establishment or reinforcement of a protection framework, to identify and investigate human rights abuses, to bring those responsible for human rights violations to justice, and to provide effective remedies and redress for victims, within a structural framework of policies, laws and programmes that ensures prevention and enforcement.'

Steps towards achieving this include:

1. Mapping national, local or grassroots organisations that are involved in SOGIESC issues and establishing relationships with them. These include engaging in dialogue and consulting them on and resolving issues that are most pertinent to the national context.
2. Periodically documenting and making a report on cases of violence and discrimination against persons on the basis of their real or perceived sexual orientation and gender identity, in conjunction with SOGIESC organisations.
3. Hearing petitions and investigating cases of violence and discrimination faced by persons on the basis of their real or imputed sexual orientation and gender identity to identify and address root causes of violence and discrimination.
4. Implementing national measures that contribute to the protection of all persons against SOGIESC-based violence and discrimination, in conjunction with the government.
5. Creating and updating a database of existing and pending SOGIESC-related cases.
6. Implementing a monitoring and evaluation programme for the SOGIESC programs and activities.

#### 6.4 Promotion mandate

NHRIs in Africa also have the duty of creating awareness of Resolution 275 by fostering a public environment where positive social attitudes towards LGBTIQ+ persons ensure freedom from violence. Steps towards promoting the objectives of Resolution 275 include:

- developing or adopting a baseline survey of social attitudes towards the rights of LGBTIQ+ people and raising awareness on how to combat SOGIESC-based violence and discrimination;
- designing and developing an awareness programme on Resolution 275, raising consciousness and creating awareness towards the prevention of SOGIESC-based violence and discrimination, including through the use of multimedia on social media, terrestrial radio and television, and posters/brochures;
- incorporating Resolution 275 into training, outreach and advocacy programmes. This includes conducting and supporting training programmes on ending SOGIESC-based discrimination and violence for NHRI staff, police agencies, prosecutors, and judicial officers;
- encouraging national dialogue by engaging government, law enforcement agencies, CSOs, academic institutions and other stakeholders on Resolution 275, through workshops and community dialogues.

## 6.5 Examples of Activities undertaken by African NHRIs

- Kenya National Commission on Human Rights joined as *amicus curiae* in a strategic litigation case to decriminalise consensual same sex conduct in Kenya. The KNCHR's complaints data disaggregates data in a non-binary manner.
- Uganda Human Rights Commission has trained more than 60 police officers on the need to protect LGBTIQ+ persons. This has significantly reduced violence against LGBTIQ+ persons in Uganda by the police.
- The Commissioner for Commission on Human Rights and Administrative Justice-Ghana has articulated on several media platforms that their protective mandate also extends to LGBTIQ+ Ghanaians.
- The South African Human Rights Commission developed an institutional position paper on the protection of LGBTIQ+ South Africans. It also intervenes, on an ongoing basis, through judicial mechanisms on behalf of LGBTIQ+ persons.
- The Malawi Human Rights Commission collaborated with CSOs in conducting radio programs on the challenges facing LGBTIQ+ refugees in Malawi upon the adoption of 2019 as the year of *Refugees, Returnees and Internally Displaced Persons* by the African Union.

### Activities



1. Design an awareness-raising campaign for your national human rights institution explaining that LGBTIQ+ persons too have human dignity and should be treated as such by society. What challenges will you encounter during the awareness-raising campaign? What innovations will you employ?
2. Have organisations been denied registration in your country because of advocating for issues of sexual orientation and gender identity? How did your national human rights institution respond to the situation? If the situation happens again in future, how else should your institution respond?

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## Additional resources

1. NANHRI Project Assessment Report, The Role of NHRIs in Implementing Res. 275: <https://www.nanhri.org/2019/12/13/nanhri-sexual-orientation-gender-identity-expression-project-assessment-report/#>

## Section 7

### Applying Resolution 275 at the African Commission

#### 7.1 Introduction

The African Charter along with its protocols remains the most important human rights normative framework in Africa. The African Commission has the responsibility of promoting and protecting human and peoples' rights in Africa. The mandate of the African Commission also extends to 'encouraging' the work of NHRIs. Consequently, NHRIs that conform to the Paris Principles enjoy affiliate status with the African Commission. This status means that NHRIs can be present at and participate at sessions of the African Commission.

In relation to SOGIESC issues, NHRIs can take advantage of their affiliate status by engaging with the work of the Commission. Some of the opportunities that NHRIs can take advantage of are discussed in the following subsections.

#### 7.2 Engaging in drafting and presentation of state reports

##### ***African Charter, Article 62***

*Each party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the present Charter.*

Article 62 of the African Charter directs States to submit a biennial report on the measures they have taken to give effects to the rights in the African Charter. This provision has evolved a reporting procedure where representatives of the States and members of the African Commission have an opportunity to discuss human rights issues that are pertinent to the State. The African Commission has the role of considering the State reports and issuing concluding observations to the States. The process offers an opportunity for the Commission to gain more insight into the domestic issues and challenges in the implementation of the African Charter and for the States to gain a better understanding of how the rights in the African Charter are interpreted and how they can be best effected.

For instance, NHRIs can advise the State on the contents of the report and encourage the inclusion of measures taken to end violence and discrimination against citizens on the basis of actual or perceived sexual orientation and gender identity. To this end, NHRIs can provide relevant information, including documentation, research output, policy steps, petition outcomes, and other material on the issues affecting LGBTIQ+ persons that will improve the content of the state report.

NHRIs can also ensure that organisations working on SOGIESC-related issues have the opportunity to review and contribute to the contents of the State report on the extent to which Resolution 275 has been implemented in their communities. Where the State is not responsive or cooperative on the inclusion of SOGIESC-related issues in the elaboration of the report, NHRIs can prepare their own shadow report for submission to the African Commission, detailing the extent to which Resolution 275 has been implemented with the national jurisdiction.

During the consideration of the State reports by the African Commission, NHRIs can engage with the commissioners and suggest that they ask the State questions on the implementation of Resolution 275. NHRIs may also draft potential recommendations and engage the commissioners on the inclusion in the Concluding Observations.

### 7.3 Implementation of concluding observations/decisions

After the consideration of a State report, the African Commission issues its concluding observations, which is a summary of the commission's positive findings from the State report, a list of the areas of concern, and recommendations to the State.

In instances where the African Commission has commented on violence and discrimination against LGBTIQ+ persons in their concluding observations, NHRIs have an important role to play in ensuring that the recommendations of the African Commission are followed by the State.

This can be done by:

- i. advising and collaborating with the government on the implementation of the concluding observations;
- ii. following up on and monitoring the measures agreed on or taken by the government to gauge the extent of implementation and
- iii. reporting to the African Commission on the implementation of the concluding observations.

### 7.4 Keeping records of human rights violations

The African Commission has special mechanisms to aid its work. The special mechanisms include the appointment of Special Rapporteurs and Working Groups. These two mechanisms are used by the Commission to obtain information on issues within the mandate of the African Commission, including by conducting on-site visits to the relevant countries.

However, there is a continuing scarcity of information on the extent of violations affecting LGBTIQ+ persons in Africa. Much of the violence and discrimination that is based on real or imputed sexual orientation and gender identity is not reported. In addition to the lack of individual communications on LGBTIQ+ issues, this means that the extent of violence and discrimination against LGBTIQ+ persons is difficult to establish.

In the absence of sufficient reports on the violations faced by LGBTIQ+ persons, these special mechanisms may not be activated. This in turn means the African Commission will be unable to adequately engage States on SOGIESC issues within their jurisdictions.

NHRIs can improve and increase the information available to the African Commission by documenting and keeping records of SOGIESC-based violence and discrimination in their national jurisdictions. The consistent availability of records may lead to the emergence of in-country special mechanisms or promotional visits on SOGIESC rights.

### Activities



1. What data are collected in your country on rights violations on the basis of sexual orientation and gender identity? How accurate do you think this data are? What limitations might there be in data collection of this kind? What does the available data tell us about patterns of violations? How can we use these data to better protect LGBTIQ+ people?
2. Find and review the latest State report submitted by the state and the African Commission's concluding observations on this report. Was there any reference to SOGIESC issues? In light of your answer, what is the potential role of your NHRI?

### References

1. *Conclusions of the International Roundtable of the Role of NHRIs and Treaty Bodies, held in Berlin in December (2006).*
2. *R Murray & E Mottershaw 'Mechanisms for the Implementation of Decisions of the African Commission on Human and Peoples' Rights' (2014) 36 Human Rights Quarterly 360.*

## ANNEX 1 – RESOLUTION 275

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

*The African Commission on Human and Peoples' Rights (the African Commission), meeting at its 55<sup>th</sup> Ordinary Session held in Luanda, Angola, from April 28 to May 12, 2014:*

**Recalling** that Article 2 of the African Charter on Human and Peoples' Rights (the African Charter) prohibits discrimination of the individual on the basis of distinctions of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status;

**Further recalling** that Article 3 of the African Charter entitles every individual to equal protection of the law;

**Noting** that Articles 4 and 5 of the African Charter entitle every individual to respect of their life and the integrity of their person, and prohibit torture and other cruel, inhuman and degrading treatment or punishment;

**Alarmed** that acts of violence, discrimination and other human rights violations continue to be committed on individuals in many parts of Africa because of their actual or imputed sexual orientation or gender identity;

**Noting** that such violence includes 'corrective' rape, physical assaults, torture, murder, arbitrary arrests, detentions, extra-judicial killings and executions, forced disappearances, extortion and blackmail;

**Further alarmed** at the incidence of violence and human rights violations and abuses by State and non-State actors targeting human rights defenders and civil society organisations working on issues of sexual orientation or gender identity in Africa;



**Deeply disturbed** by the failure of law enforcement agencies to diligently investigate and prosecute perpetrators of violence and other human rights violations targeting persons on the basis of their imputed or real sexual orientation or gender identity;

1. Condemns the increasing incidence of violence and other human rights violations, including murder, rape, assault, arbitrary imprisonment and other forms of persecution of persons on the basis of their imputed or real sexual orientation or gender identity;
2. Specifically condemns the situation of systematic attacks by State and nonstate actors against persons on the basis of their imputed or real sexual orientation or gender identity;
3. Calls on State Parties to ensure that human rights defenders work in an enabling environment that is free of stigma, reprisals or criminal prosecution as a result of their human rights protection activities, including the rights of sexual minorities; and
4. Strongly urges States 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 on the basis of 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.

**Adopted at the 55<sup>th</sup> Ordinary Session of the African Commission on Human and Peoples' Rights in Luanda, Angola, April 28 to May 12, 2014**

Source: [https://www.achpr.org/public/Document/file/English/Resolutions\\_Codified%201988-2017\\_Vol%201\\_ENG.pdf](https://www.achpr.org/public/Document/file/English/Resolutions_Codified%201988-2017_Vol%201_ENG.pdf)

## ANNEX 2: LIST OF CORE HUMAN RIGHTS TREATIES

### Global Human Rights System

| Treaty   | Date         | Monitoring Body   |
|--|--------------|---|
| International Convention on the Elimination of All Forms of Racial Discrimination  | Dec 21, 1965 | Committee on the Elimination of all forms of Racial Discrimination        |
| International Covenant on Civil and Political Rights   | Dec 16, 1966 | Human Rights Committee  |
| International Covenant on Economic, Social and Cultural Rights   | Dec 16, 1966 | Committee on Economic, Social and Cultural Rights                         |
| Convention on the Elimination of All Forms of Discrimination against Women   | Dec 18, 1979 | Committee on the Elimination of all Forms of Discrimination against Women |
| Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment   | Dec 10, 1984 | Committee against Torture   |
| Convention on the Rights of the Child  | Nov 20, 1989 | Committee on the Rights of the Child                                      |
| International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families                      | Dec 18, 1990 | Committee on Migrant Workers  |
| International Convention for the Protection of All Persons from Enforced Disappearance   | Dec 20, 2006 | Committee on Enforced Disappearances                                      |
| Convention on the Rights of Persons with Disabilities  | Dec 13, 2006 | Committee on the on the Rights of Persons with Disabilities               |
| Optional Protocol to the Covenant on Economic, Social and Cultural Rights  | Dec 10, 2008 | Committee on Economic, Social and Cultural Rights                         |
| Optional Protocol to the International Covenant on Civil and Political Rights  | Dec 16, 1966 | Human Rights Committee  |
| Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty | Dec 15, 1989 | Human Rights Committee  |

|  |              |   |
|--|--------------|---|
| Optional Protocol to the Convention on the Elimination of Discrimination against Women   | Dec 10, 1999 | Committee on the Elimination of all Forms of Discrimination against Women |
| Optional protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict                  | May 25, 2000 | Committee on the Rights of the Child                                      |
| Optional protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography | May 25, 2000 | Committee on the Rights of the Child                                      |
| Optional Protocol to the Convention on the Rights of the Child on a communications procedure                                     | Apr 14, 2014 | Committee on the Rights of the Child                                      |
| Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment                | Dec 18, 2002 | Subcommittee on Prevention of Torture                                     |
| Optional Protocol to the Convention on the Rights of Persons with Disabilities   | Dec 12, 2006 | Committee on the on the Rights of Persons with Disabilities               |

## African Human Rights System

| Treaty  | Date of adoption   | Date of entry into force |
|---|--------------------|--------------------------|
| African Charter on Human and Peoples' Rights  | June 01, 1981      | October 21, 1986         |
| Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa                             | July 01, 2003      | November 25, 2005        |
| African Charter on the Rights and Welfare of the Child  | July 01, 1990      | November 29, 1999        |
| OAU Convention Governing the Specific Aspects of Refugee Problems in Africa   | September 10, 1969 | January 20,              |
| African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) | October 23, 2009   | December 06, 2012        |
| Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons                               | January 31, 2016   | -                        |
| Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa         | January 29, 2018   | -                        |

Sources: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>;  
<https://au.int/en/treaties/>



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