



# ***UNEQUAL* JUSTICE**

Accountability for  
Torture Against LGBTIQ+  
Persons in Africa | **2022**

## **REDRESS**

Ending torture, seeking justice for survivors

# ‘Where love is Illegal’ **PHOTOS**

The photographs in this report were taken as part of a multi-year global project, “Where love is illegal”, led by Robin Hammond and his non-profit organisation Witness Change.

Where Love is Illegal documents and captures personal testimonies of survival from the LGBTIQ+ community around the world, voices rarely heard, with the aim to “transform opinions, open minds, and change policies.”

The stories in this report depict testimonies from LGBTIQ+ persons who have suffered violence and discrimination in different countries in Africa.

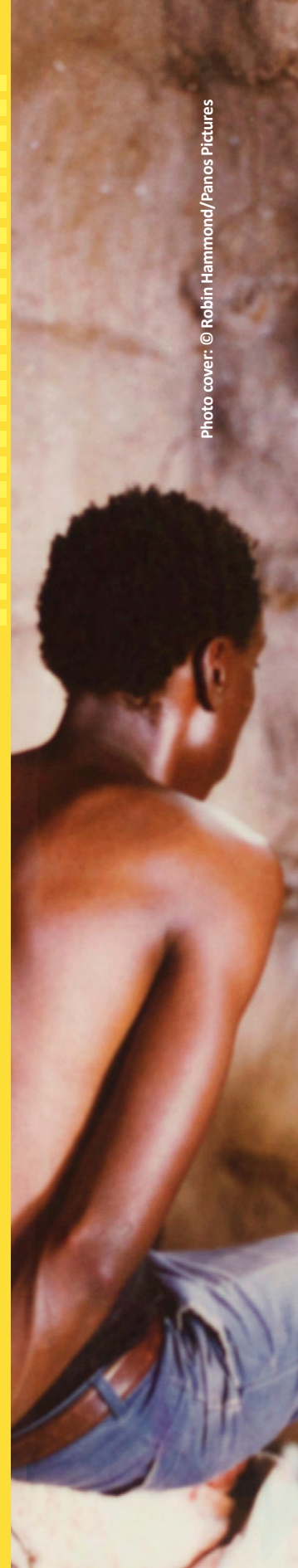
# From Abduction **TO EXILE**

Gregory (not his real name), a Ugandan refugee living in the Kakuma refugee camp in Kenya, was forced to leave his community after he and his partner were witnessed having sex.

“

**My uncle was angry about it. He decided to abduct me, with the help of some of my family members. They took me to a mud house in the village for two days. I was screaming for help, mercy. A cattle keeper heard me, broke in to rescue me. I ran away the same evening. I had no other option, but to cross into Kenya.**

”







# FOREWORD

It is often said that non-discrimination, participation, empowerment, and accountability are essential components of a human rights-based approach; every term describing a process that aims to deconstruct structural drivers of discrimination, exclusion, victimisation, and impunity. Within this context, the increasing visibility of peoples, communities, and persons as they identify as, or are perceived to be lesbian, gay, bisexual, trans or otherwise gender diverse, and intersex, has led to the recognition of their exposure to risk and the profound damage that they suffer in every corner of the world based on their sexual orientation and/or gender identity.

Surveying an ample sampling of legal, cultural, and political settings that comprise over 450 million persons, some of the youngest populations in the world, and representation of a vast array of social, political, and religious contexts, this report sheds light on some of the images created by this process of recognition as seen from the distinct vantage point of the global struggle against torture and ill-treatment. Moreover, the examples provided in the report are consistent with patterns and tendencies observed by my mandate throughout the African continent.

The resulting images are sobering. There are some indications of progress through decriminalisation (e.g., Angola, Botswana, Mozambique); sadly, at the time of inception of this report my mandate has been nonetheless compelled to express deep concern in relation to some of the surveyed countries because of deeply discriminatory draft legislation (e.g., Ghana), obstacles to justice and to the work of human rights defenders (e.g., Kenya, Mozambique), and acts of violence and intimidation to communities (e.g., Uganda). Indeed, as the report clearly documents, even when there is a robust *corpus iuris* in international human rights law for the absolute prohibition of torture – which in many cases has percolated to the domestic legislation of the countries surveyed – the applicability of these protections in the case of lesbian, gay, bisexual, trans or otherwise gender diverse, and intersex persons is severely hampered by stigma and, in many cases, by State-sanctioned legislation that criminalises sexual orientation and/or gender identity and creates environments prone to ill-treatment and torture. A clear-cut example of the way this scourge impacts the everyday life of lesbian wom-



© UN Photo by Mark Garten

## Víctor Madrigal-Borloz

UN Independent Expert on sexual orientation and gender identity.

en is rape heinously called ‘corrective’, oftentimes organised by family members; of gay men, through the perpetration of forced anal examinations; and of trans persons subjected to indignity, mutilation and in many cases death. The unwillingness of authorities to investigate these crimes, perpetrated in many cases by members of their own State institutions, creates the sort of cycles of impunity that aim at extinguishing empowerment and, ultimately, hope.

International human rights law offers some of the tools necessary to break these cycles and complement processes such as social inclusion, political recognition, and ethical value-setting. The transformational power of access to justice, be it domestic, regional, or global, is amply documented through examples of good and best practice, as are processes of legal reform to decolonise legislation that criminalises sexual orientation and/or gender identity, and the adoption of public policy based on evidence of violence and discrimination. These are the threads that tie together the evidence gathered with principles and models of reparation, including its essential component of non-repetition. In that sense, the present report is an extremely important contribution to the knowledge stock available to the international community for its formulation of public and foreign policy, developmental and cooperation activities, and the international goals of peace and security; in other words, the ideal of effective implementation of human rights-based approaches in the principal points of the agenda common to all humanity.

Washington, DC, 8 April 2022

# WHO WE ARE

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**REDRESS** is an international human rights organisation that delivers justice and reparation for survivors of torture, challenges impunity for perpetrators and advocates for legal and policy reforms to combat torture and provide effective reparations. As part of its Discrimination programme, we work to increase accountability for discriminatory torture perpetrated against LGBTIQ+ people in African jurisdictions.

## ACKNOWLEDGEMENTS

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**REDRESS** would like to express its gratitude to various organisations and individuals for their contribution to this report. In particular we would like to thank the law firm **Allen & Overy LLP** for their invaluable support for our project on Justice for LGBTIQ+ torture in Africa, as well as on the pro bono work conducting research, drafting and editing of this report. Those working on the report at REDRESS included Chris Esdaile, Legal Advisor, Renata Politi, Legal Officer, and Alix Vadot, Legal Fellow. We also thank the **UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity**, Victor Madrigal-Borloz, for sharing his expertise and contributing the foreword to this report. We are also grateful for the support of other practitioners and experts in the region, including our colleagues from the **Centre for Human Rights at the University of Pretoria** for organising a roundtable discussion that informed some of the views contained in this report, and all those who contributed to that insightful discussion. REDRESS bears sole responsibility for any errors contained in this report. Finally, our gratitude goes to our four partner organisations for their important input and experience on the issues researched: Access Chapter 2 (AC2 – South Africa), Centre for the Development of People (CEDEP – Malawi), National Gay & Lesbian Human Rights Commission (NGLHRC – Kenya), and Sexual Minorities Uganda (SMUG – Uganda).

ALLEN & OVERY



# TERMINOLOGY

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<b><u>Sex</u></b>	refers to physical or biological characteristics including sexual anatomy, reproductive organs, hormonal patterns and/or chromosomal patterns assigned to a person at birth.
<b><u>Sexual orientation</u></b>	describes a pattern of physical, romantic, emotional and/or relational attraction – or lack of attraction – to people of a particular gender, or to people regardless of their gender.
<b><u>Gender</u></b>	refers to the socially-constructed set of expectations, behaviours, roles and characteristics attributed to people on the basis of their sex. This notably includes women (femininity) and men (masculinity) among other identities.
<b><u>Gender identity</u></b>	deeply felt and experienced personal sense of one's own gender, irrespective of the sex assigned at birth; for many people, gender identity aligns with assigned sex but this is not always true, for example for transgender people.
<b><u>Gender expression</u></b>	refers to the different aspects of how one person is manifesting their gender identity through appearance, behaviour, language, interests, roles, and other ways that can be externally perceived.
<b><u>Lesbian</u></b>	people of female sex and/or gender who are emotionally, romantically, sexually and relationally attracted to people of female sex/gender.
<b><u>Gay</u></b>	people of male sex and/or gender who are emotionally, romantically sexually and relationally attracted to people of male sex/gender.
<b><u>Bisexual</u></b>	people who are emotionally, romantically, sexually and relationally attracted to a variety of sex and gender identities, though not necessarily at the same time and not necessarily to the same degree.
<b><u>Transgender</u></b>	people whose sense of their own gender differs from the sex they were assigned at birth, some of whom seek surgery or take hormones to align their body with their gender identity.
<b><u>Intersex</u></b>	people born with sex characteristics that do not fit the typical definitions for male or female bodies, which may be apparent at birth or emerge later in life. These individuals may identify as intersex, male, female, transgender, non-binary or other.
<b><u>Queer</u></b>	people whose gender, gender expression and/or sexuality do not conform to dominant expectations and may fit into one or more definitions of the LGBTIQ+ spectrum. <sup>1</sup>

In this report, we refer to the community of individuals encompassed in these (and other) definitions as LGBTIQ+ (Lesbian, Gay, Bisexual, Transgender, Intersex, Queer, and other gender and sexual identities).

All definitions above are borrowed and adapted from a combination of sources.<sup>2</sup> We note that these definitions may sometimes be limiting, and that individuals may choose to identify with multiple or none of these terms, but in this report we will use these terms for clarity.

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<sup>1</sup> Although historically a derogatory (English) term for LGBTIQ+ people, the LGBTIQ+ community has now reclaimed the word “Queer”.

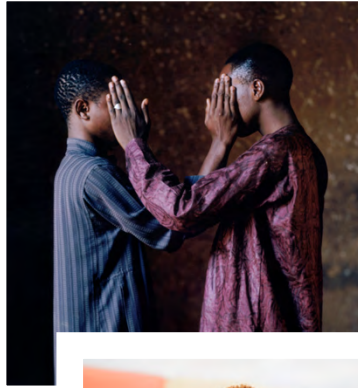
<sup>2</sup> United Nations (UN), *Living Free and Equal: What States are Doing to Tackle Violence and Discrimination against Lesbian, Gay, bisexual, Transgender and Intersex People*, 2016, UN Doc. HR/PUB/16/3, pp. 18-19; Coalition of African Lesbians (CAL), African Men for Sexual Health and Rights (AMSHer), *Violence Based on Perceived or Real Sexual Orientation and Gender Identity in Africa*, 2013; See also, Come Forward, Empowering and Supporting Victims of Anti-LGBT Hate Crimes, *Working with Victims of Anti-LGBT Hate Crimes: A Practical Handbook*, pp. 14-15.

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# EXECUTIVE SUMMARY

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Over recent decades, there has been some progress in the recognition, acceptance, and protection of individuals who identify as LGBTIQ+ under domestic laws in African States.

However, many States in Africa continue to afford little to no legal protection to LGBTIQ+ individuals, whilst others criminalise same-sex conduct and fail to recognise the full spectrum of sexual orientations and gender identities. In recent years, in some African States, there has even been a resurgence in legislation and legislative proposals which target, rather than protect, LGBTIQ+ individuals. These laws, and the anti-LGBTIQ+ sentiment that they perpetuate, enable violence, directly discriminate against LGBTIQ+ individuals, and result in those individuals being disproportionately affected by incidences of violence.

Pursuant to international law, violence committed against individuals on the basis of their actual or perceived sexual orientation or gender identity can (and often does) amount to torture. States are required to prohibit and criminalise torture under domestic law, and render it punishable with penalties proportionate to the gravity of the crime. Additionally, States must take measures to prevent torture from occurring, investigate allegations of torture, and provide redress to victims. This report offers an analysis of the gaps in national legal frameworks that weaken the protection against torture of LGBTIQ+ individuals. For example, the gaps in the legal provisions of States on the prohibition of *refoulement* results in greater vulnerability for LGBTIQ+ persons fleeing discriminatory practices and violence in their home countries.

As such, violence against LGBTIQ+ individuals perpetrated by State and non-State actors remains prevalent in many African States, and impunity for such violence persists. As documented in the report, these forms of violence include, among others, arbitrary detention, physical attacks by State actors and other forms of harassment and abuse, violence by non-State actors tolerated and supported by the State, the use of conversion therapy and ‘corrective’ rapes, and violence against refugees and migrants.

In many African States, discriminatory laws and attitudes are a scar left by colonial powers. Some States, such as Angola, Botswana and Mozambique have sought to extricate themselves from these colonial-era laws. However, other States continue to grapple with the legacy of imported LGBTIQ+ discrimination, including Kenya, whose High Court held in 2019 that a provision of its British-era penal code criminalising same-sex conduct did not violate the Constitution.

Even in States with laws aimed at protecting LGBTIQ+ individuals, progress is often fettered by States’ failure to adequately implement and observe those laws in practice. Violence perpetrated by State actors, for example through arbitrary arrests, extortion, and harassment, demonstrates that there is often little practical protection and creates a culture of mistrust in State authorities. Further, the effectiveness of these laws is stifled by the inadequacy and/or failure of State authorities to ensure accountability for violence committed against LGBTIQ+ individuals (by both State and non-State actors) through their reluctance to document, investigate, or prosecute such incidents, or otherwise provide redress to victims.

Accountability for LGBTIQ+ violence in the States researched is either absent, or severely limited. The reasons for this include inadequate legal frameworks, absence of political will and ongoing institutional discrimination, lack of independent complaints mechanisms and investigative bodies, lack of appropriate training of State officials – particularly law enforcement, prosecutors, and members of the judiciary – and absence of gender sensitive protocols on the effective investigation of such violence. Additional factors promoting impunity include fear of harassment and reprisals against LGBTIQ+ individuals who report violence, as well as attacks against the organisations supporting them.

The report outlines specific proposals on the way forward to improve this context.



## RECOMMENDATIONS

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In view of the findings and challenges noted further in this report, the following recommendations should be considered by relevant stakeholders in the African region, in order to advance the legal protection of LGBTIQ+ persons from violence, and increase accountability for such violence, including torture and other ill-treatment.

### 1. Recommendations to States and their institutions

#### 1.1. Legislative reforms

States should:

- a) Conduct a review of the current legal framework and repeal laws and specific provisions that directly or indirectly discriminate against LGBTIQ+ persons, and/or encourage or legitimise violence based on sexual orientation and gender identity. Specifically, States are encouraged to decriminalise same-sex conduct.
- b) Amend national legislation to improve legal protection for LGBTIQ+ persons, including by adopting a comprehensive anti-discrimination law with specific reference to discrimination on grounds of actual





© David Rose/Panos Pictures  
A lesbian woman holds a rainbow flag at Durban Gay Pride in South Africa.

or perceived sexual orientation and gender identity.

c) Amend national legislation to adequately address LGBTIQ+ violence, including by criminalising hate speech, and prohibiting forced medical treatment such as conversion therapy practices and forced anal examinations.

d) Ratify the United Nations (UN) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) and its Optional Protocol (OPCAT) without reservations, and make a specific declaration under Article 22 of UNCAT to recognise the competence of the UN Committee against Torture (CAT) to receive and consider communications from or on behalf of individuals subject to the State's jurisdiction who claim to be victims of a violation of UNCAT by a State Party.

e) Where these are not already in place, introduce a stand-alone anti-torture law or amend existing national legislation to incorporate obligations under UNCAT, which includes:

- i. The criminalisation of torture as a separate offence, as defined under Article 1 of UNCAT, with special attention to the discriminatory purpose.
- ii. The absolute prohibition of *refoulement*.
- iii. Provision for an independent monitoring body, such as a national preventive mechanism, which shall pay particular attention to the treatment of vulnerable groups in places of detention, including LGBTIQ+ persons.
- iv. Provision for an independent mechanism for complaints and investigations into allegations of torture and other human rights violations, including those perpetrated against LGBTIQ+ persons.
- v. Provision for a mechanism to ensure victims' access to redress, including rehabilitation and compensation.

## 1.2. Policy reforms

States should:

a) Through national human rights institutions and/or law enforcement agencies, collate disaggregated data on LGBTIQ+ violence and document reports of violence against the LGBTIQ+ community by State and non-State actors.

b) Develop and adopt a best practices protocol and/or guidelines into the effective investigation of allegations of LGBTIQ+ violence, based on international standards and following consultation with relevant stakeholders, including civil society organisations.

c) Strengthen efforts to implement anti-torture standards already incorporated into the domestic legal framework, and to implement recommendations made by UN bodies, including CAT, the UN Special Rapporteur on Torture, and the UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (UN Independent Expert on SOGI).

d) Improve efforts to effectively protect LGBTIQ+ defenders and activists and ensure that LGBTIQ+ organisations and individuals can exercise their rights to freedom of expression, association, and peaceful assembly in safety without discrimination, including by supporting victims of discriminatory torture and other violations.

e) Acknowledge increased vulnerability of specific groups, such as LGBTIQ+ asylum seekers and migrants, and strengthen efforts to prevent and address instances of violence and discrimination against them.

f) Encourage lawyers, prosecutors and judges to make use of existing anti-torture legislation and/or criminal laws to prosecute violence perpetrated against LGBTIQ+ persons, and characterise it as torture where relevant.

g) Encourage State representatives and officials to issue public statements in support of the protection of LGBTIQ+ persons, and publicly condemn violence based on sexual orientation and gender identity perpetrated by State and non-State actors in Africa.

h) Encourage State officials, including those working in national justice systems, to develop an understanding of LGBTIQ+ violence as a form of 'torture' based on international human rights standards, with a view to consider the gravity of the violence suffered by members of the LGBTIQ+ community and to craft appropriate measures to respond to it.

### **1.3. Educational initiatives**

States should:

a) Provide an ongoing and rolling program of obligatory training on LGBTIQ+ issues and anti-torture standards (including in relation to LGBTIQ+ violence) for law enforcement officials and other State institutions, including national human rights institutions, police and prison officers, border guards, immigration officers, medical personnel, prosecutors, and members of the judiciary. Such training initiatives should make efforts to align law enforcement agen-

cies' strategies with the African Commission on Human and Peoples' Rights' (ACHPR) Resolution 275 and include modules on due diligence on investigations and judicial processes into allegations of torture or other forms of violence against LGBTIQ+ persons, based on international human rights standards.

b) Incorporate comprehensive education on issues around sexual orientation and gender identity, in line with Principle 16 of the Yogyakarta Principles, covering non-discrimination, equality and gender roles, and sexual diversity, into the school curriculum, with a view to raise awareness and promote cultural change and acceptance, and eradicate practices that may legitimise or exacerbate violence and discrimination against LGBTIQ+ persons.

c) Conduct public information campaigns on the human rights of LGBTIQ+ persons.

d) Consult with civil society organisations working on these issues and/or regional and international experts prior to and during the development of such educational initiatives and campaigns.

## **2. Recommendations to the African Commission on Human and Peoples' Rights**

The ACHPR is encouraged to:

a) Within the limitations imposed by the current context in the region, exercise its functions and mandate to advance the protection against, and prevention of, discriminatory torture and ill-treatment against the LGBTIQ+ community in Africa. In this regard, the ACHPR might strengthen cooperation and coordination with other regional and international human rights bodies working on this area with a view to exchange views on challenges and best practices.

b) Create a specialised body which includes a focus on violence against LGBTIQ+ persons, which would adopt a proactive role towards the promotion and effective implementation of ACHPR Resolution 275, and engage with governments on such issues, for example through on-site visits or other special mechanisms.

c) Collate disaggregated data and document reports of violence against the LGBTIQ+ community across the region, and require States to include in their periodic reports information on such issues.

d) Increase efforts to engage with civil society organisations working on the protection of the LGBTIQ+ community, including by granting observer status to such non-governmental organisations.

e) Consider developing and adopting a best practices protocol and/or guidelines into investigations of allegations of LGBTIQ+ violence, based on international human rights standards and after consultation with civil society organisations and relevant regional and international experts.

f) Develop an understanding of LGBTIQ+ violence as a form of torture based on international human rights standards, with a view to consider the gravity of the violence suffered by members of the LGBTIQ+ community and to craft appropriate measures to respond to it.

g) Issue public statements in support of the protection of LGBTIQ+ persons, and publicly condemn violence based on sexual orientation and gender identity perpetrated by State and non-State actors in Africa.

h) Conduct public information campaigns on the human rights of LGBTIQ+ persons, in partnership with civil society organisations that work on LGBTIQ+ issues.

### 3. Recommendations to civil society

Civil society organisations may consider measures to develop and/or continue:

a) Engaging with State institutions, when this is possible, and training policymakers on LGBTIQ+ rights to increase their knowledge and awareness of relevant issues.

b) Developing an understanding of LGBTIQ+ violence as a form of torture based on international human rights standards, with a view to consider the gravity of the violence suffered by members of the LGBTIQ+ community and to craft appropriate measures to respond to it.

c) Conducting public information campaigns on LGBTIQ+ violence and human rights awareness raising for the LGBTIQ+ community, and, by doing so, increasing the capacity of the community to deal with LGBTIQ+ violence; and promoting accountability (where possible) at the domestic level for LGBTIQ+ violence.

d) Using relevant regional and international human rights mechanisms, to engage with the ACHPR and UN bodies on LGBTIQ+ issues, for example, by making submissions to the Universal Periodic Review and CAT prior to a State's examination.

e) Strengthening solidarity networks within the LGBTIQ+ movement at the regional level and taking stock of experiences in other regions.

f) Encouraging civic engagement among LGBTIQ+ persons including their participation in politics and public life.





## Slapped and **FLOGGED**

In 2013, Nigerian citizens Ishmel (left) and Gabriel (right) (not their real names) were taken from their homes by a vigilante group aligned to Bauchi City Sharia Courts who suspected them of being gay. They slapped and beat them with electric cables. They were held in prison for over 40 days and made several appearances at the Sharia Court. They were lashed 15 times with a horse whip but then acquitted of committing homosexual acts as there were no witnesses to the crime. Sodomy was punishable by death under Sharia Law but required four witnesses.







# INTRODUCTION

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African States afford varying levels of protection to individuals on the basis of their actual or perceived sexual orientation or gender identity. In spite of the varying domestic contexts, a common trait is the fact that individuals who identify as LGBTIQ+ are disproportionately affected by incidences of violence and other human rights violations.

In Resolution 275, the ACHPR condemned the increasing incidences of violence and human rights violations perpetrated by State and non-State actors against LGBTIQ+ individuals, and called on States Parties to the African Charter on Human and Peoples' Rights (African Charter) to end all acts of violence and abuse.

Violence against LGBTIQ+ persons can (and often does) amount to torture, in breach of States' obligations under international law. The prohibition against torture and other cruel, inhuman or degrading treatment or punishment (CIDTP) is accepted as an absolute and non-derogable human right enshrined in various treaties monitored by the UN, including UNCAT and OPCAT, as well as in regional treaties such as the African Charter and soft law instruments such as the Robben Island Guidelines for the Prohibition and Protection of Torture in Africa (RIG). The absolute nature of the prohibition of torture and CIDTP means that all States, regardless of whether they have ratified the relevant treaties, are bound by it in all circumstances. The prohibition unequivocally extends to anyone, regardless of their actual or perceived sexual orientation or gender identity.

Despite the strong international legal protection, in practice violence against the LGBTIQ+ community is often ignored or considered a minor offence not characterised as

torture or CIDTP. Such violence is also rarely investigated and the impunity for these crimes remains high, which in turn perpetuates discriminatory violence against LGBTIQ+ persons.

The purpose of this report is to explore the main challenges of ensuring accountability for torture against LGBTIQ+ persons in Africa. The report examines the legal protections against violence specifically afforded to LGBTIQ+ persons by specific African States, and the responses to such violence. The contexts of these States vary. In some there are no protections, in some there are gaps in those protections and failures to respond to violence, and in some the State criminalises individual expression of sexual orientation or gender identity. Further, this report assesses these protections and responses to violence not solely on the basis of their codification or legal robustness, but rather by the extent of their enforcement, societal perceptions towards sexual orientation and gender identity, and the willingness of State authorities to properly document, investigate, prosecute, and punish instances of violence against LGBTIQ+ individuals.

This report is based on desk-based research and input gathered through discussions with experts, REDRESS' partners, and other local organisations, carried out within the framework of REDRESS' Justice for LGBTIQ+ Torture in Africa Project.<sup>3</sup> In particular, the research focused on the following African States: Algeria, Angola, Botswana, the Democratic Republic of the Congo (DRC), Ghana, Kenya, Malawi, Morocco, Mozambique, South Africa, and Uganda. This selection of States enables an assessment of a range of jurisdictions from various African regions, with different legal systems and levels of protection and hostility towards LGBTIQ+ persons.

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3 Read more here: [REDRESS, Justice for LGBTIQ+ Torture in Africa](#).

## **This report considers:**


- a. National legislation against torture and its conformity to international law [\[section I\]](#);
- b. National legislation protecting or discriminating against LGBTIQ+ persons, and progressive and regressive trends in national laws and case law, including decriminalisation of individual expression of sexual orientation or gender identity [\[section II\]](#);
- c. Forms of violence perpetrated against LGBTIQ+ individuals (LGBTIQ+ violence) [\[section III\]](#); and
- d. Challenges faced in documenting, investigating, and addressing LGBTIQ+ violence, which ultimately lead to little or no accountability [\[section IV\]](#).

In view of the findings of the report, the previous section on [\[Recommendations\]](#) outlined specific proposals for legislative and policy reforms to various stakeholders who play a role in the protection of LGBTIQ+ individuals and in accountability efforts for LGBTIQ+ violence in African States.









**I will give you a scaring sentence so that the public be protected from people like you, so that we are not tempted to emulate this horrendous example.**

## Sent to prison **'TO PROTECT SOCIETY'**

Steven Monjeza Soko and Tiwonge Chimbalanga (featured left) were arrested in Malawi in 2009 and charged with buggery and permitting buggery, as well as with the offence of indecent practices contemplated in the Malawian Penal Code. Both were sentenced to the maximum penalty of fourteen years. According to the sentencing magistrate, the severity of the sentence was justified to protect Malawian society.



# SECTION I

## THE LEGAL FRAMEWORK AGAINST TORTURE AND ITS OPERATION IN PRACTICE IN AFRICA

The absolute prohibition of torture and other ill-treatment is so widely accepted by the international community that it is prohibited under international law regardless of treaty adherence. This prohibition is also reinforced by binding obligations under international and regional treaties, such as UNCAT and the African Charter, as well as by non-binding instruments such as the Universal Declaration of Human Rights and RIG.<sup>4</sup>

All African States, with the exception of Tanzania and Zimbabwe, have ratified UNCAT, whilst Morocco is the only State not to have ratified the African Charter. Nonetheless, despite this wide commitment to the prohibition of torture, this report confirms that States in the region show varying levels of compliance with international anti-torture standards, both in terms of their domestic laws and in their practice.

### The prohibition and criminalisation of torture

Whilst States are prohibited from committing acts of torture, they also have additional positive obligations

under international law. For example, UNCAT requires States to ensure that torture is prohibited and criminalised under domestic law – as defined in the Convention – as well as punished with penalties proportionate to the gravity of the crime.<sup>5</sup> In this sense, CAT has recommended that States impose a penalty for torture ranging between 6 to 20 years.<sup>6</sup> These are essential steps to ensure acts amounting to torture can be duly prosecuted as such under domestic law.

The States that were researched for this report show varying levels of compliance with international anti-torture standards. Although all States researched prohibit torture (and most of them also prohibit CIDTP) in their constitutions,<sup>7</sup> not all of them criminalise torture as a separate offence, and, even where criminalised, in some instances national legislation falls short of what is required under international law.

- Ghana, Botswana, and Malawi: torture is not criminalised as a separate offence; hence, acts amounting to torture can only be prosecuted as other ordinary criminal offences, such as rape or assault. In 2018, the

4 See: African Charter on Human and Peoples' Rights (African Charter), 1981, Art. 5; Universal Declaration of Human Rights, 1948, Art. 5. The prohibition on torture and ill-treatment is also found in the International Covenant on Civil and Political Rights (ICCPR – Art. 7), the Convention on the Rights of the Child (CRC – Arts. 37 and 39), and the Convention on the Rights of Persons with Disabilities (CRPD – Art. 15). Acts that can amount to torture and ill-treatment are also prohibited under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED).

5 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), Arts. 2 and 4.

6 Committee against Torture (CAT), Summary Report of the 93rd Meeting of the Committee, 19 November 1991, UN Doc. CAT/C/SR.93 [this document, though cited by other sources, is not available in the records of the Committee].

7 Constitution of Algeria, 2020, Art. 39; Constitution of Angola, 2010, Arts. 36(3)(b) and 60; Constitution of Botswana, 1966, Art. 7(1); Constitution of the DRC, 2005, Arts. 16 and 61; Constitution of Ghana, 1992, Art. 15(2); Constitution of Kenya, 2010, Art. 29; Constitution of Malawi, 1994 with Amendments through 2017, Art. 19(3); Constitution of Morocco, 2011, Art. 22; Constitution of Mozambique, 2018, Art. 40(1); Constitution of South Africa, 1996, Art. 12(1); Constitution of Uganda, 1995, Art. 24.

ACHPR recommended that Botswana should enact specific laws to criminalise torture,<sup>8</sup> but the Government has not, as of yet, taken any steps to do so.

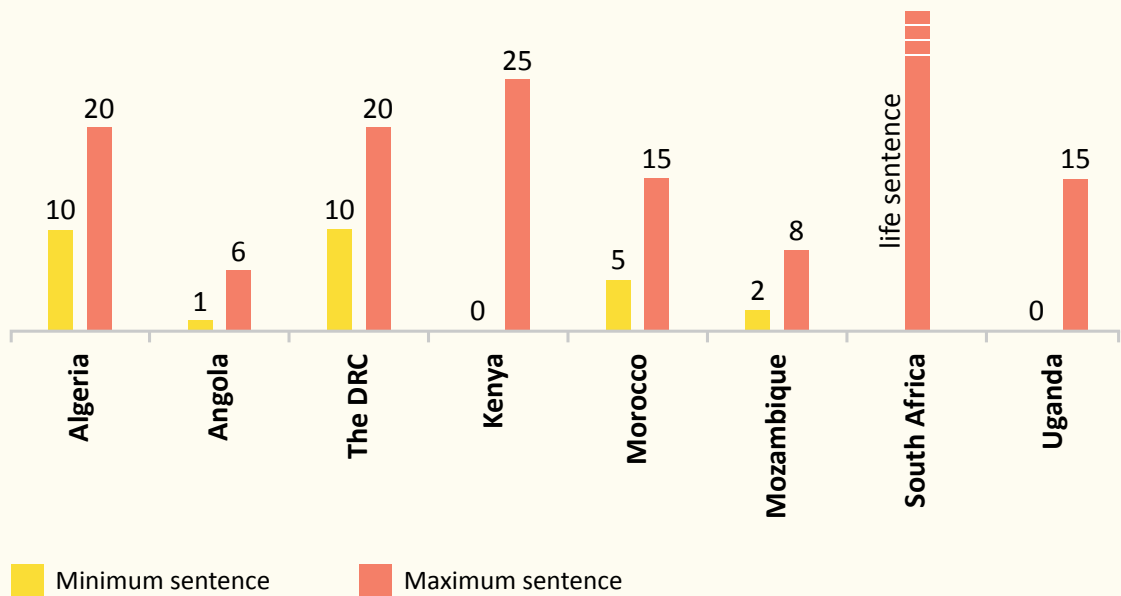
- Algeria, Angola, the DRC, Kenya, Morocco, Mozambique, South Africa, and Uganda: torture is criminalised as a separate offence, either through stand-alone

anti-torture laws or amendments to existing legislation, such as criminal or penal codes.

For the States which have criminalised torture, the extent and scope of the penalties for a breach of such offence vary between jurisdictions (see table).

**PENALTIES FOR THE CRIME OF TORTURE**

Years of imprisonment



Various States also take into account aggravating factors in sentencing acts of torture. For instance, both the DRC and Kenya allow for sentences up to life imprisonment if the victim of torture dies, as does Morocco if such death is premeditated or results from the use of weapons.<sup>9</sup> In Mozam-

bique, the death or suicide of a victim of torture increases the sentence to up to 16 to 20 years of imprisonment, and torture is also an aggravating circumstance to several other criminal offenses.<sup>10</sup> In Algeria, sentences also differ based on whether the perpetrator is a State or non-State actor.<sup>11</sup>

8 African Commission on Human and Peoples' Rights (ACHPR), *Press Statement at the Conclusion of the Promotion Mission of the African Commission on Human and Peoples' Rights to the Republic of Botswana*, 13 July 2018.

9 Where the death was unintentional, Morocco allows for a sentence between 20- and 30-years imprisonment. Moroccan Penal Code, 1962, ss 231-1 to 231-8.

10 Namely homicide, war crimes against civilians and kidnapping. Código Penal, Lei n° 24/2019, ss 160(f), 192(b), 197(b) and 198(b). Torture is criminalised under s 194.

11 Torture by non-State actors is punishable by 5 to 10 years imprisonment, as is the failure to act or report an act of torture by a State official. Algerian Penal Code, 1971, s 263 ter and quater.

## The definition of torture

The definition of torture under UNCAT<sup>12</sup> includes four distinct elements:

- (1) severe pain or suffering, whether physical or mental;
- (2) inflicted intentionally;
- (3) for a specific purpose (such as obtaining information or a confession, to punish, intimidate, or coerce, *or for any reason based on discrimination of any kind*);
- (4) by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

When criminalising torture, States must incorporate, at a minimum, these four elements of the UNCAT definition, although States are free to adopt a wider definition. In some researched States, including the DRC, Kenya, and South Africa, the definitions of torture used in domestic law are largely aligned with UNCAT.<sup>13</sup> In fact, the definition of torture under South Africa's Prevention of Combating and Torture of Persons Act, 2013, is substantively identical to the definition in UNCAT and presents a good example of such a legal provision.<sup>14</sup>

However, other States have taken more restrictive approaches or fail to distinguish torture from CIDTP. In particular, Mozambique and Angola<sup>15</sup> criminalise torture and CIDTP together, failing to recognise the important distinc-

tions, including with regards to the purpose and penalties, between the two. Among the States researched, only Kenya and Uganda criminalise CIDTP as a separate offence.<sup>16</sup>

As noted by the UN Special Rapporteur on Torture, what distinguishes torture from other ill treatment is “the purpose of the conduct, the intention of the perpetrator and the powerlessness of the victim”; CIDTP therefore “means the infliction of pain or suffering without purpose or intention and outside a situation where a person is under the de facto control of another”.<sup>17</sup> There is a general understanding in international academic literature that States do not have an obligation under UNCAT to criminalise CIDTP.<sup>18</sup> However, should they decide to do it, States are recommended to provide a clear definition of CIDTP, especially considering the lack of an internationally agreed definition, and to keep the notion separate from that of torture, as well as to adopt lighter sentences than for torture.<sup>19</sup>

12 UNCAT, Art. 1

13 Loi n°11/008 du 09 juillet 2011 portant criminalisation de la torture, s 48 bis (DRC); Prevention of Torture Act (PTA), 2017, s 4 (Kenya); Prevention of Combating and Torture of Persons Act (PCTPA), 2013, s 3 (South Africa). Uganda's definition of torture is also mostly aligned with UNCAT, with the exception of the element of purpose, as it fails to include discrimination of any kind: Prevention and Prohibition of Torture Act (PPTA), 2012, s 2 (Uganda).

14 PCTPA, s 3 (South Africa).

15 Penal Code of Angola, 2020, s 310.

16 The PTA, s 7 (Kenya) criminalises CIDTP with a fine of no more than one million shillings and/or no more than 15 years in prison. The PPTA, s 7 (Uganda) criminalises CIDTP with a penalty of imprisonment for up to 7 years and/or a fine of 168 currency points.

17 UN Human Rights Council (UNHRC), Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, 9 February 2010, UN Doc. A/HRC/13/39, para. 60.

18 Manfred Nowak et al., The United Nations Convention Against Torture and its Optional Protocol (2nd edition): A Commentary, 19 December 2019, p. 180, para. 16.

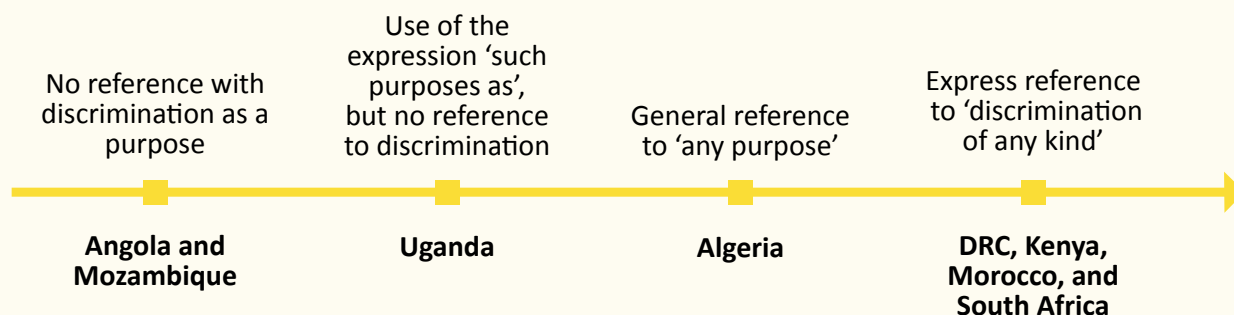
19 Association for the Prevention of Torture (APT) and the Convention against Torture Initiative (CTI), Guide on anti-torture legislation, 2016, p. 19; CAT, Consideration of reports submitted by States parties under article 19 of the Convention – Concluding observations of the CAT (Germany), 12 December 2011, UN Doc. CAT/C/DEU/CO/5, para. 9. The lack of definition of ill-treatment may pose certain challenges with respect to legal certainty and associated defense fair trial rights: REDRESS, Legal Frameworks to Prevent Torture in Africa, March 2016, p. 20.

## Purpose – “discrimination of any kind”

In the elements of the UNCAT definition of torture, the ‘purpose’, which should include “discrimination of any kind”, is perhaps the most relevant element to examine in the context of torture of LGBTIQ+ persons. Indeed, torture against LGBTIQ+ persons is often prac-

ticed due to discrimination on the basis of their actual or perceived sexual orientation or gender identity. By including the discriminatory purpose in their definition of torture, States enable the prosecution of LGBTIQ+ violence as torture, provided that the other elements of the definition are met.

### DISCRIMINATORY ELEMENT IN NATIONAL LAWS<sup>20</sup>



It is worth noting that the explicit inclusion of the purpose of “discrimination of any kind” is important to fully comply with Article 1 of UNCAT and properly account for such instances of torture. The importance

of such an element to address torture against LGBTIQ+ persons was stressed for the first time by any human rights court worldwide in *Azul Rojas Marín and Other v. Peru*.<sup>21</sup>

<sup>20</sup> Act No. 11/008 of 9 July 2011, s 48bis (DRC); PTA, s 4(b) (Kenya); Moroccan Penal Code, s 231-1 (Morocco); PCTPA, s 3(b) (South Africa – it also establishes discrimination as an aggravating circumstance that should be considered in sentencing); Penal Code of Algeria, 2015, s 263 bis (Algeria); PPTA, s 2 (Uganda); Penal Code of Angola, s 370 (Angola); Penal Code of Mozambique, 2019, s 194 (Mozambique).

<sup>21</sup> Inter-American Court of Human Rights (IACtHR), *Case of Azul Rojas Marín et al v. Peru* (Azul), Series C No. 402, 12 March 2020. See also, REDRESS, *Briefing Note: Azul Rojas Marín v Perú, Inter-American Court of Human Rights*, 12 March 2020. See also, IACtHR, *Vicky Hernández and others v. Honduras* (Hernández), Series C No. 422, 26 March 2021.

## International case law



*Azul Rojas Marín and Other v. Peru*, decided by the Inter-American Court of Human Rights (IACtHR), was the first judgement on discriminatory torture on grounds of sexual orientation and gender identity by a human rights court worldwide.

Azul is a transgender Peruvian woman, who, whilst previously living as a gay man, was arbitrarily arrested by police officers in 2008, then raped, beaten, and verbally abused due to her sexual orientation. Although Azul filed a criminal complaint with the Peruvian authorities, the State failed to adequately investigate and hold the perpetrators accountable.

The case was then litigated in the Inter-American system of human rights, and the IACtHR decided on key issues relating to LGBTIQ+ violence. Specifically, with regard to the purposive element of the definition of torture, the IACtHR found that it incorporates discrimination based on sexual orientation and gender identity. When assessing the circumstances of the case, the Court found that sexual violence that involves anal rape, especially when carried out with a tool of authority such as a police baton (which also represents masculinity), while derogatory remarks were made, showed that the specific motive of the crime was to discriminate against Azul. The IACtHR went further to label the treatment of Azul as a ‘hate crime’ given that it was the result of prejudice, and stated that the crime not only breached Azul’s rights but was also “a message to all LGBTI people, as a threat to the freedom and dignity of this entire social group”.

Consequently, the IACtHR declared Peru to be responsible for the violation of the rights to personal integrity, to a private life, and to not be subjected to torture. It also reiterated that the inappropriate definition of torture that was contained in domestic legislation in Peru at the time of the facts, which did not contain discrimination as one of the potential purposes of torture, prevented the investigation into the ill-treatment of Azul from being broadened to include ‘torture’.<sup>22</sup>

### Public official requirement

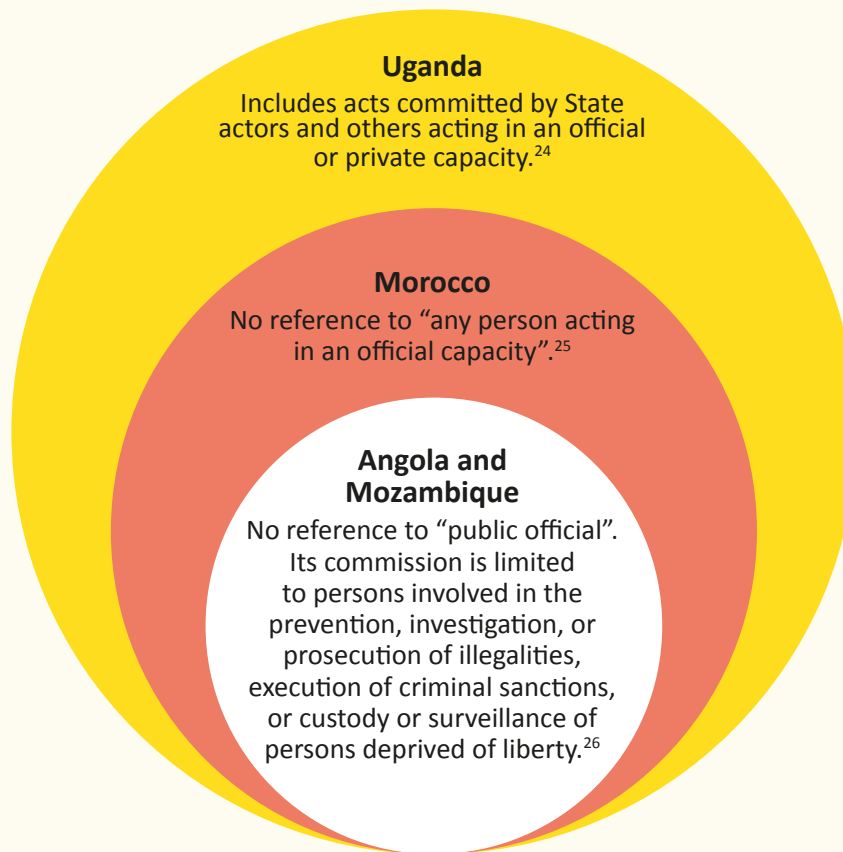
The fourth element of the definition of torture concerning the involvement of a public official (or someone acting in an “official capacity”) is also very relevant in the context of torture against LGBTIQ+ persons, particularly to the assessment of State responsibility

when such violence is perpetrated by non-State or private actors. According to CAT, States are encouraged not to interpret this requirement too narrowly.<sup>23</sup> Yet, several States researched for this report include restrictive definitions in their national legislation, whilst Uganda adopts a wider definition.

<sup>22</sup> Azul, paras. 164 and 165.

<sup>23</sup> CAT has interpreted the expression “acting in an official capacity” to include de facto authorities such as rebel and insurgent groups which “exercise certain prerogatives that are comparable to those normally exercised by legitimate governments”: CAT, *Report of the Committee against Torture, 51st and 52nd sessions (2013-2014)*, 2014, UN Doc. A/69/44, pp. 38, 113, 114 and 121; CAT, *Elmi v. Australia*, Communication No. 120/1998, 25 May 1999, UN Doc. CAT/C/22/D/120/1998, para. 6.5; CAT, *General Comment No. 2*, 24 January 2008, UN Doc. CAT/C/GC/2, para.18.

## **“PUBLIC OFFICIAL” REQUIREMENT IN NATIONAL LAWS**



In this regard, according to CAT, in a total absence of State authority, States may be held responsible for acts perpetrated by private or non-State actors which exercise quasi-governmental authority.<sup>27</sup> Moreover, a State can be accountable for acts committed by private actors where it fails to exercise due diligence to prevent, investigate, prosecute and punish them.<sup>28</sup> This failure to “intervene to stop, sanction, and provide remedies to victims of torture”, is interpreted as an “encourage-

ment and/or de facto permission” for these acts, and CAT has indeed applied this principle specifically in cases of gender-based violence.<sup>29</sup>

Particularly in relation to torture perpetrated by private actors against LGBTIQ+ persons, this principle of due diligence to prevent and investigate has been applied by both European and Inter-American human rights systems.

<sup>24</sup> PPTA, s 2 (Uganda).

<sup>25</sup> Penal Code, s 231-1 (Morocco). See also, UNCAT, Art. 1.

<sup>26</sup> Penal Code of Angola, 2020, s 370. See also, Penal Code of Mozambique, 2019, s 194.

<sup>27</sup> See, CAT, *Elmi v. Australia*, UN Doc. CAT/C/22/D/120/1998.

<sup>28</sup> See, for example, CAT, *Dzemajl and Others v. Yugoslavia*, Communication No. 161/2000, 21 November 2002, UN Doc. CAT/C/29/D/161/2000.

<sup>29</sup> CAT, *General Comment No. 2*, 24 January 2008, UN Doc. CAT/C/GC/2, para. 18.



## International case law

The cases of *Identoba and others v. Georgia*<sup>30</sup> and *MC and AC v. Romania*,<sup>31</sup> were brought to the European Court of Human Rights (ECtHR) by victims of attacks on activists during (or after) LGBTIQ+ peaceful demonstrations. Building on States' obligations to prevent and investigate LGBTIQ+ violence, the ECtHR made clear that, in addition to the nature and context of the insults against the victims, the general hostile environment towards LGBTIQ+ persons is a relevant factor in the examination of the discriminatory purpose behind the attacks.

The Court concluded that authorities had failed to adequately protect the victims, since, in light of the negative attitudes towards LGBTIQ+ persons, the "authorities knew or ought to have known of the risks associated with any public event concerning that vulnerable community, and were consequently under an obligation to provide heightened State protection".<sup>32</sup> The ECtHR also ruled that authorities have a duty to undertake effective investigations into violent incidents against LGBTIQ+ persons, which includes acting promptly and taking all reasonable measures to "unmask possible discriminatory motives".<sup>33</sup>

### The prohibition of *refoulement*

The principle of *non-refoulement* prohibits States from expelling, returning, or extraditing individuals to another State where there are substantial grounds for believing that the person would be at risk of harm upon return, including torture. The prohibition of *refoulement* is absolute, and no exceptions can be made under any circumstances.<sup>34</sup>

Regarding LGBTIQ+ persons, the UN High Commissioner for Refugees (UNHCR) has recognised that various acts perpetrated against LGBTIQ+ persons can amount to torture or CIDTP, including physical and sexual violence, conversion practices, solitary confinement, threats of

violence by families and communities, and even the cumulative effect of general discrimination in schools or in employment.<sup>35</sup> Similarly, laws criminalising same-sex relations can expose LGBTIQ+ persons to the risk of persecution – either explicitly, with penalties including the death penalty, corporal punishment and flogging, or indirectly, by enabling blackmail, extortion, and general homophobia, and failing to protect LGBTIQ+ persons from community harm.<sup>36</sup> Accordingly, in order to comply with the principle of *non-refoulement*, States ought to pay particular attention to any risks of torture or CIDTP on account of sexual orientation or gender identity and the context of criminalisation, violence, and existing persecution in their countries of origin, before making any decisions on their return.

30 European Court of Human Rights (ECtHR), *Identoba and Others v. Georgia* (Identoba), App no. 73235/12, 7 October 2014.

31 ECtHR, *MC and AC v. Romania* (MC and AC), App no. 12060/12, 12 April 2016.

32 *Identoba*, para 72.

33 *Identoba*, para 67; *MC and AC*, para 113. See also, ECtHR, *Aghdomelashvili and Japaridze v. Georgia*, (Aghdomelashvili), App no. 7224/11, 8 January 2021; ECtHR, *Sabalić v. Croatia*, App no. 50231/13, 14 April 2021; ECtHR, *Association ACCEPT and Others v. Romania*, App no. 19237/16, 1 June 2021; ECtHR, *Beizaras and Leivickas v. Lithuania*, App no. 41288/15, 14 May 2020.

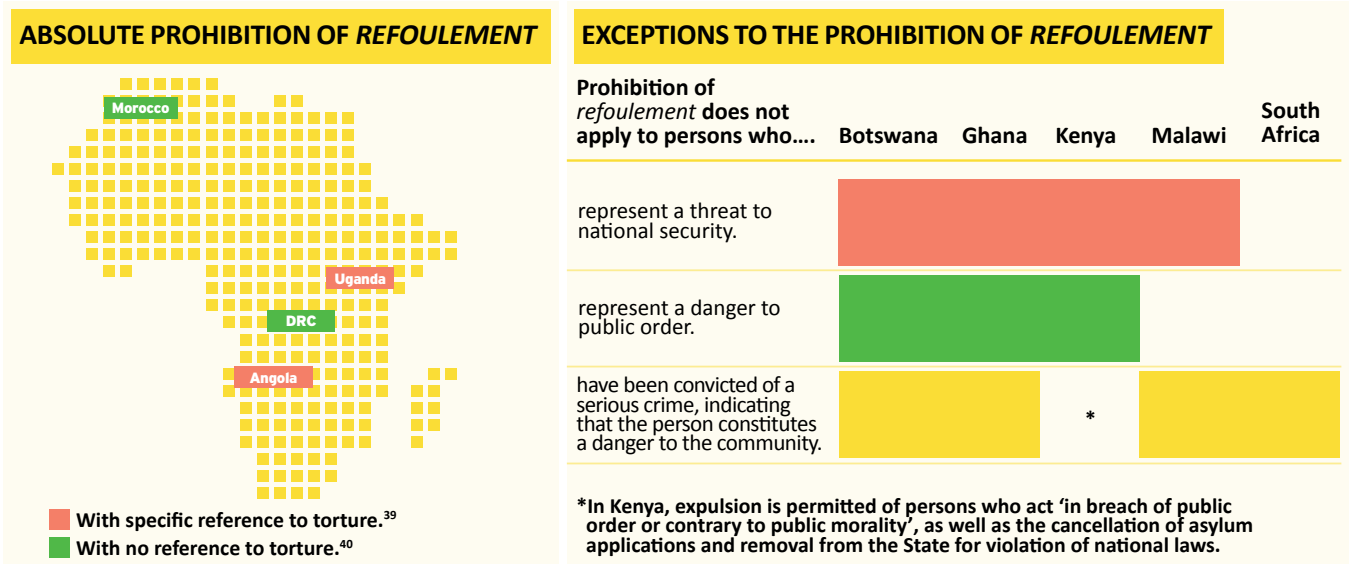
34 UNCAT, Art. 3. See also, *Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity* (Yogyakarta Principles), Principle 23.

35 UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 23 October 2012, UN Doc. HC/RGIP/12/09, paras. 20-25.

36 *Ibid*, paras. 26-27.

The principle of *non-refoulement* is codified into the examined States’ domestic legislation to varying degrees. While certain States have incorporated the absolute na-

ture of the prohibition, in practice these provisions often appear to not be strictly enforced,<sup>37</sup> and other States’ laws provide exceptions to the prohibition.<sup>38</sup> For example:



Where exceptions or exclusion from refugee protection exist, it has been recommended that they be interpreted narrowly, and with careful attention to the individual circumstances of each case. As stressed by the UNHCR, the reason for such clauses is not to discriminate, but to deprive perpetrators of only the gravest crimes of international refugee protection.<sup>41</sup>

Notably, none of the *non-refoulement* laws considered above provide protection on the grounds of sexual orien-

tation or gender identity, although some States do prohibit *refoulement* where the risk of harm exists on account of race, religion, nationality, social or political group, or opinion.<sup>42</sup> There is obvious concern that LGBTIQ+ persons fleeing discriminatory practices in their home State could be impacted by gaps in law and/or practice in this regard.

Given the illegality of same-sex relations under Kenyan law, for instance, the UNHCR expressed concern regarding the risk that the Refugees Bill posed to LGBTIQ+ individuals

37 E.g., in 2020, the UN Human Rights Committee (HRC) found that Angola breached the *non-refoulement* for issuing expulsion orders without demonstrating it had properly assessed the risk of irreparable harm to the individual, such as torture or CIDTP. See [Views adopted by the Committee under article 5 \(4\) of the Optional Protocol](#), 23 November 2020, UN Doc. CCPR/C/129/D/3106/2018-3122/2018.

38 In 2020, Botswana returned Zimbabwean refugees from the Dukwi Camp through a rushed process, preventing the UNHCR from assessing the veracity of their claims and eligibility for resettlement. After international pressure, the Government agreed to conduct a more thorough process. See also Refugees (Recognition and Control) Act, 1968, s 9(1) (Botswana); Refugee Law, 1992 ss 1(1)(2)(a)(c) (Ghana); Refugees Bill, 2019, ss 19, 23, 29 (Kenya) (unclear status of these clauses at time of publication); PTA, ss 20(1), 21(2) (Kenya); Refugee Act 1989, s 10(1)(6) (Malawi); PCTPA, s 8 (South Africa). A new rule of the South Africa Refugees Act Regulations of 2019 prohibits criminally convicted persons from applying for asylum, which may risk excluding LGBTIQ+ persons living in criminalising countries: Legal Resources Centre, [LGBTI+ Asylum Seekers in South Africa](#), April 2021, p.12. Before this rule, the Constitutional court had found that a pre-existing exclusion clause should be aligned with *non-refoulement*, to prevent returning “non-political offenders” to countries where there is a risk of persecution: [Gavric v. Refugee Status Determination Officer, Cape Town & Others](#), 28 Sep 2018, para. 31.

39 Constitution of Angola, Art. 70(2); Law no. 10/15, Law on the Right of Asylum and the Refugee Status, 2015, s 54(3) (Angola); PPTA, s 16 (Uganda).

40 Loi no. 021/2002, Statut des Réfugiés, s 30 (DRC); Decree no. 1-03-196/2003, chapter 5 (Morocco).

41 UNHCR, [Guidelines on International Protection No. 5](#), 4 September 2003, UN Doc. HCR/GIP/03/05, para. 2.

42 Ibid Fn. 40 DRC; Ibid Fn. 38 Ghana, Malawi, and Refugees Bill Kenya.

who could be vulnerable to *refoulement* on the basis of their sexual orientation.<sup>43</sup> Similarly, the South African law which impedes asylum applications for those convicted of crimes may affect LGBTIQ+ persons living in countries where same-sex conduct is criminalised.<sup>44</sup> Finally, in Algeria, although *non-refoulement* is incorporated into the Constitution, there is no specific legislative framework for the right of asylum and the protection of refugees, which consequently increases the vulnerability of migrants, particularly those from marginalised groups such as LGBTIQ+ persons.<sup>45</sup>

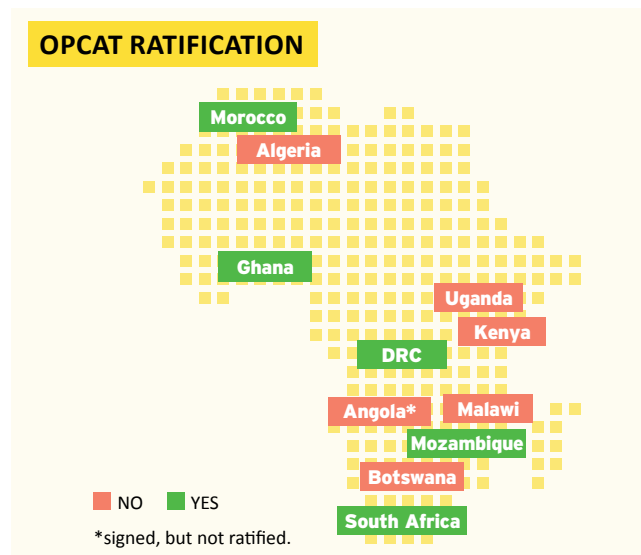
## Prevention through monitoring bodies

UNCAT requires States Parties to take effective measures to prevent acts of torture and CIDTP in their territories, as well as systematically review “methods and practices” of detention with a view to preventing such acts.<sup>46</sup> Regular monitoring of places of detention is crucial in this regard, serving to review and amend existing standards related to treatment and physical conditions of detention, observation of procedural and legal safeguards, and access to services and facilities for detainees. By ensuring transparency, independent monitoring also encourages compliance with these standards and increases accountability where they are not observed, thus providing additional protection to groups that may be vulnerable to torture, CIDTP or other human rights violations.<sup>47</sup>

Recognising that LGBTIQ+ persons in detention face multiple forms of violence and ill-treatment, the UN Subcommittee on Prevention of Torture, CAT, the UN Special Rapporteur on Torture and the UN Voluntary Fund for Victims of Torture, encouraged States to increase efforts to prevent such forms of violence. In addition to paying particular attention to vulnerable persons through monitoring,

policies and training on the specific needs of LGBTIQ+ persons are vital in order to identify risks and provide adequate protection.<sup>48</sup> The Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity provide guidance in this regard.<sup>49</sup> The lack of training on these issues remains a significant challenge in the States researched, as further detailed later in this report (see section Invisibility and lack of training on LGBTIQ+ rights).

OPCAT supplements the provisions of UNCAT and seeks to establish a system of regular visits to places of detention by independent international and national bodies, with a view to safeguard against abuse, torture, and CIDTP. OPCAT requires each State to establish, designate, and maintain at the domestic level one or more bodies tasked with preventing torture and CIDTP, known as National Preventive Mechanisms (NPMs).



43 HRC, Concluding observations on the fourth periodic report of Kenya, 11 May 2021 UN Doc. CCPR/C/KEN/CO/4.

44 Legal Resources Centre, LGBTI+ Asylum Seekers in South Africa, April 2021, p. 12.

45 Constitution of Algeria, Art. 50. See also, Human Rights Watch (HRW), Algeria: Migrants, Asylum Seekers Forced Out, 9 October 2020, (noting that migrants, including children and pregnant women, have been forced to board trucks and buses only to be abandoned in the desert at the border between Algeria and Niger without any resources); TSA, Droit d'asile : qu'en est-il pour l'Algérie ?, 30 June 2018.

46 UNCAT, Arts. 2(1), 11, and 16.

47 Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT), The approach of the SPT to prevention of torture, 30 December 2010, CAT/OP/12/6, para. 5(c), (d), (h) and (j). See also, Optional Protocol to UNCAT (OPCAT), Arts. 4 and 19(a).

48 See, the Statement by CAT, SPT, Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the UN Voluntary Fund for Victims of Torture on the International Day for the Victims of Torture 2016, Targeted and Tortured: UN Experts Urge Greater Protection for LGBTI People in Detention, 2016. See also, SPT, Ninth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 2016, UN Doc CAT/C/57/4, paras 60, 66 and 76.

49 Yogyakarta Principles, Principle 9. See also, APT, Towards the Effective Protection of LGBTI Persons Deprived of Liberty: A Monitoring Guide, December 2018.

## NATIONAL PREVENTIVE MECHANISM

<b>Mozambique</b>	National Commission on Human Rights: conducts visits to prisons and other relevant sites (such as refugee camps) and receives reports on human rights violations. <sup>50</sup>
<b>Morocco</b>	The Conseil National des Droits de l'Homme (CNDH). <sup>51</sup>
<b>South Africa</b>	Multiple-body NPM, coordinated by the South African Human Rights Commission: mandated to promote the respect for and protection of human rights, and to monitor and assess the observance of human rights. <sup>52</sup>

Certain States have either not ratified the OPCAT or have ratified the OPCAT but have not designated an NPM.<sup>53</sup> However, in those States, other detention visiting and monitoring initiatives exist.

## OTHER MONITORING BODIES

<b>Angola</b>	Ombudsman; <sup>54</sup> and independent local and international human rights observers and foreign diplomats.
<b>Botswana</b>	Prison Visitors Committee: comprised of members of the public; mandated to receive complaints or requests from prisoners and to make recommendations. <sup>55</sup>  Judges and magistrates, ombudsman, and religious ministers.
<b>DRC</b>	National Commission for Human Rights: visits places of detention. <sup>56</sup>
<b>Malawi</b>	The Inspectorate of Prisons: comprised of a justice of appeal, the chief commissioner of prisons, a member of the Prison Service Commission, a magistrate, and the ombudsman. <sup>57</sup>  Malawi Human Rights Commission.
<b>Uganda</b>	Uganda Human Rights Commission: visits places of detention, often unannounced, receives complaints, and makes recommendations. <sup>58</sup>

<sup>50</sup> Law No. 33/2009 and Resolution No. 23/2013.

<sup>51</sup> Permanent Mission of the Kingdom of Morocco in Geneva, [Letter to the SPT](#), 15 November 2018.

<sup>52</sup> South African Permanent Mission in Geneva, [Letter to the UN High Commissioner for Human Rights](#), 25 August 2020. See also, Constitution of South Africa, 1996, Art. 184. There have been concerns about the lack of financial resources to enable the South African Human Rights Commission to fulfil its mandate, the lack of clarity concerning the selection of members, and the lack of a specific mandate to monitor places of detention: Office of the United Nations High Commissioner for Human Rights (OHCHR), [Committee against Torture examines the situation in South Africa](#), 1 May 2019.

<sup>53</sup> Despite having either signed or ratified the OPCAT, Angola, the DRC, and Ghana have not yet designated an NPM. See, APT, [OPCAT Database](#).

<sup>54</sup> UNHRC, [National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21, Angola](#) (UPR National report of Angola), 2019, UN Doc. A/HRC/WG.6/34/AGO/1.

<sup>55</sup> Prison Act, 1979 (Botswana). See also, Civil Society Prison Reform Initiative (CSPRI), Marilize Ackermann, [Survey of detention visiting mechanisms in Africa](#), 2013.

<sup>56</sup> Loi n° 13/011 du 21 mars 2013 portant institution, organisation et fonctionnement de la Commission Nationale des Droits de l'Homme.

<sup>57</sup> Constitution of Malawi, 1994, Art. 169.

<sup>58</sup> Constitution of the Republic of Uganda, 1995, Art. 52.1(b). This was also suggested by research by REDRESS, including interviews with stakeholders in the region. See also, UNHRC, [National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Uganda](#), 9 November 2021, UN Doc. A/HRC/WG.6/UGA/1, para. 74.

In practice, however, these monitoring systems face several challenges, ranging from difficulties in contacting detainees and entering prisons, to a lack of necessary financial resources, and concerns regarding independence.<sup>59</sup>

## Investigation

Under UNCAT, States have a duty to conduct investigations “wherever there is reasonable ground to believe that an act of torture has been committed”.<sup>60</sup> In terms of States’ obligation to investigate allegations of torture or other ill-treatment perpetrated against LGBTIQ+ persons, regional human rights courts<sup>61</sup> have established that State authorities are required to:

- take all reasonable measures to collect and secure evidence;
- explore all practical means of discovering the truth concerning the incident;
- take all reasonable steps to unmask possible discriminatory motives and establish whether feelings of hatred or prejudice played a role in the events; and

- deliver fully reasoned, impartial, and objective decisions, without omitting suspicious facts that may be indicative of violence motivated by discrimination on the grounds of sexual orientation or gender identity.<sup>62</sup>

Promptness and reasonable expedition are also essential elements of a State’s obligation to conduct effective investigations.

Stereotypical lines of inquiry should not be used in cases of sexual violence, including when that violence is committed against members of the LGBTIQ+ community.<sup>63</sup> Finally, treating violence and brutality with a discriminatory purpose on an equal footing with ‘ordinary cases’, “would be turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights” and without such a rigorous approach, “the resultant indifference would be tantamount to official acquiescence to or even connivance with hate crimes”.<sup>64</sup>

The existence of independent investigative bodies can be crucial to ensure accountability for torture and other human rights violations, especially if other State

59 In Angola, civil society organisations face difficulties in contacting detainees and entering prisons: US Department of State, Bureau of Democracy, Human Rights and Labor (US Department of State), *Country Reports on Human Rights Practices: Angola*, 2020. In Botswana, the Committees are appointed by the Minister of Defence, Justice and Security, which raises questions about the Committee’s independence. There is also no duty to publish records or recommendations, and such recommendations are not always adhered to, which is evidenced by prison conditions being below international standards: CSPRI, Berber Hettinga et al., *Survey of Detention Oversight Mechanisms Provided for in the Laws of SADC Countries*, 2011. In the DRC, the National Commission on Human Rights’ limited budget prevents it from having a permanent presence throughout the country; and NGOs have been denied authorisation from the authorities to visit and monitor prisons: UNHRC, *Situation of human rights and the activities of the United Nations Joint Human Rights Office in the Democratic Republic of the Congo: Report of the United Nations High Commissioner for Human Rights*, 27 July 2015, UN Doc. A/HRC/48/47, para. 8. The Ghanaian Commission on Human Rights and Administrative Justice does not seem to undertake regular monitoring of prisons, in part due to a lack of resources; and the frequency of visits conducted by the Police Intelligence and Professional Services Bureau is unclear: UNHRC, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, Addendum, Mission to Ghana* (Report of the SRT on visit to Ghana), 5 March 2014, UN Doc. A/HRC/25/60/Add.1, paras. 37 and 38; Amnesty International, *Prisoners Are Bottom of the Pile: The Human Rights of Inmates in Ghana*, 2012. In Malawi, concerns were raised about the independence of the Inspectorate of Prisons, and NGOs have remarked that the recommendations made by this body and the Human Rights Commission are rarely taken seriously and “largely ignored by Parliament”: Centre for Human Rights and Rehabilitation, *Civil Society Report on the Implementation of the ICCPR (Replies to the List of Issues)*, 2014, CCPR/C/MWI/Q/1/Add.1; Malawi Human Rights Commission, *Malawi Human Rights Commission Strategic Plan 2018-2022*, pp. 2 and 15 to 16.

60 UNCAT, Arts. 12 and 13. This also applies to cruel, inhuman or degrading treatment and punishment: UNCAT, Art. 16. See also, RIG, Arts. 17 to 19.

61 In the European system of human rights, see, for example, *Identoba, MC and AC and Aghdomelashvili*. In relation to effective investigation into cases of violence due to discrimination on other grounds, such as race and ethnicity, see, for example, ECtHR, *Sakir v. Greece*, App no. 48475/09, 24 March 2016; ECtHR, *Jeronošs v. Latvia*, App no. 44898/10, 5 July 2016. More recently, ECtHR, *M.F. v. Hungary*, App no. 45855/12, 5 March 2018 on the authorities’ failure to investigate whether or not discrimination may have played a role in the events (no substantive violation, only procedural – Art. 14 taken in conjunction with Art. 3 ECHR). In the Inter-American system of human rights, see Azul and Hernández.

62 It must be noted that, according to the ECtHR’s jurisprudence, the duty to investigate the discriminatory purpose does not translate into an obligation of result and is not absolute. It relates to efforts employed by authorities, that is, the State has the “obligation to use best endeavours”. See, for example, *Aghdomelashvili*, para. 38.

63 Azul, para. 202.

64 MC and AC, paras. 112 and 124.

actors (such as the police) are unable or unwilling to investigate, or if they lack the necessary independence to do so effectively. Other challenges faced by national authorities in investigating effectively instances of discriminatory torture are addressed further in this report (see section [Main challenges faced in documenting, investigating and addressing LGBTIQ+ Violence](#)).

A majority of States researched bestow independent bodies and/or national human rights institutions with specific responsibilities to investigate human rights violations, including undertaking investigations upon receiving complaints or of their own accord, and even initiating court proceedings and providing avenues for redress.<sup>65</sup> On the other hand, some States do not have such independent bodies.

INVESTIGATIVE BODY	
<b>Algeria</b>	Conseil National des Droits de l'Homme
<b>Angola</b>	Department of Investigation and Criminal Prosecution Department of Investigation and Complaints of the Attorney General's Office <sup>66</sup> Ombudsman
<b>Botswana</b>	Office of the Ombudsman <sup>67</sup>
<b>DRC</b>	None <sup>68</sup>
<b>Ghana</b>	Commission on Human Rights and Administrative Justice <sup>69</sup>
<b>Kenya</b>	Independent Policing Oversight Authority Kenya National Commission on Human Rights
<b>Malawi</b>	Malawi Human Rights Commission
<b>Morocco</b>	Conseil National des Droits de l'Homme
<b>Mozambique</b>	National Commission on Human Rights <sup>70</sup>
<b>South Africa</b>	Independent Police Investigative Directorate South Africa Human Rights Commission
<b>Uganda</b>	Uganda Human Rights Commission <sup>71</sup>

65 For example, the Uganda Human Rights Commission may, upon finding a human rights violation, order the release of a detained or restricted person, payment of compensation, or any other legal remedy or redress. See *Avocats sans Frontières*, [How to use the remedies? – Uganda](#).

66 These departments initiate investigations as well as pre-trial proceedings and can bring perpetrators to court. UNHRC, [UPR National report of Angola](#), 2019, UN Doc. A/HRC/WG.6/34/AGO/1.

67 Since July 2021, according to the new Ombudsman (Amendment) Act, the Ombudsman has a specific mandate to investigate human rights violations.

68 Research also shows that the judiciary of the DRC lacks independence and awareness of the law against torture, resulting in a climate of quasi-impunity. See, UNHRC, [Situation of human rights and the activities of the United Nations Joint Human Rights Office in the Democratic Republic of the Congo: Report of the United Nations High Commissioner for Human Rights](#), 27 July 2015, UN Doc. A/HRC/30/32, paras. 37 and 41; HRC, [Concluding observations on the fourth periodic report of the Democratic Republic of the Congo](#), 30 November 2017, UN Doc. CCPR/C/COD/CO/4, para. 11.

69 In addition to investigating human rights violations, this body can also bring perpetrators to court.

70 Though the Commission receives complaints, what happens after, and whether these complaints are investigated, is unclear. See CAT, [Concluding observations on the initial report of Mozambique](#), 10 December 2013, UN Doc. CAT/C/MOZ/CO/1.

71 The Uganda Human Rights Commission can also provide redress and individuals can appeal to the High Court if they are not satisfied with its decision. See *Avocats sans Frontières*, [How to use the remedies? – Uganda](#).



Even where independent investigative bodies and/or national human rights institutions exist, certain challenges remain in seeking accountability for acts of torture and maintaining actual independence, including a lack of training and technical capacity of these bodies, an absence of cooperation by authorities, financial constraints, and a lack of transparency.<sup>72</sup> The UN Special Rapporteur on Torture and the UN Human Rights Committee have for example already emphasised the need for a dedicated, well-resourced, and independent body for the investigation of allegations of torture in Ghana and Botswana, respectively.<sup>73</sup>

### **Unwillingness to investigate cases of LGBTIQ+ violence**

Most States researched lack a clear protocol to address allegations of torture against LGBTIQ+ individuals, and to guide investigations into such allegations. Even where there are mechanisms in place to investigate torture more broadly, investigations of torture against LGBTIQ+ individuals are rare, often due to further discrimination and unwillingness on the part of the relevant authorities to investigate, arrest and prosecute perpetrators, as demonstrated by the examples below. This results in a culture of impunity for crimes against members of the LGBTIQ+ community and distrust in State authorities.

For instance, in Kenya, whilst in some cases the police have protected LGBTIQ+ people from violence, there are many cases in which the police have either refused to assist LGBTIQ+ individuals or are perpetrators of violence themselves.<sup>74</sup> In cases where an individual has suffered sexual violence at the hands of the police, attempts to report such incidents have been unsuccessful due to the reluctance of the police to investigate and prosecute their own.

Similarly, several reports have noted that failures to investigate allegations of torture in Uganda highlight a lack of willingness to investigate on the part of the relevant authorities.<sup>75</sup> One report has noted specifically a refusal to investigate cases when reported by persons of different sexual orientation and gender identity.<sup>76</sup> In Algeria, there is an apparent unwillingness on the part of police to investigate crimes against LGBTIQ+ individuals.<sup>77</sup> Similarly, Angolan “authorities failed to protect LBGTI people against homophobic violence and to hold the perpetrators accountable. The justice system has poor infrastructure and lacks adequately trained and qualified personnel, which resulted in cases taking a long time to finalise”.<sup>78</sup>

72 In Malawi, the Malawi Human Rights Commission has recognized the need to improve technical skills and enhance responsiveness of the Complaints Handling System: Malawi Human Rights Commission, *Malawi Human Rights Commission Strategic Plan 2018-2022*, June 2018, pp. 13 to 14. Regarding Mozambique, the Committee against Torture has concluded that almost no information with respect to complaints, investigations, prosecutions and redress is available: CAT, *Concluding observations on the initial report of Mozambique*, 10 December 2013. Concerns have also been noted regarding lack of cooperation and training of authorities in South Africa: CTI and REDRESS, *Anti-Torture Standards in Common Law Africa: Good Practices and Way Forward*, March 2022, pp. 67-68, 83. A lack of financial resources was also noted in Ghana and Botswana: OHCHR, *Ghana: Much remains to be done but UN expert welcomes steps taken to combat torture and other ill-treatment*, 7 October 2015; HRC, *Human Rights Committee Takes Up Initial Report Of Botswana On Compliance With International Covenant On Civil, Political Rights*, 19 March 2008. Finally, a lack of independence in the judiciary in Algeria was noted as a barrier to effective processes to investigate and prosecute allegations of torture: El Watan, *Nous demandons une enquête indépendante sur l'affaire Nekiche*, 4 February 2021.

73 In November 2021, after the passing of the Ombudsman Act, the HRC advised Botswana that there should be a clearer and more effective mechanism to investigate cases of torture: HRC, *Concluding observations on the second periodic report of Botswana*, 24 November 2021, UN Doc. CCPR/C/BWA/CO/2, paras. 17 and 18. Indeed, the Ombudsman in Botswana has not been made explicitly independent by statute. See, Ombudsman (Amendment) Bill. The UN Special Rapporteur on Torture also raised concerns regarding independence and resourcing of Ghana's Commission on Human Rights and Administrative Justice, noting that an independent investigative mechanism was still needed in Ghana. UNHRC, *Report of the SRT on visit to Ghana*, 5 March 2014, UN Doc. A/HRC/25/60/Add.1, paras. 87 and 97(a); OHCHR, *Ghana: Much remains to be done but UN expert welcomes steps taken to combat torture and other ill-treatment*, 7 October 2015.

74 HRW, *The Issue is Violence – Attacks on LGBT People on Kenya's Coast*, September 2015.

75 US Department of State, *2019 Country Reports on Human Rights Practices: Uganda*, 2019; Human Rights and Peace Centre, *Human Rights Violations in Uganda: The Abuse of Civil and Political Rights in the Era of Kisanja Hakuna Mchezo*, February 2019.

76 Chapter Four Uganda, *UGANDA: Where Do We Go for Justice? The Abuse of the Rights of Sexual Minorities in Uganda's Criminal Justice System (Where do We Go for Justice?)*, 27 February 2015.

77 UK Home Office, *Report on sexual orientation and gender identity in Algeria*, February 2016, paras. 5.3.3 and 5.3.4.

78 Amnesty International, *Human Rights in Africa: Review of 2019 – Angola (Angola 2019 Report)*, 8 April 2020.

In Mozambique, transgender sex workers are specifically targeted for harassment and arbitrary detention, but police often do not take reports of violence against them seriously.<sup>79</sup> The report of the UN Independent Expert on SOGI noted that Mozambique does not therefore actively attempt to protect this part of the population, nor does it seem to punish perpetrators.<sup>80</sup> In Angola, reports noted that police do not “hold the perpetrators accountable”.<sup>81</sup> The UN Human Rights Committee expressed concern regarding “stigmatization and de facto discrimination” against certain groups, including “lesbian, gay, bisexual and transgender persons” and recommended that Angola take measures to effectively protect these groups and to ensure cases of discrimination were duly addressed.<sup>82</sup>

Furthermore, in Morocco, it does not seem possible for LGBTIQ+ persons to obtain protection from the authorities,<sup>83</sup> and local organisations have stated that, because of this lack of protection, homosexuals often prefer facing homophobic assaults rather than going to police stations to seek protection, where they risk being arrested for homosexuality.<sup>84</sup> Lawyers who represent LGBTIQ+ individuals are also at risk of verbal abuse.<sup>85</sup>

In South Africa, various NGOs and CAT have noted both the culture of impunity within the police and the perpetration of new crimes against those who try to report allegations.<sup>86</sup> LGBTIQ+ violence from the community remains underreported in part due to its prevalence in rural areas and as a result of impunity within the South African police force.<sup>87</sup> One proposal aimed at addressing the inadequacy of police investigations is to make hate crimes, including rape, a separate crime, which would

force the police to take action and would mobilise resources aimed at bringing perpetrators to justice.<sup>88</sup>

## Redress

Under UNCAT, States must ensure in their legal system that victims of torture and CIDTP have an enforceable right to full and effective redress. Such right may be made enforceable by introducing specific mechanisms that can determine the right to and means of redress. Full and effective redress for victims of torture and CIDTP includes restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.<sup>89</sup>

Though the African human rights system has not yet dealt with cases of violence against LGBTIQ+ persons, the case of *Azul Rojas Marín v. Peru*, litigated in the Inter-American system, provides a useful example of the type of redress that a victim might receive, and of measures of non-repetition to tackle the root causes of discrimination. In that case, the IACtHR ordered Peru to adequately investigate the sexual violence suffered by Azul, and to provide reparation to both Azul and her mother through public recognition of responsibility, compensation, as well as medical and psychological rehabilitation. Moreover, Peru was required to ensure non-repetition of similar events, including by tackling structural discrimination and developing a protocol for investigation and accountability in cases of LGBTIQ+ violence.<sup>90</sup>

While the States included in this report have some legal provisions and practices allowing for limited access to domestic remedies for human rights violations, these le-

79 UNHRC, [Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity on his visit to Mozambique](#) (Report of the Independent Expert on SOGI on visit to Mozambique), 17 May 2019, UN Doc. A/HRC/41/45/Add.2.

80 Ibid.

81 Amnesty International, [Angola 2019 Report](#), 8 April 2020.

82 HRC, [Concluding observations on the second periodic report of Angola](#), 8 May 2019, UN Doc. CCPR/C/AGO/CO/2, para. 13.

83 Ministry of Immigration and Integration: The Danish Immigration Service, [Morocco: Situation of LGBT persons](#), March 2017, para. 26.

84 Ibid, para. 14.

85 Ibid, para. 15.

86 OHCHR, [Committee against Torture examines the situation in South Africa](#), 1 May 2019.

87 HRW, [“We’ll Show You You’re a Woman” Violence and Discrimination against Black Lesbian and Transgender Men in South Africa](#), December 2011.

88 ActionAid, [Hate Crimes: The rise of “corrective” rape in South Africa](#), March 2009.

89 UNCAT, Art. 14. See also CAT, General Comment No. 3, 13 December 2012, UN Doc. CAT/C/GC/3, paras. 5 to 7.

90 IACtHR, *Azul*, paras. 227 to 288.

gal frameworks seem insufficient and implementation in practice remains a challenge. In this regard, the following examples demonstrate that the researched States provide varied domestic remedies for victims of human rights abuses which could also benefit LGBTIQ+ victims of torture and other ill-treatment:

- **Angola:** The new Procedural Penal Code approved in 2020 allows victims of human rights abuses to seek compensation from the State. The rules provide that the Government must compensate victims who are illegally detained or arrested, are being held in excessively long pre-trial detention, are not released in due time under a legal provision or a court decision, or are victim of a gross judicial error.<sup>91</sup>
- **Ghana:** The High Court can grant redress to an individual in respect of a breach of their fundamental rights and freedoms, including freedom from torture and other ill-treatment.<sup>92</sup> In addition, the Ghanaian Supreme Court has held that District Courts should, in determining matters before them, apply a relevant provision of the Constitution to uphold human rights.<sup>93</sup>
- **Uganda:** The Ugandan Human Rights Commission has the power to award compensation to victims of human rights harms. In 2018, the Human Rights Commission registered 346 complaints relating to alleged violations of the freedom from torture (out of a total of 4,926 registered complaints), in its majority against the Ugandan Police Force. Compensation was awarded in 66 cases, and seven cases were amicably settled by the parties. The majority of the complaints that were terminated by awarding compensation or by settlement related to the violation of the right to freedom from torture and the right to personal liberty.

Despite these provisions and practices, it appears that victims may still face difficulties actually receiving reparations and other forms of redress that have been awarded to them.<sup>94</sup> Purely monetary forms of redress, or access to redress through common law tort claims, also fall short of what is required.<sup>95</sup>

### Regional and international routes to justice

Where domestic remedies are insufficient or unachievable, victims can make use of additional mechanisms both at the regional and international level to seek justice and reparation, though exhaustion of domestic remedies is usually required before such mechanisms can be accessed. As the jurisprudence highlighted in this report demonstrates, regional and international courts and adjudicatory bodies play an important role in setting standards against LGBTIQ+ violence. Therefore, where possible, civil society organisations are encouraged to make use of such mechanisms.

It is worth noting that the ACHPR has adopted a General Comment on the right to redress for victims of torture and CIDTP,<sup>96</sup> thereby strengthening existing provisions on the right to redress, including those included in RIG.

However, the African human rights system has not yet dealt with cases concerning discriminatory violence based on sexual orientation and gender identity. The only case concerning discrimination against LGBTIQ+ persons brought to the ACHPR was a communication filed in 1994 which challenged the status of homosexuals and the criminalisation of sexual conduct between men in Zimbabwe, but the complainant withdrew the case before the ACHPR could express its view on the matter.<sup>97</sup>

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91 US Department of State, Country Reports on Human Rights Practices: Angola, 2020.

92 Constitution of Ghana, 1992, Art. 33.

93 Supreme Court of Ghana, Gateway Worship Centre v. David Soon Boon Seo [2009] GHASC 7, 21 January 2009.

94 Avocats sans Frontières, Rapport Annuel, 2020, p. 32 (DRC); HRC, Concluding observations on the fourth periodic report of Kenya, 11 May 2021, UN Doc. CCPR/C/KEN/CO/4, paras. 8-9 (Kenya).

95 US Department of State, Country Reports on Human Rights Practices: Democratic Republic of Congo, 2019 (DRC); Avocats sans Frontières, Rapport Annuel, 2020, p. 32 (DRC); HRC, Concluding observations on the initial report of South Africa, 27 April 2016, UN Doc. CCPR/C/ZAF/CO/1, para. 22 (South Africa).

96 ACHPR, General Comment No. 4: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5), March 2017.

97 ACHPR, Courson v. Zimbabwe, Communication No. 136/94, 22 March 1995.

INDIVIDUAL COMPLAINTS		CONDITIONS	NEED TO EXHAUST DOMESTIC REMEDIES?
<b>UN Mechanisms</b>			
<b>CAT</b>	<input checked="" type="checkbox"/>	Declaration under Article 22 of UNCAT <sup>98</sup>	<input checked="" type="checkbox"/>
<b>Human Rights Committee</b>	<input checked="" type="checkbox"/>	Ratification of First Optional Protocol to the International Covenant on Civil and Political Rights <sup>99</sup>	<input checked="" type="checkbox"/>
<b>Committee on the Elimination of Discrimination against Women</b>	<input checked="" type="checkbox"/>	Ratification of Optional Protocol to the Convention on the Elimination of Discrimination against Women <sup>100</sup>	<input checked="" type="checkbox"/>
<b>Committee on Enforced Disappearances</b>	<input checked="" type="checkbox"/>	Declaration under Article 31 of the International Convention for the Protection of All Persons from Enforced Disappearance <sup>101</sup>	<input checked="" type="checkbox"/>
<b>Regional Mechanisms</b>			
<b>ACHPR</b>	<input checked="" type="checkbox"/>	Ratification of the African Charter <sup>102</sup>	<input checked="" type="checkbox"/>
<b>African Court</b>	<input checked="" type="checkbox"/>	Ratification of the Protocol to the African Charter with a declaration under Article 34(6) <sup>103</sup>	<input checked="" type="checkbox"/>
<b>East African Court of Justice<sup>104</sup></b>	<input checked="" type="checkbox"/>	East African State that has ratified the East African Treaty <sup>105</sup>	<input type="checkbox"/>
<b>ECOWAS Community Court of Justice</b>	<input checked="" type="checkbox"/>	ECOWAS Member State <sup>106</sup>	<input type="checkbox"/>

98 Algeria, Ghana, Morocco and South Africa, have made the necessary declaration.

99 Algeria, Angola, the DRC, Ghana, South Africa, and Uganda have ratified the First Optional Protocol.

100 Angola, Botswana, Ghana, Mozambique, and South Africa have ratified the Optional Protocol to CEDAW.

101 Among the States studied, only Morocco has made the necessary declaration.

102 All States researched except for Morocco have ratified the African Charter.

103 Among the States studied, Algeria, Ghana, Kenya, Mozambique, South Africa, and Uganda have ratified the Protocol but only Ghana has made the necessary declaration.

104 Though this Court does not have a specific operationalised human rights mandate, it can take on cases related to human rights where the complaint refers to violations of the fundamental principle of human rights embodied in the East African Community Treaty, though there is a strict two-month time limit for complaints.

105 Among the States researched, Kenya and Uganda are parties to the East African Treaty.

106 Ghana is the only ECOWAS member State among those studied.







“

**Her family said she's a woman, so she had to raise a family with a man. But I said to Katia: 'Let's raise a family, have our things, and show to the world that two women are capable too. It's not just a man who can give a woman a good life. We have strength too, we have determination, so let's go ahead'.**

”

We Have

## **STRENGTH TOO**

Katia Mariza Teixeira Matos (29, left) lived with her girlfriend Becky Mathambe (28, right) in Mozambique. Becky's family accepted this relationship, but Katia's family did not. When Becky went to South Africa, Katia's family encouraged her to date a man, thinking she needs a man to have a family and be provided for.



## SECTION II

### LEGAL PROTECTION OF AND DISCRIMINATION AGAINST LGBTIQ+ PERSONS IN AFRICA

African States offer varying levels of protection, or lack of protection, to LGBTIQ+ individuals as part of their domestic laws. Certain States directly prohibit discrimination on the basis of an individual's actual or perceived sexual or gender identity, whilst others have specific anti-LGBTIQ+ legislation.

#### Absence of protective laws

The domestic laws of certain States are silent when it comes to affording protections from discrimination to LGBTIQ+ individuals. For example, whilst same-sex acts are not criminalised in the DRC and have never been prohibited in the State's history, there are no specific legal protections for LGBTIQ+ individuals.<sup>107</sup> As such, the

Constitution of the DRC, which prohibits discrimination, does not include discrimination on the basis of sex, sexual orientation, or gender identity, as a protected category.<sup>108</sup> By implication, the LGBTIQ+ population cannot be the intended beneficiaries of the prohibition on discrimination in the DRC's Constitution.<sup>109</sup>

#### Legislation providing limited legal protection

Certain States have laws which prohibit discrimination on the grounds of sex and/or gender, but this protection does not extend to sexual orientation or gender identity. For example:

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107 The East African Sexual Health and Rights Initiative (UHAi EASHRI), Christian Rumu, Landscape Analysis of the Human Rights Situation of Lesbian, Gay, Bisexual, Transgender, Intersex People and Sex Workers in the Democratic Republic of Congo (Human Rights of LGBTI People and Sex Workers in the DRC), 2017, p. 15.

108 Article 13 reads "No Congolese person may, in matters of education or access to public functions or any other matter, be subject to any discriminatory measure, whether it results from a statute or from a measure of the executive, on the ground of his/her religion, family origin, social condition, residence, views or political convictions, or membership of a certain race, ethnicity, tribe, cultural or linguistic minority". Given the exhaustive nature of the list of protected categories, it appears that discrimination on the basis of sex, sexual orientation or gender identity is not prohibited.

109 UHAi EASHRI, Christian Rumu, Human Rights of LGBTI People and Sex Workers in the DRC, 2017.

## NATIONAL LEGISLATION

### Algeria

Law no. 20-05 on the fight against discrimination and hate speech does not include any prohibition against discrimination based on sexual orientation (but it does based on gender).<sup>110</sup>

In September 2020 the Parliament adopted a constitutional reform to include measures aimed at protecting women (with no reference to LGBTIQ+ persons) against all forms of violence in public places and spaces.<sup>111</sup>

### Morocco

The Penal Code prohibits discrimination and hate speech on the basis of sex but fails to similarly protect LGBTIQ+ persons.<sup>112</sup>

### Uganda

The Constitution prohibits discrimination on the ground of sex but makes no reference to sexual orientation.<sup>113</sup>

### Mozambique

The Constitution contains a general provision regarding the principle of universality and equality, as well as gender equality and non-discrimination, but no reference to sexual orientation or gender identity.<sup>114</sup>

Nevertheless, State officials and Supreme Court judges in Mozambique affirmed to the UN Independent Expert on SOGI that the provision regarding non-discrimination “should be interpreted as prohibiting all forms of discrimination, including discrimination based on sexual orientation and gender equality”.<sup>115</sup>

### Kenya

The Constitution provides that individuals shall not be discriminated against on the basis of sex and, although sexual orientation is not explicitly mentioned, case law has stated that sexual orientation may also be read into Article 27(4) on a case-by-case basis.<sup>116</sup>

The fact that prohibitions against discrimination do not explicitly refer to sexual orientation or gender identity may create uncertainty for LGBTIQ+ people in their attempts to seek justice and weakens the pro-

tection of their rights. Implementing laws need to be introduced to outlaw discrimination on the grounds of sexual orientation or gender identity.

<sup>110</sup> Loi n° 20-05 du 5 Ramadhan 1441 correspondant au 28 avril 2020 relative à la prévention et à la lutte contre la discrimination et le discours de haine.

<sup>111</sup> Constitution de la République Algérienne Démocratique et Populaire, Journal Officiel de la République Algérienne N° 82, 30 December 2020, Art. 40.

<sup>112</sup> Moroccan Penal Code, ss 308-5 and 431-1.

<sup>113</sup> Constitution of Uganda, 1995, Art. 21.

<sup>114</sup> Constitution of Mozambique, 2004, Arts. 35, 36 and 39.

<sup>115</sup> UNHRC, Report of the Independent Expert on SOGI on visit to Mozambique, 17 May 2019, UN Doc. A/HRC/41/45/Add.2, para. 23.

<sup>116</sup> Court of Appeal of Kenya at Nairobi, Non-Governmental Organisations Co-ordination Board v. EG & 5 Others [2019] eKLR (NGO Board v. EG & 5 Ors), 22 March 2019.

## Legislation providing broad legal protection

Examples of States which offer broad legal protection to LGBTIQ+ individuals are rare. However, there are several States which do afford, in law, protections to the LGBTIQ+ community in different contexts, including in the work environment, access to education, freedom of association, and others.

For example, the South African Constitution specifically references gender, sex, and sexual orientation in the text of its prohibition against discrimination.<sup>117</sup> As a result, there are a number of legislative protections afforded to LGBTIQ+ individuals, including through the Promotion of Equality and Prevention of Unfair Discrimination Act, the Labour Relations Act, the Employment Equity Act, the Rental Housing Act, the Alteration of Sex Description and Sex Status Act, and the Civil Union Act.<sup>118</sup> In addition to these anti-discrimination laws, the South African legal system also affords protection to LGBTIQ+ individuals with regards to the equal age of consent, stepchild and joint adoption by same-sex couples, open service in the military, access to IVF for lesbian couples, automatic parenthood after birth for both spouses, commercial surrogacy for gay male couples, and parental leave for same sex couples.<sup>119</sup> South Africa is also currently revising its national identity system to recognise different gender identities.<sup>120</sup>

In 2019, Angola approved a new Penal Code that repealed a “vices against nature” offence (which captured same-sex relations) and prohibited discrimination against people based on sex or sexual orientation.

Further, Angola’s Penal Code criminalises the act of refusing to employ or provide services due to discrimination based on sexual orientation, and acts of incitement to discriminate, including discrimination based on sexual orientation. Moreover, discrimination based on sex or sexual orientation was introduced as a generic aggravating circumstance and as a specific aggravating circumstance to certain offences.<sup>121</sup> Beyond its Penal Code, Angola’s General Labour Law prohibits discrimination and, despite no specific reference being made to sexual orientation, some have interpreted this as including a prohibition on discrimination based on sexual orientation.<sup>122</sup>

In Mozambique, whilst there are no comprehensive anti-discrimination laws that prohibit discrimination on the grounds of sexual orientation and gender identity, there are laws that provide some degree of protection to LGBTIQ+ individuals. For example, its Penal Code criminalises the foundation or constitution of organisations or the elaboration of organised propaganda activities “that incite discrimination, hate or violence based on race, colour, ethnicity, nationality, religion, sex or gender identity”.<sup>123</sup> Furthermore, Mozambique’s Labour Law explicitly prohibits discrimination on the basis of sexual orientation (yet not on the basis of gender identity), as well as a protection of the right to privacy.<sup>124</sup>

In Botswana, the Employment Act provides protection from termination on the basis of an individual’s sexual orientation.<sup>125</sup> Finally, in 2019 Kenya became the first country in Africa to incorporate an intersex category into the national census.<sup>126</sup>

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117 Constitution of South Africa, 1996, Arts. 9(3)-(5).

118 Promotion of Equality and Prevention of Unfair Discrimination Act, 2000; Labour Relations Act, 1995; Employment Equity Act, 1998; Rental Housing Act, 1999; Alteration of Sex Description and Sex Status Act, 2003; Civil Union Act, 2006 (South Africa).

119 See Equaldex, [LGBT Rights in South Africa](#).

120 Quartz Africa, [South Africa wants to enshrine the right to be non-binary](#), 22 April 2021.

121 Penal Code of Angola, 2020, ss 212, 71, 170, 213, 214, 223 and 380. Despite these positive reforms, civil society has raised concerns that the new criminalisation of the wilful transmission of HIV disproportionately affects LGBTIQ+ persons, as it “encourages violence when serostatus is disclosed” and “create[s] blame and sets risk and violent situations for people living with HIV”: Angolan feminist LGBTQI Collective, [Step by step, maybe, we will get there](#), submitted to CEDAW in 2019.

122 General Labour Law, 2015 (Angola); Miranda & Associados, [Employment & Labour Law in Angola](#).

123 Penal Code, s 191 (Mozambique).

124 Labour Law, 2007, ss 4(1) and 5 (Mozambique).

125 Employment Act, 1982, s 23(d) (Botswana).

126 Nita Bhalla, [In a first for Africa, Kenya census to count intersex people](#), 20 August 2019.

## Legislation which is directly discriminatory

In sharp contrast to laws that protect persons on the basis of actual or perceived sexual orientation or gender identity, several States still have laws that are directly discriminatory towards LGBTIQ+ persons, sometimes going as far as criminalisation. Many of these laws are remnants of legislation first introduced by colonial powers,<sup>127</sup> but have remained ingrained in law to this date.

## Prohibitions on same-sex marriage and lack of recognition of same-sex couples

In many of the researched States, there are still laws based on heteronormative and cisgender values and traditional views on marriage and family, which are overtly discriminatory against LGBTIQ+ individuals. For instance, laws in Mozambique and the Constitution of

Uganda prohibit marriage between two persons of the same sex, and Mozambique also excludes same-sex couples from adopting.<sup>128</sup>

In Algeria,<sup>129</sup> Angola,<sup>130</sup> the DRC,<sup>131</sup> Kenya,<sup>132</sup> Malawi,<sup>133</sup> and Morocco,<sup>134</sup> marriage is only recognised between persons “of the opposite sex” or “between a man and a woman”. Morocco also prevents the recognition of same-sex marriages involving Moroccan citizens in France, and both countries agreed that Moroccan law governs the eligibility for marriage of Moroccan citizens in France, and vice-versa.<sup>135</sup>

Similarly, in Botswana, LGBTIQ+ couples have no legal recognition, and both national and foreign same-sex marriages are not recognised. LGBTIQ+ individuals are also prohibited from adopting and cannot serve in the Botswanan military.<sup>136</sup>

## Case Study: Malawi



In 2010, two individuals were convicted of “buggery” and, alternatively, of “indecent acts by males”, after they engaged in a traditional marriage ceremony.<sup>137</sup> Relying on various witness statements, the Court reached its decision after determining that one of the individuals, who dressed and acted like a woman but had the genitals of a man, was in fact a man, and that the two had engaged in anal sex. The Court stated that the conviction of the married couple also served as a “scaring sentence so that ‘the public must also be protected from others who may be tempted to emulate their [horrendous] example’”, thus reinforcing both transphobic and homophobic principles.<sup>138</sup>

127 UNHRC, Report of the Independent Expert on SOGI on visit to Mozambique, 17 May 2019, UN Doc. A/HRC/41/45/Add.2, para. 23.

128 See, Y Ilesanmi, Freedom to love for all: Homosexuality is not un-African, cited in CAL, AMSHeR, *Violence Based on Perceived or Real Sexual Orientation and Gender Identity in Africa*, 2013, pp. 7 to 9.

129 Family Law, 2004, ss 53(e) and 393 (Mozambique); Constitution of Uganda, 1995, Art. 31(2)(a).

130 Family Code, s 4 (Algeria).

131 Constitution of Angola, 2010, Art. 35; Family Code, 1988 (Angola).

132 Constitution of the DRC, Art. 40. Furthermore, in 2016 the Congolese Senate passed a law prohibiting the adoption of children by individuals or couples who are homosexual or transgender: UHAI EASHRI, Christian Rumu, Human Rights of LGBTI People and Sex Workers in the DRC, 2017, p. 13.

133 Constitution of Kenya, 2010, Arts. 45(2) and (4); Marriage Act, 2014, s 3(1) (Kenya).

134 Marriage, Divorce and Family Relations Act No. 4 of 2015, s 14 (Malawi).

135 Family Code, 2004, s 4 (Morocco).

136 Convention relative au statut des personnes et de la famille et à la coopération judiciaire du 10 août 1981 publiée par décret no. 83-435 du 27 mai 1983, s 5.

137 High Court of Malawi, *R.v. Soko and Another* (359 of 2009) [2010] MWHC 2, 19 May 2010.

138 Ibid.

### **Prohibitions of same-sex conduct and ‘indecentry’**

In addition to the non-recognition of same-sex marriage, several of the States reviewed criminalise same-sex conduct or so-called acts of ‘indecentry’ or ‘unnatural offences’.

For example, in Ghana, there is a prohibition against so-called ‘unnatural offences’. Under Ghana’s Criminal Offences Act, “whoever has unnatural carnal knowledge of any person sixteen years or over with his consent is guilty of a misdemeanour”, punishable by up to 3 years of imprisonment.<sup>139</sup> “Unnatural carnal knowledge” is defined as “sexual intercourse with a person in an unnatural manner or with an animal”.<sup>140</sup>

Similarly, the Kenyan Penal Code states that a person “who...has carnal knowledge of any person against the order of nature...or permits a male person to have carnal knowledge of him or her against the order of nature” is guilty of a felony and faces imprisonment for up to fourteen years, and even a person who attempts to commit such acts may be imprisoned for up to seven years.<sup>141</sup> An act “against the order of nature” is typically interpreted by the courts as anal sex.<sup>142</sup> Further, Section 165 states that any male person who commits any act of “gross indecentry” with another male person (or procures another male person to commit any act of gross indecentry with him or with another male person), whether in public or private, is guilty of a felony and is liable to imprisonment for 5 years.<sup>143</sup>

#### **STATES STUDIED WHERE SAME-SEX CONDUCT IS CRIMINALISED**



139 Criminal Offences Act, 1960, s 104(1)(b) and Criminal Procedure Code, 1960, s 296(4) (Ghana). Both natural and “unnatural: carnal knowledge of a person under sixteen years of age is punishable by imprisonment between 7 and 15 years. Criminal Offences Act, s 101.

140 Criminal Offences Act, 1960, s 104(1)(2) (Ghana).

141 Penal Code, 2012, ss 162 and 163 (Kenya).

142 Ibid, s 162 (Kenya).

143 Ibid, s 165.

## Case Study: Kenya

In the 2019 case of *EG v. Attorney General*, the High Court of Kenya found that Sections 162 and 165 of the Kenyan Penal Code did not violate an individual's rights under the Constitution of Kenya such as, amongst others, the right to privacy and the right to freedom and security of person, when read with Article 45(2) (the right to marry a person of the opposite sex).

The High Court considered that, if the acts described in these sections were legal, it would result in same-sex couples being allowed to live together as a couple and “[s]uch relationships, whether in private or not, formal or not would be in violation of the tenor and spirit of the Constitution...therefore, decriminalizing the impugned provisions would indirectly open the door for unions among persons of the same sex”.<sup>144</sup> Moreover, they apply to “any person” and “any male person” respectively, and not specifically to those of a particular sexual orientation.

The High Court summarised cases in several jurisdictions where the criminalisation of private consensual acts between members of the same sex had been found to be unconstitutional, but noted that however persuasive these decisions may be, they are not binding on the Court.<sup>145</sup> It is understood that this decision is under appeal at the time of writing this report.<sup>146</sup>

The Moroccan Criminal Code states that “anyone engaging in an act that is indecent or against nature with an individual of the same sex” shall be punished by way of imprisonment for a duration of six months to three years and by way of a fine ranging from 200 to 1000 dirhams, unless the act constitutes a more serious offence.<sup>147</sup> The Criminal Code in Morocco also criminalises extra-marital sexual relations between persons of different sexes but, since LGBTIQ+ persons cannot legally get married, any sexual relations between them can also, by default, be captured by this provision of the Moroccan Criminal Code.<sup>148</sup>

The Moroccan Criminal Code also criminalises public indecency, an act broadly defined as “voluntary nudity or

obscenity of gestures or acts” and thus subject to judicial discretion.<sup>149</sup> It has been reported that this provision, in combination with other provisions of the Moroccan Criminal Code (namely, those described above), has a direct discriminatory impact, and could lead to prosecution merely on the basis of a person's dress code.<sup>150</sup> Taken as a whole, these provisions may constitute an obstacle to the expression of sexual orientation and gender identity.

In Algeria, any person who has “committed a homosexual act” will be punished by imprisonment (between 2 months and 2 years) and a fine, and such act is an aggravating factor for the crime of public indecency.<sup>151</sup> The penalties for the latter range from imprisonment from 6 months to 3 years and a fine.

144 High Court of Kenya at Nairobi, *EG & 7 others v. Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)* [2019], 24 May 2019, paras. 296-297.

145 Ibid, 398.

146 Human Dignity Trust, *Eric Gitari & Others v. Attorney General Kenya*, 2019.

147 Criminal Code, 1962, s 489 (Morocco).

148 Ibid, s 490.

149 Ibid, s 483.

150 See, for example, The Guardian, *Amnesty condemns trial of Moroccan women who wore ‘too tight’ dresses*, 7 July 2015. See also International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), *State Sponsored Homophobia 2019*, March 2019, pp. 205, 352.

151 Penal Code, ss 333 and 338 (Algeria).



The Malawi Penal Code contains similar prohibitions against same-sex acts, describing them as acts of “gross indecency”, and also prohibits carnal knowledge “against the order of nature”.<sup>152</sup> Consensual same-sex sexual activities or “unnatural offences” are punishable by up to 14 years of imprisonment, including hard labour. Conviction of attempting “unnatural offences” is punishable by 7 years of imprisonment and “indecent practices” between men as well as between women are punishable by up to 5 years of imprisonment.<sup>153</sup> On the basis of these laws, the Government of Malawi has banned LGBTIQ+ asylum seekers from being registered.<sup>154</sup>

### **Laws concerning diverse gender identity**

Identity documents are an integral part of daily life and are required to carry out a number of basic activities, such as working, voting and travelling. However, some States researched do not allow individuals from amending identity documents to reflect their gender identity.

For example, there is no law in Angola authorising a change in legal identity. In fact, its Civil Registry Code prohibits any modification of details of civil registration, except for an individual’s name (including due to change of civil status).<sup>155</sup> It could be argued that this exception could be used to alter one’s legal identity.

The DRC does not have a law that allows intersex or transgender individuals to change their legal documents.<sup>156</sup> Similarly, there is no law in Mozambique which authorises a change of legal identity. In fact, the Civil Registry Code prohibits alterations of details of civil registration unless otherwise provided in law.<sup>157</sup> However, since the Code foresees alterations of some aspect of the identity or the civil status of the registered person,

some argue that this provision could potentially be used to request a change of one’s legal identity.<sup>158</sup>

## **Progressive trends**

### **Legislative reforms decriminalising same-sex conduct**

Examples of recent attempts to repeal laws which criminalise same-sex conduct or are otherwise discriminatory towards LGBTIQ+ individuals are limited. However, one of the most significant recent legislative changes for the protection of the LGBTIQ+ community was the approval of the new Mozambique Penal Code. This law removed provisions from the colonial-era Penal Code that criminalised “vices against nature”, which could be used to criminalise same-sex relations. As there are no reports of any prosecutions under those provisions since Mozambique’s independence in 1975, this change was rather symbolic. Nonetheless, it was perceived as an important step to protect Mozambique’s LGBTIQ+ population.

Similarly, in February 2021, Angola’s new Penal Code, which no longer criminalises consensual same-sex conduct, came into effect. The provision related to “vices against nature”, which was widely interpreted as a ban on same-sex conduct, was removed.<sup>159</sup> Along with Mozambique, Angola is therefore one of the few States to recently shed laws (proactively, by way of legislative reform) that discriminate against LGBTIQ+ individuals. Angola is a member of the Southern African Development Community (SADC) and Angola’s decriminalisation of same-sex conduct in 2019 “means those SADC states which actively criminalise same sex activity are officially in the minority. And data shows that attitudes towards homosexuality in the region are becoming less negative. Decriminalisation in Angola brings SADC, which has 16 members, to a tipping point”.<sup>160</sup>

<sup>152</sup> Penal Code, 1930, ss 137A, 153, 154 and 156 (Malawi).

<sup>153</sup> Ibid.

<sup>154</sup> US Department of State, *Malawi 2020 Human Rights Report*, 2020.

<sup>155</sup> Civil Registry Code of Angola, 1967, ss 78, 131.

<sup>156</sup> Human Rights Based Approach at Sida, *Compilation of Briefs on Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Persons* (Compilation of Briefs on LGBTI Persons), December 2014.

<sup>157</sup> Civil Registry Code of Mozambique, 2004, s 77.

<sup>158</sup> UNHRC, *Report of the Independent Expert on SOGI on visit to Mozambique*, 17 May 2019, UN Doc. A/HRC/41/45/Add.2, para. 26.

<sup>159</sup> HRW, *Angola Decriminalizes Same-Sex Conduct*, 23 January 2019.

<sup>160</sup> The Conversation, *Abolition of Angola’s anti-gay laws may pave the way for regional reform*, 14 February 2019.

Alongside efforts to decriminalise same-sex acts, Angola has also taken legislative steps to stamp out stigma suffered by LGBTIQ+ individuals. For example, Angola adopted a National Human Rights Strategy in April 2020 that includes several measures to strengthen the Government's relationship with civil society, as laid out in a Decree detailing the strategy. It includes seminars, workshops, and debates for the promotion of civil, political, economic, social, and cultural rights, and those related to gender, HIV, LGBTIQ+ rights, and other minority and vulnerable groups.<sup>161</sup> The National Human Rights Strategy also demonstrates a strong commitment to pro-

moting equality and non-discrimination and stresses the importance of implementing measures in compliance with international human rights standards established in international and regional legal instruments.<sup>162</sup>

### **Court rulings**

Despite the prevalence of laws discriminating against LGBTIQ+ individuals, there have been some positive judicial decisions which seek to interpret existing legislation more liberally, including to decriminalise same-sex conduct.

## **Case Study: Botswana**

In November 2021 the Court of Appeal of Botswana upheld a 2019 High Court decision finding that laws criminalising same-sex relations were unconstitutional and conflicted with the rights of liberty, privacy, security of the person, and equal protection and freedom from discrimination. One of the Judges of the High Court considered the laws “discriminatory” and stated that “[s]exual orientation is not a fashion statement. It is an important attribute of one’s personality”.<sup>163</sup> Accordingly, Sections 164 and 165 of the British-era Penal Code were deemed to be unconstitutional. The ruling further recognised that “sex”, within the definition of Article 15(3) of Botswana’s Constitution which endows protections to individuals whatever their sex (amongst other characteristics), should be interpreted as including “sexual orientation”.<sup>164</sup>

Further, in 2017, in two separate High Court decisions in Botswana, the court ruled in favour of a transgender man and a transgender woman who sought to change their gender on their identity documents. During the court proceedings, recognition of gender was held to be part of the right to dignity and freedom of expression under the Constitution.<sup>165</sup>

In Kenya there have also been positive judicial decisions. In the civil case of *COI & another v. Chief Magistrate Ukunda Law Courts & 4 others*, the Court of Appeal found in

favour of two men who had been arrested on suspicion of “gay activities”. There, the Court found that the anal examinations to which they were subjected violated their fundamental rights and freedoms, including the right to equality and freedom from discrimination, to human dignity, to freedom and security of the person, and to a fair hearing, all enshrined in the Constitution of Kenya.<sup>166</sup> In *Non-Governmental Organizations Co-ordination Board v. EG & 5 others*, the Kenyan High Court held that the

<sup>161</sup> Decree no.100, 2020 (Angola).

<sup>162</sup> Ibid, ss 7.1, 7.2 and 9.8.

<sup>163</sup> BBC, *Botswana decriminalises homosexuality in landmark ruling*, 11 June 2019.

<sup>164</sup> Constitution of Botswana, 1966, chapter 2, Art. 3; Court of Appeal of Botswana, *Attorney General v. Letsweletse Motshidiemang*, No. CACGB-157-19, 29 November 2021.

<sup>165</sup> Reuters, *Botswana court orders government to recognize transgender woman as female*, 12 December 2017.

<sup>166</sup> Court of Appeal of Kenya at Mombasa, *COI & another v. Chief Magistrate Ukunda Law Courts & 4 others* [2018], Civil Appeal No. 56 of 2016 (COI v. Chief Magistrate), 22 March 2018.

NGLHRC should be allowed to register as an NGO, and a final decision by the Kenyan Supreme Court is pending.<sup>167</sup>

Finally, in the South African case of *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, the Constitutional Court stated that the concept of sexual orientation in the South African Constitution “must be given a generous interpretation” and thus include the orientation of individuals who identify as transgender.<sup>168</sup>

### **Anti-discrimination and hate crimes legislation**

Further efforts have also been made by the government of South Africa to improve its response strategies to incidences of violence against LGBTIQ+ individuals. Since 2011, South Africa has had a National Task Team on Gender and Sexual Orientation-Based Violence to address human rights concerns and violations against LGBTIQ+ individuals. The National Task Team was established to respond to the series of attacks against black lesbians and practices of ‘corrective’ rape, including by State actors.

Furthermore, whilst South Africa does not currently have comprehensive legislation criminalising hate crimes, the Prevention and Combating of Hate Crimes and Hate Speech Bill seeks to increase the sentences for offences motivated by hate and founded on discrimination. The Bill was introduced to Parliament in 2018 but has since been delayed following concerns that it is too vague and threatens freedom of speech. In April 2021, a number of civil society organisations in South Africa called on the Government to take urgent action (including to finalise and enact the Bill) in light of recent attacks against LGBTIQ+ individuals.<sup>169</sup> Nonetheless, at the date of writing this report, there have been no further developments.

### **Regressive trends**

In contrast to progressive trends aimed at protecting LGBTIQ+ individuals in certain States, several States researched are entrenching even further LGBTIQ+ discrimination into their legislative frameworks. One of the most egregious examples of regressive legislation is the Ghanaian private members’ Bill, named the Promotion of Proper Human Sexual Rights and Ghanaian Family Values Bill, which was introduced in the Ghanaian Parliament in 2021. The Bill remains in the legislative process, but a vote on its passage is expected soon.<sup>170</sup>

Amongst other proposed measures, the Bill would:

- Criminalise identifying as LGBTIQ+, undergoing or performing sex-reassignment surgeries, forming LGBTIQ+ associations, advocating for LGBTIQ+ rights, and funding or sponsoring an activity prohibited under the Bill.<sup>171</sup>
- Criminalise “gross indecency”, defined as any “show of amorous relations” between or among LGBTIQ+ individuals; and “intentional cross-dressing”.<sup>172</sup>
- Promote so-called conversion therapy for LGBTIQ+ individuals and “gender realignment” for intersex children.<sup>173</sup>
- Criminalise LGBTIQ+ marriages and prohibit LGBTIQ+ individuals from adopting or fostering children.<sup>174</sup>

The Bill’s only minor concession to protecting LGBTIQ+ rights is its proposed criminalisation of the verbal or physical abuse, assault or harassment of individuals who

167 Court of Appeal of Kenya at Nairobi, *NGO Board v. EG & 5 Ors*, 2019.

168 Constitutional Court of South Africa, *National Coalition for Gay and Lesbian Equality v. Minister of Justice* (CCT11/98) [1998] ZACC 15, 9 October 1998; See also Labour Court of South Africa, *Ehlers v. Bohler Uddeholm Africa (Pty) Ltd Africa* (JS296/09) [2010] ZALC 117, 13 August 2010.

169 Joint Statement from Lawyers for Human Rights and others, 21 April 2021; Global Citizen, *LGBT+ South Africans Resist ‘War on Queerness’ as Activists Demand Justice After Killings*, 17 May 2021.

170 NBC News, *Ghana poised to vote on “worst anti-LGBTQ bill ever” advocates warn*, 29 July 2021.

171 Promotion of Proper Human Sexual Rights and Ghanaian Family Values Bill, 2021, ss 6(1), 12(1)-(3)-(4), 13(1)-(2)-(3), 14, and 16.

172 Ibid, s 10(2).

173 Ibid, s 23.

174 Ibid, ss 11, 18 and 19.

are accused of an offence under the Bill or who are sexually or gender diverse, identified in the Bill as those who “suffe[r] from any gender or sexual identity challenge”.<sup>175</sup>

There have also been recent efforts to pass further discriminatory laws against LGBTIQ+ individuals in Uganda. The Penal Code Act (adopted during British colonial rule) already criminalises so-called “unnatural offences” and “indecent practices” which are used to target the LGBTIQ+ population.<sup>176</sup> Yet, on 3 May 2021, the Ugandan Parliament approved the Sexual Offences Bill,<sup>177</sup> which punishes consensual same-sex sexual acts, allows for prosecution of such acts even where these were performed outside of Uganda, and allows for forced HIV testing. President Museveni has issued a letter to Parliament refusing to provide his assent for the Sexual Offences Bill (without which the Bill cannot take effect) on the ground that a number of its provisions are already captured in existing legislation.<sup>178</sup> It remains to be seen whether an amended version will be resubmitted to the Ugandan President, though some reports claim that the authorities have refrained from passing these legal instruments because they fear backlash from the international community.<sup>179</sup>

In 2010, there was a proposal in the DRC for a Sexual Practices Against Nature Bill.<sup>180</sup> Whilst the Bill was not approved and is currently not under consideration, similar bills were introduced in 2013, 2015, and 2016, demonstrating enduring attempts by anti-LGBTIQ+ groups to

introduce discriminatory laws. These later iterations also sought to sanction “the promotion of homosexuality” including any “homosexual public demonstrations”.<sup>181</sup>

Civil society has also raised concerns about Morocco’s so-called Bill 22.20, which would penalise forms of speech on social networks and leave it up to private network providers to suppress content which undermines the “sacredness and [the] symbols” of the Kingdom of Morocco.<sup>182</sup> In Morocco, where same-sex sexual acts are still criminalised, the views of LGBTIQ+ activists (and members of the LGBTIQ+ community more widely) are often suppressed on social media, including through frequent harassment and crackdowns on online campaigns.<sup>183</sup> In this context, the Bill may further limit the ability of LGBTIQ+ activists (and others) to use social media to report abuses against the LGBTIQ+ community, and may lead to increased levels of self-censorship.

In other States, laws discriminating against the LGBTIQ+ community remain the *status quo* and there is little political, and often societal, appetite for change. For instance, in Morocco the decriminalisation of same-sex sexual acts is not on the legislative agenda and official attitudes towards LGBTIQ+ individuals appear to be hardening. Moreover, many discriminatory laws continue to be enforced. For example, in September 2020 the tribunal of El Khroub in Algeria sentenced the organisers of a same-sex wedding to 1 to 3 years of imprisonment.<sup>184</sup>

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175 Ibid, ss 22(1) and (2).

176 Penal Code Act, 1950, ss 145, 146 and 148 (Uganda).

177 E. Nakkazi, *Uganda’s Sexual Offences Bill—a step backwards*, The Lancet Infectious Diseases, Vol. 21, July 2021, para. 920; HRW, *Uganda: Reject Sexual Offences Bill*, 6 May 2021; OHCHR, *Press briefing notes on Uganda*, 7 May 2021.

178 Parliamentarians for Global Action, *Uganda’s President Refuses to Promulgate Sexual Offences Bill*, 21 September 2021. Previously in 2013, the Parliament had passed the Anti-Homosexuality Act, which provided for life imprisonment sentences in cases of “aggravated homosexuality”, but the Act was annulled by the Constitutional Court on procedural grounds. See also, OHCHR, *Anti-Homosexuality law in Uganda violates human rights and endangers LGBT people—Pillay*, 24 February 2014.

179 E. Nakkazi, *Uganda’s Sexual Offences Bill—a step backwards*, The Lancet Infectious Diseases, Vol. 21, July 2021, 920; HRW *Uganda: Reject Sexual Offences Bill*, 6 May 2021; OHCHR, *Press briefing notes on Uganda*, 7 May 2021.

180 Human Rights Based Approach at Sida, *Compilation of Briefs on LGBTI Persons*, December 2014.

181 Mouvement pour la promotion du respect et égalité des droits et santé (MOPREDS) et al., *Human Rights Violations Against Lesbian, Gay, Bisexual and Transgender (LGBT) People in the Democratic Republic of the Congo (DRC)* (Human Rights Violations Against LGBT People in the DRC), October 2017, 14.

182 ARTICLE 19, *Government must fully withdraw draft law on social media*, 10 July 2020.

183 Freedom House, *Freedom on the Net 2020: Morocco*, 2020.

184 Whilst the court ruling was reported in the press, no transcript of the judgment and its legal basis (presumably “indecentry” according to the reported count of arrest) is available: El Watan, *Célébration d’un mariage gay à la nouvelle ville de Constantine: Des peines de prison ferme prononcées à l’endroit des auteurs*, 5 September 2020.







“

**I can't forget when I was raped in the police cell by prisoners. After all that I decided to start an organisation with some campus students. But it became hard for me to find a permanent place to stay because the majorities are homophobic.**

”

## Tied with ropes **AND RAPED**

Kamarah Apollo, a 26-year-old gay activist from Uganda, was disowned by his family because of his sexual orientation. He left home with no option but to do sex work for survival. He was arrested several times because police officers thought he was promoting homosexual acts in Uganda. He says he has been tortured several times by homophobic people and police officers by tying him with ropes, being beaten, pierced by soft pins, nicknamed, and suffering psychological torture.



## SECTION III

### VIOLENCE AGAINST LGBTIQ+ PERSONS

#### Types of violence against LGBTIQ+ persons

Members of the LGBTIQ+ community face patterns of violence throughout the African region, some of which have been documented in local, regional, and UN reports, as well as by civil society organisations. Forms of LGBTIQ+ violence exemplified in this section often amount to torture or CIDTP, although they are rarely investigated and prosecuted as such.

Even in States where the legislative framework suggests there is a wider acceptance of diverse sexual orientations and gender identities, patterns of violence against the LGBTIQ+ community persist. This seems to be the case in Angola, where, despite recent decriminalisation, “LGBTI people [have] continued to face discrimination, intimidation and harassment by both non-state actors and state actors”.<sup>185</sup> In addition, “almost half of men who have sex (MSM) with men (171, 46.2%) reported having experienced some form of violence in their life, that is, were physically assaulted or discriminated against. With respect to homophobia, 133 (70.4%) report episodes. Among those reporting episodes of discrimination because of sexual orientation, 40.1% reported that it occurred many times in the last 12 months and at work, school, business and recreation areas”.<sup>186</sup>

Similarly, in Mozambique, there remains societal discrimination and violence on the basis of sexual orientation



and gender identity, and LGBTIQ+ persons are often discriminated against at home, within their families, in the workplace, and in public spaces.<sup>187</sup> Furthermore, in South Africa, a recent spate of attacks against LGBTIQ+ individuals, predominantly in less populated areas, demonstrates that violence against the LGBTIQ+ community is far from relenting.<sup>188</sup> In addition, LGBTIQ+ individuals in South Africa have been reported to be particularly vulnerable to violent crime due to anti-LGBTIQ+ attitudes within the community and amongst police.<sup>189</sup> In this context,

<sup>185</sup> UNHRC, *Summary of Stakeholders' submissions on Angola*, 20 August 2019, UN Doc. A/HRC/WG.6/34/AGO/3, para. 12; See also UOL, “Já fui apedrejada”, diz Titica, primeira cantora trans de Angola, 17 November 2017 (noting that one of Angola’s most famous artists, a transgender woman, says she has been a victim of violence and discrimination on many occasions).

<sup>186</sup> Kendall, Carl et al, *Population size, HIV, and Behavior Among MSM in Luanda, Angola: Challenges and Findings in the First Ever HIV and Syphilis Biological and Behavioral Survey*. *Journal of acquired immune deficiency syndromes*, Vol. 66(5) (2014), 544-551.

<sup>187</sup> UNHRC, *Report of the Independent Expert on SOGI on visit to Mozambique*, 17 May 2019, UN Doc. A/HRC/41/45/Add.2; LAMBDA, *Attitudes towards homosexuality*, 2017; US Department of State, *Mozambique 2019 Human Rights Report*, 2019.

<sup>188</sup> Business Day, *SA's LGBT+ activists refuse to lie low*, 13 May 2021.

<sup>189</sup> US Department of State, *2019 Country Reports on Human Rights Practices: South Africa*, 2019.

civil society organisations in South Africa have called for greater legislative reform to prevent future violence.

### **Arbitrary arrests, extortion and harassment**

One form of harassment frequently used by law enforcement officials is arbitrary detention. Especially, but not exclusively, in jurisdictions where same-sex relations are criminalised, police officers often detain individuals on the basis of perceived sexual orientation

or gender identity and threaten them with charges of homosexuality, indecency, or other ‘morality’ laws. Threats of public shaming or forced outing, which are used to extort individuals into paying police officers for their silence, are also common.

Examples of such arrests, harassment, and blackmail against LGBTIQ+ persons were identified in several of the researched States, including in the context of the COVID-19 pandemic.

## **Case Study: Uganda**

In March 2020, 23 individuals were arrested during a police raid at an LGBTIQ+ shelter for alleged violations of COVID-19 related restrictions and “negligent acts likely to spread infection of disease” under Section 171 of the Penal Code Act.<sup>190</sup> Later, reports revealed that the raid was conducted to find “evidence of homosexuality”.<sup>191</sup> In this case, following actions taken by civil society organisations, the UN Working Group on Arbitrary Detention declared the detention of 19 of those LGBTIQ+ individuals arbitrary under international law, recalling that “deprivation of liberty on the basis of sexual orientation is arbitrary and prohibited under international law”.<sup>192</sup>

Also, in the DRC, public decency crimes under the Penal Code, which can include homosexuality, are rarely charged, but are frequently used to detain and extort LGBTIQ+ individuals in exchange for not bringing criminal charges.<sup>193</sup> This is particularly true for transgender men or gay men whose physical presentation may appear more in line with that typically associated with women,

and particularly pronounced in regions such as Kinshasa, Goma, Lubumbashi, and Bukavu.<sup>194</sup> During the course of six months in early 2016, eight transgender individuals were arrested in Goma and Eastern DRC. In one case, three transgender people were arrested by the police and accused of being a threat to public order and public decency. They spent 36 hours detained and were freed

190 Robert F Kennedy Human Rights, [19 Ugandan LGBTQ+ detainees obtain favorable opinion from the united nations working group on arbitrary detention](#), 22 October 2021. Another example of abuse in the Covid-19 pandemic context was identified in Algeria: HRW, [Algeria: Mass Convictions for Homosexuality](#), 15 October 2020.

191 UNHRC, Working Group on Arbitrary Detention, [Opinions adopted by the Working Group on Arbitrary Detention at its ninetieth session, 3–12 May 2021](#), 9 July 2021, UN Doc. A/HRC/WGAD/2021/20.

192 Ibid.

193 MOPREDS et al., [Human Rights Violations Against LGBT People in the DRC](#), October 2017, 8 and 10.

194 UHAI EASHRI, Christian Rumu, [Human Rights of LGBTI People and Sex Workers in the DRC](#), 2017, p. 13.

only after local civil society organisations intervened. In another case, a gay man was arrested without any legal procedure. Devoid of any proof, he was accused

of having sexually assaulted a minor. He spent several hours detained and was only released after paying the police.<sup>195</sup>

## Case Study: Kenya

In Kenya, LGBTIQ+ individuals have reported instances of extortion by undercover police officers who lured them through Grindr, a dating app dedicated to LGBTIQ+ persons. In a particular case in December 2021, one individual who used the app revealed his location to a man he met on Grindr but clarified he did not want to meet him. Later that day, three police officers approached him, and asked him to get in their car supposedly to “help with an investigation”. After his refusal, the police officers “accused him of having sex with a minor and started getting violent”, including trying to handcuff him, punching him on the chest and pushing him over the car bonnet. Once he managed to contact a lawyer from the NGLHRC, the police officers took him to the station, “but not before threatening him and demanding money to ‘make everything go away’”. The NGLHRC has dealt with 679 cases of blackmail and extortion since 2013 but there is anecdotal evidence among local organisations of thousands of such cases. In other cases where lawyers were not involved, victims of this type of extortion have suffered severe beatings by both police officers and members of the public, sometimes requiring hospital treatment.<sup>196</sup>

Likewise, in Ghana, LGBTIQ+ activists have experienced violence and suffered police raids and arrests. In May 2021, a case which gained significant public attention – and which was marked by #ReleaseThe21 campaign on social media – concerned the arrest of 21 individuals during an LGBTIQ+ training session targeted at lawyers on how to better identify and report violations suffered by LGBTIQ+ Ghanaians.<sup>197</sup> These individuals were prosecuted and later acquitted of charges of unlawful assembly.<sup>198</sup> In addition to arbitrary arrests, threats of outing LGBTIQ+ persons to their family or wider community are also practiced in the context of police custody. Such threats

tend to have a strong impact due to the stigmatisation and ostracization faced by the LGBTIQ+ community. In 2017, the Algerian NGO, Alouen, reported acts of arrests, public shaming, and non-official intimidation of LGBTIQ+ activists by the police.<sup>199</sup> It must be noted, nonetheless, that such threats are not exclusively perpetrated by State officials. For example, the Kenya Human Rights Commission and the Equal Rights Trust have documented and reported instances of LGBTIQ+ persons being blackmailed not only by members of the security forces, but also by their partners, family members, and colleagues, often to extort money or to force custody agreements to be en-

195 MOPREDS et al., *Human Rights Violations Against LGBT People in the DRC*, October 2017, 10.

196 The Guardian, ‘I’d been set up’: the LGBTQ Kenyans ‘catfished’ for money via dating apps, 4 January 2022.

197 Reuters, *Ghana police arrests 21 LGBT+ activists at ‘unlawful’ gathering*, 21 May 2021. See also, Africanews, *Ghana: Court acquits 21 LGBT activists on charges of “unlawful assembly”*, 5 August 2021.

198 Africanews, *Ghana: Court acquits 21 LGBT activists on charges of “unlawful assembly”*, 5 August 2021.

199 Association Alouen, *Examen Périodique Universel 3e cycle Algérie: Préoccupations de l’Association Alouen concernant la Situation du Droit à la Non-Discrimination et à l’Égalité : Cas des LGBTI Algérien-ne-s* (Concerns of Alouen regarding the right to non-discrimination and equality: The Case of LGBTI Algerians).

tered into over children.<sup>200</sup> Cases of blackmail were also reported by GALCK in Zimbabwe<sup>201</sup> and in Malawi, where a bisexual woman reported being blackmailed by another bisexual woman, and has continued to endure threats from her.<sup>202</sup>

### **Violence by State actors**

The research undertaken for this report also confirmed that LGBTIQ+ persons are often victims of serious physical violence by State actors, in the form of beatings, rapes and forced anal examinations, which commonly take place in the context of police custody or in detention facilities. Most of these cases constitute torture and/or CIDTP and amount to other grave human rights violations.

For example, Kenya's Human Rights Commission noted in a 2011 report multiple examples of gay men suffering sexual violence perpetrated by police officers.<sup>203</sup> A case detailed by the Commission revealed that a male victim was arbitrarily arrested, blackmailed, and sexually abused by police officers, following which he contracted gonorrhoea.<sup>204</sup> Despite having reported the case to Kenya's Human Rights Commission, the case was not taken forward due to a lack of evidence.<sup>205</sup>

Additionally, in 2013, an LGBTIQ+ activist in the DRC was arrested, charged with 'promotion of homosexuality', and reportedly detained for four days. During the period of detention, he was tortured and beaten by the po-

lice, as well as beaten and raped by fellow inmates in the presence of an investigator. He was only released after paying the arresting officer USD 400, after which his partner, who had been vocally advocating for his release, was also detained and tortured.<sup>206</sup>

In Angola, a survey conducted in 2017 by the US President's Emergency Plan for AIDS Relief revealed that 17.3% of men who have sex with men suffered aggression by the police in the previous 12 months. Similarly, in Morocco, there are reports of LGBTIQ+ individuals having been beaten violently by police while in detention.<sup>207</sup>

In relation to forced anal examinations, the UN Special Rapporteur on Torture, CAT, and the UN Working Group on Arbitrary Detention have noted that such examinations are "medically worthless and [amount] to torture or ill-treatment",<sup>208</sup> "have no medical justification and cannot be consented to fully",<sup>209</sup> and "contravene[e] the prohibition of torture and ill-treatment".<sup>210</sup> Nonetheless, these practices continue to be used against LGBTIQ+ persons in some of the States researched, often to obtain 'evidence' to support prosecutions for criminal offences targeting LGBTIQ+ persons for alleged 'unnatural offences' and 'indecent practices'. For example, in 2019, Human Rights Watch reported that in Uganda "the police carried out two mass arrests on spurious grounds, abused the detainees, and forced at least 16 to undergo anal examinations".<sup>211</sup>

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200 Equal Rights Trust, Submission to the United Nations Human Rights Council for a universal periodic review (21st session) of Kenya, 2015; Kenya Human Rights Commission, *The Outlawed Amongst Us, A Study of the LGBTI community's search for equality and non-discrimination in Kenya* (The Outlawed Amongst Us), 2011.

201 GALCK, *Statement regarding the rise in blackmail reports*, 10 August 2021.

202 Information from CEDEP, Malawi.

203 Kenya Human Rights Commission, *The Outlawed Amongst Us*, 2011.

204 Ibid.

205 Ibid.

206 MOPREDS et al., *Human Rights Violations Against LGBT People in the DRC*, October 2017, pp. 4 and 9. See also, Erasing 76 Crimes, *Congo report: LGBT activists arrested, tortured*, 14 May 2013.

207 Country of Origin Information Report from the Danish Immigration Service, *Morocco – Situation of LGBT persons*, September 2019.

208 UNHRC, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, 5 January 2016, UN Doc. A/HRC/31/57, para. 36.

209 HRW, *Dignity Debased, Forced Anal Examinations in Homosexuality Prosecutions*, 2016.

210 UN Working Group on Arbitrary Detention, *Concluding observations on the third periodic report of Tunisia*, 10 June 2016.

211 HRW, *Uganda: Stop Police Harassment of LGBT People*, 17 November 2019.



## Case Study: Kenya

In 2018, in *COI & another v. Chief Magistrate Ukunda Law Courts & 4 others*,<sup>212</sup> the Mombasa Court of Appeal declared forced anal examinations unconstitutional on the basis that they violate the right to dignity, including freedom from torture and other CIDTP, and therefore violate the rule against self-incrimination. The case litigated by the NGLHRC involved two men in Kwale who were charged under Section 162 (a) and (c) of the Penal Code for same-sex conduct. During the investigation, and following a court order, the defendants were subjected to forced anal testing for the purposes of proving the commission of an offence under Section 162 (a) and (c).<sup>213</sup>

Transgender persons in police custody and in detention are also subjected to an increased risk of torture and CIDTP due to discrimination on the basis of gender identity and expression. For example, in Mozambique, transgender detainees are often placed in male or female prisons according to their biological sex, which makes them more vulnerable to violence.<sup>214</sup> They are also subject to ill-treatment, such as having long hair shaved and having clothes which are deemed to be too feminine confiscated. In Malawi, it was reported that a transgender woman, who local news outlets described as a man posing as a female prostitute,<sup>215</sup> was stripped naked at a police station to determine her biological sex.<sup>216</sup>

### Violence by non-State actors

LGBTIQ+ persons across different States researched also face widespread violence from non-State actors, including family members, religious leaders, and the community more broadly. In some cases, this violence, including mob violence, has resulted in the death of LGBTIQ+

individuals. Sometimes this violence takes place in the presence of or with the participation or acquiescence of State officials. In other cases, it illustrates the omissions and lack of protection of the State, and the lack of accountability for such violence.

For example, in Algeria, a medical student who had previously shared his LGBTIQ+ status on Facebook was killed in his university residence. *Alouen*, an LGBTIQ+ activist group, described the attack as a “homophobic hate crime”, stating that the two assailants, reportedly peers of the victim, wrote “He is gay” on the crime scene wall in the victim’s blood.<sup>217</sup> Similarly, in Angola, at least four people who identified as homosexual had been killed in Angola in the previous three years, as reported by the NGO *Íris* Angola in February 2019.<sup>218</sup>

In Ghana, there are also reports of physical attacks on LGBTIQ+ individuals or groups by vigilante mobs, which have included robbery, stripping, and property damage, including in their own homes and meeting places.

212 Court of Appeal of Kenya at Mombasa, *COI v. Chief Magistrate* [2018], Civil Appeal No. 56 of 2016, 22 March 2018.

213 NGLHRC, *Our wins*.

214 UNHRC, *Report of the Independent Expert on SOGI on visit to Mozambique*, 17 May 2019, UN Doc. A/HRC/41/45/Add.2.

215 See, for example, Malawi 24, *Man impersonates female prostitute*, 17 July 2017.

216 Malawi: Civil Society Report on LGBTI Rights (Contribution to the List of Issues Prior to Reporting). To be submitted for the adoption of the List of Issues Prior to Reporting at the 131st session of the Human Rights Committee (Malawi: Civil Society Report on LGBTI Rights), March 2021.

217 QNews, *Killers Slit Algerian Student’s Throat in Sickening Gay Hate Murder*, 12 February 2019; See also, Alouen’s *statement on the incident*, posted on Facebook, 11 February 2019.

218 DW, *Angola no pelotão da frente contra discriminação homosexual*, February 2019.

There are also local gang campaigns to attack LGBTIQ+ people.<sup>219</sup> The situation has become severe enough that in 2021 Ghanaian community leaders and some politicians attempted to further criminalise LGBTIQ+ persons and encouraged the general public to report them to State authorities. In February 2021, the Ghanaian National House of Chiefs issued a statement condemning homosexuality but “appealing to Ghanaians not to take the law into their own hands by way of burning, lynching, molesting and visiting mayhem on suspected gay or lesbian couples, rather should report such individuals to the law enforcement agencies for necessary action”.<sup>220</sup> The introduction to the Promotion of Proper Human Sexual Rights and Ghanaian Family Values Bill cites this statement and notes “the need to ensure that the overwhelming public abhorrence for LGBTIQ+ activities is not channelled into mob justice...” as part of its justification for the proposed new legislation (summarised in section Anti-discrimination and hate crimes legislation – Regressive trends).<sup>221</sup>

In South Africa, the issue of violence against black lesbians was highlighted in 2008 with the gang rape and murder of Eudy Simelane, an open lesbian and member of South Africa’s national football team, which attracted significant media attention. This is also an example of the intersectional basis of violence (as noted below), as black lesbians and transgender men in South Africa bear the weight of discrimination and violence.<sup>222</sup>

While the above killings are examples of mob violence, there are also instances of mob violence that do not re-

sult in death but constitute a serious violation of human rights. For example, Human Rights Watch has reported that there were at least six incidents of mob violence against groups of LGBTIQ+ persons in the Kenyan coastal counties of Kilifi, Kwale, and Mombasa between 2008 and 2015. In this report Human Rights Watch also noted the impunity faced by the perpetrators.<sup>223</sup>

In Morocco, people perceived to be gay or transgender have also been subjected to mob violence. Again, the government fails or refuses to take adequate action to prevent or punish such violence.<sup>224</sup> In 2016, “a group of men entered an apartment where there were two men: before the police [were] able to intervene the group insulted and beat up both of them; the group of men threw them outside naked and filmed the incident”.<sup>225</sup> Another example occurred in May 2019, when media reported that four individuals in Tiznit forcibly stripped and physically assaulted a man because of his sexual orientation.<sup>226</sup> In Botswana, a transgender woman was violently attacked by men, women, and security personnel in Gaborone while bystanders stood by, yelling obscenities at her and filming the incident, leaving her hurt, exposed, and humiliated. These acts were committed under the pretext that they were “defending public morality and instilling good behaviour”.<sup>227</sup> In addition, a Botswanan NGO reported that physical violence such as beatings against LGBTIQ+ individuals is pervasive, multi-faceted, and often goes unpunished.<sup>228</sup> According to one study in Botswana, in 2018, 42% of LGBTIQ+ individuals interviewed for the study reported having experienced physical violence in their lifetime.<sup>229</sup>

219 Abubakar Sadiq Yussif et al., Working Group of CSOs, Human Rights Violations Against Lesbian, Gay, Bisexual, and Transgender Intersex and Queer (LGBTIQ) People in Ghana: Joint Stakeholder Report by the Working Group of CSOs, 2017; The Guardian, “One guy took a cutlass”: gay women at greater risk of violence in Ghana, 10 January 2018; US Department of State, Ghana 2020 Human Rights Report, 2020, pp. 22 and 23; Pink News, Gay man “beaten to a pulp” by “homophobic mob” in Ghana. The media “glorified” the attack, 16 July 2021.

220 MyJoyOnline.com, Report LGBTIQ persons to law enforcement agencies, don’t take matters into your hands – House of Chiefs advises, 2 March 2021.

221 Promotion of Proper Human Sexual Rights and Ghanaian Family Values Bill, 2021.

222 International Observatory Human Rights, Violence and discrimination against LGBT+ people in Sub-Saharan Africa, 5 December 2019.

223 HRW, The Issue is Violence – Attacks on LGBT People on Kenya’s Coast, September 2015.

224 Ibid.

225 Danish Ministry of Immigration and Integration, 2019.

226 US Department of State, Country Reports on Human Rights Practices: Morocco, 2019.

227 Sunday Standard, Public trans-bashing shames Botswana, 20 November 2018.

228 Southern Africa Litigation Centre, The impact of laws criminalising same-sex relationships in Botswana, May 2018, p. 15

229 Ibid.

## Conversion therapy and so-called ‘corrective’ rapes

As noted by the UN Independent Expert on SOGI, ‘conversion therapy’<sup>230</sup> is still a common practice worldwide:

**A recent desk review of available public reports found sources indicating that practices of ‘conversion therapy’ occur in at least 68 countries; similarly, several surveys yielded testimonies of its existence in all regions of the world, with a majority of respondents in one survey answering that they were “very common” in Africa.<sup>231</sup>**

There are also practices of sexual violence, including so-called ‘corrective’ rapes, which are noted by the UN Independent Expert on SOGI as “linked to alleged intentions of conversion”, although rapes against LGBTIQ+ persons can also be practiced with the intent of punishment.<sup>232</sup>

A clear example of conversion therapy incorporating corrective rape was detailed in 2021 by the UN Independent Expert on SOGI in relation to practices in Algeria. He noted “isolation, prayers, fasts, medication, but also beatings, electric shocks, forced nudity and even rapes” which were said to be aimed at changing a person’s personality in order to make them ‘normal’, hence evidently falling within a “conversion culture”.<sup>233</sup> The report further describes the so-called ‘corrective’ or punitive rapes of young girls or lesbian women as one of the most shocking methods of conversion therapy.<sup>234</sup> There are also examples in Morocco of intersex persons genitally mutilated at birth and forced to undergo hormone treatment to strengthen their birth assignment. Often, this assignment, based on social criteria, does not correspond to the individual’s true gender identity. Moreover, many only become aware of their intersexuality at a late age.<sup>235</sup>

## Case Study: Malawi

CEDEP reported in 2020 the case of a lesbian woman who was raped by a man who wanted to “correct” her sexual orientation and told her she needed to know what it was like to engage with a man. After being rescued by community members, the victim filed a complaint with the police authorities. However, because of the criminalisation of same-sex conduct in Malawi, the victim was unable to disclose her sexual orientation as she feared being arrested. Following investigation and prosecution, the perpetrator was eventually convicted of rape, though the discriminatory element was not particularly considered, and sentenced to 14 years of imprisonment.

230 As defined by the UN Independent Expert on SOGI, “Conversion therapy” is used as an umbrella term to describe interventions of a wide-ranging nature, all of which are premised on the belief that a person’s sexual orientation and gender identity, including gender expression, can and should be changed or suppressed when they do not fall under what other actors in a given setting and time perceive as the desirable norm, in particular when the person is lesbian, gay, bisexual, trans or gender diverse. Such practices are therefore consistently aimed at effecting a change from non-heterosexual to heterosexual and from trans or gender diverse to cisgender. Depending on the context, the term is used for a multitude of practices and methods, some of which are clandestine and therefore poorly documented”. See, UNHRC, [Practices of so-called “conversion therapy”](#), Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (Practices of so-called “conversion therapy”, Report of the Independent Expert on SOGI), 1 May 2020, UN Doc. A/HRC/44/53, para. 17.

231 Ibid, para 24.

232 Ibid, para. 39.

233 Ibid.

234 Ibid.

235 Conseil civil de lutte contre toutes les formes de discrimination, 2018.

Similar practices were also identified in 2018 in Mozambique, with examples of children who disclosed their LGBTIQ+ identity and who have been victims of psychological, physical, and sexual violence as part of ‘treatments’ by members of the clergy or so-called ‘traditional healers’.<sup>236</sup> Sometimes these treatments included ‘corrective’ rapes.<sup>237</sup> These so-called ‘corrective’ rapes appear to be a reoccurring issue in Mozambique, as later in 2020 the UN Independent Expert on SOGI noted the ongoing use of the practice by “the families of lesbian women, the community, authorities in faith-based organisations or traditional healers”.<sup>238</sup> This practice also seems to be an issue in South Africa, especially against black lesbians,<sup>239</sup> and against gay men and trans men in Kenya.<sup>240</sup>

In Ghana, conversion therapy is widely considered to be a ‘cure’ for LGBTIQ+ individuals. In October 2019, the National Coalition for Proper Human Sexual Rights and Family Values, which includes traditional leaders, the Christian Council of Ghana, and the Coalition of Muslim Organisations, stated that “the LGBTQI phenomenon is a physiological, psycho-social, and biological coupled with medical conditions that can be addressed by employing a range of counselling methods and spiritual solutions”.<sup>241</sup> This coalition has run conversion therapy programmes and prayer sessions advocating conversion therapy.<sup>242</sup> In addition, violent methods of conversion therapy have been reported in privately-run prayer camps.<sup>243</sup> There are also reports of corrective rape or sexual assault of

LGBTIQ+ individuals, combined with beating, robbery, or blackmail.<sup>244</sup>

In the DRC, LGBTIQ+ individuals, particularly female sex workers, lesbians, and transgender men, are also often targeted for rape as a ‘corrective’ measure.<sup>245</sup> As described by Lola, a lesbian sex worker: “in Bukavu trans men are targets of sexual violence because of their gender expression. People perceive them to be lesbians and so subjected to rape for example which the offenders perceive to be a ‘corrective’ measure”.<sup>246</sup>

Similarly, in Morocco, individuals are encouraged by State health professionals to undergo hormonal treatment for their sexuality (a treatment that is based on the assumption that there is something wrong with the hormonal balance of LGBTIQ+ people). This ‘treatment’ generally involves injections with hormones, which can cause severe damage to the person’s physical health.<sup>247</sup>

### **Intersectional violence**

In addition to facing discrimination on the basis of sexual orientation or gender identity, many LGBTIQ+ individuals also face discrimination on the basis of gender or race.

In the DRC, as previously described in this report, female sex workers, lesbians, and transgender men are often particularly targeted for violence and sexual assault.<sup>248</sup>

236 UNHRC, Report of the Independent Expert on SOGI on visit to Mozambique, 17 May 2019, UN Doc. A/HRC/41/45/Add.2.

237 Ibid.

238 UNHRC, Practices of so-called “conversion therapy”, Report of the Independent Expert on SOGI, 1 May 2020, UN Doc. A/HRC/44/53, para 18.

239 International Observatory Human Rights, Violence and discrimination against LGBT+ people in Sub-Saharan Africa, 5 December 2019.

240 UNHRC, Practices of so-called “conversion therapy”, Report of the Independent Expert on SOGI, 1 May 2020, UN Doc. A/HRC/44/53, para 39.

241 The Ghanaian Times, Ghana: Keep Out CSE From Ghanaian Society – NCPHSRFV, 11 October 2019.

242 MyJoyOnline.com, Christians pray against LGBTQI+ movement in Ghana, 22 March 2021; ThePressRadio.com, 400 homosexuals register for counselling, 21 August 2018.

243 HRW, “No Choice but to Deny Who I Am”: Violence and Discrimination against LGBT People in Ghana, January 2018.

244 Ibid, paras. 41-43. See also, Sahara Reporters, How I Was Kidnapped, Drugged And Raped In Ghana For Two Days— Nigerian Lesbian, 11 June 2021.

245 MOPREDS et al., Human Rights Violations Against LGBT People in the DRC, October 2017, pp. 10 and 11.

246 UHAI EASHRI, Christian Rumu, Human Rights of LGBTI People and Sex Workers in the DRC, 2017, p. 14.

247 Conseil civil de lutte contre toutes les formes de discrimination, 2018. One testimony reads: “I was hospitalised after a suicide attempt that I committed as a result of harassment and the violence that I suffered from my family, neighbours and at school. During my hospitalisation and when I confided in the psychiatrist, he advised me to abstain sexually or to take treatment until I no longer have of sexual desire”.

248 MOPREDS et al., Human Rights Violations Against LGBT People in the DRC, October 2017, pp. 10 and 11.



Black lesbians and transgender men in South Africa also face heightened discrimination.<sup>249</sup> In 2016, the UN Office of the High Commissioner for Human Rights noted the vulnerability of lesbian women to extreme forms of violence, which is on the rise despite under-reporting by victims and impunity within the police force.<sup>250</sup> In 2011, the UN Committee on the Elimination of Discrimination against Women (CEDAW) had also expressed its concern around violence (including sexual violence such as ‘corrective’ rape) committed against women on account of their sexual orientation. It called for the “enactment of comprehensive anti-discrimination legislation that would include the prohibition of multiple forms of discrimination against women on all grounds, including on the grounds of sexual orientation”. CEDAW also recommended sensitisation campaigns directed towards the general public and appropriate training for law enforcement agencies.<sup>251</sup>

Similarly, in March 2019, CEDAW expressed concern that women in Angola living with HIV/AIDS and who identify as LGBTIQ+ face multiple and intersecting forms of discrimination, restricting in particular their access to health services, employment, education, housing, justice, and their participation in public and political life.<sup>252</sup>

## **Violence against LGBTIQ+ refugees and asylum seekers**

LGBTIQ+ refugees and asylum seekers who must flee their countries due to discrimination based on sexual orientation or gender identity (or other reasons) are often met with hostility, further discrimination, and violence in the receiving country. Kenya is one of the few countries in Africa accepting refugees on the basis of sexual orientation and gender identity persecution, which suggests that Kenya is safer than neighbouring countries.<sup>253</sup> Once in Kenya, however, hostility from other refugees is common, sometimes acting as a barrier for LGBTIQ+ refugees to access livelihood programs, as observed in the Kakuma Refugee Camp.<sup>254</sup> There are also reports of exploitation of refugees by the police on account of being LGBTIQ+, leading to increased uncertainty and fear amongst LGBTIQ+ applicants.<sup>255</sup>

Similarly, in South Africa, LGBTIQ+ asylum seekers have reported being ridiculed, bribed, or outed when seeking to lodge asylum applications or renew existing permits. Classification of transgender asylum seekers on official papers as a gender other than their lived gender has also been noted to increase their vulnerability to violence.<sup>256</sup> Additionally, misconceptions among officers about homosexuality have led to the denial of asylum applications based on evidence that applicants previously engaged in heterosexual behaviour, or other factors such as lack of involvement with the LGBTIQ+ community or failure to report rape or assault.<sup>257</sup>

249 HRW, “We’ll Show You You’re a Woman” Violence and Discrimination against Black Lesbian and Transgender Men in South Africa, December 2011; Amnesty International, *Making Love a Crime: Criminalization of Same-Sex Conduct in Sub Saharan Africa*, 24 June 2013.

250 UNHRC, *Report of the Special Rapporteur on violence against women, its causes and consequences on her mission to South Africa*, 14 June 2016 UN Doc. A/HRC/32/42/Add.2.

251 CEDAW, *Concluding observations of the Committee on the Elimination of Discrimination against Women: South Africa*, 5 April 2011.

252 CEDAW, *Concluding Observations on the seventh periodic report of Angola*, 14 March 2019.

253 Rainbow Railroad and Organization for Refuge, Asylum & Migration, *The Challenges Facing LGBTIQ+ Refugees in Kakuma Refugee Camp, Kenya*, October 2021, p. 5.

254 Ibid, pp. 5 and 6.

255 The Washington Post, ‘We were so ready’: LGBT refugees in Kenya live in fear as global resettlement is put on hold, 26 May 2020

256 Legal Resources Centre, *LGBTI+ Asylum Seekers in South Africa*, April 2021, pp. 21, 22 and 34.

257 In examining these issues, civil society organisations noted this raised a particular concern that the principle of *non-refoulement* may be violated. Ibid, pp. 35-39.

## Case Study: Mozambique

The UN Independent Expert on SOGI noted instances of LGBTIQ+ violence in the Maratane refugee camp due to the significantly higher level of prejudice in comparison to the general population: “Reports of violence are often not registered and even those that are registered are rarely addressed by the police officers present in the camp. The Independent Expert was informed that this was the result of a problem of capacity that affected the whole refugee population: with only four police officers allocated to the camp, reports of abuse cannot be addressed adequately. As a result, refugees hide their diverse sexual orientation or gender identity, they become invisible for fear of being ostracized, abandoned or subjected to abuse, including ‘corrective rapes’, by their community”.<sup>258</sup>

### **Other types of violence and human rights violations against LGBTIQ+ persons**

Discrimination and violence on the basis of sexual orientation or gender identity is also experienced by LGBTIQ+ persons in the context of health care services, including by being denied access to healthcare. For instance, in Malawi, a gay man with sexually transmitted infections (STIs) was denied health care and faced verbal harassment. In another case, a transgender woman was denied assistance for anal warts.<sup>259</sup> After she attempted to self-medicate by using salt and water due to lack of money for the medicine, the sores spread to her entire body, leading her to be hospitalised for three weeks. During that time, rumours spread in her village that she was dead.<sup>260</sup> Also in Malawi, a transgender woman took her own life after being refused medical treatment.<sup>261</sup>

Furthermore, members of the LGBTIQ+ community may be subject to threats, duress, and violations of due process and fair trial rights. In Morocco, LGBTIQ+ individuals are often forced to sign statements under

pressure by the police and are not allowed the right to remain silent or to contact a lawyer. They are regularly subjected to unfair trials based on confessions extracted under duress.<sup>262</sup> Similarly, in the Kenyan case *COI v. Chief Magistrate* mentioned above, Human Rights Watch reported that the two men were threatened with physical violence by the police in order to elicit a confession.<sup>263</sup>

### **General discrimination and harassment**

Due to the existing context of discrimination, violence, and lack of effective protection, many LGBTIQ+ persons in Africa suffer further harassment and violation of fundamental rights. In the DRC, people who come out or are outed as LGBTIQ+ are often kicked out of their homes or disowned by their families, including parents stopping to pay their children’s school fees, which in turn has caused high levels of homelessness. Many are forced to turn to sex work and may contract HIV, but do not seek out medical treatment for fear of being met with further prejudice.<sup>264</sup>

258 UNHRC, [Report of the Independent Expert on SOGI on visit to Mozambique](#), 17 May 2019, UN Doc. A/HRC/41/45/Add.2.

259 [Malawi: Civil Society Report on LGBTI Rights](#), March 2021.

260 Ibid.

261 Ibid.

262 Country of Origin Information Report from the Danish Immigration Service, [Morocco – Situation of LGBT persons](#), September 2019.

263 HRW, [The Issue is Violence – Attacks on LGBT People on Kenya’s Coast](#), September 2015.

264 Jana Ašenbrennerová, [The GroundTruth Project – Abuse of Congo’s LGBT Community puts US Supreme Court ruling in perspective](#), 2 July 2015; NPR, [Gay, Out And On The Airwaves In Kinshasa](#), 21 November 2017. MOPREDS et al., [Human Rights Violations Against LGBT People in the DRC](#), October 2017, pp. 13 and 14.

In Malawi, cases have been reported of persons who, fearing abuse at home because of family members who did not understand or accept their gender expression or sexual orientation, stayed with friends, where they sometimes suffered further violence. In one case, a lesbian woman who was outed by her girlfriend was burnt with a hot iron by her family and chased out of her home, as well as threatened by male students at her college.<sup>265</sup>

Also in Malawi, CEDEP noted that a bisexual person was expelled from school after being outed and has not returned to his home since.<sup>266</sup> Similarly, Kenya's Human Rights Commission has documented a lack of comprehensive services offered to the LGBTIQ+ community in the country, and a high incidence of expulsion from school on the grounds of actual or suspected sexual orientation.<sup>267</sup>

In Morocco, members of the LGBTIQ+ community also face discrimination from their families, who are either themselves homophobic or fear government action against LGBTIQ+ family members.<sup>268</sup> There are instances of sexual abuse in schools that remain unpunished, such as a case in which a "child who, because he was effeminate, was sexually abused by his classmates who took turns touching him in the school toilets. [Someone] alerted the education delegation, which took the measure to place him in a girls' non-mixed school".<sup>269</sup>

A variety of rights are implicated in general discrimination and harassment, and, in Uganda, reports also note breaches of the right to dignity and freedom from torture and CIDTP, the right to privacy, the right to freedom of association, and the right to equality and freedom from discrimination.<sup>270</sup> Civil society in Uganda further notes that in a society where LGBTIQ+ persons are generally strongly discriminated against, the Ugandan public is re-

ported to lash out frequently in physical violence against such individuals.<sup>271</sup> As another example of discrimination entrenched in public institutions, a transgender woman in Botswana was sentenced to a court-ordered flogging in July 2020, which is a punishment traditionally reserved for men.<sup>272</sup>

## Factors fuelling LGBTIQ+ violence

The forms of LGBTIQ+ violence illustrated above are fuelled by a number of factors rooted in discrimination that ultimately create a context of hostility towards LGBTIQ+ persons. These include criminalisation of non-normative sexual orientation or gender identity, discriminatory statements made by political figures or other State authorities which can be interpreted to be legitimising violence, and the limited ability of LGBTIQ+ persons to exercise certain fundamental rights such as employment and healthcare. The media and social media platforms, which can sometimes be powerful tools for positive change, can also engage in or be used to spread further discrimination.

### Criminalisation

Criminalisation of same-sex conduct or other behaviour linked to diverse sexual orientations or gender identities tend to legitimise State violence and encourage discriminatory and violent behaviour by non-State actors.<sup>273</sup> Where such criminalisation exists, LGBTIQ+ persons face increased risks of direct physical violence upon arrest and in custody, and indirect violence due to fear of reporting crimes or seeking support. Almost all States researched that criminalise same-sex conduct report the targeting of the LGBTIQ+ community by way of widespread arbitrary arrests and detention, extreme societal violence, and extortion by police and others.

265 Information from CEDEP, Malawi.

266 Information from CEDEP, Malawi.

267 Kenya Human Rights Commission, *The Outlawed Amongst Us*, 2011.

268 HRW, *Audacity in Adversity: LGBT Activism in the Middle East and North Africa*, April 2018; HRW, *Morocco: Homophobic Response to Mob Attack*, July 2015.

269 Conseil civil de lutte contre toutes les formes de discrimination, 2018.

270 HRAPF, *The Uganda Report of Human Rights Violations Based on Sexual Orientation and Gender Identity*, 2018, August 2019.

271 Ibid.

272 U.S. Department of State, *2020 Country Reports on Human Rights Practices: Botswana*, 2020.

273 ILGA, *State Sponsored Homophobia 2019*, March 2019.

In Uganda, the passing of the Anti-Homosexuality Act by the Ugandan Parliament (later nullified by the Constitutional Court) led to a significant increase in arbitrary arrests of LGBTIQ+ persons, many of whom then suffered groping and beatings in custody by police and other inmates.<sup>274</sup> In Ghana, a section of the Criminal Code “commonly referred to as the anti-gay law, is seen as tacit government approval of discrimination, and even violence, on the basis of real or imputed sexual orientation and gender identity”.<sup>275</sup>

Criminalisation can also lead to violent practices under the pretext of ‘gathering evidence’ of criminal behaviour, for example through forced anal examinations which continue to be practiced in many States researched.<sup>276</sup> In Uganda, a report by SMUG stated that health workers carried out forced anal examinations of individuals arrested for “homosexuality”, “sodomy”, or “carnal knowledge against the order of nature” upon orders by the Uganda Police Force.<sup>277</sup>

Arrests, detentions, and convictions pursuant to laws criminalising consensual same-sex activity also lead to violence by both State and non-State actors. For example, in the DRC in 2013, an activist was arrested and detained on charges of promoting homosexuality. During detention, he was reportedly “tortured and beaten by the police, and then beaten and raped by fellow inmates”.<sup>278</sup>

In Morocco, convictions “for homosexuality” can lead to reputational damage and harassment, including by other inmates.<sup>279</sup> Similarly, in Ghana, despite a lack of prosecutions or convictions for consensual same-sex sexual conduct, violence still exists as “most citizens take the law into their own hands, rather than report alleged incidents to the police”.<sup>280</sup>

In Angola, despite the recent decriminalisation of same-sex conduct, the Penal Code’s provision criminalising wilful transmission of HIV “encourages violence when serostatus is disclosed”.<sup>281</sup> Despite the recent change in the law, Angolan LGBTIQ+ persons still face a high level of societal and state violence.<sup>282</sup>

### **Statements by political and public figures**

Statements by political and religious figures also contribute to promote discrimination, misinformation and hatred towards the LGBTIQ+ community and can create a climate in which violence is acceptable, incited, or indeed inevitable.<sup>283</sup> Though specific research on the impact of discriminatory statements in Africa is lacking, judicial bodies outside Africa have held that speech by political figures can increase the vulnerability of potential victims of violence (specifically in the context of LGBTIQ+ violence), and UN bodies have recognised the responsibility of State officials to firmly reject hate speech and other instances of discrimination in order to prevent violence and further discrimination.<sup>284</sup>

274 Amnesty International, *Rule by Law: Discriminatory Legislation and Legitimized Abuses in Uganda*, October 2014.

275 HRW, *Ghana: Drop Charges Against LGBT Rights Defenders*, 17 June 2021.

276 For example, in Kenya, two men were arrested on suspicion of ‘gay activities’ and subjected to forced anal examinations and threats of violence to elicit confessions, although the Court of Appeal of Mombasa subsequently decided that the forced anal examinations were a violation of the right to dignity and privacy and the right against self-incrimination. See, Court of Appeal of Kenya at Mombasa, *COI v. Chief Magistrate*.

277 Sexual Minorities Uganda, *Even If They Spit At You, Don’t Be Surprised*, June 2018, p. 28. According to a Human Rights Watch Report confirming the prevalence of these examinations, a medical officer in Uganda stated he did not understand why this was a human rights violation. HRW, *2018 World Report – Uganda*, 2018.

278 MOPREDS et al., *Human Rights Violations Against LGBT in the DRC*, October 2017.

279 Danish Immigration Service, *Country of Origin Information – Morocco: Situation of LGBT persons*, September 2019.

280 US Department of State, *Ghana 2020 Human Rights Report*, 2020; Asylum Research Centre, *Ghana: State treatment of LGBTIQ+ persons*, March 2021, para. 36.

281 Angolan feminist LGBTIQ Collective, *Step by step, maybe, we will get there*, submitted to CEDAW in 2019.

282 DW, *Angola no pelotão da frente contra discriminação homosexual*, February 2019.

283 Y Ilesanmi, *Freedom to love for all: Homosexuality is not un-African*, cited in CAL, AMSHeR, *Violence Based on Perceived or Real Sexual Orientation and Gender Identity in Africa*, 2013, pp. ix, 36 and 37.

284 Organisation of American States, *Hate Speech and Incitement to Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*, paras. 30-35.



In Uganda in 2014, after passing the Anti-Homosexuality Act, President Museveni described homosexual people as “disgusting”, said that “what they do is terrible”, and commissioned a group of Government scientists to study homosexuality (who later published findings claiming that homosexuality was a choice).<sup>285</sup> In addition, politicians and public figures have claimed that people fleeing Uganda and seeking asylum elsewhere are only “pretending” to be gay to gain asylum.<sup>286</sup>

Some statements provide more explicit encouragement of hate crimes against the LGBTIQ+ community, effectively inciting State-sanctioned violence. In Ghana in 2018, the Second Deputy Speaker of Parliament, Alban Bagbin, said that “homosexuality is worse than [an] atomic bomb”,<sup>287</sup> and a leader of the National Democratic Congress suggested in 2020 that homosexuals should be killed.<sup>288</sup> Most recently, Ghana’s first LGBTIQ+ community centre closed temporarily after severe backlash against it by the community, including a statement by a member of the ruling New Patriotic Party calling on the public to “find the centre and shut it down”.<sup>289</sup>

In the DRC, religious leaders, radio broadcasts, and political organisations play a key role in perpetrating discrimination against LGBTIQ+ persons. For example, in 2018, LGBTIQ+ individuals in South Kivu reported that a coalition of revivalist churches published materials characterising LGBTIQ+ individuals as against the will of God. The publications contributed to a hostile envi-

ronment, and some LGBTIQ+ people were even forced to withdraw from schools and other community institutions.<sup>290</sup> Rejection by religious institutions and the cultural belief in witchcraft to which homosexuality and transgender women are often linked, lead to further alienation from society.<sup>291</sup>

In contrast, some notable examples of support for LGBTIQ+ persons and their rights from high-level officials also exist, such as in Botswana and South Africa.<sup>292</sup>

### **Role of the media and social media**

While the media can play an important role in educating and informing the general population on LGBTIQ+ rights, as well as advocating for the protection of the LGBTIQ+ community, negative engagement such as outings of LGBTIQ+ persons and discriminatory remarks further increase the risk of violence towards an already vulnerable community.

For example, in Uganda, civil society organisations have documented the parading of LGBTIQ+ victims by the media, who refer to them by derogatory words and expose them to societal risks.<sup>293</sup> In the DRC, two women were arrested in 2014 because they were perceived as lesbians. Although one was told the arrest was due to a business regulation violation, the press immediately exposed them as lesbians during a countrywide movement to pass the Anti-Homosexuality Bill proposed by a member of Parliament.<sup>294</sup>

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285 CNN, [Uganda president: Homosexuals are ‘disgusting’](#), February 2014.

286 PinkNews, [Ugandan government shamefully claims queer people fleeing its homophobia are fake ‘economic gays’](#), September 2021.

287 Peacefm, [‘Homosexuality is Worse than Atomic Bomb’ – Alban Bagbin](#), April 2018.

388 Abu Mubarik, [NDC national women’s organizer suggests homosexuals should be killed](#), March 2020.

389 Reuters, [Anti-gay uproar after Ghana opens its first LGBT+ community centre](#), February 2021.

290 US Department of State, [2020 Country Reports on Human Rights Practices: Democratic Republic of the Congo](#), 30 March 2021.

291 Human Rights Based Approach at Sida, [Compilation of Briefs on LGBTI Persons](#), December 2014.

292 For example, in Botswana, President Mokgweetsi Masisi recently met with representatives from LEGABIBO and vowed to protect LGBTIQ+ persons and fully implement the decision by the Court of Appeal in Botswana v. Motshidiemang, providing hope for a path to decriminalisation. Erasing 76 Crimes, [Botswana’s president meets LGBT activists, supports their work](#), 29 January 2022; President Cyril Ramaphosa in South Africa also condemned widespread homophobia and hate crimes in 2021, stating: “Nobody has the right to take life and abuse someone else because of their sexuality”. eNCA, [Ramaphosa delivers Freedom Day address](#), 27 April 2021.

293 Chapter Four Uganda, [Where Do We Go for Justice?](#), 2015.

294 MOPREDS et al., [Human Rights Violations Against LGBT in the DRC](#), October 2017.

Examples of social media outings of LGBTIQ+ individuals leading to violence are also common in North Africa. In Morocco, ordinary citizens created fake accounts on same-sex dating apps and circulated private information about users in what became a “campaign of outing” in April 2020, at the peak of the COVID-19 pandemic. In Tunisia, which was not researched in detail for this report, a queer activist suffered severe harassment and was eventually arrested after police officers took a photo of her at a protest and published it on Facebook, identifying her and making derogatory comments about her gender expression.<sup>295</sup>

Social media platforms are often used to spread harmful information regarding homosexuality. In the Arabic-speaking world, media monitoring has become increasingly crucial as a tool to protect LGBTIQ+ youth, who are often targets of social media advertising for conversion therapy services. While Facebook has banned the promotion of conversion therapies, the social media company has not removed Arabic content on this topic. One video mentioned in an article describing the issue encouraged parents who suspected their children of being gay “to ‘detain’ them at home until they get help because they pose ‘a danger to society’”.<sup>296</sup>

### **Lack of access to employment and/or healthcare**

Penal laws criminalising same-sex relations can also lead to prejudicial treatment of LGBTIQ+ persons by healthcare workers, causing further harm and contributing to the overall hostile environment that feeds violence. For example, in Uganda, there are reports that healthcare workers have called on State actors to arrest LGBTIQ+ persons,<sup>297</sup> and sometimes even led community members to beat them when they went to clinics seeking medical assistance.<sup>298</sup> Likewise, in Mozambique, medical staff have also been known to chastise LGBTIQ+ individuals when they seek treatment.<sup>299</sup>

Homosexual or transgender people also often suffer discrimination in the labour market. As a result, many turn to sex work, a sector notorious for the criminalisation of its workers, and in which the risk of violence (from State and non-State actors) are well-documented. For example, in Mozambique, where same-sex conduct has been decriminalised, LGBTIQ+ persons (especially transgender persons) engage in sex work because of social exclusion and are victims of violence and harassment by police as a result.<sup>300</sup>

In Ghana, sex work is outlawed by the Criminal Offences Act provision prohibiting living “wholly or in part on the earnings of prostitution”, and police are known to abuse sex workers.<sup>301</sup> In Uganda, one transgender sex worker cited concerns that, as a result of the COVID-19 pandemic, she and other transgender sex workers were likely to be increasingly vulnerable to crime and violence.<sup>302</sup>

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295 Rasha Younes, “Clean the Streets of Faggots”: Digital Targeting of LGBT People by Middle East/North Africa Governments, August 2021.

296 Reuters, LGBT+ conversion therapy: banned on Facebook, but thriving in Arabic, June 2021.

297 UK Home Office, Country Policy and Information Note Uganda: Sexual Orientation and Gender Identity and Expression, February 2022.

298 US Department of State, 2019 Country Reports on Human Rights Practices: Uganda, 2019.

299 US Department of State, 2019 Country Reports on Human Rights: Mozambique, 2019.

300 See, UNHRC, Report of the Independent Expert on SOGI on visit to Mozambique, 17 May 2019, UN Doc. A/HRC/41/45/Add.2.

301 Health and Human Rights Journal, A Reporting System to Protect the Human Rights of People Living with HIV and Key Populations, October 2017, pp. 214 and 218.

302 Thomson Reuters Foundation, ‘Who is going to stand up for us?’ A trans sex worker in Uganda on life under lockdown, April 2020.





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**They said a lot of stuff, that we are sons of evil, we need to go to hell, we shall kill them direct if we get them.**

”

## Chased **BY A MOB**

While same sex marriage is not legal in Uganda, Ashiraf (a transgender woman) and Kajjan (a gay man) conducted a marriage ceremony in a hotel to celebrate their relationship. That was the day their new married life began, and also the day their lives changed for the worse. A friend posted photos of their wedding on social media. When their neighbours recognised them, they went to the police. When they heard the mob with the police coming to their house, they locked their door and hid inside. They could hear them shouting while trying to enter. That night they packed their bags and left for Kenya.



## SECTION IV

### MAIN CHALLENGES FACED IN DOCUMENTING, INVESTIGATING AND ADDRESSING LGBTIQ+ VIOLENCE

#### Structural discrimination

Accountability for LGBTIQ+ violence in the States researched is either absent, or severely limited. The reasons for this include inadequate legal frameworks, absence of political will and ongoing institutional discrimination, lack of independent complaints mechanisms and investigative bodies, lack of appropriate training of State officials – particularly law enforcement, prosecutors, and members of the judiciary – and absence of gender sensitive protocols on the effective investigation of such violence. As noted in section [The Legal Framework against Torture and its Operation in Practice in Africa](#), the legal framework against torture in several of the States researched falls short of what is required under international law. The lack of criminalisation of torture, or omission of the discriminatory purpose in national definitions of torture, tend to prevent forms of LGBTIQ+ violence from being prosecuted and dealt with as torture, which means these are often considered minor offences. Even in cases where LGBTIQ+ violence is addressed and perpetrators are convicted (see, for example, the case study on ‘corrective’ rape in Malawi above),<sup>303</sup> the discriminatory purpose is often not accounted for and, consequently, courts do not consider the root causes of such discriminatory violence. Inadequate legal frameworks for the protection of the LGBTIQ+ community, including the existence of discriminatory laws (such as criminalisation of same-sex relations), also tend to marginalise LGBTIQ+ persons. This legitimises a differentiated treatment based on discrimination that suggests LGBTIQ+ persons do not deserve the same level of protection afforded to the general population. Consequently, it discourages State authorities from taking prompt and effective action to investigate

and address violations committed against this marginalised group. For instance, criminalisation of same-sex conduct is often used to shift the focus of investigations and target LGBTIQ+ victims that report crimes committed against them. This is further aggravated by significant discrimination entrenched in State institutions that leads to a general unwillingness by State authorities to address such violence and ultimately creates a culture of impunity (see section [Unwillingness to investigate cases of LGBTIQ+ violence](#)).

Additionally, although the majority of States have in place investigative bodies responsible for receiving complaints and investigating allegations of human rights violations, numerous challenges identified in practice, including in relation to the independence of such bodies and the financial constraints that they face, reduce their capacity to effectively conduct investigative activities (see section [Investigation](#)). Furthermore, the lack of sensitisation on LGBTIQ+ issues, linked to the lack of appropriate protocols and training, further prevents such investigative mechanisms and law enforcement officials from adequately dealing with LGBTIQ+ violence (see section [Invisibility and lack of training on LGBTIQ+ rights](#)).

Due to misinformation and further discrimination, those undertaking investigations are therefore rarely encouraged to pursue lines of enquiry to assess whether violence was motivated by discrimination on the grounds of sexual orientation or gender identity. For similar reasons, discriminatory lines of inquiry are often followed, along with inadequate forms of gathering evidence (such as forced anal examinations), which are ineffective and compound the damage being suffered by the victims.

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303 See page 58 of this report.

## Invisibility and lack of training on LGBTIQ+ rights

In some researched States there is a lack of data and information about the violence facing the LGBTIQ+ community, which exacerbates difficulties in understanding the nature and scale of the problem, and therefore compounds the challenges faced in responding to it. For example, Mozambique does not seem to have any official reports on State violence against LGBTIQ+ persons, in part due to a lack of statistics on sexual orientation and gender identity, which makes it harder to understand the experience of the LGBTIQ+ community. As noted by the UN Independent Expert on SOGI following its visit to Mozambique in December 2018:

**Statistics based on sexual orientation and gender identity are absent from every sector, and official statistics invariably misrepresent the size of affected communities and populations, the number of incidents concerning their particular problematic, which leads to prejudicial and inexact categorization of cases as a result of misidentification, concealment of the victim's true sexual orientation or gender identity, and underreporting. The systemic failure to collect data often results in the virtual invisibility of the concerns and abuses faced by lesbian, gay, bisexual and trans individuals.**<sup>304</sup>

Similarly, in Angola, there is no disaggregated data for crimes against, and victimisation of, individuals on the basis of sexual orientation and gender identity. The State acknowledged that as of 2018 “the number or percentage of LGBTI people in Angola is not known”.<sup>305</sup>

In relation to South Africa, local organisations note that a general lack of knowledge and understanding of LGBTIQ+ rights among civil society, law enforcement agencies, and the community more broadly result in a mix of mal-intent, homophobia, and mis-education.<sup>306</sup> Particularly in relation to the police, some note that the need to better understand LGBTIQ+ issues is an institution-wide concern, which can only be dealt with by the inclusion of such issues in an appropriate manner in the official curriculum of law enforcement agencies, and is unlikely to be addressed adequately only with one-off training sessions from NGOs (although such initiatives are also important).<sup>307</sup> Increased awareness of LGBTIQ+ issues and public educational campaigns for the community are also highly relevant in the context of African Island countries, where a lack of understanding of such issues also tends to create underreporting and a general discriminatory environment, which results in structural violence against LGBTIQ+ persons.<sup>308</sup>

Despite examples of attempts by States to prevent incidences of torture and other human rights violations by establishing protocols and providing training on human rights standards more broadly, these rarely include aspects concerning LGBTIQ+ violence. For example, in 2013, Mozambique informed CAT that the Police of Mozambique were developing a set of policies and strategies called the Prevention of Torture and Treatment of People in Custody,<sup>309</sup> and a more recent report noted that training of police and prison officials was “one of the most frequently highlighted activities that the state implemented to prevent acts of torture”.<sup>310</sup> However, it was unclear what it encompassed, how often it was carried out and how many law enforcement officials have benefited

304 UNHRC, *Report of the Independent Expert on SOGI on visit to Mozambique*, 17 May 2019, UN Doc. A/HRC/41/45/Add.2.

305 “Não se conhece qual o número ou percentagem de pessoas LGBTI em Angola”: ACHPR, *Republic of Angola: 6th Periodic Report, 2011-2016*, 12 March 2018, para. 24.

306 Contribution of local organisations during Roundtable discussion held in January 2022 by REDRESS and the Centre for Human Rights at University of Pretoria.

307 Ibid.

308 Ibid.

309 CAT, *Initial report of States parties, Mozambique*, 29 January 2013, UN Doc. CAT/C/MOZ/1, para. 66. Also, in relation to Angola, an agreement between the Ministry of Interior and the Ministry of Justice and Human Rights a training component for security forces, including a module on human rights. See, UNHRC, *UPR National report of Angola*, 2019, UN Doc. A/HRC/WG.6/34/AGO/1. Similarly, in Botswana, Police Service officers also receive human rights training at the country's International Law Enforcement Academy. See, US Department of State, *Country Reports on Human Rights Practices: Botswana*, 2020

310 Lorzio T and Petrovic V, *Developments in addressing torture in Mozambique, A Situational Report*, REFORMAR and Dullah Omar Institute & Africa Criminal Justice Reform, March 2018.

from such initiatives. In 2018, particularly in relation to LGBTIQ+ persons in detention, the UN Independent Expert on SOGI noted that “law enforcement and prison personnel lack information and sensitization on the issue” and that transgender people are often placed in male or female prisons according to their biological sex, and are therefore more vulnerable to violence.<sup>311</sup>

Where training and educational initiatives for State officials have included an aspect relating to LGBTIQ+ rights, additional concerns have been raised. For example, in Uganda, whilst there are reports of training initiatives provided to police officials around LGBTIQ+ rights, the effectiveness of these engagements have been criticised “considering the police service’s continued deliberate suppression and violation of the rights of LGBT Ugandans”.<sup>312</sup> Civil society organisations have also warned that, at times, official training may include discriminatory elements, for example referring to LGBTIQ+ persons as “deviant”.<sup>313</sup>

Therefore, what emerges as perhaps the most important factor ensuring adequate training of State officials is the need for the development of a curriculum that reflects international standards on the protection of LGBTIQ+ persons from violence, and for that curriculum to be integrated into the institutions providing regular and compulsory training to law enforcement officials and other actors such as prosecutors and members of the judiciary. It is also recommended that civil society organisations working on LGBTIQ+ issues and/or against torture, as well as LGBTIQ+ activists and other experts, are able to participate in the development and monitoring of such educational initiatives.

## Limitations on the operation of LGBTIQ+ organisations

Especially in the context of hostility against the LGBTIQ+ community, civil society organisations play an important role in addressing discriminatory violence and supporting victims, not least because of State inaction. However, many LGBTIQ+ activists and civil society organisations working with the LGBTIQ+ community across Africa face restrictions on their ability to organise, register themselves, and otherwise function effectively. The limitations exemplified in this section therefore hinder accountability for LGBTIQ+ violence, as they limit proper documentation of allegations of violence, impede or reduce the representation or accompaniment of victims by NGOs, which is particularly crucial where victims are reluctant to report to the authorities without support, and impact on the awareness of victims’ rights.

At the regional level, there are continuing challenges faced by the Coalition of African Lesbians whose observer status before the ACHPR was revoked by the ACHPR in 2018, after decisions promulgated by the African Union Executive Council.<sup>314</sup> This obviously represents a regressive move, which may impact on the ability of other LGBTIQ+ organisations to engage with the ACHPR. This event has caused activists and lawyers to question whether the ACHPR is the appropriate forum at this stage in which to conduct strategic litigation on LGBTIQ+ rights and pursue the objectives of Resolution 275.<sup>315</sup>

At the domestic level, numerous grassroots organisations have had their activities impeded by local laws or administrative processes. In States such as Algeria and Ghana,

311 UNHRC, [Report of the Independent Expert on SOGI on visit to Mozambique](#), 17 May 2019, UN Doc. A/HRC/41/45/Add.2.

312 HRW, [Uganda: Police Raid Queer Kampala Film Festival](#), 15 December 2017.

313 Contribution of local organisations during Roundtable discussion held in January 2022 by REDRESS and the Centre for Human Rights at University of Pretoria.

314 CAL, [Women and Sexual Minorities Denied a Seat at the Table by the African Commission on Human and Peoples’ Rights](#), 17 August 2018; Executive Council of the African Union, [Decision on the Thirty-Eighth Activity Report of the African Commission on Human and Peoples’ Rights](#), 27th Ordinary Session 7-12 June 2015, Doc.EX.CL/921(XXVII) and EX.CL/Dec.887(XXVII), para. 7; Executive Council of the AU, [Decision on the Report on the Joint Retreat of the Permanent Representatives’ Committee \(PRC\) and the African Commission on Human and Peoples’ Rights \(ACHPR\)](#), 33rd Ordinary Session 28-29 June 2018, DOC.EX.CL/1089(XXXIII) and at EX.CL/Dec.1015(XXXIII), para. 8(vii).

315 See, for example, OMCT, [Joint Statement: The Executive Council of the African Union moves towards dismantling the main body tasked with the protection of human rights in Africa](#), 17 September 2018; Article 19, [ACHPR: Withdrawing Coalition of African Lesbians’ observer status threatens civil society participation](#), 18 October 2018.

public morality laws are used to prevent organisations focused on LGBTIQ+ issues from operating and the Government has prevented NGOs defending LGBTIQ+ rights from organising meetings. In Algeria, since the election of President Abdelmadjid Tebboune, the number of arrests and detentions pending trial (*mandat de dépôt*) of journalists and activists have increased dramatically.<sup>316</sup> It is generally not possible for local NGOs to be created for the purpose of defending LGBTIQ+ rights, as such a purpose is deemed contrary to public morality. Most NGOs therefore perform their work without registering or without mentioning their work on LGBTIQ+ rights specifically.

Algerian NGOs defending LGBTIQ+ rights have reported several cases of harassment and threats of imprisonment by Government authorities.<sup>317</sup> As a consequence of this environment, activists generally need to operate online, but even this can leave activists susceptible. Tellingly, the websites for *Alouen* and *Abu Nawas* no longer appear to be operational.

In Ghana, in February 2021, following pressure by government officials, death threats, and online abuse, an LGBTIQ+ centre in Accra had to close to protect its staff.<sup>318</sup> Another organisation's founder in Ghana has faced constant threats of arson, deportation, and murder.<sup>319</sup> In Uganda, police raided a Pride Beauty Pageant in 2016<sup>320</sup> and an LGBTIQ+ shelter in 2020,<sup>321</sup> using COVID-19 restrictions on gatherings as a pretext for arrest in the latter incident.

In Malawi, LGBTIQ+ organisations also face obstacles in registering as civil society organisations. In 2017, when the Nyasa Rainbow Alliance filed with the Registrar Gen-

eral's Department, the Minister of Justice and Registrar General "refused to register the organization on the ground that the 'membership practices' are recognized as an offence under the Laws of Malawi".<sup>322</sup>

## **Victims' fear of reprisals, distrust, and hesitancy in reporting violence**

Considering the experiences of LGBTIQ+ individuals who report crimes to the police, it is unsurprising there is a general fear of reporting, especially where the crime was motivated by discrimination on grounds of sexual orientation or gender identity. For example, in Ghana, "stigma, intimidation, and the negative attitude of police toward LGBTI persons were factors in preventing victims from reporting incidents of abuse".<sup>323</sup>

Similarly, in South Africa, there are many cases of police harassing, ridiculing, and assaulting victims of sexual violence, which has led to distrust and reluctance to turn to police.<sup>324</sup> For instance, the Astraea Lesbian Foundation reported that survivors who do seek police intervention reported high rates of abuse and discrimination by the police.<sup>325</sup> These incidences of secondary victimisation were also identified by the South African Human Rights Commission, which they concluded leads to high levels of distrust towards the police.<sup>326</sup> More recently in 2019, cases have been documented in South Africa of secondary victimisation of lesbians and transgender individuals, including cases in which police harassed, ridiculed, and assaulted victims of sexual violence. Apparently, LGBTIQ+ individuals were particularly vulnerable to violent crime due to anti-LGBTIQ+ attitudes within the community and amongst police.<sup>327</sup>

316 See The Tahrir Institute for Middle East Policy, *Algeria's Worsening Crackdown on the Press Amid Transition and Pandemic*, 17 November 2020.

317 US Department of State, *2019 Country Reports on Human Rights Practices: Algeria*, 2019.

318 The Guardian, *Ghanaian LGBTIQ+ centre closes after threats and abuse*, 25 February 2021.

319 Solace Brothers Foundation et al., *Human Rights Violations Against LGBT People in Ghana: A Shadow Report*, Submitted for consideration at the 117th Session of the Human Rights Committee Geneva, June-July 2016, p.4.

320 HRW, *Uganda: Police Attack LGBT+ Pride Event*, August 2016.

321 OHCHR, *UN rights experts fear Uganda is using COVID-19 emergency powers to target LGBT people*, 27 April 2020.

322 The Nyasa Rainbow Alliance has appealed the decision to the High Court but is still awaiting the final decision. See, CHREAA et al., *Joint Stakeholder Submission to the UN Human Rights Committee for the LOIPR to be considered in relation to Malawi*, 131st session, 1st-26th, March 2021.

323 US Department of State, *Custom Report Excerpts: Ghana*.

324 Astraea Lesbian Foundation for Justice, *South Africa LGBTI: Landscape Analysis of Political, Economic & Social Conditions*, 2015; US Department of State, *2019 Country Reports on Human Rights Practices: South Africa*, 2019.

325 Astraea Lesbian Foundation for Justice, *South Africa LGBTI: Landscape Analysis of Political, Economic & Social Conditions*, 2015.

326 The Network of African National Human Rights Institutions & The South African Human Rights Commission, *In – Country Meeting On Sexual Orientation, Gender Identity And Expression*, 29 and 30 November 2017.

327 US Department of State, *2019 Country Reports on Human Rights Practices: South Africa*, 2019.



In Botswana, it is noted that the victims of such incidents seldom file police reports, primarily due to stigma or, possibly, overt official intimidation.<sup>328</sup> In both Kenya<sup>329</sup> and Ghana,<sup>330</sup> LGBTIQ+ persons who attempted to report incidents of violence or crime to the police were subject to further verbal or physical abuse, or even arrest, by the police, as a result of officers' perception of the victims' sexual orientation or gender identity.

In Algeria, it is reported that LGBTIQ+ victims, especially in cases of rape, sexual assault, or homophobic violence, are unable to report the crimes to the authorities out of fear of being convicted for public outrage or indecency. Even in cases of violence against the LGBTIQ+ community that have been reported in the press and on social networks, perpetrators are not charged.<sup>331</sup>

## Case Study: Malawi

After her sexual orientation was disclosed by her girlfriend, a lesbian woman in Malawi was chased by her family and burnt with a hot iron. Male students at her college also threatened to attack her at any time. Despite the threats and physical violence suffered, the victim did not report the case to the authorities due to fear of reprisals, and further discrimination, especially considering the criminalising context in Malawi. Since she also continues to live with her family, she is concerned that she would be disowned by them and would lose support for her studies if she were to report the case to the authorities.<sup>332</sup>

In Algeria, homophobic murders are rarely investigated, and LGBTIQ+ persons fail to report homophobic violence and rape for fear of prosecution under Algerian penal laws – though these laws are rarely used, “they made LGBTI community feel vulnerable and were used to pressure LGBTI victims of crime to withdraw their complaints”.<sup>333</sup> Furthermore, the Algerian LGBTIQ+ NGO *Alouen* noted that “homophobic murders were being closed [by the police] with-

out any further action being taken, demonstrating an unwillingness by the state to investigate these honour killings”.<sup>334</sup>

In Morocco, one organisation suggested that homosexuals prefer facing homophobic assaults than reporting them, explaining that victims of homophobic violence often end up getting higher penalties than their assaulters for being “sexually deviant”.<sup>335</sup>

328 US Department of State, Country Reports on Human Rights Practices: Botswana, 2020.

329 Kenya Human Rights Commission, The Outlawed Amongst Us, 2011.

330 Health and Human Rights Journal, A Reporting System to Protect the Human Rights of People Living with HIV and Key Populations, October 2017; See also, the 2014 Walewale and 2012 Jamestown incidents reported in Working Group of CSOs, Human Rights Violations Against LGBTIQ People in Ghana, 2017.

331 Association Alouen, Concerns of Alouen regarding the right to non-discrimination and equality : The Case of LGBTI Algerians, 2017.

332 Information from CEDEP, Malawi.

333 UK Home Office, Country Policy and Information Note – Algeria: Sexual Orientation and Gender Identity, May 2020

334 UK Home Office, Country Information and Guidance – Algeria: Sexual Orientation and Gender Identity, February 2016. See also, TranshomoDZ and Arab Foundation for Freedoms and Equality, LGBTQI in Algeria. Violence in everyday life, November 2016.

335 Conseil civique de lutte contre toutes les formes de discrimination, État des lieux des discriminations au Maroc, 2018.

# SECTION V

## CONCLUSION

This report has reviewed the practice of violence against LGBTIQ+ persons in a number of African States, and the circumstances in which it arises. It has also examined the legal framework in place in these States to prevent and respond to such violence, including discriminatory laws that fuel instances of violence and the significant challenges that hinder accountability for torture against LGBTIQ+ persons.

There remain numerous legislative and policy gaps which enable torture and other forms of violence against the LGBTIQ+ community to persist in the region. Torture and other forms of violence against the LGBTIQ+ community persist not only in hostile environments where discrimination on grounds of sexual orientation or gender identity is entrenched in domestic legislation, but also in States which provide (to a greater or lesser extent) legal protection to LGBTIQ+ persons.

In many instances, State authorities fail to ensure any accountability for violence committed against LGBTIQ+ persons. Even where accountability mechanisms do exist,

inadequacies in these mechanisms include a reluctance to document, investigate, and prosecute such acts, and provide redress to victims. The reasons for these inadequacies can be linked to several factors. These include legislative and policy gaps, absence of political will, ongoing institutional discrimination – which also cause fear of harassment and reprisals against LGBTIQ+ individuals who report violence – lack of independent complaints mechanisms and investigative bodies, lack of appropriate training of State officials, and the absence of gender sensitive protocols on the effective investigation of such violence.

In order to prevent violence perpetrated against LGBTIQ+ individuals in Africa and provide an adequate response to it after the event, this report sets out specific recommendations to relevant stakeholders in the region, including the ACHPR, civil society, States and their executive, legislative and judicial branches and other State institutions such as law enforcement and national human rights institutions (see section [Recommendations](#)).

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