Claiming SOGIESC rights through the African human rights system

Analysis of normative, institutional and procedural frameworks based on the example of sexual orientation

Dissertation
zur Erlangung des Grades eines Doktors der Rechte der Rechts- und Wirtschaftswissenschaftlichen Fakultät
der Universität Bayreuth

Vorgelegt von
Isabelle Ann-Kathrin Zundel
aus
Mosbach

Dekan: Prof. Dr. Claas Christian Germelmann

Erstberichterstatter: Prof. Dr. Thoko Kaime

Zweitberichterstatterin: Prof. Dr. Eva Julia Lohse

Tag der mündlichen Prüfung: 06.12.2024

Acknowledgement

The process of writing this thesis has been characterised by exploration, learning, and sharing. Ultimately, writing a PhD thesis is a collaborative effort that takes a village, and I am extremely thankful for the support and contributions that have made this possible. In this regard, I wish to acknowledge and thank all of you who have made this project possible through your various roles during this journey.

In particular, I wish to thank my supervisor, Prof. Dr. Thoko Kaime, for his dedicated supervision, mentorship, inspiration, and guidance throughout the process. Thank you for teaching me so much about law and life. I'm especially grateful I learned how to jump-start a car - just in case my legal arguments ever run out of juice. Thank you for always believing in me and providing the Chair sandpit for academic exploration and learning. I would also like to thank my co-supervisor Prof. Dr. Eva Lohse for her availability, guidance and ideas from the very beginning. I am very thankful.

Additionally, I give special thanks to Prof. Dr. Ulrike Wanitzek, who has not only ensured that African legal studies has its dedicated academic space in Bayreuth and Germany but has also introduced me to this PhD opportunity and become a constant, kind mentor and friend afterwards. I very much enjoyed our walks through Bayreuth.

Of course, I must thank the whole Chair of African Legal Studies, especially Max Zuber, Philipp Bogensperger, Antonia Friedle, Julia Reiher, Gift Mauluka, Nelson Otieno, Ange Dorine Irakoze and our honorary member Dr. Serawit Debele for their substantive and moral support during my doctoral research. I never thought I would say this, but I will miss B9. Keep advocating for the right courses.

I would like to thank all my friends, especially the *Großhexen* and my other special Bayreuth friends, my old Mosbach friends, the *it's a match* girls, and the *radical donkeys*, for ensuring I maintained a life outside of research and work. Thank you for showing me even more love and support when I was struggling. I am grateful to have all of you as my chosen family.

Most importantly, I would like to thank my parents and grandparents for their mental support and constant love – especially given my interesting choice to go into law despite all odds. Thank you for always supporting me, even in endeavours that initially seemed hopeless, like my attempts at cycling, swimming, driving and all those other adventures. I could not have achieved any of this without you. I love you.

The thesis would not have been possible without the financial and institutional support from the Chair of African Legal Studies at the University of Bayreuth, the PhD Club of the Chair of African Legal Studies, the Bayreuth International Graduate School for African Studies, the Writing-up Fellowship of the Max Planck Institute for Social Anthropology Department Law and Anthropology, the Centre for Human Rights at the University of Pretoria and the Centre for Legal Integration in Africa at the University of the Western Cape. I am very much grateful for the opportunities that I was given during my doctoral research, especially for the connections I made and the interlocutors I met at and through these various institutions. Finally, I would like to thank my interview partners for their generosity in sharing their knowledge and insights with me. This thesis would not be the same without your input.

Dedication

This is for you Anna. Thank you for showing me how to be brave, adventurous, and stubborn.

Abstract

Rights related to sexual orientation, gender identity, gender expression and sex characteristics (SOGIESC) constitute one of the most controversial categories of human rights worldwide. In Africa, the discussion is even more fraught due to predominantly hostile societies in which people suffer, among other things, from discrimination, hate crimes, and marginalisation perpetrated by individuals and institutions. This thesis investigates the question of whether the African human rights system (AHRS) is fit to effectively promote and protect SOGIESC rights on the African continent. It does this by an analysis of aspects of the normative, institutional and procedural frameworks through the lens of the concept of claiming, using the example of sexual orientation.

The analysis of the frameworks led to the conclusion that over the past decades, the AHRS has developed into a compact framework for the promotion and protection of human rights on the continent. However, to date, the legal and procedural mechanisms offered by the regional framework for promoting and protecting SOGIESC rights are insufficient. Despite a growing body of soft law mechanisms including or even focusing on SOGIESC rights, the current structures have no consistent focus on or a specific framework for SOGIESC rights.

The initial hypotheses were driven by the claim that despite certain shortcomings in the regional framework, the AHRS is still the right place for SOGIESC advocacy. The findings show that the normative framework is characterised, among other things, by its flexibility and context-specificity, given the incorporation of specific African societal notions into the African Charter. The institutions of the AHRS face severe challenges in terms of their effectiveness with regard to claiming, which, however, can be traced back to features that are common to all IHRL institutions. While the normative framework of the AHRS has incorporated a number of particularities to account for societal, historical, economic and political contexts, such customization is currently lacking in the institutional framework, which limits its effectiveness for claiming significantly. The mechanisms available in the procedural framework are well designed. However, the findings show that its effectiveness for claiming largely depends on the commitment and practices of individuals, which is a limiting factor. Further, despite some promising opportunities, the (quasi-) judicial mechanisms are not designed to address the local realities of systemic and widespread human rights violations on the African continent.

In essence, the analysis shows that the AHRS has several severe shortcomings, but that it also has important features of the AHRS that are effective. These effective aspects of the framework show where and how to claim SOGIESC rights.

Table of Contents

List of Graphics

List of Abbreviations and Acronyms

AARI	All-Africa Rights Initiative
ACSE	ACHPR CSO's Side Events
African Charter	African Charter on Human and Peoples' Rights
African Children's Charter	African Charter on the Rights and Welfare of the Child
African Children's Committee	African Committee of Experts on the Rights and Welfare of the Child
African Commission	African Commission on Human and Peoples' Rights
African Court	African Court on Human and Peoples' Rights
African Court Coalition	African Human Rights Mechanisms Nomination and Selection Initiative
African Court Protocol	Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights
AHRS	African Human Rights System
AMSHeR	African Men for Sexual Health and Rights
AU	African Union
AU Assembly	Assembly of Heads of State and Government of the African Union
AU Constitutive Act	Constitutive Act of the African Union
AU Reform	Institutional Reform of the African Union
BONELA	Botswana Network on Ethics, Law and HIV/AIDS
BTM	Behind the Mask
CAL	Coalition of African Lesbians
CAT	Committee Against Torture
CED	International Convention for the Protection of All Persons from Enforced Disappearance

CEDAW	Convention on the Elimination of all forms of discrimination against women
CEDAW Committee	Committee on the Elimination of Discrimination against Women
CEDEP	Centre for Development of the People
Centre for Human Rights	Centre for Human Rights, Law Faculty, University of Pretoria, South Africa
CERD	International Convention on the Elimination of all forms of racial discrimination
CIAC	Coalition for the Independence of the African Commission
CMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
PLHIV	People Living With HIV
CRC	Committee on the Rights of the Child
CRPD	Convention of the Rights of Person with Disabilities
CRPD Committee	Committee on the Rights of Persons with Disabilities
CSO	Civil Society Organisation
Decision 1015	Decision on the Report on the Joint Retreat of the Permanent Representatives' Committee (PRC) and the African Commission
EAC	East African Community
EACJ	East African Court of Justice
EAC Treaty	Treaty for the Establishment of the East African Community
ECOWAS	Economic Community of West African States
ECOWAS Commission	The Commission of the Economic Community of West African States
ECOWAS Court	ECOWAS Community Court of Justice

ECOWAS Court Protocol	ECOWAS Treaty and Protocol A/P.l/7/91 on the Community Court of Justice
ECOWAS Treaty	Treaty of the Economic Community of West African States
ECtHR	European Court of Human Rights
e.g.	for example
EHRS	European Human Rights System
EU	European Union
IAHRS	Inter-American Human Rights System
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Commission of Jurists
IE SOGI	Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity
IGLHRC	International Gay and Lesbian Human Rights Commission
IHRDA	The Institute for Human Rights and Development in Africa
IHRL	International Human Rights Law
ILGA	The International Lesbian, Gay, Bisexual, Trans and Intersex Association
LEDAP	Legal Defence and Assistance Project
LGBTIQ+	Lesbian, gay, trans, intersex, and queer
Malabo Protocol	Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights
Maputo Protocol	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
MSM	Men who have sex with men

NANHRI	Network for African Human Rights Institutions
NGO	Non-Governmental Organisation
NHRI	National Human Rights Institution
OAU	Organisation of African Unity
OHCHR	Office of the United Nations High Commissioner for Human Rights
PAP	Pan African Parliament
PAP Protocol	Protocol to the Treaty establishing the African Economic Community concerning the Pan-African Parliament
Paris Principles	Principles relating to the Status of National Institutions
PIL	Public Interest Litigation
PRC	Permanent Representatives Committee
PSC	Peace and Security Council
REC	Regional Economic Community
Resolution 30	Resolution on the Co-Operation between the African Commission on Human and Peoples' Rights and NGOs having Observer Status with the Commission
Resolution 275	Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity
Resolution 370	Resolution on the Granting of Affiliate Status to National Human Rights Institutions and specialized human rights institutions in Africa
Resolution 376	Resolution on the Situation of Human Rights Defenders in Africa
Resolution 455	Resolution on the Renewal of the Mandate, Appointment of the Chairperson, Reconstitution and Expansion of Mandate of the Working Group on Indigenous Populations/Communities in Africa 2020

Resolution 552	Resolution on the Promotion and Protection of the Rights of Intersex Persons in Africa
Resolution 572	Resolution on the Criteria for Granting and Maintaining Observer Status to Non-Governmental Organizations working on Human and Peoples' Rights in Africa
Rules of Procedure of the African Children's Committee	Revised Rules of Procedure of the African Committee of Experts on the Rights and Welfare of the Child
Rules of Procedure of the African Commission	Rules of Procedure of the African Commission on Human and Peoples' Rights (2020)
SADC	Southern African Development Community
SAIL	Stop AIDS in Liberia
SAL	Strategic Action Litigation
SERAC	Social and Economic Rights Action Center
SL	Strategic Litigation
SMUG	Sexual Minorities of Uganda
SOGI	Sexual orientation and gender identity
SOGIESC	Sexual orientation, gender identity, gender expression and sex characteristics
SVS	Savages-Victims-Saviours
Synergía	Synergía - Initiatives for Human Rights
The African Disability Rights Protocol	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa
The Older Persons Protocol	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons
The Social Assistance Protocol Africa	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Citizens to Social Protection and Social Security
TWAIL	Third World approaches to international law
UDHR	Universal Declaration of Human Rights of 1948
UN	United Nations

UN Charter	Charter of the United Nations
UNCHR	United Nations Commission on Human Rights
UNCRC	Convention on the Right of the Child
UNHRC	United Nations Human Rights Council
UNHRS	United Nations Human Rights System
WSW	Women who have sex with women
Yogyakarta Principles	Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity
1998 Resolution on Affiliate Status	Resolution on Granting Observer Status to National Human Rights Institutions in Africa
2005 Supplementary Protocol	Supplementary Protocol L A/SP.1/01/05 Amending the Preamble and Articles 1, 2, 9 and 30 of Protocol A/P.1/7/91 relating to the Community Court of Justice and Article 4 Paragraph 1

Chapter 1: Introduction

1. The research question

This thesis investigates the question of whether the African human rights system (AHRS)[1] is fit to effectively promote and protect rights related to sexual orientation, gender identity, gender expression and sex characteristics (SOGIESC)[2] on the African continent. Normative, institutional and procedural frameworks are analysed through the lens of the concept of claiming, using the example of sexual orientation. In examining this question, the thesis is guided by the following hypotheses that inform the analysis:

a. The AHRS has gaps and its current structure is not adequate for the promotion and protection of SOGIESC rights. Its current normative, institutional and procedural structures have no consistent focus on SOGIESC rights or a specific framework for their promotion and protection.

b. However, the system is intended to be comprehensive and to protect the rights of everyone across Africa. Its flexible and living character allows for strategic utilisation to fill the existing gaps and expand the system's current scope. Therefore, the AHRS is the right place for SOGIESC advocacy.

c. Claiming as a concept can fill the existing gaps of the system and actively and permanently transform it, which would benefit not only lesbian, gay, trans, intersex and queer (LGBTIQ+) individuals, but everyone.

The research question is informed by, and the thesis based on, the realisation that despite tremendous strides in the legal and institutional protection of human rights in Africa,[3] LGBTIQ+ individuals still suffer under the yoke of human rights abuses.[4] The question therefore arises why, despite the establishment and development of the AHRS with its extensive normative, institutional and procedural frameworks, human rights violations still persist on a large scale. Why is there such a huge discrepancy between the legal

[1] See list of acronyms on pages xiii et seqq.
[2] I use the terms queer or LGBTIQ+ to refer to members of the LGBTIQ+ community, and SOGIESC to refer to rights and specific topics. For more about SOGIESC terms and concepts, see Annex 1, 202 et seqq.
[3] Frans Viljoen, *International Human Rights Law in Africa* (2. ed. Oxford University Press 2012).
[4] Adrian Jjuuko and others, *Queer lawfare in Africa: Legal strategies in contexts of LGBTIQ+ criminalisation and politicisation* (Pretoria University Law Press 2022).

framework and the frequency of human rights violations? What can be done to close the gap between formal protection and the lived reality of citizens? Is the AHRS fit for claiming SOGIESC rights to transform the system and ensure the better protection of LGBTIQ+ citizens?

2. Motivation for the research

I had three main reasons for conducting this doctoral research. The first is the research question itself, which is of urgent importance because it addresses the globally recognised and pressing topic of SOGIESC rights in Africa, a topic which is being actively discussed within scientific and civil society.[5] The second is the absence of a comprehensive analysis of the promotion and protection of SOGIESC rights in the AHRS despite the urgency of the topic.[6] While there have been legal and socio-legal publications, these are either limited to a specific aspect of the AHRS, or fall short in terms of their regionally based and grounded analysis. The few times the role of the AHRS in strengthening the rights of LGBTIQ+ people has been discussed, this has mostly consisted of warnings against the direct involvement of the African Commission on Human and Peoples' Rights (African Commission), depicting this central pillar of the AHRS as a forum which would rather engender backlash instead of highlighting possible paths.[7] The prospects offered by the normative, institutional and procedural frameworks are routinely neglected, as "many international human rights writers consistently fail to concentrate upon the progressions and developments from the African system".[8] This study will therefore engage in detail with the opportunities given by the system in place to build legal and political pathways towards the better promotion and protection of SOGIESC rights. The third reason is my

[5] See for example, Stephen Brown, 'Visibility or Impact? International Efforts to Defend LGBTQI+ Rights in Africa' (2023) 15(2) Journal of Human Rights Practice 506 <https://academic.oup.com/jhrp/advance-article/doi/10.1093/jhuman/huad006/7146708>.

[6] The only publication that analyses the African human rights system as a whole in the context of SOGIESC rights is Adrian Jjuuko, 'The protection and promotion of LGBTI rights in the African regional human rights system: opportunities and challenges' in Sylvie Namwase and Adrian Jjuuko (eds), *Protecting the human rights of sexual minorities in contemporary Africa* (Pretoria University Law Press 2017).

[7] For example, Rachel Murray and Frans Viljoen, 'Towards Non-Discrimination on the Basis of Sexual Orientation: The Normative Basis and Procedural Possibilities before the African Commission on Human and Peoples' Rights and the African Union' (2007) 29(1) Human Rights Quarterly 86 <www.jstor.org/stable/20072789> accessed 15 July 2024, 106.

[8] Murray acknowledges the routine neglect of the AHRS, despite her own reluctance towards the African Commission at that time. See Rachel Murray, 'International Human Rights: Neglect of Perspectives From African Institutions' (2006) 55(1) International and Comparative Law Quarterly 193 <https://www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/international-human-rights-neglect-of-perspectives-from-african-institutions/867928D2FE06FCE4E980669260297143#> accessed 15 July 2024.

strong belief in the potential of the AHRS and its comprehensive and distinctive framework which insists that all African peoples are entitled to the enjoyment of rights. This promise makes the regional human rights system a good place to find ways to actually protect LGBTIQ+ individuals.

In addition to my personal motivation, this study is one of the outcomes of the interdisciplinary and collaborative research project "When the law is not enough: Tackling intractable problems of human rights – Prospects for integrated approaches" within the Africa Multiple Cluster of Excellence at the University of Bayreuth, funded by the Deutsche Forschungsgemeinschaft (German Research Foundation) under Germany's Excellence Strategy – EXC 2052/1–390713894. At its start, this research project identified three intractable problems of human rights, which are so defined because of the seeming impossibility of resolving them: child labour, human trafficking, and LGBTIQ+ rights. Together with studies by other researchers, my study is located in the area of LGBTIQ+ rights.

3. My positionality in relation to the topic

During my doctoral research, I was constantly confronted with and challenged by my positionality as a white German heterosexual cis woman in relation to a research topic befouled by the colonial legacy. This situation hasn't changed. Over the years, I have come to realise the contentiousness of my research topic in general, and for me as a non-African scholar. I have regularly questioned whether my work on this topic was justified. Therefore, I have aimed to establish my own unique perspective by critically examining my personal background, which encompasses my knowledge, my inherent Western biases, and my identity as a white person. I have sought to provide an analysis firmly rooted in the local context, ensuring that my research contributes meaningfully to the field of study, while respecting and acknowledging the efforts and remarkable work of the individuals and organisations upon which I draw. Thus, I have actively reflected on my position as a foreign researcher and what this means for the whole process of producing knowledge. A crucial part of my research was to seek active involvement with African literature, scholars and advocates and to learn from them. While my research builds on the substantial struggles and contributions of African and Africanist activists, scholars, and human rights defenders over the past decades, I recognise that, due to my position, I will not always be able to encapsulate or honour this rich legacy fully.

Regarding my skills, I utilised my legal education to analyse the frameworks of the AHRS from a doctrinal standpoint. However, this leads me to the second challenge I faced. My legal training in Germany was predominantly focused on the dogmatic analysis and techniques of German law examined from an ivory tower. This led to the abstraction of real problems and concentration on legal schemes only. By contrast, my doctoral research is devoted to an inherently political topic that cannot be seriously discussed from an exclusively legal perspective that ignores the social, cultural, political, and economic contexts in which the law operates.

While some legal scholars argue for the superiority of objective research in law, especially in the field of human rights, Akbar et al. state that "objectivity is perpetually out of our grasp".[9] Every endeavour to conduct research within the human rights discourse is inherently political. Objectivity or neutrality in this field is neither more favourable nor more scientific[10] but overlooks the historical context and the protective intent of the legal framework. Consequently, the challenges faced by marginalised and vulnerable groups are not only rendered invisible, but are also deemed irrelevant. Together with Kaime, I have pointed out why I have learned to strongly reject this concept of objective research:

> This [concept] reflects the idea that the law is neutral, so that legal scholarship attains value only through the exclusion of any positionality. Here, two facts are overlooked in my opinion. First, scholars of critical legal theory have clearly demonstrated that the neutrality of the law and of its interpretation has failed, and that the relationship of researchers to social reality is "coloured" by politics. Second, even when neutrality is aimed at in research, this may fail due to multiple factors, such as the epistemological and social context of the researcher and his or her norms and values. [11]

My quest for a voice that emerges from my legal education, and adept utilisation of the analytical tools it provides while also being true to the multiple contexts my research topic is embedded in, has proven to be a persistent challenge, albeit an enlightening one. I believe I have found an approach that addresses my topic within its social, cultural, political,

[9] Amna Akbar, Sameer Ashar and Jocelyn Simonson, 'Movement Law' (2021) 73 Stanford Law Review 821 <https://heinonline.org/HOL/Page?handle=hein.journals/stflr73&id=853&div=&collection=> accessed 15 July 2024.
[10] Isabelle Zundel, 'Decolonizing Law and its Practitioner's Minds on the Example of LGBTQI+ Rights' *African Legal Studies* (2021) <https://africanlegalstudies.blog/2021/07/31/decolonizing-law-and-its-practitioners-minds-on-the-example-of-lgbtqi-rights/> accessed 21 January 2022.
[11] Thoko Kaime and Isabelle Zundel, *African Studies Centres: Observations around the cake theory* (forthcoming).

moral and religious context, and this clearly reveals my positionality: I am invested in exploring the possibilities available within the AHRS to secure better promotion and protection of the rights of LGBTIQ+ individuals. My thesis is, therefore, orientated towards a specific outcome. However, I strongly believe this does not make my legal analysis less sharp in the application of the technical legal tools available, nor does it make the work less valid in general. Overall, the thesis is a legal analysis, but one that looks beyond the dogmatic pattern. This is reflected in the questions raised, the choice of methods, the structure of the thesis and the selection of references.

4. Background to the state of SOGIESC rights in Africa

This thesis discusses and answers, in essence, the question of how to best utilise the normative, institutional, and procedural frameworks of the AHRS in order to protect and strengthen SOGIESC rights, illustrated by the example of sexual orientation.

Sexual orientation, gender identity, gender expression and sex characteristics continue to constitute what are probably the most controversial categories of human rights worldwide.[12] In Africa, the discussion is even more fraught, due to the existence of hostile institutions and individuals, which make people suffer, among other things, from discrimination, hate crimes, and marginalisation.[13] While specific legal frameworks acknowledging SOGIESC rights exist in exceptional cases, they are obviously insufficient to protect the communities, given the ongoing high number of human rights violations.

As of May 2024, same-sex sexual relations are criminalised in more than half of the 54 African countries.[14] Northern Nigeria, where sharia law applies, is one of several places on the African continent where the death penalty is ordered for same-sex sexual activities.[15] Two divergent trends can be identified on the legal and political levels: some countries are tightening their laws and increasing punishments, while other countries are aiming to decriminalise same-sex sexual activities and protect SOGIESC rights. There have been legal successes in two areas: litigation and legislative reform. One recent and well-

[12] Jjuuko, 'The protection and promotion of LGBTI rights in the African regional human rights system: opportunities and challenges' (n 6), 263.
[13] Gebrandt van Heerden, 'LGBTQ Rights in Sub-Saharan Africa: Perspectives of the region from the region' (2019) <https://cisp.cachefly.net/assets/articles/attachments/80669_lgbtq-rights-in-sub-saharan-africa.pdf> accessed 29 March 2021.
[14] ILGA World, 'Database: A unique knowledge base on laws, human rights bodies, advocacy opportunities, and news related to sexual orientation, gender identity and expression, and sex characteristics issues worldwide' <https://database.ilga.org/en> accessed 6 September 2023.
[15] Ibid.

known example is the landmark decision of the High Court of Botswana from 2019, which the Supreme Court later upheld, in which consensual same-sex sexual acts between adults were decriminalised.[16] These positive legal developments, however, do not necessarily go hand in hand with improvements in the living situation of the individuals concerned. Hostility and discrimination persist, even in countries like South Africa which has some of the most protective laws in the world concerning sexual orientation and gender identity.[17] These two divergent trends raise two main questions. Firstly, whether there are determinants that are decisive for the attitude of a country towards SOGIESC rights, such as colonial heritage, religious influences or global inequalities in contemporary times. Secondly, how the rights of LGBTIQ+ individuals can be best promoted and protected in Africa. Is codified law the best instrument to do this? Can codified law bring or promote social change?

The possibilities offered by the AHRS for the protection of SOGIESC rights, especially at the regional level, have played a subordinate role in the academic discussion, as well as in practical application. While the system has gaps and is not adequate in its current structure, it offers prospects due to its flexible and living character. Nevertheless, there has been a hesitant approach to engaging with the AHRS, particularly the African Commission, when it comes to issues related to SOGIESC rights. This reluctance is often driven by concerns about potential pushbacks. Yet, there are positive examples which show that the AHRS can be effectively employed for the promotion and protection of contentious rights, such as SOGIESC rights. One of the best-known examples of active application of the AHRS for the strengthening of SOGIESC rights is the Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity (Resolution 275), which was adopted by the African Commission in 2014.[18] There is a need for more positive examples, which is why the aim of this study is to identify normative, institutional, and procedural possibilities for claiming SOGIESC rights through the regional system.

[16] *Letsweletse Motshdiemang v The Attorney-General (LEGABIBO as amicus curiae)* (2019) MAHGB-000591-16 (High Court of Botswana held at Gaborone).
[17] Pierre De Vos, 'The Limit(s) of the Law: Human Rights and the Emancipation of Sexual Minorities on the African Continent in Contested Intimacies: Sexuality, Gender, and the Law', *Contested Intimacies: Sexuality, Gender, and the Law in Africa* (2015).
[18] Berry Nibogora, 'Advancing the rights of sexual and gender minorities under the African Charter on Human and Peoples' Rights: The journey to Resolution 275' in Ebenezer Durojaye, Gladys Mirugi-Mukundi and Charles Ngwena (eds), *Advancing Sexual and Reproductive Health and Rights in Africa* (Routledge 2021).

5. Significance of the study

Over the past decades, the AHRS and its institutions have developed into a compact and effective framework for the promotion and protection of human rights on the continent. In relation to SOGIESC rights, however, the institutions have been more hesitant, and the normative frameworks do not mention SOGIESC directly. Over time, a set of protective measures for SOGIESC rights has evolved within the system. Nevertheless, especially the activities and reactions of the African Commission in relation to SOGIESC rights have shown ambivalence and renewed reluctance in the recent past. Today, the independence and even some operations of the AHRS are under threat due to strong political influence. This situation is alarming, not only for the state of international human rights law (IHRL) and LGBTIQ+ individuals in Africa, but for everyone. Hence, there is a compelling call for unified efforts from all sectors to bolster the AHRS, and this study aims to contribute to this endeavour by analysing the system and examining strategies for leveraging the AHRS to advance the promotion and protection of SOGIESC rights more effectively.

This study is significant for academia, advocates, activists and communities for three key reasons. Firstly, it aims to serve as a handbook giving insights into the structures and workings of the AHRS in order to show the reader on how the regional system can be used to claim SOGIESC rights. It transcends other commentaries and overviews due to its jurisprudential, philosophical and argumentative character, and its orientation towards practical application of the system and engagement with it through the concept of claiming. Secondly, the study contributes to the creation of a comprehensive archive detailing the established protective and promotional mechanisms related to SOGIESC rights that have evolved through the African Commission and have already been applied. It aims to document social and activist movements and validate the relevant work that has already been done. To say it with Tamale's words, "it captures the complexity of historical process and social change and it is from this that people and movements can reflect and learn".[19] Institutions such as the Centre for Human Rights, Law Faculty, University of Pretoria, South Africa (Centre for Human Rights) have already put much effort into documenting their engagement with the regional system on their website.[20] The thesis strives

[19] Sylvia Tamale and Jane Bennett, 'Legal Voice: Challenges and Prospects in the Documentation of African legal feminism', Feminist Africa 15 Legal Voice: Special.
[20] Centre for Human Rights, Faculty of Law, University of Pretoria, 'Centre for Human Rights, Faculty of Law, University of Pretoria, South Africa' <https://www.chr.up.ac.za/> accessed 6 September 2023.

to visualise the mechanisms established to promote and protect SOGIESC rights in the context of the current challenges and, at the same time, build a basis for future work. Thirdly, the thesis offers a toolbox of legal instruments derived from the concept of claiming that can enable the promotion and protection of SOGIESC rights through the system by expanding its current scope and permanently transforming it. This part of the thesis is significant because it encourages active engagement with the regional system, when many scholars and advocates are hesitant and warn against possible backlash.

In the light of the aforementioned points, I believe that this study will make a substantial contribution to the existing body of literature concerning AHRS and SOGIESC rights.

6. Scope of the thesis

The thesis is structured into seven chapters. Chapter 1 serves as the introduction, where the principal research question is presented. This chapter outlines the thesis's motivation and provides a concise analytical context for the study. Furthermore, it addresses my position as researcher and the thesis's contribution to the ongoing discourse regarding SOGIESC rights within the AHRS.

Chapter 2 comprises the literature review for the study. Within this chapter, the foundational structure of the AHRS is delineated, and its overarching mechanisms are expounded upon as a toolbox. Furthermore, this chapter evaluates the existing body of literature concerning SOGIESC rights in Africa, pinpointing potential areas for further research, including examination of the regional system in relation to SOGIESC rights.

Chapter 3 outlines the research methods utilised to address the questions raised by the thesis and offers justification for their selection. In addition, the chapter sets the analytical framework of the study by introducing the concept of claiming, which is put in relation to theories such as strategic litigation and the queering of law. The concept of claiming is explored in relation to the different human rights actors in the system, as well as its different law-related and societal-related dimensions.

Chapter 4 concentrates on the normative framework of the AHRS by introducing the fundamental rights it covers and different legal documents, such as the African Charter on Human and Peoples' Rights (African Charter), the Protocol to the African Charter on Human and Peoples' Rights of Women in Africa (Maputo Protocol) and the African

Charter on the Rights and Welfare of the Child (African Children's Charter). Overall, the chapter assesses the framework's effectiveness for claiming SOGIESC rights.

Chapter 5 concentrates on the institutional framework, especially the African Commission, the African Court on Human and Peoples' Rights (African Court) and the African Children's Committee Court on Human and Peoples' Rights (African Children's Committee). Here, too, the question is whether the institutions are fit as a framework for claiming.

Chapter 6 focuses on the versatile procedural framework. The promotional and protective mechanisms are introduced and critically analysed in the context of their relevance for claiming the promotion and protection of SOGIESC rights, using the example of sexual orientation. Within this analysis, the chapter visits past events in which the procedural mechanisms have already been used in the context of SOGIESC rights and contextualises these events for the endeavour of claiming.

The final chapter addresses the challenges the AHRS currently faces and critically discusses the implications this might have for claiming SOGIESC rights through the regional system. It then draws a bigger picture around the concept of claiming, before it identifies areas for further research.

7. Limitations of the study

The study has certain limitations, which must be acknowledged. Rather than providing a comprehensive assessment of the entire AHRS with all its legal frameworks and individual provisions, as well as the institutions, it deliberately concentrates on specific aspects that directly pertain to the claimability of SOGIESC rights. This selectivity is driven by practical constraints in terms of time and space, as well as a strategic focus on the core elements of the system that hold the most promise for safeguarding the rights of LGBTIQ+ individuals. For instance, with regard to the Regional Economic Communities (RECs), the study gives examples from the East African Community (EAC) and Economic Community of West African States (ECOWAS), as these two communities exhibit the most extensive human rights provisions.

A comprehensive examination of sexual orientation, gender identity, gender expression, and sex characteristics in the AHRS is not possible due to the study's scope and the availability of resources. As a result, the primary focus is on sexual orientation, which is the

most extensively discussed aspect at both national and regional levels in Africa. Despite the potential challenges associated with an emphasis on sexual orientation, I believe that this focus will yield the most fruitful outcomes in the current situation. Towards the end, the study addresses the potential applicability of its findings to gender identity, gender expression, and sex characteristics. Given its role as a foundational piece of research for future investigations into SOGIESC rights within the AHRS, it serves as a solid starting point for further exploration, especially on gender identity, gender expression, and sex characteristics.

The national examples provided in the study should be viewed with the understanding that they are not exhaustive or evenly balanced. The predominance of examples from Common Law countries is limiting but is primarily due to language barriers.

The thesis is a doctrinal legal work that has employed empirical legal research to a limited extent. Originally, the research design included fieldwork that was intended to inform the research in terms of understanding distancing from and engagement with the institutions and mechanisms of the AHRS on the part of individuals, non-governmental organisations (NGOs) and other organisations of civil society. Unfortunately, due to the constraints imposed by the COVID-19 pandemic, this undertaking had to be significantly scaled down. Consequently, the anthropological aspect of the study has not been fully developed, although I am fully aware of the untapped potential of adding a stronger anthropological perspective. Nevertheless, the research question and analytical framework of this thesis are necessarily intertwined with the societal and political contexts involved, which precludes the possibility of conducting a purely doctrinal investigation.

A significant challenge encountered during my research was the limited accessibility of certain documents and jurisprudence of the African Commission, despite the fact that the African Commission's guidelines include the intention to publish them. The African Commission plays a pivotal role in shaping jurisprudence related to SOGIESC rights in the African context, so that this study, particularly its archival component, would have greatly benefited from having unrestricted access to all the pertinent reports and working materials.

The thesis is intentionally crafted to be inclusive, targeting a diverse audience beyond only legal professionals and academics. I hope that it will be of value and relevance to a wide range of stakeholders actively engaged in efforts to advance SOGIESC rights. Furthermore, the thesis structure, which in turn is shaped by the structure of the frameworks

assessed, and the concept of claiming in relation to human rights, can be universally applied to other rights. While some sections might appear elementary to readers familiar with the AHRS or SOGIESC advocacy in Africa, the intention is to create a body of work that can be utilised by everyone.

Chapter 2: Literature Review: SOGIESC Rights and the African Human Rights System

1. Introduction

Chapter 2 comprises the literature review, out of which several questions emerge that guide this study of SOGIESC rights in the AHRS. My aim is to build on and extend the existing body of research on the frameworks of the AHRS as part of IHRL, and on SOGIESC rights and advocacy in Africa. This chapter assesses the current body of literature concerning SOGIESC rights in Africa, identifying potential areas for future research which are off the beaten track. In particular, the regional system's role in advancing SOGIESC rights is examined and emerging questions are posed.

The chapter is structured into seven sections. After the introduction, the second section provides a general introduction to international human rights law with a focus on SOGIESC. Here a particular emphasis is placed on the United Nations (UN) level. The next section provides an overview of the normative, institutional and procedural framework of the AHRS, which constitutes a key component of the IHRL framework and serves as the arena of this study. The fourth section poses a crucial question, exploring relevant literature to determine whether human rights, particularly those pertaining to sexual orientation, are perceived as foreign to Africa. Answering this question leads to the debate on cultural relativism and the universality of human rights in the context of SOGIESC, taking into account the concepts of sex and gender in precolonial Africa. The fifth section offers an overview of the existing literature on SOGIESC rights in Africa, primarily outside the AHRS. Following this, the sixth section introduces the relationship between law and society under the heading ‘socio-legal analysis of law as change-maker and social developments and claims as law-changer’. This section assesses the potential impact of the AHRS in safeguarding SOGIESC rights and, consequently, the broader implications of this thesis. The last section identifies questions emerging from this chapter that will guide the subsequent study.

2. International human rights law and SOGIESC

IHRL is a system of treaties, with legal principles and norms, that binds States and oversees the relationship between States and individuals, with the primary objective of promoting and protecting fundamental human rights.[21] The origins of IHRL can be traced back to the Universal Declaration of Human Rights (UDHR), a document adopted by the United Nations General Assembly in 1948.[22] Since then, the international community has devoted efforts towards developing and implementing human rights treaties complemented by customary international law, creating a robust system for the protection of human rights all over the world. Today, IHRL is structured into human rights systems, including the United Nations Human Rights System (UNHRS), as well as three well-established regional human rights systems, of which one is the AHRS.[23]

Beyond these established frameworks, strategies to further develop and expand existing human rights systems in general can be summarised in three categories. Firstly, enhancement can be achieved by creating new normative frameworks. This is a strong and distinct option which, however, comes with an elaborate administrative and political process that minimises the chances of (short-term) changes. Secondly, the existent normative framework can be supplemented, for example by adopting additional protocols to existing treaties.[24] While the administrative burden is lower, the newly introduced focus is primarily linked to the main treaty which results overall in thematically limited gains. Thirdly, the frameworks of the respective system can be expanded by applying the existing mechanisms of the system in an extensive manner. In the context of SOGIESC issues, efforts can focus, among others, on equality and non-discrimination to encourage passing of resolutions and comments that broaden the framework‘s scope through an expansive interpretation. A significant advantage of this approach lies in its low barriers to entry and the potential for gradual implementation, facilitating seamless and inconspicuous integration. States are not compelled to join a new treaty; instead, existing frameworks can be incrementally extended to encompass specific developments. However, this flexibility can also come with the risk of regression depending on the political environment. The adaptable

[21] Rhona Smith, *International human rights law* (Oxford University Press 2022), 2.
[22] Universal Declaration of Human Rights 1948, UDHR (United Nations General Assembly); Kerry O'Halloran, *Sexual orientation, gender identity and international human rights law: Common law perspectives* (Routledge 2020), 48.
[23] The other two regional human rights systems are the European Human Rights System and the Inter-American Human Rights System.
[24] On the example of CEDAW: Gabrielle Simm, ‘Queering CEDAW? Sexual orientation, gender identity and expression and sex characteristics (SOGIESC) in international human rights law’ (2020) 29(3) Griffith Law Review 374, 389.

strategy can respond to changing environmental dynamics by adjusting its level of intensity accordingly. Hence, this last approach has predominantly been employed in addressing matters related to SOGIESC.[25]

2.1. United Nations Human Rights System

The framework of the UNHRS is designed as a dual system consisting of the Charter of the United Nations (UN Charter) along with its institutions, called the UN-Charter-based system, as well as the network of treaties subsequently adopted by UN members, called the UN-Treaty-based system.

2.1.1. UN-Charter-based system

As the name suggests, the UN-Charter-based system centres around the founding document of the UN and its institutions. Even though the UN Charter does not make direct reference to sexual orientation, it recognises the protection of human rights as its mandate in Article 1 (3).[26] Accordingly, the institutions under the UN Charter all have their role to play in promoting and protecting human rights. Each institution[27] has its own procedural framework that enables the investigation and protection of SOGIESC rights, even in cases where they are not explicitly mentioned. Due to these frameworks, the UNHRS has, over time, officially acknowledged and classified sexual orientation as a human rights category. For example, the General Assembly has a legislative role and oversees different activities, such as reports from bodies and the work of Rapporteurs and High Commissioners.[28] It is the legislative body of the UDHR and oversees the Office of the United Nations High Commissioner for Human Rights (OHCHR). As of May 2024, the

[25] Ibid., 388.
[26] Article 1 (3) UN Charter
[27] Article 7 UN Charter
[28] Chapter IV UN Charter

General Assembly has adopted eight resolutions in which, with all Member States, it recognises sexual orientation as deserving protection.[29]

Additionally, the General Assembly has established the UN Human Rights Council (UNHRC) as the successor of the UN Commission on Human Rights (UNCHR).[30] Since 2006, the UNHRC has been responsible for promoting and protecting human rights issues as an inter-governmental body within the UN system. Its procedural mechanisms include periodic reviews and complaint procedures.[31] In relation to sexual orientation, the UNHRC requested the OHCHR in Resolution A/HRC/19/41 to work on and publish an official report on human rights violations against individuals based on their sexual orientation and gender identity. This report, which was only the second official UN report on the topic, was published in 2015. It highlighted the "continuing, serious and widespread human rights violations perpetrated" around sexual orientation and gender identity (SOGI) and gave several recommendations.[32] In 2016, the UNHRC appointed an Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (IE SOGI).[33] The engagement of the OHCHR with SOGI issues has significantly increased since the High Commissioner's Strategic Management Plan

[29] The Resolutions are: Resolution on Extrajudicial, Summary or Arbitrary Executions 25 February 2003, A/RES/57/214 (General Assembly of the United Nations), Resolution on Extrajudicial, Summary or Arbitrary Executions 20 December 2004, A/RES/59/197 (General Assembly of the United Nations), Resolution on Extrajudicial, Summary or Arbitrary Executions 19 December 2006, A/RES/61/173 (General Assembly of the United Nations), Resolution on Extrajudicial, Summary or Arbitrary Executions 18 December 2008, A/RES/63/182 (General Assembly of the United Nations), Resolution on Extrajudicial, Summary or Arbitrary Executions 21 December 2010, A/RES/65/208 (General Assembly of the United Nations), Resolution on Extrajudicial, Summary or Arbitrary Executions 20 December 2012, A/RES/67/168 (General Assembly of the United Nations), Resolution on Extrajudicial, Summary or Arbitrary Executions 18 December 2014, A/RES/69/182 (General Assembly of the United Nations); Resolution on Strengthening the role of the United Nations in the promotion of democratization and enhancing periodic and genuine elections 2021, A/RES/76/176 (General Assembly of the United Nations).

[30] Resolution Human Rights Council 2006, 60/251 (General Assembly of the United Nations)

[31] Resolution Institution-building of the United Human Rights Council, 5/1 (Human Rights Council)

[32] Office of the High Commissioner for Human Rights, 'Discrimination and violence against individuals based on their sexual orientation and gender identity: A/HRC/29/23' (4 May 2015) <https://www.ohchr.org/en/documents/thematic-reports/ahrc2923-discrimination-and-violence-against-individuals-based-their> accessed 14 May 2022.

[33] Resolution of protection against violence and discrimination based on sexual orientation and gender identity 2016, A/HRC/RES/32/2 (Human Rights Council), renewed mandate with Resolution on Mandate of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity 2019, A/HRC/RES/41/18 (Human Rights Council) and Resolution on Mandate of Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity 2022, A/HRC/RES/50/10 (Human Rights Council).

of 2010-2011.[34] For example, in 2023, the IE SOGI called for inputs for a report on colonialism and sexual orientation and gender identity.[35]

2.1.2. UN-Treaty-based system

The UN-Treaty-based system comprises nine major human rights treaties[36] and their corresponding treaty bodies. These treaty bodies or committees are staffed with human rights experts who act independently and are therefore not bound by their national affiliation.[37] The experts supervise and execute three main mechanisms most treaty bodies have established to monitor the implementation of human rights. Firstly, all Member States of a treaty have to submit an initial report, followed by periodical reports (every four or five years), on which the treaty body comments after review. This supports the treaty body in monitoring the convention's implementation.[38] Secondly, each treaty body can give general recommendations for interpreting its provisions, methods and processes, or comment on a thematic, often pressing issue. For example, the Convention on the Rights of the Child (UNCRC) has established the Committee on the Rights of the Child (CRC), which has addressed sexual orientation in various General Comments and concluding observations. In General Comment No. 4 of 2003, the CRC stated that

> "state parties must ensure that all human beings below 18 enjoy all the rights set forth in the Convention without discrimination (Article 2), including with regard to 'race, colour, sex, language, religion, political or other opinion, national, ethnic

[34] United Nation Human Rights Office of the High Commissioner, 'High Commissioner's Strategic Management Plan 2010-2011' <https://www.ohchr.org/sites/default/files/Documents/Press/SMP2010-2011.pdf> accessed 4 October 2023.
[35] The Chair of African Legal Studies has followed this call with an input. <https://www.ohchr.org/en/calls-for-input/2023/call-inputs-report-colonialism-and-sexual-orientation-and-gender-identity> accessed on 29 February 2024.
[36] International Convention on the Elimination of All Forms of Racial Discrimination (CERD), International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Convention on the Rights of the Child (CRC), International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), International Convention for the Protection of All Persons from Enforced Disappearance (CED), Convention on the Rights of Persons with Disabilities (CRPD).
[37] Simm (n 24), 381.
[38] Valentina Carraro, 'Promoting Compliance with Human Rights: The Performance of the United Nations' Universal Periodic Review and Treaty Bodies' (2019) 63(4) International Studies Quarterly 1079 <https://academic.oup.com/isq/article/63/4/1079/5567246?login=false> accessed 15 July 2024, 1080.

> or social origin, property, disability, birth or other status'. These grounds also cover adolescents' sexual orientation […]"[39].

With this General Comment, the CRC initially located sexual orientation as a ground for non-discrimination in Article 2 under "other status". Additionally, the CRC irregularly comments on issues of sexual orientation in its concluding observations on State reports.[40] Thirdly, most treaty bodies[41] have established an individual complaint mechanism through which individuals (and third parties on behalf of individuals) can complain about the violation of rights under the respective treaty. The State against whom the complaint is directed must have explicitly recognised this right of the separate treaty body.[42] For example, in 1994, in *Toonen v Australia*, the Human Rights Committee held that "consensual sexual acts in private fall within the concept of privacy." This was the first time in international law that the rights of LGBTIQ+ persons were recognised as human rights.[43] The Human Rights Committee broadened the interpretation of the word "sex" in Article 26 of the International Covenant on Civil and Political Rights (ICCPR) to include "sexual orientation".[44] In *Young v Australia,* the Human Rights Committee found that Australia violated Article 26 of the ICCPR by denying Edward Young a state pension as a dependant of a deceased war veteran because he and his deceased partner were a same-sex couple.[45] This second decision went beyond *Toonen v Australia* and applied the principles of non-discrimination and equal protection to civil, economic, and social claims.[46] Finally, some States have accepted an inquiry procedure allowing a delegation of the

[39] General Comment No. 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child 1 July 2003, CRC/GC/2003/4 (Committee on the Rights of the Child)
[40] For example, Committee on the Rights of the Child, 'Concluding observations on the combined 3rd to 6th periodic reports of Malta: CRC/C/MLT/CO/3-6' (26 June 2019) <https://www.ohchr.org/en/documents/concluding-observations/crccmltco3-6-committee-rights-child-concluding-observations> accessed 4 October 2023.
[41] All but the Committee on the Protection on the Rights of All Migrant Workers and Members of Their Families.
[42] Kseniya Kirichenko, 'United Nations Treaty Bodies' jurisprudenceon sexual orientation, gender identity, gender expression and sex characteristics: UN Treaty Bodies Strategic Litigation Toolkit – Part 1' (2019) <https://ilga.org/downloads/Treaty_Bodies_Strategic_Litigation_toolkit_policy_paper_en.pdf> accessed 27 August 2021, 25.
[43] Odette Mazel, 'Queer Jurisprudence: Reparative Practice in International Law' 2022(116) American Journal of International Law 10 <https://www.cambridge.org/core/journals/american-journal-of-international-law/article/queer-jurisprudence-reparative-practice-in-international-law/DC662AF815F55D43A7A62C5D4EB10EA5> accessed 15 July 2024; Giulia Dondoli, 'LGBTI Activism Influencing Foreign Legislation' (2015) 16 Melbourne Journal of International Law 124 <https://law.unimelb.edu.au/__data/assets/pdf_file/0006/1586814/16105Dondoli2.pdf> accessed 15 July 2024.
[44] *Toonen v Australia* [1994] CCPR/C/50/D/488/1992 (Human Rights Committee).
[45] *Young v Australia* [2003] CCPR/C/78/D/941/2000 (Human Rights Committee).
[46] Mazel (n 43).

Committee to investigate a specific topic.[47] However, so far, no such study has taken place on issues of sexual orientation.

One of the nine human rights treaties has been ascribed particular potential to address and engage with SOGIESC rights.[48] The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) calls for the modification of "social and cultural patterns of conduct of men and women" in Article 5 (a).[49] In this context, different procedural approaches to expanding the protection of the Convention seem feasible and have been discussed in the literature. For example, Holtmaat and Post propose an "inconspicuous" way involving the building of a coherent structure that leverages the already existing framework of CEDAW to protect SOGIESC rights through "encourag[ing] state parties and non-governmental organisations to include discussions of discrimination against LGBTI persons in Country Reports and Shadow Reports to the Committee, thereby inviting the Committee to reflect on LGBTI discrimination".[50] In this regard, General Recommendation No. 28 raised the point that discrimination against women is often linked with other factors, among other things, sexual orientation and gender identity, thus highlighting intersecting forms of discrimination.[51] Nevertheless, the interventions from CEDAW have so far fallen short of expectations.

This brief introduction to the UNHRS and its approaches to and developments around SOGIESC issues is not comprehensive. Still, it offers insights into how procedural mechanisms of existing frameworks can be utilised to subtly but determinedly expand the system's scope. Despite important and significant advancements within the UNHRS, which have been very well documented by The International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) World[52], other strategies, avenues and mechanisms of the system remain regrettably untapped, and it is indispensable to conduct a critical evaluation of how the normative advancements have impacted the daily lives of the global LGBTIQ+ community.

[47] Simm (n 24).
[48] Rikki Holtmaat and Paul Post, 'Enhancing LGBTI Rights by Changing the Interpretation of the Convention on the Elimination of All Forms of Discrimination Against Women?' (2015) 33(4) Nordic Journal of Human Rights 319.
[49] Article 5 (a) Convention on the Elimination of all Forms of Discrimination against Women.
[50] Holtmaat and Post (n 48), 336.
[51] UN Committee on the Elimination of Discrimination Against Women (CEDAW Committee), General Recommendation No. 28 on the Core Obligations of State Parties under Article 2 of the Convention on the Elimination of all Forms of Discrimination against Women 2010 CEDAW/C/GC/28 (Committee on the Elimination of Discrimination against Women).
[52] ILGA World (n 14).

2.2. Yogyakarta Principles

The Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity (Yogyakarta Principles) are a set of international law principles regarding SOGI[53] intended to harmonise the "diverse approaches, inconsistency, gaps and opportunities".[54] The principles were defined by human rights experts in 2007 to create a comprehensive and systematic articulation of the existing human rights and their respective applications. The 29 principles identify the State's standing obligations, and offer guidance on how to apply human rights law in relation to SOGI.[55] The principles are designed to apply to all humans "regardless of the characteristic of actual or perceived sexual orientation or gender identity".[56] Each principle "comprises a statement of the law, its application to a given situation, and an indication of the nature of the state's duty to implement the legal obligation".[57] Additionally, the principles give recommendations and advice to different bodies of the UN, and States and institutions have responded to the principles in reports and events of various kinds.[58] The framework was later incorporated into the mandate of the IE SOGI.

In 2017, the Yogyakarta Principles plus ten were established to supplement the initial Yogyakarta Principles.[59] The initial set of principles was mainly expanded by issues of gender expression and sex characteristics. While O'Flaherty and Fisher[60] have identified significant potential for the Yogyakarta Principles and associated with this, the enhanced protection of the human rights of SOGI, several scholars have called attention to more critical perspectives on the principles. For example, Otto criticises that the principles do not consider the boundless and fluxionary reality of SOGI but instead rely on and

[53] I use the term SOGI in relation to the Yogyakarta Principles, as this is the terminology employed there.
[54] Michael O'Flaherty and John Fisher, 'Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles' (2008) 8(2) Human Rights Law Review 207, 232.
[55] Ibid., 207.
[56] Sheila Quinn, 'An Activist's Guide to The Yogyakarta Principles' (2010) <https://queeramnesty.ch/wp-content/uploads/2010/11/Yogyakarta_Principles_Activists_Guide_201011.pdf> accessed 14 May 2022, 23.
[57] Michael O'Flaherty, 'The Yogyakarta Principles at Ten' (2015) 33(4) Nordic Journal of Human Rights 280, 284.
[58] For example, ARC International and CAL, 'International Dialogue on Gender, Sexuality, and HIV/AIDS: 'Strengthening Human Rights Responses in Africa and Around the Globe'' (Johannesburg, 6 December 2007).
[59] Yogyakarta Principles plus 10 2017, YP+10.
[60] O'Flaherty and Fisher (n 54).

reinforce a dualist heteronormative framework that is dominantly based on (bio)logical assumptions instead of societal construction.[61]

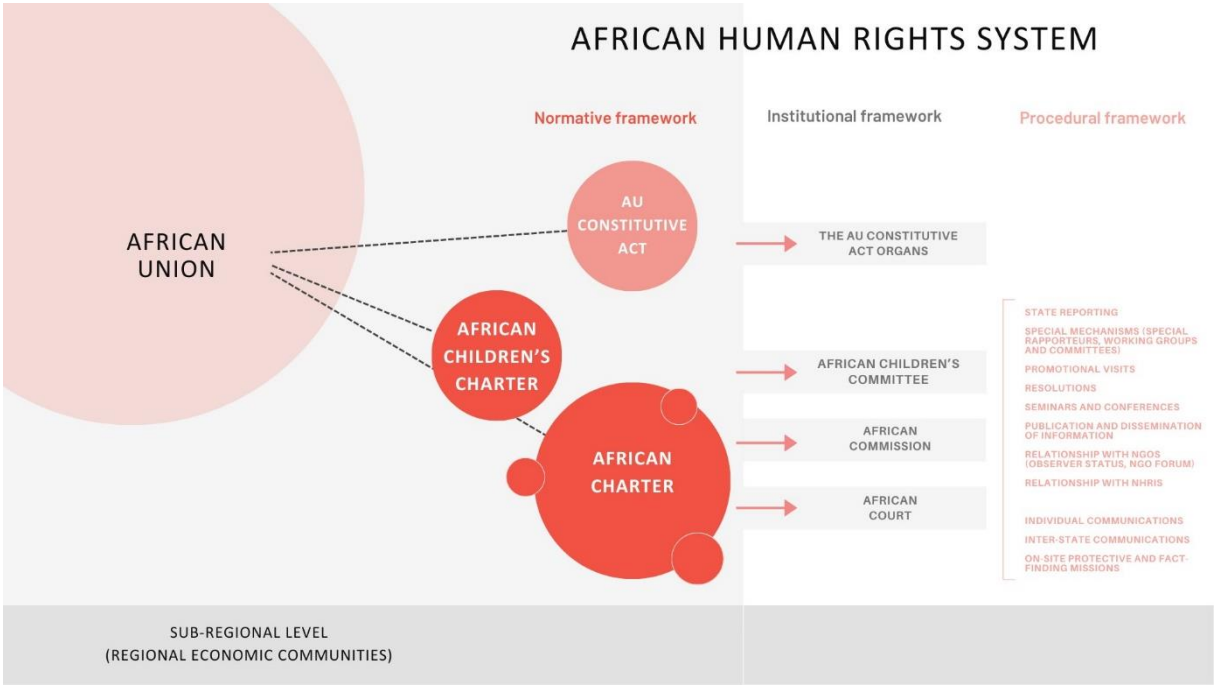
Over the past twenty years, significant progress has been made in integrating SOGIESC into international human rights law. The Yogyakarta Principles have played a pivotal role in this evolving landscape and continue contributing through cross-fertilisation. Nevertheless, the question remains of how the principles impact the actions of national stakeholders, such as governments, inter-governmental bodies and judiciaries, enabling change to better protect SOGIESC rights on the ground. O'Flaherty elaborates in detail on the impacts of the principles on international, regional, and national levels. At the national level, the Yogyakarta Principles have been incorporated, for instance, in the presentation of legal principles in the South African case *September v Subramoney N.O. and Others* (EC 10/2016).[62] On the regional level, according to O'Flaherty, the Yogyakarta Principles have mainly impacted the European human rights system (EHRS).[63] While this assessment implies limited influence on both the AHRS and the Inter-American human rights system (IAHRS), it's worth noting that dedicated research on the correlation between the Yogyakarta Principles and these two regional human rights systems has so far not been conducted.

2.3. Regional human rights systems

In addition to the UNHRS, the IHRL entails three well-established regional human rights systems: the EHRS, IAHRS and AHRS. As the name suggests, regional human rights systems are restricted geographically to a specific region. The structure and mechanisms of the systems are comparable in their core features, as they all consist of normative, institutional and procedural frameworks for the promotion and protection of human rights. In respect of SOGIESC rights, the three functioning regional human rights systems have experienced different developments and adopted independent approaches. This study focuses on the AHRS, but comparisons with the other regional human rights systems are regularly drawn throughout the study.

[61] Dianne Otto, 'Queering Gender [Identity] in International Law' (2015) 33(4) Nordic Journal of Human Rights 299, 312 et seq.
[62] *Jade September v Subramoney N.O. and others* (2019) EC 10/2016 (Equality Court of South Africa, Western Cape Division).
[63] O'Flaherty (n 57), 291.

3. The African human rights system as a toolbox



Graphic 1: African human rights system

The AHRS functions under the African Union (AU), the former Organisation of African Unity (OAU).[64] This continental Union, which today consists of 55 States, replaced the OAU (established in 1963) in 2002.[65] Whilst liberation, decolonisation and regional co-operation were the initial drivers of the regional system,[66] the objectives of the Union have been enhanced over the years, with a stronger focus on human rights protection.[67] Today, the African Charter, ratified by 54 of the 55 Member States, is the heart of the AHRS.[68]

The AHRS is the youngest of the three regional human rights systems and comprises normative, institutional and procedural frameworks. The normative framework contains

[64] Viljoen, *International Human Rights Law in Africa* (n 3), 151.
[65] African Union, 'About the African Union' (14 February 2021) <https://au.int/en/overview> accessed 22 March 2024.
[66] Victor Ayeni, 'The African Human Rights Architecture: Reflections on the Instruments and Mechanisms within the African Human Rights System' (2019) 10(02) Beijing Law Review 302 <https://www.scirp.org/journal/paperinformation.aspx?paperid=91361> accessed 15 July 2024.
[67] For more information on the development of the continental Union with regard to human rights, see Adrian Jjuuko, 'Beyond court victories: using strategic litigation to stimulate social change in favour of lesbian, gay and bisexual persons in common law Africa' (University of Pretoria); Viljoen, *International Human Rights Law in Africa* (n 3), 156 et seq.
[68] Morocco was the only country not to ratify the African Charter.

numerous Charters and Protocols, such as the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), which emanate from and supplement the African Charter as the primary legal document of the system. The AHRS features three central institutional pillars on the regional level. Firstly, there is the African Commission, whose legal basis is found directly in the African Charter (Articles 30 et seqq.). Secondly, the African Court was established through the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol). Its legal legitimation is derived from Article 66 of the African Charter, allowing the development of supplementary protocols and agreements. Thirdly, the African Children's Committee, whose legal basis is found in Chapter 2 of the African Charter on the Rights and Welfare of the Child (African Children's Charter), focuses, as the name implies, on the rights of African children.

All these institutions have specific mandates, outlined within the normative frameworks, which are realised through procedural mechanisms. For example, the African Commission can hear communications from individuals and organisations alleging violations of the rights enshrined in the African Charter, as stipulated in Articles 55 et seqq. This mechanism fulfils the African Commission's mandate, as articulated in Article 45 (2), to protect human and peoples' rights within the African continent. The procedural mechanisms are manifold and offer possibilities to shape and advance the AHRS. Yet, the scope and effectiveness of some procedures have been criticised repeatedly for different reasons. For example, the accessibility of the individual complaint mechanism of the African Court, particularly Article 34 (6) of the African Court Protocol, which requires States to make an additional declaration, has been widely criticised for its unfortunate constraining nature. The legal necessity of this requirement is a highly debated issue.[69] It is one of many factors contributing to the AHRS' distance from the people and its inaccessibility.[70]

The regional level of the system is underpinned by the sub-regional level, which is structured by the institutions of the RECs. From a range of sub-regional organisations, the AU

[69] Frans Viljoen, 'Understanding and Overcoming Challenges in Accessing the African Court on Human and Peoples' Rights' (2018) 67(1) International & Comparative Law Quarterly 63 <https://www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/understanding-and-overcoming-challenges-in-accessing-the-african-court-on-human-and-peoples-rights/B07DB215F5DB24E5A267098F92740240> accessed 15 July 2024; Annika Rudman, 'The protection against discrimination based on sexual orientation under the African human rights system' (2015) 15(1) African Human Rights Law Journal 1.

[70] For a more detailed discussion on the accessibility of the African Court, see Chapter 6, 181 et seqq.

recognises eight RECs[71] which differ in their advancement of human rights jurisdiction.[72] While the institutions on the sub-regional level offer advantages to the regional bodies, especially in locational terms, human rights jurisdiction needs to be developed in all parts of the continent.

The AHRS reflects unique characteristics of the continent's history, culture and geo-political context through normative and procedural particularities specific to this system. For instance, Chapter 2 of the African Charter recognises duties of individuals derived from communal notions of society[73], a distinct feature of this regional framework and most African societies.[74]

Especially in the early days of the AHRS, a small group of legal scholars analysed and followed the developments of the regional system, contributing to the establishment of an interpretation that is now widely recognised regarding its key features. With his book *International Human Rights Law in Africa*, Viljoen has provided an all-encompassing work that can be referred to repeatedly because of its descriptive and appraising character.[75] He has also written extensively on specific mechanisms, analysing, for example, the communication procedure under the African Charter.[76] In her many publications, Murray has analysed different mechanisms of the AHRS, such as the role of the special rapporteur.[77] In 2020, she published an extensive commentary on the African Charter.[78] Heyns has also written comprehensively on the African human rights system and the realisation

[71] The eight RECs are: Arab Maghreb Union (UMA), Common Market for Eastern and Southern Africa (COMESA), Community of Sahel–Saharan States (CEN–SAD), East African Community (EAC), Economic Community of Central African States (ECCAS), Economic Community of West African States (ECOWAS), Intergovernmental Authority on Development (IGAD) and Southern African Development Community (SADC).
[72] Solomon Ebobrah, 'Human rights developments in African sub-regional economic communities during 2011: recent developments' (2012) 12(1) African Human Rights Law Journal 223; Gilbert Hagabimana, 'African Regional Economic Communities and Human Rights' (2021) 10(5) Journal of Civil & Legal Sciences 1 <https://www.omicsonline.org/peer-reviewed/african-regional-economic-communities-and-human-rights-115854.html> accessed 16 March 2023.
[73] For example, Julius Nyerere, *Ujamaa: Essays on Socialism* (Oxford University Press 1974).
[74] See Chapter 4, 107 et seqq.
[75] Viljoen, *International Human Rights Law in Africa* (n 3).
[76] Frans Viljoen, 'Communications under the African Charter: Procedure and Admissibility' in Malcolm Evans and Rachel Murray (eds), *The African Charter on Human and Peoples' Rights* (Cambridge University Press 2008).
[77] Rachel Murray, 'The Special Rapporteurs in the African System' in Malcolm Evans and Rachel Murray (eds), *The African Charter on Human and Peoples' Rights* (Cambridge University Press 2008).
[78] Rachel Murray, *The African Charter on Human and Peoples' Rights: A commentary* (Oxford University Press 2020).

of international human rights law in Africa.[79] His "struggle approach to human rights"[80] has gained particular recognition, a concept this thesis also refers to. Murray and Evans edited a collection of articles on the AHRS in practice,[81] to which Banda contributed with an analysis of the Maputo Protocol.[82]

Over the years, the scope of the AHRS has expanded, and priorities have been set. For example, the African Commission and the African Court have established a protective body around indigenous peoples' rights.[83] The flexible and living character of the system allows for constant expansion of the scope. While the system is not comprehensive, and will never be, this characteristic is essential for inclusive protection of human rights. Nevertheless, some areas are still on the outskirts of protection, such as SOGIESC rights. This doesn't imply a complete absence of measures, but highlights that the existing ones continue to be inadequate despite the efforts of parts of civil society.[84] This study offers pathways and challenges in the current framework to improving the protection of SOGIESC rights through the AHRS.

4. Are human rights (of sexual orientation) alien to Africa?

Attempts are regularly made to devalue general claims for the recognition and protection of SOGIESC rights, disregarding the existence of different sexual orientations in Africa. The rationales behind these attempts differ and can be divided into two main groups: those that contest universal rights in the African context and those that classify homosexuality as un-African and a Western import.

[79] Among others, Christof Heyns and Magnus Killander, 'The African Regional Human Rights System', *International protection of human rights* (2006); Christof Heyns, 'The African Regional Human Rights System: The African Charter' (2004) 108(3) Dickinson Law Review (1908-2003) 679 <https://ideas.dickinsonlaw.psu.edu/dlra/vol108/iss3/2> accessed 15 July 2024; Christof Heyns, 'The African Regional Human Rights System: The African Charter' (2003-2004) 108(3) Penn State Law Review (Dickinson) 679 <https://heinonline.org/HOL/Page?handle=hein.journals/dlr108&id=691&div=38&collection=journals> accessed 15 July 2024.
[80] Christof Heyns, 'A "Struggle Approach" to Human Rights' in Arend Soeteman (ed), *Pluralism and Law* (Springer 2001).
[81] Malcolm Evans and Rachel Murray (eds), *The African Charter on Human and Peoples' Rights* (Cambridge University Press 2008).
[82] Fareda Banda, 'Protocol to the African Charter on the Rights of Women in Africa' in Malcolm Evans and Rachel Murray (eds), *The African Charter on Human and Peoples' Rights* (Cambridge University Press 2008).
[83] See for example, the Working Group on Indigenous Populations/Communities of the African Commission.
[84] See Chapter 6, 157 et seqq.

4.1. Contesting Universal Rights in the African context

Some critics contest the universal application of human rights and instead advocate a culturally relative approach. This discourse on the universal versus the relative application of human rights is old, much discussed and versatile, encompassing theoretical, historical and philosophical arguments.[85] Shivji has put much effort into proposing a structure that organises the arguments of this extensive and nearly boundless discussion on four distinct levels.[86] In this study, I adhere to this system, aiming to debunk the notion that human rights (of sexual orientation) are alien to Africa.

4.1.1. Historical genesis and philosophical basis of human rights

The historical genesis of conceptions of human rights, including the different treaties and organs, is recognised by the majority of scholars as Western.[87] For example, Mutua illustrates the numerous layers of Western dominance with his metaphorical savages-victims-saviours construction (SVS).[88] The evolution of the international human rights framework, rooted in the UDHR, with inadequate participation of non-Western parties and their philosophical perspectives, speaks volumes. Mutua identifies this development as an "impulse to universalise Eurocentric norms and values".[89] Yet, several scholars have countered this perspective by insisting on the non-negligible influence of small States and non-Western actors.[90] They emphasise that the UDHR was not drafted by one uniform voice but is the result of a political process with disputed results. Despite these influences, whose intensity can be debated, it is evident that Western dominance persists, leading to the continued under-representation of African actors and their philosophies in the formation of the UDHR.[91]

---

[85] See for example, Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd ed. Cornell University Press 2013); Nsama Simuziya, 'Universal human rights vs cultural & religious variations: an African perspective' (2021) 8(1) Cogent Arts & Humanities 1988385.
[86] Issa Shivji, *The concept of human rights in Africa* (Codesria Book Series 1989).
[87] Ibid., 10.
[88] Makau Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights' (2001) 42(1) Harvard International Law Journal 201 <https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/hilj42&id=208&men_tab=srchresults> accessed 17 March 2022.
[89] Ibid., 210.
[90] See, for example, Susan E Waltz, 'Universalizing Human Rights: The Role of Small States in the Construction of the Universal Declaration of Human Rights' (2001) 23(1) Human Rights Quarterly 44.
[91] Tim Murithi, 'A local response to the global human rights standard: the ubuntu perspective on human dignity' (2007) 5(3) Globalisation, Societies and Education 277, 278.

This raises the question of whether the prevailing Western influence forecloses universal application of the current conception of human rights. Such a conclusion can be disputed by emphasising that the historical genesis of the concept of human rights cannot be equated with its philosophical basis. While common consensus on the philosophical foundation of the international human rights system remains elusive, it is crucial to underscore that African societies have also embraced conceptions of human rights, albeit with differences in their institutions and concepts compared to Western paradigms. Concepts such as Ujamaa and Ubuntu serve as examples of such conceptions.[92] The opposing viewpoint, which must be strongly objected to, presumes the absence of conceptions of human rights in pre-colonial Africa, asserting that any contrary view mistakenly conflates human rights with the concept of human dignity.[93] This latter argument raises a number of critical questions: What relationship between human rights and human dignity is assumed? To which human rights theory is the latter argument related? Who has the authority to determine the criteria for defining human rights? Specifically, who has asserted that human rights concepts are valid only when their principles are formally documented and accompanied by institutional structures aligning with the Western perspective? The argument must be dismissed as reinforcing Western imperialistic systems that ignore and devalue African epistemological notions and institutional settings. Conceptions of human rights are deeply rooted in African society, reflecting the existence of a philosophical foundation for the human rights framework in Africa.

4.1.2. Validity and applicability of human rights conceptions

Shivji's second level is concerned with the validity and applicability of existing conceptions of human rights in African societies. According to Howard, who argues that there was no conception of human rights in pre-colonial Africa, human rights are individual claims against the State.[94] She says that in the "modernisation process" of African countries, which came with an individuation process, these rights now also apply in Africa.[95] Thus, Western concepts of human rights do have universal validity. Another argument, originating from a different perspective but arriving at the same conclusion, asserts the

[92] Ibid.; Nyerere, *Ujamaa: Essays on Socialism* (n 73); Innocent Sanga and Ron Pagnucco, 'Julius Nyerere's understanding of African socialism, human rights and equality' (2020) 4(2) The Journal of Social Encounters 15 <https://digitalcommons.csbsju.edu/social_encounters/vol4/iss2/2/> accessed 15 July 2024.
[93] Rhoda E Howard, *Human rights in Commonwealth Africa* (Rowman & Littlefield 1986), 23.
[94] Ibid., 17.
[95] Ibid., 17.

pertinence of human rights concepts in Africa. This argument maintains that the fundamental philosophy of human rights is not exclusive to Western societies but is a universal phenomenon that is relevant to African societies as well.[96]

By contrast, advocates of the relativity theory suggest that Western and African conceptions neither confirm nor contradict each other. These scholars say that Western societies are focused on the autonomous individual, whilst African societies centre around the community, as reflected, for example, in the concept of Ubuntu.[97] Thus, in Africa group identity and the strong collective and communitarian aspect of social constructs are different to the Western individualised concept of human rights. Shivji counters this argument by highlighting that African societies have substantially changed since colonial times, and purely communitarian societies are no longer a reality.[98]

The discourse on the validity and applicability of human rights conceptions in Africa revolves around the structural and conceptual composition of African societies in the past and in the present. However, it is doubtful whether the pronounced communitarian character of a society should preclude the safeguarding of individuals through human rights concepts.

4.1.3. Identification and cataloguing of rights in traditional African society

Shivji's third level identifies and catalogues rights in traditional African societies in relation to today's Western conceptions. The discourse within the third level underscores diverse perspectives regarding the prerequisites for a human rights conception in terms of structural and institutional frameworks. M'Baye argues, "[…] pre-colonial Africa possessed a fitting system of rights and freedoms, although there was neither the recognition nor the clear formulation of such rights and freedoms as they are recognised, formulated and analysed today".[99] However, other scholars, such as Eze, have challenged this argument and accused M'Baye of conflating the 'humanism and socialism' of ancient African societies with what are considered modern human rights principles. Eze does not doubt the existence of human rights notions in Africa but argues that the status of rights depends

[96] Shivji (n 86), 11.
[97] Adamantia Pollis, 'Liberal, Socialist and Third World Perspectives of Human Rights', *Toward a Human Rights Framework* , 1.
[98] Shivji (n 86), 12.
[99] Keba M'Baye and Birame Ndiaye, 'The organization of African unity (OAU)', *The International Dimensions of Human Rights* 588.

on how far a particular society has developed.[100] Eze's argument raises two critical questions: Who determines what can be recognised and accepted as human rights? And what conception of development do we relate to, especially in the African context?

Once more, there is a risk of classifying rights within an African context through a Western, preconceived and restricted lens. Approaching the question of whether Western-style human rights institutions are applicable in Africa by evaluating African concepts from a Eurocentric viewpoint exemplifies the perpetuation of Western dominance in a self-reinforcing cycle.

4.1.4. Location of human rights within a cultural-relativist paradigm

Within Shivji's scheme, the fourth level unites arguments and discussions that locate human rights within a cultural relativist paradigm. The basis of this argumentation is the claim that conceptions of human rights existed in ancient African societies but that they differ to some extent from Western concepts. This argument has its raison d'être, and should be accepted by universalists. Moreover, it offers a chance for Western societies to question their more or less narrow conceptions of human rights and learn from the differences.

The discourse on human rights covers a wide spectrum of positions and perspectives, with various layers that differ in their alignment with, or resistance to, the (Western) universal concept of human rights. Cobbah[101] and Nahum[102] call for an "Afrocentric perspective" which deserves a place in the international community and can indeed contribute to it, for example with its unique principles of "comprehensiveness" and "harmony". The cultural relativist position calls for a methodology that allows country-specific and individual protection of human rights according to the respective specifics. The so-called weak cultural relativists restrict this concept by saying, "no cultural relativist argument may be allowed to justify derogation from the basic obligation to uphold and protect the full human rights […] or any other cultural context".[103] Shivji contributes to this perspective by following An-Na'im's claim to consider the universal human rights corpus in light of an Islamic reality with applicable Sharia law.[104] However, in any conflict between a cultural relative

[100] Osita Eze, *Human rights in Africa: Some selected problems* (Macmillan Nigeria Publishers Ltd. 1984), Ch 2.
[101] Quoted in Shivji (n 86), fn. 17.
[102] Quoted in ibid., fn. 18.
[103] Abdullahi An-Na'im, 'Religious Minorities under Islamic Law and the Limits of Cultural Relativism' (1987) 9(1) Human Rights Quarterly 1, 75.
[104] Ibid.

system such as Sharia law and the universal application of human rights, priority should be given to the 'full' protection of human rights.[105]

Coming from the universal angle, Viljoen also acknowledges the need to consider local realities. He highlights that within the concept of "universality", the "exact contours of a 'dignified existence' differ".[106] He further argues universality should not be conflated with uniformity; instead, it should be regarded as an institution that manifests itself uniquely in various contexts. Thus, human rights should not be considered as a one-size-fits-all blueprint to be imposed on every situation, but rather as a framework that can be adapted and implemented in accordance with local realities. Overall, these proposals show that the universal against the cultural-relativist arguments do not represent the two opposing ends of a spectrum, but are positioned along an axis between two extremes.

4.1.5. Possibility of universal application despite Western origin?

Regardless of the debate on whether the conception of human rights is universally applicable, most of the arguments put forward lose their plausibility as soon as one looks beyond the theoretical, historical and philosophical dimensions. When considering the state of ratification of the key international human rights treaties, one observes that almost all African States have signed them, including, for instance, the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR). This means they have bound themselves to upholding such rights.[107] The principles set down in these treaties are reflected in the AHRS, national constitutions and other domestic frameworks.[108] Thus, the African States have decided actively and independently to become part of the international human rights corpus. This was also manifested in the global consensus regarding the Vienna Declaration and Programme of Action in 1993.[109]

It has been argued that this situation is a result of the continuing influence of the colonial intrusion that led to "deadlocked power relations between the Global North and Global South"[110]. These arguments refer to the emergence of conceptions of human rights in the West, the political supremacy of the former colonial powers over the former colonies, and

[105] Shivji (n 86), 14.
[106] Viljoen, *International Human Rights Law in Africa* (n 3), 7 et seq.
[107] Fareda Banda, 'Global Standards: Local Values' (2003) 17(1) International Journal of Law, Policy an Family 1, 4.
[108] Jjuuko, 'Beyond court victories: using strategic litigation to stimulate social change in favour of lesbian, gay and bisexual persons in common law Africa' (n 67), 7.
[109] Vienna Declaration and Programme of Action (1993).
[110] Sylvia Tamale, *African sexualities: A reader* (Pambazuka Press 2011); Zundel, 'Decolonizing Law and its Practitioner's Minds on the Example of LGBTQI+ Rights' (n 10).

the historical background of the national legal frameworks in Africa, which are deeply rooted in the colonial creation of statutory structures. While it is necessary to acknowledge the continuing unbalanced power relations, the arguments fail to do justice to the African government officials and advocates by denying their commitment and agency within the structures of the international human rights corpus.[111]

We may thus conclude that human rights, including SOGIESC rights, are universally applicable in Africa. Yet, this does not imply that there are no regional specifics. As Viljoen has rightly stated, "universality does not mean uniformity".[112] The regional features that have evolved from different historical backgrounds and local contexts influence the way human rights are defined and applied. However, this does not affect the quintessence of such rights.

4.2. Is Homosexuality un-African and a Western import?

Attempts to undermine efforts for the recognition and protection of SOGIESC rights are prevalent throughout African communities and do not (only) pertain to legal matters. People contend that SOGIESC rights, especially concerning sexual orientation, clash with African cultural, religious and moral values.[113] Consequently, they argue that these rights do not warrant protection within national, sub-regional and regional legal frameworks. This argumentation is the root of the well-known but inherently incorrect assertion that homosexuality is un-African.[114] While politicians frequently resort to this argument and focus on "homosexuality" as something evil,[115] their motivation is frequently to advance and promote a political agenda.[116]

However, these arguments do not explain the intensity of discrimination, violence and adversity faced by LGBTIQ+ individuals through and in politics, law, and society. Instead, they provide frameworks to justify and maintain these attitudes. According to Murithi, African leaders want to prevent external influence in internal politics and thus

[111] Viljoen, *International Human Rights Law in Africa* (n 3), 7.
[112] Ibid., 8.
[113] See, for example, Yahya Jammeh, *President Yahya Jammeh of Gambia on Homosexuality.* (PRESSTV tr).
[114] Ibid.
[115] Murithi (n 91); Pierre De Vos, 'Mind the gap: Imagining new ways of struggling towards the emancipation of sexual minorities in Africa' (2015) 29(1) Agenda 39, 45.
[116] For example in Uganda: Amar Wahab, '"Homosexuality/Homophobia Is Un-African"?: Un-Mapping Transnational Discourses in the Context of Uganda's Anti-Homosexuality Bill/Act' (2016) 63(5) Journal of homosexuality 685.

protect their autonomy.[117] Nyeck argues that postcolonial African States, as well-established, legitimised institutions, now also feel the need to assign immorality and evil to someone else.[118] The choice fell on queerness and was nailed down with the appropriate legal systems. The argumentation is wrongly used by African leaders as a manifestation of political and economic independence, proof of decolonisation and disassociation from Western imperialism. Epprecht categorises it as a liberation strike and "patriotic defensiveness"[119] for the continent, its countries and its people.

Consequently, the arguments suggesting that SOGIESC rights are incompatible with African culture go hand in hand with the thesis that "homosexuality" is a Western import. This viewpoint invites us to explore the historical context of pre-colonial African societies in the context of sexuality and gender. The common arguments can be structured around three aspects of pre-colonial African societies.

4.2.1. Same-sex sexual practices in pre-colonial Africa

Firstly, same-sex sexual practices and relationships existed in pre-colonial African societies. Namwase et al. categorise sexuality as a human condition without geographical reference and conclude that if homosexuality, which is characterised as just a form of sexuality by the authors, were indeed "un-African", pre-colonial Africa would not have had inhabitants.[120] Same-sex sexual practices have never been alien to African societies, but Africa has experienced different phases of influence in terms of sexuality. Knowledge of same-sex sexual practices and the linguistic means to refer to them are evidence of this. For example, in their comprehensive book *Boy Wives and Female Husbands: Studies in African homosexualities,* Murray and Roscoe gather extensive evidence for same-sex sexual relations in pre-colonial African societies.[121] Mawerenga also shows that some societies had the vocabulary to describe same-sex sexual practices; for example, the Shangaan

[117] Murithi (n 91), 277.
[118] SN Nyeck, *African(a) Queer Presence: Ethics and Politics of Negotiation* (Imprint Palgrave Macmillan 2021), 27.
[119] Marc Epprecht, 'Sexual minorities, human rights and public health strategies in Africa' (2012) 111(443) African Affairs (Lond) 223, 223.
[120] Sylvie Namwase, Adrian Jjuuko and Ivy Nyarango, 'Sexual minorities' rights in Africa: What does it mean to be human; and who gets to decide?', *Protecting the human rights of sexual minorities in contemporary Africa*.
[121] Stephen Murray and Will Roscoe (eds), *Boy-wives and female husbands: Studies of African homosexualities* (Palgrave 2001).

used the term *into Shane* (male-wife).[122] Thus, an understanding is gained regarding how homosexuality was embedded in pre-colonial African societies.

Acknowledging the existence of same-sex sexual practices, scholars have argued that they did not take place in public but existed in a "culture of discretion".[123] Ambani analyses the regulation of sexuality in African societies in three historical phases, namely pre-colonial, colonial and post-colonial Africa.[124] He sees two main factors as a basis for understanding sexuality in pre-colonial Africa. Firstly, "pre-colonial African systems were predominated by religion".[125] Religious beliefs and customs, whether indigenous religions or Muslim and Christian influences, differed in each society and determined the rules of social conduct. Every aspect of life was seen and understood in the context of the dominant religious beliefs. Tessmann concludes that sexual orientation cannot be examined in isolation but only in the social context of a specific society.[126] Secondly, most African societies cherished the idea of "fertile marriage", focusing on producing many children as the leading purpose of sexuality. Heterosexual relations and fertility were thus the accepted social standard.[127] The social determination of the purpose of sexuality created a situation in which divergent forms, such as same-sex sexual relations, were often concealed by a "culture of discretion".

If not hidden, same-sex sexual practices often came with different explanatory tactics and institutions. Some societies created institutional mechanisms, such as women-to-women marriages or relationships. These institutions could hide instances of impotence or same-sex sexual desire,[128] but may also have been created for reproductive, economic and diplomatic reasons.[129] For instance, a woman unable to conceive was paired with another woman who had children, leading to her recognition as a parent and societal acknowledgement. This was therefore an institution that served to hide barrenness.[130] In

[122] Hamburu Mawerenga, *The Homosexuality Debate in Malawi* (2018), 197 et seq.
[123] For example, Marc Epprecht, 'The 'unsaying' of indigenous homosexualities in Zimbabwe: Mapping a blindspot in an African masculinity' (1998) 24(4) Journal of Southern African Studies 631 accessed 15 July 2024, 635.
[124] John Ambani, 'A Triple Heritage of Sexuality? Regulation of Sexual Orientation in Africa in Historical Perspective', *Protecting the human rights of sexual minorities in contemporary Africa*.
[125] Ibid., 18.
[126] Günter Tessmann, 'Homosexuality among the Negroes of Cameroon and a Pangwe tale: Originally published as "Die Homosexualität bei den Negern Kameruns," Jahrbuch für sexuelle Zwischenstufen unter besonderer Berücksichtigung der Homosexualität 21 (1921): 121–38.' in Stephen Murray (ed), *Boy-Wives and Female Husbands: Studies in African Homosexualities* (State University of New York Press 2021).
[127] Ambani (n 124), 20.
[128] Ibid., 20.
[129] Sylvia Tamale, *Decolonization and Afro-feminism* (Daraja Press 2020), 201 et seq.
[130] Epprecht, 'The 'unsaying' of indigenous homosexualities in Zimbabwe: Mapping a blindspot in an African masculinity' (n 123), 139.

Cameroon, same-sex sexual acts between two Pangwe men was considered "wealth medicine".[131] The existence of explanations other than sexual pleasure for same-sex sexual practices, or the employment of mechanisms to cover them up, are found in many different pre-colonial societies.

Epprecht argues that the mechanism of hiding was also reflected in some indigenous languages. For example, several languages in what is today Zimbabwe had no specific terminology to refer to same-sex sexual relations. In Shona, for example, innocent descriptions such as *sahwira* (intimate male comrade) were used.[132] These terms were not immoral but did have a categorising effect. Apparently, more specific terms were borrowed from other languages only at a later point.

4.2.2. Structures and fixed concepts of SOGIESC in pre-colonial Africa

Ambani has shown that while in some societies there were institutional mechanisms in place to conceal the presence of same-sex sexual practices, there were other societal structures and established concepts based on same-sex relationships and embodying gender roles within communities.

Several reported cases show not only that same-sex relationships existed in various pre-colonial African societies, but also that these societies were characterised by some gender fluidity and more nuanced relations and kinships. For example, the Akamba in Kenya practised women-to-women marriages,[133] as in many other African societies. In some Nigerian communities, post-menopausal women chose to take on roles as sons, kings or 'honorary men'.[134] In some communities in Cameroon, men who have sex with men (MSM) have been married,[135] in addition to accepting and living the status of a heterosexual family.

What is particularly intriguing are the likely factors that have contributed to the emergence of these social structures and how they have been realised in society. According to

[131] Tessmann (n 126), 151.
[132] Epprecht, 'The 'unsaying' of indigenous homosexualities in Zimbabwe: Mapping a blindspot in an African masculinity' (n 123), 636.
[133] Grace Nyamongo, 'Woman to woman marriage: the case of female husbands among the Akamba of Kenya' (2020) 7(4) strategicjournalscom <https://www.strategicjournals.com/index.php/journal/article/view/1874> accessed 15 July 2024.
[134] Hermann von Hesse, 'Gender, flexible systems, in Africa', *Global encyclopaedia of lesbian, gay, bisexual, transgender, and queer history* , 595.
[135] Roselyn A Odoyo, 'From Russia with love: an impact assessment of resolution A/HRC/21/L2 on sexual minorities in Africa' (2013) <https://repository.gchumanrights.org/bitstream/handle/20.500.11825/618/odoyo.pdf?sequence=1> accessed 15 July 2024.

von Hesse, same-sex relationships were not necessarily connected to biological sex, but were often associated with adopting specific gender roles.[136] It has been argued that the justification for concepts like same-sex marriage or cross-dressing practices might be rooted in securing social protection systems, such as family structures, even in cases where a suitable partner is lacking, rather than being solely driven by sexual desire or changing gender identities.[137]

4.2.3. Fluidity of sex and gender in pre-colonial Africa

Regardless of the extent to which same-sex sexual practices were concealed or their existence required a special explanation, and the fact that institutions that are considered queer today – such as same-sex marriage – were established only to uphold societal structures, the fundamental point persists: most pre-colonial African societies exhibited some degree of pluralism, flexibility, and inclusiveness concerning matters of sex and gender. This was the case independently of, or even despite, potential societal constraints or restrictions.

Tamale claims that colonialism imposed a dual system of sex/gender on Africa that is arranged along heterosexual and patriarchal lines.[138] It is clear, however, that the understanding of gender in pre-colonial African societies was more "pluralistic, elastic and accommodating".[139] Murray and Roscoe argue that,

> "[t]he colonialists did not introduce homosexuality to Africa but rather intolerance of it – and systems of surveillance and regulation for suppressing it [...] these systems were not successful as long as the reaction of the colonised was simply to hide or deny such practices. Only when native people began to forget that same-sex patterns were ever a part of their culture did homosexuality become truly stigmatised."[140]

[136] Hesse (n 134), 595.
[137] See for example, Monicah Kareithi and Frans Viljoen, 'An Argument for the Continued Validity of Woman-to-Woman Marriages in Post-2010 Kenya' (2019) 63(3) Journal of African Law 303, 304.
[138] Tamale, *Decolonization and Afro-feminism* (n 129), 100. In Serawit Debele and Isabelle Zundel, *The human as an intractable problem of the law: a critical appraisal* (forthcoming), Debele and I question this general statement by Tamale to some extent.
[139] Tamale, *Decolonization and Afro-feminism* (n 129), 100.
[140] Murray and Roscoe (eds) (n 121), xvi.

Overall, the literature shows that efforts to undermine the recognition and protection of SOGIESC rights in Africa lack any legal or anthropological foundation. Same-sex sexual activities existed in pre-colonial Africa, contrary to the notion that 'homosexuality' is un-African. There is a growing body of literature that supports the call to challenge homo- and transphobic arguments from within Africa and highlight that Africa is queer without external influences or politicisation.[141] However, there is a need for more research in this field.

5. Ongoing debates on SOGIESC rights in Africa

Due to heteronormative colonial legacies, SOGIESC rights are amongst the most contested human rights in Africa. LGBTIQ+ individuals experience discrimination, marginalisation and violence from State and non-State actors on a daily basis. Therefore, the negotiation of spaces for LGBTIQ+ individuals in Africa is an urgent and widely debated topic, both on a local and a global scale. Most of the discussions in the literature examine the situation from a political, legal or anthropological context in specific countries, mostly with well-known case studies, such as South Africa[142] and Uganda[143]. The authors often focus on a particular aspect, such as access to health care, national legal frameworks, the colonial burden, litigation or advocacy.[144] Recently, the troubling development of discussing and passing anti-homosexuality bills has understandably become the predominant topic.[145] For example, Machingura and Shahmanesh focus on Uganda's Anti-Homosexuality Act, passed in 2023.[146] In this regard, Nyeck observes that efforts to "integrate a human rights framework as a major communication strategy for queer organising have

[141] For example, Nyeck (n 118), 2.
[142] For example, Thamar Klein, 'Querying medical and legal discourses of queer sexes and genders in South Africa' (2009) 10(2) Anthropology Matters; Nevill Hoad, Karen Martin and Graeme Reid, 'Sex and Politics in South Africa' (3 May 2020) <https://books.google.de/books?hl=de&lr=&id=yAI8FLi9aAAC&oi=fnd&pg=PA7&dq=sex+and+politics+in+south+africa&ots=nCEkIuNHX-&sig=9eUxexLqjTYIVnu2Meq5jeaYE2g#v=onepage&q=sex%20and%20politics%20in%20south%20africa&f=false> accessed 3 May 2020.
[143] For example, Stella Nyanzi and Andrew Karamagi, 'The social-political dynamics of the anti-homosexuality legislation in Uganda' (2015) 29(1 (103)) Agenda: Empowering Women for Gender Equity 24 <http://www.jstor.org/stable/43825974> accessed 15 July 2024; Fortunate Machingura and Maryam Shahmanesh, 'Uganda's Anti-Homosexuality Act' (2023) 382 BMJ (Clinical research ed) 1840.
[144] See Alex Müller, 'Scrambling for access: availability, accessibility, acceptability and quality of healthcare for lesbian, gay, bisexual and transgender people in South Africa' (2017) 17(1) BMC International Health and Human Rights 16; Ashley Currier, *Politicizing sex in contemporary Africa: Homophobia in Malawi* (Cambridge University Press 2019); Alan Msosa, 'Human Rights and Same-sex Intimacies in Malawi'.
[145] For example in Ghana, Theophilus Coleman, Ernest Ako and Joshua Kyerematen, 'A human rights critique of Ghana's Anti-LGBTIQ+ Bill of 2021' (2023) 23(1) African Human Rights Law Journal 96.
[146] Machingura and Shahmanesh (n 143).

prioritised state-centred approaches and legal challenges to discriminatory laws".[147] In my understanding, this implies a critique of the mainstream pathways taken to promote and protect human rights. This leads us to African regional human rights law, a framework which rarely features in the current body of literature on SOGIESC rights in Africa, but, as I argue, can be a place to locate clustered and non-Western efforts for the African continent. The pioneering position of the system in relation to children's rights illustrates its potential.

One of the earliest publications analysing SOGIESC rights in the context of the AHRS was published in 2007 by Murray and Viljoen.[148] Their analysis focused on the opportunities for getting the principle of non-discrimination on grounds of sexual orientation recognised by the African Commission. While the scope of the analysis is limited, the article must be evaluated in the context of its time. Fifteen years later, Jjuuko wrote a book chapter titled 'The protection and promotion of LGBTI rights in the African regional human rights system: opportunities and challenges', which has been valuable for my doctoral research.[149] In addition, Ndashe has shared in detail her experiences of strategic engagement with the African Commission in terms of SOGIESC advocacy, especially through the NGO Forum.[150] Nibogora explores the advancement by the AHRS of the rights of sexual and gender minorities, focusing on the milestone of Resolution 275.[151] Recent engagements with the AHRS predominantly focus on the landmark development of this resolution due to its outstanding success, such as a short article by Sogunro and Surajpal.[152] In addition, Viljoen and Sogunro published an up-to-date overview titled 'The promotion and protection of sexual and gender minorities under the African regional human rights system'.[153]

[147] Nyeck (n 118), 1.
[148] Murray and Viljoen (n 7).
[149] Jjuuko, 'The protection and promotion of LGBTI rights in the African regional human rights system: opportunities and challenges' (n 6).
[150] Sibongile Ndashe, 'Seeking the protection of LGBTI rights at the African Commission on Human and Peoples' Rights' (2011) Feminist Africa 17 <http://www.agi.uct.ac.za/sites/default/files/image_tool/images/429/feminist_africa_journals/archive/15/2_case_study_sibongile_ndashe.pdf> accessed 15 July 2024.
[151] Nibogora (n 18).
[152] Ayodele Sogunro and Sohela Surajpal, 'Resolution 275 and the realisation of LGBTIQ+ rights in Africa' *African Legal Studies* (2022) <https://africanlegalstudies.blog/2022/06/24/resolution-275-and-the-realisation-of-lgbtiq-rights-in-africa/> accessed 31 July 2022.
[153] Frans Viljoen and Ayodele Sogunro, 'The promotion and protection of sexual and gender minorities under the African regional human rights system' in Andreas Ziegler, Michael Fremuth and Berta Hernández-Truyol (eds), *The Oxford Handbook of LGBTI Law*.

The Centre for Human Rights has, together with other institutions, developed an extensive framework of advocacy documents, such as 'A Guide to LGBTIQ+ rights in the UN and African Human Rights Systems'[154] or a guide to 'Promotion and protection of the rights of intersex children under the African human rights system'.[155] However, the academic literature focusing on the AHRS in relation to SOGIESC is still very limited, and fails to capture all developments within the institutions of the regional human rights system.

One reason for the insufficient attention paid to the normative, institutional and procedural frameworks relating to SOGIESC issues could be the regular reluctance from activists and scholars against engagement with the African Commission and its sister institutions, due to the risk of pushbacks.[156] This predominant fear has increased due to the current threats to the African Commission's independence, as Nanima has shown in the context of NGOs[157] and Mute in the context of national human rights institutions (NHRI).[158]

While this perspective has dominated discussions on SOGIESC rights within the AHRS for quite some time, to some extent undoubtedly understandable, it overlooks a well-established framework that provides the LGBTIQ+ community with a significant range of possibilities.

[154] Centre for Human Rights, Faculty of Law, University of Pretoria, 'A Guide to LGBTIQ+ rights in the UN and African Human Rights Systems' (2022) <https://www.chr.up.ac.za/images/researchunits/sogie/documents/A_Guide_to_LGBTIQ_Rights_in_the_UN_and_Africa_V3_27.09.2022_1.pdf> accessed 19 March 2023.

[155] Centre for Human Rights, Faculty of Law, University of Pretoria, 'Promotion and protection of the rights of intersex children under the African human rights system' (2023) <https://www.chr.up.ac.za/images/researchunits/sogie/documents/Intersex_and_Children_s_Rights_pamphlet_design_updated_Page_2.jpg> accessed 4 October 2023.

[156] For example, De Vos, 'Mind the gap: Imagining new ways of struggling towards the emancipation of sexual minorities in Africa' (n 115).

[157] Robert Nanima, 'NGOs & The Independence of the African Commission' (2021) <https://achprindependence.org/ngos-the-independence-of-the-african-commission/> accessed 15 July 2024.

[158] Lawrence Mute, 'Protecting the mandate and autonomy of the African Commission on Human and Peoples' Rights: leveraging the roles of national human rights institutions' (2021) <https://achprindependence.org/wp-content/uploads/2021/07/nhris-achpr_en.pdf> accessed 15 July 2024.

6. Socio-legal analysis of law as change-maker and social developments and claims as law-changers

6.1. Introduction to socio-legal questions

Socio-legal studies, also known as the sociology of law or sociological jurisprudence,[159] whose precursor was Montesquieu,[160] experienced a powerful upturn in the last century, especially in Europe and the United States. It has developed into a discrete discipline[161] where questions of nomenclature as an indication of affiliation have lost importance. On the other hand, the question of what is meant by the sociology of law has accompanied the discipline since its emergence. Griffiths dedicates an entire publication to this question and describes the discipline as follows: "Sociology of law is an empirical social science whose subject is social control, that is to say, the social working of rules (primary and secondary), its causes and effects."[162] The interdependence of law and society is one of the major themes in the sociology of law, according to Röhl.[163] This point is also decisive for Creutzfeld et al., who describe socio-legal studies in the following manner:

> "At its broadest, the field of socio-legal studies might be defined as a way of seeing, of recognising the mutually constitutive relationship between law and society. That relationship is open to endless interpretation because law and society are both constantly changing."[164]

Discussing the potential and the limits of the AHRS as a change-maker in respect of SOGIESC rights raises questions about the interplay between law and society. Two fundamental questions arise: How can existent normative, institutional and procedural frameworks be transformed and expanded through societal impulses to ensure normative protection of LGBTIQ+ persons? To what extent can normative protection of LGBTIQ+ persons change their realities on a daily basis?

---

[159] Francis Aumann, 'Reviewed Work(s): Sociology of Law by Georges Gurvitch: Review' (1942) 36(4) The American Political Science Review 754.
[160] Klaus F Röhl, *Rechtssoziologie: Ein Lehrbuch* (Heymanns 1987); James Gardner, 'The Sociological Jurisprudence of Roscoe Pound (Part I)' (1961) 7(1) Villanova Law Review 1 <https://digitalcommons.law.villanova.edu/vlr/vol7/iss1/1> accessed 15 July 2024.
[161] Röhl (n 160) < https://rechtssoziologie online.de/ > Chapter 2 § 13 I, accessed 27 May 2020.
[162] John Griffiths, 'What is sociology of law? (On law, rules, social control and sociology)' (2017) 49(2) The Journal of Legal Pluralism and Unofficial Law 93, 121.
[163] Röhl (n 160) Chap. 2 §3 I.
[164] Naomi Creutzfeldt, *Routledge Handbook of Socio-Legal Theory and Methods* (Routledge 2020), 4.

6.2. Law as change-maker

Primordial, special attention was paid to the theory of "natural rights" which said that normative legal regulations were derived from rights which existed objectively in nature.[165] With modern progress, the dominant perspective has changed towards prioritising the function of law in relation to society, and human rights have been seen as legally protected "interests".[166] Over time, two major approaches have developed with regard to the interrelation between law and society. The genetic approach presumes the emergence of law out of society and considers law as the product of social processes.[167] The operational approach concentrates more on the effects, and considers the law, including its external regulatory mechanism with penalties, as a factor influencing and impacting the social life of a community.[168] From a positivistic perspective, the law could be used as a game-changer to maximise the welfare of societies and ensure de facto protection of marginalised groups. Based on this assumption, Pound coined the concept of social engineering.[169]

6.2.1. Social engineering

The concept of social engineering has been dominantly applied in a national and mostly Western context. Yet, some characteristic works have analysed the concept in an African setting. For example, Beckstrom remarks on hindrance factors of legal-social engineering in a developing nation, in the case of Nigeria.[170] Moore also sketches the impact of legislation among the Chagga of Mount Kilimanjaro, a social field with legal pluralism.[171] In his dissertation, Jjuuko discusses strategic litigation as a tool to stimulate social change in favour of same-sex sexual practices in common law Africa (and the other way around).[172] The analysis of existing research leads to a number of conclusions. One, the effectiveness of legal-social engineering in the context of the AHRS, or any other regional human rights

[165] Susanne Baer, *Rechtssoziologie: Eine Einführung in die interdisziplinäre Rechtsforschung* (Nomos Verlagsgesellschaft mbH & Co. KG 2017), 61.
[166] Wolfgang Friedmann, *Legal Theory* (1949) 213-217; Roscoe Pound, 'Legislation as a Social Function' (1913) 18(6) American Journal of Sociology 755 <www.jstor.org/stable/2763325> accessed 15 July 2024.
[167] Manfred Rehbinder, *Rechtssoziologie: Ein Studienbuch* (C.H. Beck 2014), 1.
[168] Max Weber, *Wirtschaft und Gesellschaft: Studienasgabe* (1972), 509-511.
[169] Roscoe Pound and Javier Treviño, *Social control through law* (Routledge, Taylor and Francis Group 2017).
[170] John Beckstrom, 'Handicaps of Legal-Social Engineering in a Developing Nation' (1974) 22 American Journal of Comparative Law 697 <https://heinonline.org/HOL/Page?handle=hein.journals/amcomp22&id=705&div=&collection=> accessed 15 July 2024.
[171] Sally Moore, 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1973) 7(4) Law & Society Review 719.
[172] Jjuuko, 'Beyond court victories: using strategic litigation to stimulate social change in favour of lesbian, gay and bisexual persons in common law Africa' (n 67).

system, has yet to undergo comprehensive analysis. However, the legally pluralistic context in which a regional system operates may have either amplifying or curtailing effects on societal behaviour. While the normative framework of the regional human rights system can appear distant and has to compete with the national, customary and religious laws, the individual case law of regional bodies can have amplifying effects that transcend local and national contexts. Two, objectively evaluating the law's impact on society is challenging, due to its correlation with numerous non-legal factors. It must be asked which role law can play. However, the multi-dimensional reality of factors can be seen and utilised as an opportunity, as combining several tools can significantly strengthen the effect of the law. Three, even though the law's influence might be limited to its enforcement, it can be actively used by individuals and organisations to demand the transformation necessary in society. Thus, it can serve as a boosting tool. Finally, social engineering is a concept based on specific assumptions which tackles a well-known issue, how to anticipate and challenge the influence of the law (whatever law means in this context) on society. This has been extensively discussed in other contexts using different terminology. It is tempting to accept the idea of the law as a loaded toolbox for achieving social change. However, this is based on a very mechanical and simplistic view of societal processes. The usability of this approach in an African context is an underexplored research field. In addition to the existing studies, specific conditions such as the strong influence of legal pluralism, the colonial legacy and struggles regarding law enforcement have to be considered.

6.2.2. The non-ideal

In the book *African(a) Queer Presence: Ethics and Politics of Negotiation*, Nyeck discusses the concept of the non-ideal. In building on Adorno's Negative Dialects, [173] in which the non-ideal is understood as a category "with many identifiers" in contrast to the Hegelian dominant identity, Nyeck refers to LGBTIQ+ persons in the context of the non-ideal.[174] Against this background, Nyeck argues that the theoretical and the operative systems differ.[175] If changes are made to the laws, resolving theoretical contradictions, the operative and theoretical systems may not automatically align. Nyeck concludes that engagement with human rights and constitutional law alone is insufficient for achieving a specific transformation in society. This once more directs the focus to an important issue

[173] Theodor Adorno, *Negative Dialectics* (Routledge, Taylor & Francis Group 2003).
[174] Adorno (n 173); Nyeck (n 118), 26 et seq.
[175] Nyeck (n 118), 26 et seq.

in the sociology of law and human rights discourses, namely the relationship between law and society.[176] The following questions are regularly asked anthropologists and lawyers: Which role can legal measures play in improving the living conditions of the non-ideals? Can codified law bring or promote social change?

To overcome the divergence between the theoretical and operative systems, or in this context, law and society, Nyeck proposes to look beyond politics and the system. The speculative moment offers a new vision "to restore the playful elements of the non-ideal as a qualitative instantiation of intersectional rationality and relationality".[177] In my opinion, it is not necessary to turn our backs on the concerns of LGBTIQ+ persons in Africa. We may not find solutions in law and, more precisely, in human rights law. However, we can use the legal tools available to support general efforts to "unmask the incapacitating abstractions".[178] I propose contextualisation of these legal tools to protect the human rights of LGBTIQ+ persons by acknowledging that the law enables and limits at the same time, and calling for efforts with and beyond the law.

6.3. Social developments and claiming as law-changer[179]

Normative changes can be achieved through two pathways: legislative change or judicial challenge to existing provisions based on an individual case. However, legal change, be it through the judiciary or political impulse, cannot be achieved in a vacuum. It is only possible in momentous situations in the social, political and legal fields. Thus, with regard to the decriminalisation of same-sex sexual relations, the recent examples of Angola, Botswana, Mozambique, the Seychelles and South Africa have shown the importance of national advocacy strategies that work towards creating a national momentum in which ground-breaking legal developments are possible. Such a momentum is unique in each specific context, but every case involves legal and non-legal preliminary steps. These pre-steps can strategically build on each other to enable incremental legal, political, and social transformation. Advocacy strategies use different tools, such as strategic litigation[180], cross-border partnerships[181], inter-movement solidarity (even though often accompanied

[176] Sharyn Anleu, *Law and Social Change* (2009).
[177] Nyeck (n 118), 29.
[178] Ibid., 28.
[179] Parts of this sub-chapter originate from Thoko Kaime and Isabelle Zundel, *Let's (not) talk about the gays: Malawi's stalled attempts at decriminalisation of same-sex laws* (forthcoming).
[180] Jjuuko, 'Beyond court victories: using strategic litigation to stimulate social change in favour of lesbian, gay and bisexual persons in common law Africa' (n 67).
[181] Kelly Kollmann, 'Same-sex Partnership and Marriage: The Success and Costs of Transnational Activism', *The Ashgate Research Companion to Lesbian and Gay Activism* (2016).

by obstacles)[182] and community engagement. For example, in Botswana, a series of ground-breaking decisions by the High Court of Botswana upholding human rights[183], in combination with a strong queer movement, have built jurisprudence which paved the way for the recent decision in *Letsweletse Motshidiemang v The Attorney-General* in which the court struck out the provisions in the penal code from the colonial era which criminalised same-sex sexual relations. In Malawi, organisations such as the Centre for Development of the People (CEDEP)[184] have

> "developed [and executed] a three-year multi-layered strategy that contains several culture-shifting advocacy tools. One area that stands out is CEDEP's efforts to sensitise the media to LGBT issues, including television and radio outlets".[185]

Strategic litigation is a legal instrument for expanding and transforming existing frameworks with the aim of better protecting specific marginalised groups within a society through a series of court cases directed at an overarching goal. Tamale and Bennett describe so-called strategic action litigation (SAL) as "a process in public interest law whereby members of a marginalised group deliberately and proactively take a test case to court to establish a positive legal precedent whose effect goes beyond the immediate litigants".[186] Jjuuko has dedicated his doctoral dissertation to analysing strategic litigation as a tool for stimulating social change in favour of same-sex sexual practices in common law Africa.[187] Elsewhere, he has described strategic litigation as a strategy to conquer an ongoing battlefield.[188] Strategic litigation is a long-term, non-linear project that has to consider a multitude of contexts and considerations, including timing, regional context and political environment. The agenda of advancing LGBTIQ+ rights in the African context through strategic litigation raises questions relating to the specific contexts and concerns, especially the risk of pushbacks - be they legal, political or societal - regardless of the actual

[182] Ashley Currier, 'Arrested Solidarity: Obstacles to Intermovement Support for LGBT Rights in Malawi' (2014) 42(3/4) Women's Studies Quarterly 146 <http://www.jstor.org/stable/24364997> accessed 15 July 2024.
[183] For example, *Mmusi and Others v Ramantele and Others* CACGB-104-12 (High Court of Botswana).
[184] CEDEP is one of the earliest local non-governmental organisations in Malawi focusing on the promotion and protection of the rights of LGBTIQ+ people.
[185] Bradley Demone, 'LGBT Rights in Malawi: One Step Back, Two Steps Forward? The Case of R v Steven Monjeza Soko and Tiwonge Chimbalanga Kachepa' (2016) 60(3) Journal of African Law 365, 386.
[186] Tamale and Bennett (n 19), 1.
[187] Jjuuko, 'Beyond court victories: using strategic litigation to stimulate social change in favour of lesbian, gay and bisexual persons in common law Africa' (n 67).
[188] Jjuuko, *To challenge or not to challenge sodomy laws in courts of law: Re-examining Uganda's incremental approach towards decriminalisation of homosexuality* (n 188).

judgment and how to manage this risk. In this regard, one of my interview partners elaborates,

> "What does it mean to the local population when you win a LGBT case? Let's say the court has ordered that you must treat these people the same way as everyone else? […] What does it mean in terms of backlash? […] Have you educated the community about what the decision means? Have you provided for every community, not only the LGBT community? What does it mean when you get a decision that favours LGBT people, for example, in terms of economic development? Imagine you do economic calmative action in a country that is not out of poverty. Look at the situation in South Africa, where the LGBT community had more rights than everyone else [in terms of marriage]. Such happenings should be avoided by adopting a system that builds the law from the bottom and at the same time protects the most vulnerable."[189]

While the concerns are valid and justified, they have, to some extent, led to reluctance to use strategic litigation in order to avoid any sort of pushback. Considering the risk of pushbacks, it is fair to critically ask if the chosen institution and time are right. However, I argue that not all judicial and quasi-judicial institutions are untouchable in relation to SOGIESC rights and other contentious issues. Firstly, efforts in countries such as Botswana[190] and Uganda have shown the benefits of strategic litigation, which focuses on building jurisprudence by cautiously approaching the courts. This means, for example, that a decriminalisation case might not necessarily be the first to be brought to court. Other related but less contentious legal issues, such as freedom of association, where registration of a SOGIESC organisation has been denied, could be pursued initially. Secondly, I believe that, regardless of the outcome and the anticipated resistance, court cases offer possibilities for awareness building, public discourse and the presentation of important arguments. Finally, the development of jurisdictions through the Supreme Court

[189] Interview with E1.
[190] Tashwill Esterhuizen, 'Decriminalisation of consensual same-sex sexual acts and the Botswana Constitution: Letsweletse Motshidiemang v The Attorney-General (LEGABIBO as amicus curiae)' (2019) 19(2) African Human Rights Law Journal 843.

of India[191] and the Supreme Court of Kenya[192] show that court rulings are not set in stone but can be overcome in due time.

Nevertheless, it is necessary to acknowledge the harm and exposure that can result from court rulings (regardless of the actual judgment) for marginalised groups, especially LGBTIQ+ people. This is why strategic litigation efforts should be cautious and imaginative. I argue that there is a need to identify and focus on legal instruments together with concepts outside judicial and quasi-judicial rights claiming.

6.4. Contextualisation: Scope of the African human rights system

Following these elaborations, the question arises as to how LGBTIQ+ persons can be best protected within the limits of the law. The introduction to socio-legal topics has shown that the influence of the law as a change-maker is limited and that trying to transform social frameworks by using legal tools comes with risks for individuals and communities. Nevertheless, this thesis focuses on the potential of the AHRS's normative, institutional and protective frameworks for promoting and protecting SOGIESC rights, and the possibilities for individuals and communities to claim these rights. To date, the opportunities offered by the AHRS for the protection of SOGIESC rights, especially at the level of the AU, have played a subordinate role in the academic discussion and practical application.

6.4.1. Can the human rights discourse shed its neo-colonial character?

Discussing the scope of the AHRS ultimately raises the question: how can the human rights discourse in general serve as a tool for the protection of LGBTIQ+ individuals in an African context? Scholars such as de Vos have argued in the past against the assertive utilisation of human rights discourses as an "emancipatory tool" for recognising and protecting the rights of people with same-sex desires in Africa.[193] One reason for this reluctant position is the embeddedness of the discourse in a post-colonial context, when it needs to be seen in a "broader political context".[194] The colonial intrusion on the African

[191] Danish Sheikh, 'A Tale of Two Judgments: The Afterlives of a Defeat and Victory for Queer Rights in India' (2018) Harvard Kennedy School LGBTQ Policy Journal 8.
[192] Saoyo Griffith, 'Kenya: Supreme Court Decision Reaffirms That Human Rights Protection Is for All in Kenya' *All Africa* (26 February 2023) <https://allafrica.com/stories/202302260014.html> accessed 27 February 2023.
[193] de Vos, 'The Limit(s) of the Law: Human Rights and the Emancipation of Sexual Minorities on the African Continent in Contested Intimacies: Sexuality, Gender, and the Law' (n 17).
[194] Ibid.; Derrick Higginbotham and Victoria Collis-Buthelezi, *Contested Intimacies: Sexuality, Gender, and the Law in Africa* (Siber Ink 2015), 11.

continent attempted to dictate rules for all areas of life, creating deadlocked power relations that persist to this day. This is why, depending on the "political and legal realities"[195] of the specific context, human rights discourses can quickly be denounced as a neo-colonial product that classifies the "Africans as 'savages' in need of Western-led enlightenment".[196] This categorisation of the discourse as a neo-colonial product has been utilised for political campaigns in different countries,[197] with profound negative implications for LGBTIQ+ communities. Thus, the original purpose has had a reverse effect, with the often heated debates putting a spotlight on the individuals concerned and increasing their stigmatisation.[198] As a result, de Vos opts, in his 2015 publication, for tentative and nuanced strategies around the notion of human dignity to engage in and with the struggles of LGBTIQ+ communities on the continent.[199] I understand this as a call for adopting a cautious and restrained position in the ongoing activist human rights discourse (which emerged in the 2000s) on the African continent. The tentative strategies recommended by de Vos are less blaring and more nuanced than usual in this discourse, which leads to exposure of LGBTIQ+ individuals and acknowledges the commonly created image of an imposed Western strategy. As an alternative, de Vos proposes an emphasis on multidisciplinary approaches to achieve recognition of LGBTIQ+ individuals. Even though, or precisely because, I agree with this call for multi- and interdisciplinary approaches, I disagree with a strategy that is primarily driven by excessive tentativeness. I believe that multidisciplinary and people-centred approaches have the capacity to contextualise the human rights discourse and thus acknowledge and mitigate the neo-colonial character of the human right discourse. Legal scholars such as Jjuuko have identified spaces and voices that recognise and address the specifics of LGBTIQ+ communities in Africa beyond statutes and cases. A path has emerged in which an African people-centred human rights discourse is outgrowing the neo-colonial legacy. Therefore, there is no need to follow tentative strategies in claiming human rights. As a regionally owned system, the AHRS can help to amplify this disentanglement. This dissertation endeavours to be a contribution to the African people-centred human rights discourse as part of a multidisciplinary approach.

[195] Higginbotham and Collis-Buthelezi (n 194), 14.
[196] Ibid., 11.
[197] See Chapter 2, 25 et seqq.
[198] de Vos, 'The Limit(s) of the Law: Human Rights and the Emancipation of Sexual Minorities on the African Continent in Contested Intimacies: Sexuality, Gender, and the Law' (n 17), 39.
[199] Ibid., 48.

6.4.2. The multitude of influences on and from the African human rights system

My decision to analyse the AHRS, among many other legal and non-legal instruments influencing the status of LGBTIQ+ people in Africa, was a deliberate choice. However, it inevitably prompts the question of the scope of the AHRS in this respect.

The AHRS covers only the regional and sub-regional levels, so that its correlation to the international human rights system on the UN level and protection measurements on the domestic level must be considered. The legal provisions at these different levels may differ, and even be contradictory. These differences can lead to disputes over which is the dominant legal framework, which can restrict the influence on the AHRS.[200] The effectiveness of regional human rights systems faces several well-known challenges regarding the institutional processes and implementation on the national level. Firstly, by their nature, regional systems are directly and indirectly distant from the Member States and their people. Secondly, the political character of regional systems is reflected in decision-making processes, especially when politicians pursue interests beyond the topic at hand. Thirdly, the sovereign interests of each country can lead to a restrained commitment towards regional integration, including human rights protection. Fourthly, one set of legal tools in the regional system has to fit the singularities of all Member States of a regional system. This inevitably raises the question of whether one set of legal tools can meet every Member State's needs. Or, how effective can a uniform legal framework be in each country?[201] Lastly, enforcing treaties in regional systems is based on contractual concepts, which implies sanctions for States failing to meet their obligations under the treaty.

The AHRS, in particular, has its risks and potential limitations. In the past, it has been criticised for not supporting enough the ongoing human rights discourses around the protection of SOGIESC rights,[202] and warned against the direct involvement of the African Commission as a problematic forum[203]. One of the common fears was backlash engendered by loud activism that would automatically be accused of being a Western import.[204]

[200] For example, the conflict between the European Court of Justice (ECJ) and the Federal Constitutional Court (BVerfG) or the establishment of the European Union (EU) global human rights sanctions regime.
[201] Thiruna Naidoo, Interview with Adrian Jjuuko, Centre for Human Rights Pretoria (2020).
[202] de Vos, 'The Limit(s) of the Law: Human Rights and the Emancipation of Sexual Minorities on the African Continent in Contested Intimacies: Sexuality, Gender, and the Law' (n 17).
[203] Murray and Viljoen (n 7), 106.
[204] See Chapter 2, 30 et seqq.

It was assumed that such a backlash would create a momentum that would be difficult to reverse.

However, some positive examples show that the AHRS's normative, institutional and procedural frameworks can be effectively employed to promote and protect SOGIESC rights.

There is a need for more positive examples. This dissertation therefore aims to identify the normative, institutional and procedural possibilities which the AHRS offers to strengthen SOGIESC rights, using the example of sexual orientation. Thus, I will look at its substantive rules and institutions and their procedural frameworks at the international, regional and sub-regional levels, which will allow me to give a comprehensive and comparative overview. One key aspiration of this thesis is to shed light on the potentials of the AHRS and formulate them in a way that can be utilised in future campaigns for SOGIESC rights and other human rights issues. According to Jjuuko, "there is […] a lot of potential for the African human rights system, just like there are lots of challenges",[205] and these will be elaborated in the following chapters.

7. Conclusion and Emerging Questions

In view of the fact that scholarly (and other kinds of) engagement with SOGIESC rights in the AHRS has been limited, but can be fruitful, some important questions arise:

a. Which critical features of the normative, institutional, and procedural frameworks in the AHRS are helpful for promoting and protecting SOGIESC rights, especially sexual orientation?

b. In the past, how have the frameworks within the AHRS been leveraged to promote and protect SOGIESC rights, especially sexual orientation? Which mechanisms and procedures are still unexplored but promising?

c. What features of the UNHRS and non-African regional systems could help the AHRS to advance SOGIESC rights?

d. What experiences have different actors had in relation to the AHRS and its available mechanisms for ensuring the protection of LGBTIQ+ individuals? Why have

[205] Jjuuko, 'The protection and promotion of LGBTI rights in the African regional human rights system: opportunities and challenges' (n 6), 262.

NGOs been reluctant with regard to using the mechanisms and avenues offered by the regional system?

e. What are the existing barriers (e.g. political, cultural, socio-ethical, economic, religious and customary) that prevent the AHRS from promoting and protecting SOGIESC rights more proactively?

f. What is the AHRS's role in tackling this present human rights challenge? What aspects of the existing frameworks need to be changed in order to enhance recognition and protection? How can the regional system be deployed with other legal and non-legal tools to tackle the problems and bring transformation?

g. Which frameworks and approaches can enable the focused protection of SOGIESC rights? What can be done by individuals and communities, in line with an interactionist people-centred approach,[206] to gain active support from the institutions of the AHRS?

In addressing these questions, this study employs library-based methods, complemented by socio-legal research approaches, to offer an analysis of the opportunities offered by the AHRS for enhancing SOGIESC rights, positioning the study within the ongoing human rights discourse while at the same time critically assessing it. The next chapter introduces the conceptual framework of the study and discusses the research methods applied in the thesis more fully.

[206] Nyeck (n 118), 5.

Chapter 3: The concept of claiming in relation to human rights

1. Introduction

LGBTIQ+ individuals regularly experience violence, oppression and hate crimes in different parts of Africa.[207] However, the African Charter gives an important promise to the African people: "Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind […]"[208]. This necessarily includes LGBTIQ+ individuals, even if this is not reflected in current practice. In this thesis, I research how this promise can be realised through the frameworks of the AHRS. After all, these powerful words are meant to be more than just lip service. They are intended to govern and protect the people of Africa in a flexible and comprehensive manner. So how can such protection be achieved?

I argue that it can be achieved through the concept of claiming. Claiming in relation to human rights has several dimensions and purposes, which extend beyond going to court or using other (quasi-)judicial mechanisms to enforce the enjoyment of one's rights.[209] This chapter seeks to establish an analytical framework for claiming SOGIESC rights through the normative, institutional, and procedural frameworks of the AHRS. The chapter is structured into six sections, explaining the thesis's structural, conceptual and methodological foundation.

After the introduction, the second section outlines the research methods used to investigate how SOGIESC rights can be claimed through the AHRS. The third section introduces well-known concepts and theories from the existing literature that pertain to the research question. In the fourth section, the concept of claiming human rights is presented as the analytical framework of the thesis, situating it within the context of these theories.

[207] The Coalition of African Lesbians and African Men for Sexual Health and Rights (eds), *Violence based on perceived or real sexual orientation and gender identity in Africa* (Pretoria University Law Press 2013).
[208] Article 2 African Charter
[209] Margaret Satterthwaite, 'Crossing Borders, Claiming Rights: Using Human Rights Law to Empower Women Migrant Workers' (2005) 8 Yale Human Rights & Development Law Journal 1 <https://heinonline.org/HOL/Page?handle=hein.journals/yhurdvl8&id=1&div=2&collection=journals> accessed 15 July 2024; Jack Donnelly, 'Universal Human Rights in Theory and Practice' in Jack Donnelly (ed), *Universal human rights in theory and practice* (Cornell University Press 2013); Donnelly (n 85), 274 et seq.

The concluding section highlights the challenges and opportunities arising from this analytical framework.

2. Research Methods

2.1. Introduction

I contend that effective and comprehensive answers to the pressing question of how to protect LGBTIQ+ individuals cannot be derived solely from a dogmatic analysis of one particular legal framework. What is needed is a versatile mix of legal and non-legal instruments, including domestic legislation, IHRL, insights from civil society organisations (CSOs) and grass-roots experiences.

I can explore only some of these instruments, and further research in this field is necessary. I have chosen to look at the AHRS because it offers legal opportunities that have not been sufficiently assessed or utilised. My focus is, therefore, on analysing this regional system's normative, institutional, and procedural frameworks in order to show the opportunities it offers for claiming and protecting SOGIESC rights, based on the example of sexual orientation. My investigation of the AHRS is not intended to be an isolated analysis that neglects other instruments and their mutual influences. Instead, I will adopt an inclusive and multidisciplinary perspective.

The following subsections will address the methodological approach I have chosen, explain the reasons for my selection, and outline the objectives I aim to achieve. My methodological approach is a combination of two main pillars:

Firstly, I utilise library-based international law methods, focusing on the legal and institutional basis of the regional system. Within this framework, I pay special attention to decolonial comparative law methods[210] to critically relate the AHRS to its international and regional counterparts. Additionally, approaches from legal philosophy and sociology are applied in order to relate the dogmatic analysis of the AHRS to the fundamental struggles faced by LGBTIQ+ communities in Africa and elsewhere. The library-based law methods allow me to conduct a legal analysis of the framework, which constitutes the

[210] Lena Salaymeh and Ralf Michaels, 'Decolonial Comparative Law: A Conceptual Beginning' (2022) 86(1) Rabel Journal of Comparative and International Private Law (RabelsZ) 166.

foundation of the thesis. Part of this foundation is a chronological documentation of all procedural mechanisms of the AHRS applied within the context of SOGIESC rights.

Secondly, I combine this with empirical legal research methods, enabling me to take the lived reality of African LGBTIQ+ individuals, advocates and NGOs into account in my analysis. In this regard, I have conducted semi-structured interviews and engaged in participant observation.

The aim of this methodological approach is to do justice to the manifoldness of the problem itself, which inevitably calls for multi-level, interconnected responses.

2.2. Library-based international law methods

My library-based research is focused on a dogmatic analysis[211] of the normative, institutional and procedural framework of the AHRS. I utilise materials such as treaties, resolutions, decisions of courts and official communications, other soft law mechanisms, reports from civil society organisations, and other scholars' work in law and beyond. My choice of materials depends heavily on the availability of documents, and I have appreciated the data that is available on the website of the African Commission. This thorough and multi-source analysis offers a nuanced understanding of the existing legal framework, its opportunities, and shortcomings.

I have also applied comparative law methods wherever possible. The AHRS influences, and is influenced by, IHRL and other regional systems. Comparing different regional legal systems enables a comparison of conceptions and ideological posturing, leading to a much broader range of model solutions for using the legal framework positively. I employ a decolonial comparative approach that considers Africa's historical and epistemological realities, and those of the AHRS.

I integrate perspectives from legal philosophy and sociology to contextualise the dogmatic analysis. This contextualised approach can deepen the understanding of the legal analysis within its societal context, shedding light on the fundamental struggles experienced by LGBTIQ+ communities in Africa and beyond.

[211] Jan Smits (ed), *What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research* (Rob van Gestel, Hans Micklitz, and Edward Rubin. Rethinking Legal Scholarship: A Transatlantic Dialogue, 2015).

2.3. Empirical legal research methods

SOGIESC rights do not exist as independent objective truths. On the contrary, these rights are shaped and impacted by, as well as mirror, the everyday practices of individuals, communities and the political landscape within diverse contexts. Therefore, it is not sufficient to outline and analyse the legal framework, but the legal analysis must be enlarged and combined with socio-legal methods to provide comprehensive insights into how to protect SOGIESC rights and capture the voices and struggles of LGBTIQ+ individuals, advocates and NGOs. I will focus on the challenges and experiences of these communities, and of organisations advocating for these communities' rights, initiating a forward-looking dialogue on power dynamics, social context, social justice, and colonial and postcolonial aspects. This approach will inform my socio-legal methodology and enrich the findings of my research.

To achieve a deeper understanding of socio-legal realities and move beyond a strictly legal perspective, I have conducted field research, the findings and insights from which will be continuously integrated into the thesis. The field research was based on two methods, semi-structured interviews and participation observation.

2.3.1. Semi-structured interviews

Due to severe limitations, especially the COVID-19 pandemic and my limited access to the research field due to my positionality, only a small group of interview partners was selected, mainly lawyers and activists working on SOGIESC advocacy in the regional system, and other interested parties. My approach was inspired by Jjuuko's procedure in his doctoral thesis.[212] The selection of interview partners follows purposive sampling, where the researcher makes deliberate and strategic decisions regarding whom to interview for particular aspects of the study.[213] To determine the participants in this study, I explicitly employed stakeholder sampling, which requires identifying those actively "involved in designing or implementing a cause or its primary beneficiaries".[214] The key stakeholders identified for this study were activists and lawyers advocating for SOGIESC rights on the continent, researchers focussing on the AHRS or SOGIESC rights in their

[212] Adrian Jjuuko and others, *Envisioning Global LGBT Human Rights: (Neo)Colonialism, Neoliberalism, Resistance and Hope* (University of London Press 2018); Jjuuko, 'Beyond court victories: using strategic litigation to stimulate social change in favour of lesbian, gay and bisexual persons in common law Africa' (n 67).
[213] Lisa Given, *The Sage encyclopedia of qualitative research methods* (SAGE 2008), 697.
[214] Jjuuko, 'Beyond court victories: using strategic litigation to stimulate social change in favour of lesbian, gay and bisexual persons in common law Africa' (n 67), 20.

research, and lawyers working at or with the African Commission. Some of these stakeholders identify at the same time as LGBTIQ+ persons, who have sought to claim their rights through different legal and non-legal instruments. Yet, I have identified them as stakeholders because of their professional expertise. Further, some of the participants fall into multiple categories. The sample size for this study is 14. While the initial findings from this sample are not representative, they do provide an opportunity for a comprehensive and useful examination of strategies, discourses, and approaches. The people who participated in my interviews were driven by their own motivations,[215] sharing their own experiences, working with me and engaging in an academic exchange about the opportunities the AHRS provides. The participants were of different genders, ages, origins and professions.

My data collection process involved conducting semi-structured interviews[216] with people I identified as stakeholders.[217] To guide these interviews and address the research questions set for the thesis, I developed interview guides categorised by themes, and customised them according to the category of the stakeholders.[218] The interview guides and an overview of the interview partners can be found in the Annex.[219] I had to conduct most of the interviews online due to the COVID-19 pandemic and the different locations and availabilities of my interview partners. During the interviews, I took notes and used recording devices when feasible. In many cases I had an assistant who helped me by transcribing the recordings to produce texts I could work with.

To maintain ethical standards during the study, it was imperative to obtain informed consent from all interview partners. I ensured that they had a comprehensive understanding of the study's objectives, potential impacts, and benefits. Their participation in the interviews was entirely voluntary, and no financial incentives were offered to the interview partners. Furthermore, I have anonymised all identities to ensure that the observations and arguments stand on their own without only being linked to specific experts or organisations and to safeguard the anonymity and privacy of the interview participants.

[215] Larissa Vetters, 'Making sense of noncitizens' rights claims in asylum appeal hearings: practices and sentiments of procedural justice among German administrative judges' (2022) 26(7) Citizenship Studies 927, 930.
[216] Given (n 213), 810.
[217] See the list of interview partners in Annex 2, 207 et seq.
[218] Hanna Kallio and others, 'Systematic methodological review: developing a framework for a qualitative semi-structured interview guide' (2016) 72(12) Journal of Advanced Nursing 2954.
[219] See, Annex 2, 207 et seqq.

2.3.2. Participant Observation at the Centre for Human Rights

In addition to conducting interviews, I engaged in participant observation[220] for ten weeks, from February to April 2023, at the Centre for Human Rights. Participant observation is an ethnographic method which

> "involves the process of immersing oneself into the natural setting of some group of people from whom the researcher is not too different or from which the researcher may already be a member. […] The goal of participant observation is to gain an understanding of the various activities and experiences of those being observed in their natural setting."[221]

While my colleagues were informed that I was doing research (overt observation), they categorised and accepted me as an intern. My choice of conducting participant observation at the Centre for Human Rights was deliberate. I have been following the Centre for Human Rights' activities for years and was able to observe the unique role it has played in shaping human rights advocacy on the continent over the past decades, especially in respect of SOGIESC rights. In November 2022, I visited the Centre for Human Rights for a conference they had organised on the Decriminalisation of Same-Sex Laws and the Eradication of Conversion Practices in Africa. With the support of my supervisor and the contacts I made during the conference, I was able to organise my fieldwork there. According to its website, the Centre for Human Rights is

> "an internationally recognized university-based institution combining academic excellence and effective activism to advance human rights, particularly in Africa. It aims to contribute to advancing human rights, through education, research and advocacy".[222]

As indicated in this statement, one notable feature of the Centre for Human Rights is its character as both a university institution and NGO, which is reflected in all areas of operation. The work of the Centre for Human Rights is structured into different Research Units, each focusing on a specific topic, such as Women's Rights or Disability Rights. As of May 2024, the Centre for Human Rights runs eight Units. I was located in the SOGIESC Unit, which at that time consisted of one manager, two full-time employees,

[220] James Spradley, *Participant Observation* (Waveland Press 2016).
[221] Given (n 213), 829.
[222] Centre for Human Rights, Faculty of Law, University of Pretoria (n 20).

one part-time employee and one long-term intern.[223] My time there was characterised by personnel changes, which happened shortly before and during my stay. The SOGIESC Unit is one of the most vibrant ones at the Centre for Human Rights. It has many activities and projects during the year, some of which are constant and repetitive, while others are one-time events. The profile of the Unit is the result of many influences, including the different members of the team over the years, as well as the interests of the funders. Some of the projects I witnessed during my time there were South African-specific trainings on the newly established Equality Courts with a particular focus on SOGIESC rights, a film project, the organisation of conferences, for instance on the decriminalisation of same-sex relations and the eradication of conversion practices in Africa.

Together with several other organisations,[224] the Centre for Human Rights has been formative in the regional advocacy landscape of SOGIESC rights over the past twenty years. For example, they were instrumental in the development, dissemination and interpretation of Resolution 275. One could even claim that the organisations that have been committed to regional advocacy in relation to SOGIESC rights for two decades have more institutional knowledge than the Commissioners at the African Commission, who frequently change and have many different focuses.[225]

The position of the Centre for Human Rights today is exceptional and the result of complex and dedicated work over the past decades. The Centre for Human Rights is one of the most distinguished and experienced institutions on the continent advocating for human rights, especially SOGIESC rights. Especially through its master courses, it has established a substantial footprint, extending through the alumni network into numerous regional and international organisations. Thus, the ideas and approaches to human rights of the Centre for Human Rights are present all over the continent. However, as an observer and researcher, I am not only concerned with producing one mainstream story around the efforts of the Centre for Human Rights. There are multiple approaches to SOGIESC advocacy on the continent, and many of these efforts do not receive enough space, awareness or funding. I am dedicated to painting this versatile landscape in my research as much as possible.

[223] Centre for Human Rights, Faculty of Law, University of Pretoria, SOGIESC Unit <https://www.chr.up.ac.za/sogiesc-unit> accessed on 01 March 2024.
[224] For example, AMSHeR, CAL, ISLA and Synergía.
[225] Interview with E5.

2.4. Documentation: Procedural mechanisms in respect of SOGIESC rights

My research analysis originates from a chronological documentation of procedural mechanisms at the African Commission applied in the context of claiming SOGIESC rights, structured according to the different mechanisms available through the mandates of the African Commission.[226] While various institutions and scholarly studies have examined the implementation of mechanisms related to the AHRS in the specific context of SOGIESC rights, such as the six-year assessment by African Men for Sexual Health and Rights (AMSHeR) and Synergía - Initiatives for Human Rights (Synergía) titled 'Application of Resolution 275 by the African Commission on Human and People's Rights: A six-year assessment'[227], these studies do remain limited in various ways. The documentation I have collected provides a unique platform consisting of all available implementations[228] of the African Commission for promoting and protecting sexual orientation. The period covered by the chronological documentation presented in this thesis ends on 31 December 2023. This documentation offers a contextualisation and appreciation of the efforts of different stakeholders for others to learn from and build on in the field of promoting and protecting SOGIESC rights in Africa. While archiving and doing research in archives are well-known research methods that have led to heated debates among anthropologists, the character of this legal documentation is located between state-centred archives[229] and new radical bottom-up participatory approaches.[230]

2.5. Concluding remarks

The research methods of this study have been chosen in order to realise and accommodate the analytical framework and answer the research questions. A special emphasis has been put on moving beyond the limits of doctrinal legal research and doing justice to the efforts of LGBTIQ+ communities.

---

[226] The chronological documentation can be found in Annex 3, 224 et seqq.

[227] African Men for Sexual Health and Rights (AMSHeR) and Synergía, 'Application of Resolution 275 by the African Commission on Human and People's Rights: A six-year assessment' (2020) <https://www.chr.up.ac.za/images/researchunits/sogie/documents/Report_2020.pdf> accessed 15 July 2024.

[228] As far as these are published and available.

[229] Susan Pell, 'Radicalizing the Politics of the Archive: An Ethnographic Reading of an Activist Archive' (2015) Archivaria 33 <https://www.archivaria.ca/index.php/archivaria/article/view/13543> accessed 15 July 2024; Giulia Battaglia, Jennifer Clarke and Fiona Siegenthaler, 'Bodies of Archives/ Archival Bodies: An Introduction' (2020) 36(1) Visual Anthropology Review 8.

[230] Anne Gilliland and Sue McKemmish, 'The role of participatory archives in furthering human rights, reconciliation and recovery' (2014) 24 University of California Press 78 <https://escholarship.org/uc/item/346521tf> accessed 15 July 2024.

3. Constructing a foundation for claiming: Exploring concepts and theories

This section explores a number of concepts and theories relevant to the establishment of the analytical framework in respect of claiming SOGIESC rights.

3.1. Public Interest Litigation, Strategic Litigation and more

Public Interest Litigation (PIL) is a legal mechanism that allows individuals or groups to bring cases to the court's attention in the interest of the public or society at large.[231] In this way, PIL offers marginalised and minority groups access to justice to enforce widespread or collective rights and enable civil society to raise awareness for human rights and influence government decision-making.[232] PIL is intended to protect public interests, especially when the parties concerned cannot afford to take legal action or have no access to the legal system for other reasons. The unique feature of PIL is that third parties, such as NGOs, can bring actions on behalf of many affected parties and even the general public.[233] PIL plays a crucial role in addressing social justice and public concerns, often involving matters such as environmental protection, human rights, and government accountability.[234] It shapes legal precedents that can have far-reaching implications for social transformation, and aims to produce positive results for society as a whole, not just for the individual parties involved.[235]

Strategic Litigation (SL), also known as impact litigation, goes hand in hand with and is a sub-category of PIL, as it involves legal action as a strategic tool to achieve broader social and policy goals.[236] Unlike PIL, SL may be initiated by advocacy groups or NGOs seeking to create legal precedents that align with and advance their objectives. The concept reflects the need to be strategic in litigation to ensure that the process contributes to real success, inside and outside the courtroom, beyond legal victory. By strategically

[231] Jjuuko, 'Beyond court victories: using strategic litigation to stimulate social change in favour of lesbian, gay and bisexual persons in common law Africa' (n 67), 26.
[232] Surya Deva, 'Public Interest Litigation in India: A Critical Review' (2009) Issue 1 Civil Justice Quarterly 19 <file:///C:/Users/anton/Downloads/SSRN-id1424236.pdf> accessed 15 July 2024, 19.
[233] Ibid., 20 et. seq.
[234] For example, PIL has enabled the Indian appellate courts to function as a slum demolition machine: Anuj Bhuwania, 'Competing Populisms: Public Interest Litigation and Political Society in Post-Emergency India' (2013) <file:///C:/Users/anton/Downloads/Bhuwania_columbia_0054D_11468.pdf> accessed 15 July 2024, 91 et seq.
[235] Andrea Durbach, Luke McNamara and Mark Rix, 'Public interest litigation: making the case in Australia' (University of Wollongong 2013) 219.
[236] Jjuuko, 'Beyond court victories: using strategic litigation to stimulate social change in favour of lesbian, gay and bisexual persons in common law Africa' (n 67) 25 et seq.

selecting cases and utilising the legal system to challenge, for example, discriminatory laws or policies, advocates aim to bring systemic change.[237] This approach involves a calculated legal strategy to influence societal norms and challenge existing economic and political power structures.[238] SL can thus help identify and change structural obstacles at the root of human rights violations.[239] The use of SL to advance SOGIESC rights in different African countries has been labelled as queer lawfare.[240]

The motives and strategies of PIL and SL are closely connected to Movement Law, where legal strategies are employed as tools within social movements to advance the cause of justice and equality. Movement Law is a jurisprudential approach based on solidarity, accountability and engagement with grassroots organisations and social movements. It provides a methodology for scholars from different disciplines to work alongside social movements.[241] Akbar et al. identify four methodological approaches to articulating Movement Law. Firstly, movement law scholars are concerned with forms of resistance in social movements and local organisations. The study of resistance is significant, as it meaningfully diversifies the voices and sources within legal scholarship. Secondly, movement law scholars work to understand the strategies, tactics and experiments of resistance and contestation. By examining the range of strategies and tactics – including but not limited to law reform campaigns – movement lawyers are opening up new possibilities for justice. Thirdly, movement lawyers are shifting their knowledge away from the courts and isolated legal expertise to the stories, strategies, and history of social movements. Fourthly, movement law scholars embody an ethos of solidarity, collectively and accountability with social movements, rather than a hierarchical or oppositional relationship.[242]

---

[237] The utilisation of the legal system is related to the concept of lawfare: Gloppen S, 'Conceptualizing Lawfare: A Typology & Theoretical Framework' (2018) Center of Law and Social Transformation Paper, Bergen 6.

[238] Helen Duffy, *Strategic Human Rights Litigation: Understanding and Maximising Impact* (Hart Publishing 2018); Jo-Marie Burt, 'Strategic Litigation in gross human rights violations in Guatemala: Impact and lessons learned' <https://www.impunitywatch.org/wp-content/uploads/2021/05/policy-brief-human-rightsv2.pdf> accessed 15 July 2024, 3.

[239] Jo-Marie Burt, 'Strategic Litigation in gross human rights violations in Guatemala: Impact and lessons learned' (2021) <https://www.impunitywatch.org/wp-content/uploads/2021/05/policy-brief-human-rightsv2.pdf> accessed 15 July 2024, 5.

[240] Adrian Jjuuko and others (eds), *Queer lawfare in Africa: Legal strategies in contexts of LGBTIQ+ criminalisation and politicisation* ; Viljoen and Sogunro (n 153).

[241] Amna Akbar, Sameer Ashar, & Jocelyn Simonson, 'Movement Law' Stanford Law Review 1; Betty Hung, 'Movement Lawyering as rebellious Lawyering: Advocating with humility, love and grace' (2016) Clinical Law Review 663.

[242] Amna Akbar, Sameer Ashar, & Jocelyn Simonson (n 241), 22 et seq.

In the context of these concepts, it is clear that pursuing social transformation through legal means does not come without risks, such as pushbacks and backlash[243], challenging the progress made and underscoring the complex interplay between law and societal transformation.[244] However, Kaime and I argue that the trajectory toward social justice is an ongoing process, where perceived pushbacks may serve as catalysts for moments of hope.[245]

The theories and frameworks explored all have a particular emphasis on targeting social transformation through legal strategies. These are at the heart of the concept of claiming in relation to human rights and offer a broad and dynamic perspective by pushing the boundaries of available methods and instruments for asserting these rights. Yet, they do not reflect the specific circumstances of SOGIESC rights in the regional framework, which is why they need to be expanded with theories around queering.

3.2. Queering the African human rights system?

3.2.1. Introduction to Queer Theory

Queer theory is a way of thinking that challenges traditional perceptions of gender and sexual identities. Queer theorists analyse gender and sexuality as socially and culturally constructed concepts[246] and have shown that heterosexuality is seen as the basic condition and archetype of all social relations.[247] They are interested in how such categories as 'heterosexual', 'gay' and 'lesbian' came to be seen as stable identities and reveal them as fragile constructs, constantly reliant on the successful performance of gender.[248] Queer theory has helped to denaturalise prevailing understandings of gender and sexuality, exposing them as provisional, contingent, and worthy of reconsideration.[249]

---

[243] Gloppen, *Conceptualizing Lawfare: A Typology & Theoretical Framework* (n 237).
[244] The risk of pushbacks is a recurring theme in this thesis: See for example, Chapter 2, 42 et seq.
[245] Kaime and Zundel, *Let's (not) talk about the gays: Malawi's stalled attempts at decriminalisation of same-sex laws* (n 179), 24 (forthcoming).
[246] For example, Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge 1990). Butler suggests that sex and gender are performative elements of identity rather than inherent characteristics. Michael Foucault refuses to accept that sexuality can be clearly defined and instead has focussed on the expansive production of sexuality within governments of power and knowledge. Michel Foucault, *The history of sexuality: An introduction, volume I* (1978).
[247] Volker Woltersdorff, 'Queer Theory and Queer Politics' (2003) Utopie kreativ (Rosa-Luxemburg Stiftung) 914 <https://th.rosalux.de/fileadmin/rls_uploads/pdfs/156_woltersdorff.pdf> accessed 15 July 2024, 9.
[248] Katherine Watson, 'Queer Theory' (2005) 38(1) Group analysis 67.
[249] Mazel (n 43); Butler (n 246).

The term 'queer theory' was first used by de Lauretis.[250] De Lauretis outlined a completely new understanding of sexuality that breaks away from the binaries and norms defined by heterosexual power structures – structures that Warner would call heteronormativity[251]. Today, the term is misleading in that it is not a unified body of work, but one that is constantly evolving and characterised by a range of theories. The term 'queer' is used for different purposes and gradually merges with other theories and perspectives.[252] Therefore, it is difficult to find a comprehensive description that does justice to what queer theory comprises. According to Nyeck,

> "the term queerness simply means 'out of order', something that if it previously existed is no longer recognised or needed as such; it has ceased to be in line with expected dominant conventions regarding matters of taste and (re)presentation".[253]

Thus, queer theory challenges all categories relating to sexuality and gender, and insists on flexibility and fluidity. Otto has described 'queer theory' as a form of intersectional curiosity offering a more radical critique. According to Otto, queer theory has worked to destabilise and deconstruct not only categories of identity but also the systems based on these categories.[254] Edelman perceives queer "as an identity always under construction, a site of permanent becoming: utopic in its negativity, queer theory curves endlessly toward a realization that its realization remains impossible."[255]

Jagose points out that the extent to which different theorists have emphasised the unknown potential of the term queer suggests that its most enabling characteristic may well be its potential for looking forward without anticipating the future. Instead of theorising queer in terms of its opposition to identity politics, it is more accurate to represent it as

[250] Teresa de Lauretis, 'Queer Theory: Lesbian and Gay Sexualities: An Introduction' 1991 Indiana University Press <https://cpb-us-e1.wpmucdn.com/wordpressua.uark.edu/dist/e/218/files/2019/05/DeLauretis.Queer Theory1991.pdf> accessed 15 July 2024.
[251] Michael Warner, 'Fear of a Queer Planet' (1991) 9(4) Social Text 3 <https://www.jstor.org/stable/pdf/466295.pdf> accessed 15 July 2024.
[252] Watson (n 248), 68.
[253] Nyeck (n 118), 11.
[254] Mazel (n 43); Dianne Otto, 'Introduction: Embracing Queer Curiosity' in Dianne Otto (ed), *Queering International Law: Possibilities, Alliances, Complicities, Risks* (1st edn. Routledge).
[255] Lee Edelman, 'Queer Theory: Unstating Desire' (4) 1995(2) GLQ: A Journal of Lesbian and Gay Studies 343.

ceaselessly interrogating both the preconditions of identity and its effects.[256] For Jagose, queer theory has become an

> "anti-normative or non-conformist project that rejects the possibility of operating within the structures of power because as long as political intervention is constrained by the system it opposes, political success is also seen as constrained."[257]

3.2.2. Queering International Human Rights Law

Queer theory has also been discussed and applied in the legal context, from which, among other things, queer legal theory has arisen. Kirichenko comments as follows:

> "[…] Queer legal theory considers law as one of the discourses which constructs social norms. For example, sexuality and its particular forms (or related identities) are not natural and innate but constructed, and law functions as one of the most powerful discourses creating these identities and concepts."[258]

Consequently, scholars have pointed out that inclusion of SOGIESC topics in the legal system reinforces a set of conditions that legitimate and recreate dominant culture, keeping intact heterosexual standards and structural subordination.[259] As shown in Chapter 2 on the place of sexual orientation in the UNHRS, the so-called human rights discourse refers to the ongoing discussion and analysis surrounding the concept of human rights. It encompasses exploring fundamental human rights and freedoms to which every individual is inherently entitled. The discourse is based on purely legal analysis and delves into other aspects of human rights, such as philosophy and ethics, exploring their universality, application, limitations, and challenges. The human rights discourse is regarded as one of the most important discourses of our times, given its importance at national and global levels. Gready states that human rights have been the most dynamic political ideology of the second half of the twentieth century and describes it as the dominant moral vocabulary of our time.[260] Nyeck relates to and reflects critically on the ongoing human rights

[256] Annamarie Jagose, 'Preview Queer Theory' (This piece is extracted with permission from her new book, Queer Theory, University of Melbourne Press, 1996. 1996) <https://australianhumanitiesreview.org/1996/12/01/queer-theory/> accessed 4 July 2024.
[257] Annamarie Jagose, *Queer Theory: An Introduction* (NYU Press 1996), 106.
[258] Kseniya Kirichenko, 'Queer Intersectional Perspective on LGBTI Human Rights Discourses by United Nations Treaty Bodies' (2023) 49(1) Australian Feminist Law Journal 55, 4.
[259] Mazel (n 43).
[260] Paul Gready, 'The politics of human rights', *Third World Quarterly, Vol 24, No 4* , 749.

discourse.[261] With much criticism of the scope, effectiveness, justification and Eurocentricity of human rights, the human rights discourse is itself a place of contestation. In line with this, Ballakrishnen has argued that "[…] the locus of postcolonial normativity, especially about individual rights, is largely traced to a discourse that is predominantly Western", and that "[…] paying attention to local contexts matters, and it might serve us to think beyond the rights discourse and its limitations."[262] Ballakrishnen concludes by saying that one should not "dismiss the usefulness of rights discourse as a tool with its own meaning and logic and value."[263] Overall, in juxtaposition with queering, the human rights discourse in relation to LGBTIQ+ people is a different exercise for including SOGIESC rights in the current legal frameworks.

3.2.3. Paradox between queering and law

Otto has described the project to queer international human rights law (or even international law) as a "scholarly and activist project"[264] that is more demanding than mere "LGBTI normative inclusion".[265] Kapur goes further and claims that the utilisation and application of the so-called human rights discourse has led to the deradicalisation of queerness rather than to the queering of IHRL.[266] Kapur identifies queerness as a "critical anti-normative project" that endeavours to reshape the normative human rights framework. However, the utilisation of, and immersion in, the human rights discourse leads to alignment with fixed, embedded categories, such as sex, gender, culture and race.[267] Thus, queer subjects are forced into the inherent "heteronormative structures and patriarchal institutions"[268] which erase and invalidate any other ways of existence.

Therefore, the advancements of the UNHRS have to be seen as integration into the existing human rights project, which reinforces its fixed understandings of sex and gender, centred around the "white middle class heterosexual man"[269]. According to Simm, queer

---

[261] Isabelle Zundel, 'Breaking through the colonial impositions: Africa, Queerness and the Law' *African Legal Studies* (2022) <https://africanlegalstudies.blog/2022/07/01/breaking-through-the-colonial-impositions-africa-queerness-and-the-law/> accessed 8 July 2023.
[262] Swethaa Ballakrishnen, 'Of Queerness, Rights, and Utopic Possibilities: An Interview with Dr. Swethaa S. Ballakrishnen' (2023) <https://www.sociolegalreview.com/post/of-queerness-rights-and-utopic-possibilities-an-interview-with-dr-swethaa-s-ballakrishnen> accessed 15 July 2024.
[263] Ibid.
[264] *Otto (Hg.) – Queering International Law* ; Otto, 'Introduction: Embracing Queer Curiosity' (n 254), 1.
[265] Otto, 'Introduction: Embracing Queer Curiosity' (n 254), 1.
[266] Ratna Kapur, 'The (im)possibility of queering international human rights law', *Otto (Hg.) – Queering International Law* (2017), 132.
[267] Ibid., 132 et seq.
[268] Ibid., 140.
[269] On the understanding of the concept of the human, see Chapter 3, 70 et seqq; Mutua (n 88).

has to be seen as "a method or approach rather than a content matter".[270] Thus, the mere expansion of individual categories of rights would miss the goal of queering human rights. Instead, the nature and structure of legal frameworks need to be reconstructed.[271]

Queer in the context of human rights has been characterised and critiqued as a Western concept.[272] In consequence, Kapur poses the question of what happened to the "anti-normativity impulse of queer theory".[273] She reasons that the juxtaposition between anti-normativity and normativity has not been successful, which is why the human rights discourse should be strictly separated from the goal of queering international human rights law. New strategies beyond the existent ones must be found. Finally, she concludes that the "potential for queer radicality remains on the outskirts of human rights".[274]

Nevertheless, Otto and Kapur seem to agree that utilisation of the human rights discourse to challenge the current legal frameworks regarding LGBTIQ+ people is in itself a necessary step to ensure adequate protection.[275] However, what are the costs of this advancement? Is the human rights approach radical enough, or does this discourse invalidate all other efforts to queer international human rights law, and thus silence the "anti-normativity impulse of queer theory"?[276] Can the human rights discourse exist next to this impulse, both aiming to improve the everyday life of LGBTIQ+ people? Or are there ways to bridge the apparent gap?

In the interplay between queer normativity and anti-normativity, Otto has developed a puzzle with four pieces or questions, which all refer to the balancing act between "the benefits of attaining queer objectives against the costs of being integrated into the mainstream"[277]: One, how can queer activists address violence and discrimination without reaffirming the regulatory power of the State? Two, how can queer activists work in transnational coalitions without treatment of 'the homosexual' becoming a new measure of civilisation? Three, how can queer social and cultural change be promoted without being assimilated into neoliberalism's pink economies? Four, how can appeals be made to international human rights law to make precarious queer lives more liveable without

[270] Simm (n 24), 377.
[271] Ibid., 377.
[272] Ibid., 377; Ryan Richard, 'The Queer Paradox of LGBTI Human Rights' (2011) InterAlia: Pismo poświęcone studiom queer <file:///C:/Users/anton/Downloads/6%20Thoreson.pdf> accessed 15 July 2024, 11.
[273] Kapur (n 266), 143.
[274] Ibid., 132.
[275] Otto, 'Introduction: Embracing Queer Curiosity' (n 254); Kapur (n 266), 134.
[276] Kapur (n 266), 143.
[277] Simm (n 24), 377.

legitimising the heteronormative imperial heritage of the normative framework of international law?[278]

The fourth piece of Otto's puzzle refers directly to the dilemma I find myself confronted with in the context of the regional human rights framework. In the context of this thesis, the following question arises: (How) can I utilise the human rights discourse to advance SOGIESC rights without reinforcing and validating the fixed structures of sex, gender, culture and race within the AHRS?

3.2.4. Queering and the African human rights system

With regard to the AHRS, there are two gaps in research and practice regarding the interplay between queer normativity and anti-normativity that need to be considered. Firstly, the exploration and contextualisation of queering law on the African continent, both in scholarly and in practical terms, have remained unaddressed. Instead, discussions have focused on the human rights discourse, especially the decriminalisation of same-sex sexual practices. Therefore, queering of the AHRS carries the risk of being associated with a dominant Western body of thought that does not sufficiently consider the specifics of African societies and legal systems. Secondly, the application of queering as a radical endeavour within the context of human rights remains predominantly theoretical, needing concrete examples and strategies on all levels. This prompts inquiries about the potential challenges involved in translating theory into practice.

With regard to the first gap, Nyeck argues that there is a need to 'Africanize queerness' instead of 'queering' Africa.[279] I understand this as meaning that Africa is queer without any external influence or politicisation. However, when thinking about queerness, one does not naturally connect it with Africa, underscoring the necessity to establish a connection. Building on Nyeck's argument, it can be extended to queer legal theory by arguing that there is a need to Africanize queer legal theory. The idea of queering is being developed without sufficient reference to third world approaches to international law (TWAIL).[280] I assume scholars challenging the idea of queering law mainly refer to dominant Western notions of rights characterised by structures, categorisation and institutionalism embedded in fixed and absolute systems. However, I argue that African traditional

[278] The four pieces have been summarised by ibid., 377.
[279] Nyeck (n 118), 2.
[280] On Third World Approaches to International Law, see Bhupinder Chimni, 'Third World Approaches to International Law: A Manifesto' in Antony Anghie and others (eds), *The Third World and International Order: Law, Politics and Globalization* (Brill Nijhoff 2003).

legal systems, which are preserved in all African societies today, are characterised by specific concepts, rituals and principles of which some are compatible with inherently queer characteristics. In general, African traditional legal systems are flexible, inclusive, participatory and community-focused.[281] For example, Moore, with the help of Gutmann's studies of the Chagga of Mount Kilimanjaro, points out that 'exact' rules are "coupled with flexibility of practice".[282] This "adjustable relationship of standardized rules to practice"[283], which is common in areas such as contract and inheritance, challenges fixed legal categories and prioritises social relationships and community values over individual rights. This characteristic of the exemplary Chagga traditional legal system is in contrast to the fixed structures and categories inherent in Western legal systems and embodies a distinctly queer – "ceased to be in line with expected dominant conventions"[284] - character, as explored in the context of queer theory.[285] One of my interview partners observes: "In pre-colonial times when African traditional justice systems applied, we found more acceptance."[286] The interview partner continues,

> "In my county, we have today something called local council system. Community members sit together and decide questions that are within their own purview. In such cases you see that people understand: This is my neighbour. This is my neighbour's son. You are different from us, but you are part of our community."[287]

Some of the notions and principles of traditional African legal systems have also found their way into the AHRS, for example through the duties of individuals anchored in the African Charter, or the manifestation of peoples' rights through the African Commission and African Court.[288] Debele and I have focused on the nuanced perspective provided by notions and concepts from African traditional legal systems in contrast to mainstream Westernised legal frameworks, despite them not being inherently perfect or absolutely better.[289] In the context of bridging the perceived gap, Thoreson points out that what is queer in one place and time is not queer in another, and any intervention inevitably serves

[281] Tamale, *Decolonization and Afro-feminism* (n 129); Debele and Zundel (n 138), 11 (forthcoming).
[282] Sally Moore, *Social facts and fabrications: "customary" law on Kilimanjaro, 1880-1980* (The Lewis Henry Morgan Lectures vol 1981, Cambridge University Press 1986), 40.
[283] Ibid., 40.
[284] Nyeck (n 118), 11.
[285] For more on queer theory, see Chapter 3, 59 et seqq.
[286] Interview with E1.
[287] Interview with E1.
[288] See Debele and Zundel (n 138) (forthcoming).
[289] Ibid. (forthcoming).

to bolster some norms and rules while challenging and subverting others.[290] This emphasis on the inconsistency between law and queerness underscores the perception of law as being restricted to Westernised legal frameworks. The call to Africanize queer legal theory serves as a reminder that while Westernised legal frameworks are dominant, they are neither exclusive nor necessarily preferable. On the contrary, these frameworks have negatively influenced the entanglement of law, gender and sexuality worldwide. Many societies, especially in Africa, are struggling with the process of disentanglement from Western attitudes to gender and sex, which are still enforced through the prevailing legal and administrative frameworks.[291] The call to Africanize queer legal theory can serve as a valuable means to establish a nexus between law and queering.

The second gap in queering human rights law is the need for practical examples. While scholarship can be very enriching, legal research cannot be separated from the lived realities of the people concerned. Otherwise, its applicability beyond the academic realm is minimal. Currently, suggestions for the practical realisation of queering international human rights law in its more radical form fall short. Disregarding the law as a potential arena is an untenable choice because it overlooks its significant role in driving societal transformation. This raises the question of what viable and transformative alternatives are available for the realisation of queering in human rights systems.

3.2.5. Concluding Remarks

The above analysis of the relevant concepts and theories shows that there is a need for a concept that is located in the socio-legal context and which at the same time can serve as a practical, argumentative and philosophical tool. I propose the concept of claiming in relation to human rights to fill this gap. Although it is a frequently employed term in human rights scholarship, it has not been analysed in detail or used as a foundation for a conceptual framework. Yet, it is a promising approach that aligns with and transcends strategic litigation and writes alongside movement law. The concept of claiming is embedded in and grows out of the call to Africanize queer legal theory. It not only fills the existing gap in the system by including LGBTIQ+ individuals but is also capable of transforming the normative, institutional and procedural framework of the AHRS. Through its people-centred approach, the concept of claiming remedies the shortcomings of the

[290] Richard (n 272), 18.
[291] Zundel, 'Breaking through the colonial impositions: Africa, Queerness and the Law' (n 261).

human rights discourse. It offers feasible options for transforming the system that fall short in the purely scholarly engagement with queering.

The concept of claiming in relation to human rights is closely connected to the idea of law and social movements[292], as well as the concept of social change.[293] It builds on the extensive work of public interest litigation[294] and incorporates strategic litigation.[295] The methodology of movement law[296] can serve as an inspiration, especially the connectivity to different law-related and societal-related modes of resistance by grassroots organisations. The concept of claiming offers an analytical framework that is embedded in well-known concepts through which international human rights systems, especially their normative and procedural mechanisms, can be expanded and sharpened in a way that transforms the system in its entirety.

4. The concept of claiming in relation to human rights

4.1. Different dimensions of claiming

According to Heyns, "human rights are not dependant on recognition by the state. People can claim them even when the law, whether made by a dictator or by the majority, denies those rights".[297] In the context of the power cube approach, Gaventa describes the category of 'claimed/created spaces' as one of the spaces of participation.[298] According to Gaventa, these spaces are "claimed by less powerful actors from or against the power holders"[299], which is often manifested in the work of CSOs. Loher has referred to law in this context "as a 'weapon of the weak' in order to protest against social inequality and

[292] Michael McCann, 'Law and Social Movements: Contemporary Perspectives' (2006) 2(1) Annual Review of Law and Social Science 17.
[293] Anthony Smith, *The Concept of Social Change (Routledge Revivals): A Critique of the Functionalist Theory of Social Change* (Routledge 2010).
[294] Siri Gloppen, 'Public Interest Litigation, Social Rights and Social Policy', *Inclusive States: Social Policy and Structural Inequalities* (2008) 343.
[295] Jjuuko, 'Beyond court victories: using strategic litigation to stimulate social change in favour of lesbian, gay and bisexual persons in common law Africa' (n 67).
[296] Amna Akbar, Sameer Ashar, & Jocelyn Simonson (n 241).
[297] Heyns, 'A "Struggle Approach" to Human Rights' (n 80), 16.
[298] John Gaventa, 'Finding the Spaces for Change: A Power Analysis' (2006) 37(6) IDS Bulletin 23; John Gaventa, 'Reflections on the Uses of the 'Power Cube' Approach for Analyzing the Spaces, Places and Dynamics of Civil Society Participation and Engagement' (2005) 4 <https://www.participatorymethods.org/sites/participatorymethods.org/files/reflections_on_uses_powercube.pdf> accessed 15 July 2024; Cecilia Luttrell and others, 'The Power Cube Explained' <file:///C:/Users/anton/Downloads/powercube-2.pdf> accessed 19 December 2023.
[299] Gaventa, 'Finding the Spaces for Change: A Power Analysis' (n 298).

strive for social change through the transformation of law".[300] In this way, "the established theoretical, conceptual and activist norms historically emanating from the global North"[301] are challenged.

My interviews show that the interpretation of claiming in relation to human rights varies widely. For example, one of the interview partners at the African Commission says that,

> "[…] claiming is to take systematic processes to get an official status and ensure human rights are operationalised, such as during the Ogiek case[302] when the right to worship has been realised".[303]

Another interview partner refers to the use of language and symbols to show the "universality of our humanity and the equality of our human".[304] One of the activists I interviewed said in the context of SOGIESC rights that there are two ways to claim these rights: they can be claimed either by people who identify as LGBTIQ+ or by people who are not LGBTIQ+. The interview partner explains:

> "You claim human rights by claiming your identity. You accept being different or accepting diversity. The second way of claiming human rights is usually overlooked. It is being empowered. To be independent in a society and not victimised. […] and the other way of claiming human rights is to disrupt the historical narrative. […] It's about reclaiming, you know, the history of Africa."[305]

Another interview partner argues along similar lines and admits that they do not identify with the term claiming.

> "If it's for me, I don't need to claim, but I do reclaim. The reclaiming is totally different from claiming for me. Reclaiming is a sense of something that inherently belongs to me but has been taken away."[306]

---

[300] David Loher, 'David Loher, Social Anthropologist PhD: Teaching' <https://www.dloher.ch/page/teaching> accessed 22 June 2022.
[301] Penny Miles and Carlos Zelada, 'Introduction to: LGBTQIA+ Rights Claiming in Latin America: Some Lessons from the Global South' (2021) 40(5) Bulletin of Latin American Research 631.
[302] On the Ogiek case, see Ricarda Rösch, 'Indigenousness and peoples' rights in the African human rights system: situating the Ogiek judgement of the African Court on Human and Peoples' Rights' <https://www.ejiltalk.org/the-ogiek-case-of-the-african-court-on-human-and-peoples-rights-not-so-much-news-after-all/> accessed 15 July 2024.
[303] Interview with E13.
[304] Interview with E11.
[305] Interview with E9.
[306] Interview with E3.

I take this focus on reclaiming as a response to the false proposition that 'homosexuality is un-African', as an argument that it is something that inherently belongs to the African people and has to be reclaimed. While the perspectives of my interview partners varied, depending on their professional and personal background, there is a consensus regarding the overarching purpose and need to (re)claim. In light of these different but coherent understandings, I have identified three dimensions of the concept of claiming in relation to human rights:

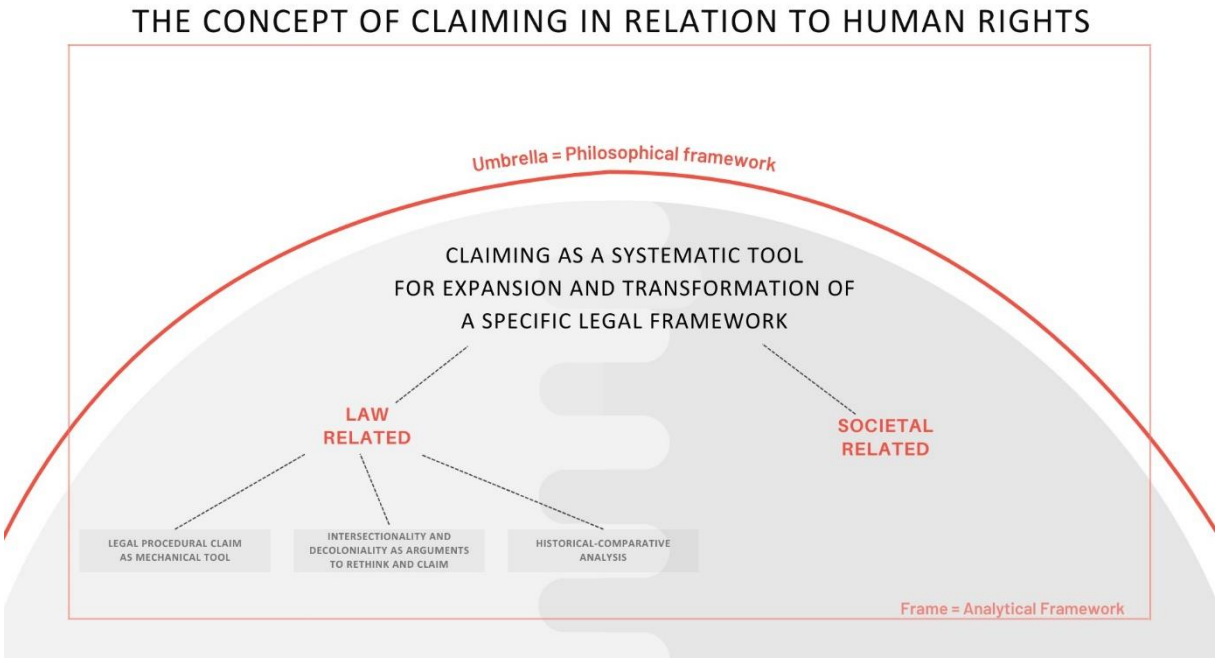
a. The overarching understanding of claiming, which serves as a frame for the concept itself, is philosophical and relates to the essence of being human. The possibility of claiming one's rights builds the foundation of human dignity, and is the essence and validation of the conception of human rights. After all, what is the purpose of the rights institutionalised in the legal frameworks if they cannot serve the protection of all people?

b. The concept of claiming serves at its core as a systematic tool for transforming the current scope of a specific legal framework. There are different ways of claiming, which can be either law-related or societal-related. For example, the application of strategic litigation to ensure the protection and enforce the enjoyment of specific rights through tactical court cases is part of law-related claiming. On a societal level, claiming the right of individuals to visibility in everyday life is often manifested through seemingly small acts of resistance, such as holding hands in public.[307]

c. The concept of claiming serves as an analytical framework for this thesis. The following questions structure my research on promoting and protecting SOGIESC rights within the AHRS: What does claiming in relation to human rights mean? Are the normative, institutional and procedural frameworks of the AHRS fit as a framework for claiming? How can the promises of the normative, institutional and procedural frameworks of AHRS be claimed? Who can claim which rights? Against whom can claims be addressed? This analytical framework is reflected in the choice of research methods, specifically the fieldwork-based research undertaken.

[307] This example was brought forward in one of my interviews by a white South African. I acknowledge that it might not be feasible in all African contexts. In many African societies, a man may hold hands with another man simply to show that they are good friends, but they would not show affection to their wives in public.

Below, I will delineate the identified dimensions of claiming based on the structure of the analytical framework outlined in the graphic below.



Graphic 2: The concept of claiming in relation to human rights

4.2. Philosophical framework of claiming

This section embarks on the construction of a philosophical framework for claiming within the context of the human being and human rights (systems). Building on the scholarship of Debele, who critically assesses the concept of "being human" in different African contexts,[308] this construction involves a philosophical derivation of the human as a category, with a particular emphasis on its manifestation in the African context. Through this analysis, the philosophical and theoretical underpinnings of the concept are built.

The intractability of some human rights problems rests in the seemingly insuperable divergence between normativity and reality. This gives rise to inquiries regarding the roots

[308] Debele, *Provisional thoughts on "Being human as Praxis" in/of revolution* (n 308); Serawit Debele, 'Book Review of African(a) Queer Presence: Ethics and Politics of Negotiation' (2023) 17(2) Journal of the African Literature Association 368 <https://www.tandfonline.com/doi/full/10.1080/21674736.2023.2223025> accessed 15 July 2024; Debele and Zundel (n 138) (forthcoming).

of this divergence and explores potential law- or societal-related mechanisms that can be employed to bridge this gap and ensure the protection of marginalised individuals.

According to IHRL, every human being is entitled to enjoy their human rights. However, what about those who are not recognised as fully human and consequently remain (partly) outside the protective ambit of human rights frameworks? The entitlement to human rights depends on being qualified as human, a status which is not self-evident if one looks beyond the legal norms. Arendt has pointed to the exclusion of certain groups of people in the context of statelessness and migration. She criticises the concept of human rights as privileges that are not attributed to everyone, even though that is the very promise of documents such as the UDHR. Instead, she contends that these rights are reserved for those who belong to specific communities. Here, the criticism of human rights targets both the deficiency of the institutional mechanisms meant to guarantee the practical protection of rights and the conceptual framework of human rights in general.[309] In this regard, Arendt developed the concept of the 'Recht, Rechte zu haben' (the right to have rights). [310] According to Arendt, the concept signifies the manifestation of human dignity in the right of being a member of a community of rights-holders.[311] Having restricted access to rights extends beyond the context of migration and applies to other settings and groups of people.

IHRL is designed around the image of "the white middle class heterosexual man".[312] The embeddedness of this conception of the human in the law, which is of Western epistemological origin, is problematic as it results in disembodiment of the human in the normative frameworks.[313] Anyone who cannot identify with this image of the human is perceived as 'less human' or a sub-citizen. The classification of individuals depends on the degree of their deviation from the Eurocentric image. For those initially on the outskirts of humanity, climbing the ladder, or being recognised as human, is made possible only by becoming a member of a particular class. In this case, which is almost exclusively associated

[309] Stephanie DeGooyer and others, *Vom Recht, Rechte zu haben* (Hamburger Edition 2018), 10.
[310] Hannah Arendt, *Elemente und Ursprünge totaler Herrschaft: Antisemitismus, Imperialismus, Totalitarismus* (Piper 1998), 614.
[311] Hannah Arendt, 'Es gibt nur ein einziges Menschenrecht' (1949) 4 Die Wandlung 754 <http://www.hannaharendt.net/index.php/han/article/download/154/273> accessed 15 July 2024, 760.
[312] Debele, *Provisional thoughts on "Being human as Praxis" in/of revolution* (n 308).
[313] Anna Bradley, 'Human Rights Racism' (2019) 32 Harvard Human Rights Journal 1 <https://heinonline.org/HOL/Page?handle=hein.journals/hhrj32&id=7&div=4&collection=journals> accessed 15 July 2024 , 11; Nelson Maldonado-Torres, 'On the Coloniality of Human Rights' in Boaventura d S Santos and Bruno Martins (eds), *The pluriverse of human rights: The diversity of struggles for dignity* (Routledge 2021), 122.

with power and capital, individuals can be identified as fully human by way of exception.[314]

In the context of colonialism, Fanon describes how the dehumanised individual is

> "declared insensible to ethics; he represents not only the absence of values but also the negation of values. He is, let us dare to admit, the enemy of values, and in this sense he is the absolute evil. He is the corrosive element, destroying all that comes near him; he is the deforming element, disfiguring all that has to do with beauty or morality; he is the depository of maleficent powers, the unconscious and irretrievable instrument of blind forces".[315]

This cruel form of dehumanisation has enabled those who are classified as humans "to build civilization and to satisfy the needs of the civilized"[316] on the backs of those pushed to the outskirts of humanity.

Today, in Western societies, neither Black people nor LGBTIQ+ individuals are considered fully human. The struggles and lived realities of Black people and LGBTIQ+ individuals are inherently connected through their deviation from the image of the human. The colonial powers disseminated a binary understanding of sexuality and gender originating from Europe,[317] and African LGBTIQ+ citizens continue to be deprived of full recognition today. So what does this mean for African LGBTIQ+ people? How can they overcome being identified as 'less human' and obtain humanism?

Fanon campaigns for a new concept of the human, which does not aim at inclusion in the dominant idea of what is human but is embedded "into the objectives and methods of the struggle".[318] Fanon sees the concept of decolonisation as a way to overcome the deep-rooted divide between humans and the "rest".[319] Nyeck elaborates on the connection between Africanness and queerness through the philosophy of Negritude[320] by arguing that the

[314] Makau Mutua; Human Rights: A Political and Cultural Critique; Chapter 1, 11 et seq.
[315] Frantz Fanon, *The Wretched of the Earth* (1963), 41.
[316] Maldonado-Torres (n 313), 123.
[317] Tamale, *Decolonization and Afro-feminism* (n 129), 100.
[318] Alberto Castelli, 'Liberation through violence in Fanon's The Wretched of the Earth: Historical and contemporary criticisms' (2022) 47(4) Peace & Change 325, 328; Fanon (n 315).
[319] Fanon (n 315), 35 et seq.
[320] Negritude involves the cultivation of the dignity of Black people by reclaiming African cultural traditions and civilisations, serving as an anti-colonial initiative as advocated by Leopold Sedar Senghor and his contemporaries.

> "sensibilities of Senghorian Négritude so outlined are pertinent to the imagination of queerness, especially their articulation of freedom as sustained self-disclosure and social communion. They offer ethical responses to queer negation in postcolonial contexts."[321]

Nyeck also argues that Negritude, stemming from rejection of the dispossession and alienation of Black people, provides a way to dismantle the Western conception of what is human. It advocates for a more comprehensive genre, unravelling African inferiority to embrace diversities that transcend the dual binary of sex and gender imposed by the colonial powers. Finally, Wynter argues that we need to "displace the heterosexual Man from the category of the human, provincialize it and imagine specific genres of the human".[322]

Regarding the politics of the human,[323] I construct the concept of claiming within a philosophical framework that embraces the relationality of the human being and human rights (systems), taking into account the current insufficiencies of the notion of the human. The framework identifies claiming as a fundamental aspect of human dignity and human rights on several levels. On an individual level, claiming allows everyone to choose who they want to be in everyday life. For example, every individual is free to choose their religion or sexual partner without any direct or indirect external influence, be it from State actors, an employer or in the domestic environment. Thus, the concept of claiming is fundamental to identifying one's personhood and relates to the essence of being human. Consequently, any restriction of the ability to claim one's rights limits one's human dignity. Concerning the dignity of LGBTIQ+ individuals, the theory of intimate justice focuses on "the individuals' evaluations of their lives".[324] The dignity of humans must be respected in social settings and intimate spheres. The origin of this theory rests in resistance to the exercise of power through the bodies of individuals.[325] This power finds manifestation, among other things, in normative frameworks governing topics of sex and gender. This regularly leads to divergence between the human dignity of every individual

[321] Nyeck (n 118), 21.
[322] Cited in Debele, *Provisional thoughts on "Being human as Praxis" in/of revolution* (n 308), 4.
[323] See, Debele and Zundel (n 138) (forthcoming).
[324] As cited in, Sara McClelland, 'Intimate Justice', *Encyclopedia of Critical Psychology* (Springer New York 2014), 1010; Chielzona Eze, *Justice and Human Rights in the African Imagination: We, too, are humans* (Routledge), 111 et seq.
[325] Foucault (n 246).

and legal and public constructions of the social order.[326] In this setting, the concept of claiming serves as a means of preserving one's dignity.

The possibility of claiming protection of one's rights constitutes the essence and validation of human rights systems. This prompts the question of the purpose of institutionalised rights frameworks if they fail to safeguard the well-being of all individuals. Individuals who are unable to claim their rights are effectively denied these rights and their personhood, and their human dignity is undermined. This renders the system ineffective, losing both its theoretical foundation and practical purpose. IHRL frameworks must therefore be designed to ensure and enforce the protection of minoritised people who are otherwise marginalised at the national level by State and non-State actors. Without shielding individuals in need, any such system would be rendered meaningless. The normative, institutional and procedural frameworks of IHRL systems must, on the one hand, provide for the rights of minorities, while at the same time being applied by actors willing to protect these minorities. Whether this is the case will be explored through a jurisprudential, philosophical and argumentative analysis in the coming chapters.

4.3. Claiming as a systematic tool for the expansion and transformation of a specific legal framework

Within the broader philosophical setting, the concept of claiming serves as a systematic tool for the dogmatic and factual expansion of the scope of protection of a specific human rights framework, and thus its transformation. There are different ways of claiming, which can be divided into law-related claiming and societal-related claiming. While the concept of claiming in relation to human rights is inevitably closely related to law, it is not limited by it, particularly in terms of its mechanisms. The different forms and mechanisms of law-related and societal-related claims coexist and flourish in an interdependent relationship.

4.3.1. Law-related claiming

4.3.1.1. Legal procedural claiming as a mechanical tool

"There is a strong belief in strategic litigation. When there is a training for communities, there is also case hunting. […] They are also asking, can there be a case

[326] Chielzona Eze (n 324), 113.

where citizens are claiming their rights in this area and the [organisation] can support in terms of research and connecting to other partners?"[327]

This is a comment I received from one interview partner engaged in SOGIESC advocacy. It not only emphasises the interconnectedness of different forms of claiming but also shows the dominance and active promotion of strategic litigation. The classical understanding of legal procedural claiming is closely related to strategic litigation.[328] It is a mechanical tool for demanding recognition of one's rights, and, if necessary, transformation of the relevant legal framework. Satterthwaite has identified the application of this tool at different levels, depending on the addressee against whom the claim is directed.[329] Using the example of women's rights, Satterthwaite characterises claims against the State as advanced, while claims against partners or families are described as "embryonic rights claims as felt and expressed […] on the micro level".[330] In the context of advanced claims, various types of human rights exist, each imposing different requirements on the respective State. In the event of any violation of an institution's obligations to respect, protect, and fulfil human rights, individuals and specific groups can utilise this tool to actively address the issue by employing conflict resolution mechanisms.

4.3.1.2. Historical comparative analysis

The concept of claiming in relation to human rights is not restricted to SOGIESC rights or the AHRS. It is a framework available to all groups or individuals whose rights need to be identified and accepted, as in the case of anti-racist rights, women's rights, indigenous rights,[331] or rights of the elderly.[332] These groups have in common that they suffer from inadequate protection, which can be traced back to either poor implementation of the law or a normative gap. A historical comparative analysis of not (yet) fully recognised rights reveals similarities in the struggles of these groups and commonly available mechanisms for overcoming the challenges they face. Such a comparison gives insights into how societal beliefs can be shaped through activism and legal changes. Many human

[327] Interview with E10.
[328] See Chapter 3, 57 et seqq.
[329] Satterthwaite (n 209).
[330] Ibid., 64.
[331] Murray and Viljoen (n 7), 100.
[332] Marijke de Pauw, 'Interpreting the European Convention on Human Rights in Light of Emerging Human Rights Issues: An Older Person's Perspective' (2014) 8(2) Human Rights and International Legal Discourse 235 <https://heinonline.org/HOL/Page?handle=hein.journals/hurandi8&id=234&collection=journals&index=> accessed 12 July 2022.

rights categories recognised today are the result of legal and societal historical struggles.[333]

Heyns states that, "human rights […] are guides to action and triggers of resistance."[334] Very often, the respective human rights framework does not relate explicitly to the rights being claimed; thus, people need to claim protection "through the 'translation' or 'construction' of their rights into the language of the [respective] framework"[335]. This raises several questions: What mechanisms are available to achieve this translation? How do different mechanisms interrelate with each other? When are claims recognised and established as human rights?

Prominent and ongoing examples of the gradual and strategic expansion of the human rights framework, beyond the boundaries of what were historically considered human rights at a specific time, are women's rights, anti-racist rights and indigenous rights. In the unique context of South Africa, struggles around racial equality and sexual recognition were interwoven in the anti-Apartheid movement.[336] This unique momentum facilitated the creation of awareness and realisation of change through different approaches, enabled by collaborative efforts. The gradual expansion and recognition of women's rights globally is driven by a multidisciplinary strategy, which includes a focus on women's own "sense of entitlement".[337] The relation between private and public spheres, the extent to which the public regulates private matters, is expressed in the slogan that 'the personal is still political'.[338] This is a concern not only in the realm of women's rights, but also in the context of SOGIESC rights.[339] Today, the achievements in the realm of women's rights serve as a precedent, cornerstone and companion for claiming SOGIESC rights.

It can also be enlightening to examine specific developments in different national, regional and international settings. For example, the developments of jurisdiction on

[333] These have inevitably included pushbacks.
[334] Heyns, 'A "Struggle Approach" to Human Rights' (n 80), 171.
[335] Pauw (n 332), 237.
[336] Sheila Croucher, 'South Africa's Democratisation and the Politics of Gay Liberation' (2002) 28(2) Journal of Southern African Studies, 315.
[337] Satterthwaite (n 209), 64.
[338] Carol Hanisch, 'The Personal is still political' 1970 Notes from the Second Year: Womens Liberation; Theresa Lee, 'Rethinking the Personal and the Political: Feminist Activism and Civic Engagement' (2007) 22(4) Hypatia 163 <https://www.jstor.org/stable/pdf/4640110.pdf?refreqid=fastly-default%3Ac5849235c49503fd2e531768e225e774&ab_segments=&origin=&initiator=&acceptTC=1> accessed 15 July 2024.
[339] Benjamin Shepard, *Queer Political Performance and Protest* (Routledge 2010), 39 et seq.

SOGIESC issues in India[340] show that judgments are not set in stone but can be overcome in due time through intensive advocacy. In the context of the regional normative framework, Article 60 and Article 61 of the African Charter are unique features that facilitate historical comparative analysis by incorporating international legal developments and alternative sources for interpretation.

The historical comparative analysis of specific struggles for the recognition and protection of human rights, and the interrelationship between these struggles, opens up pathways for the advancement of other human rights. Heyns' political call to action, in his struggle approach to human rights, provides a perspective and hope. He urges that

> "if claims of universality have not yet been truly vindicated, and should be vindicated, then it is up to those who believe that this should happen to make sure this happens".[341]

His activist and optimistic approach to protecting human rights aligns with the observation that historically resistance and claiming one's rights has in many cases led to recognition of these rights.

4.3.1.3. Intersectionality and decoloniality as arguments for rethinking and claiming[342]

Claiming as a systematic tool for the expansion and transformation of a specific legal framework comes with rethinking and challenging some of the current provisisions of IHRL. I argue that the concepts of intersectionality and decolonisation can serve to move the AHRS towards more openness, fluidity and transformation. They offer much-needed opportunities for developing innovative mechanisms for the advancement and safeguarding of SOGIESC rights.

As touched upon in Chapter 1, the law is structured according to specific categories and conveys the impression of being neutral. Yet, it regularly fails to capture the lived realities

[340] Sheikh (n 191).
[341] Heyns, 'A "Struggle Approach" to Human Rights' (n 80), 187.
[342] Parts of this section have been developed in Isabelle Zundel, *A Queer Critique: Intersectionality in the African human rights system* (forthcoming).

due to its single-axis model in anti-discrimination law[343] and it actively exerts influence, regulation and shaping forces on societal dynamics. This results in a profound disconnection between the lived experiences of individuals and legal constructs. In relation to the lived reality of many layers of existence, one of my interview partners observes:

> "Each one of us has different layers of identities and people push us to be selective. Either you be [citizen of home country] or queer. Either you be a Muslim or queer. […] You cannot be so many things at the same time. So, I feel pressured to reclaim all the layers to be equal. It is not only that I have all of them, but I cannot say one is more important than the other."[344]

The concept of intersectionality was coined and articulated, though not invented, following the realisation that intersecting grounds of discrimination, such as sex and race, create a situation of multiple reinforced discrimination.[345] According to Chow, "individuals face a form of discrimination owing to their multiple identities."[346] Yuval-Davis moves, in her understanding of intersectionality, beyond the description and visualisation of multiple identities towards 'situated intersectionality', an approach to understanding the complexity of social relations. In this regard, Yuval-Davis argues that "intersectional analysis should be applied to all people and not just to marginalized and racialised women, with whom the rise of intersectionality theory is historically linked" because the analysis "relates to the distribution of power and other resources in society" more broadly.[347] Tamale points out in the context of gender oppression within colonial constructs that

> "[…] while all Africans are adversely affected by enduring legacies of colonialism and its convergence with racism, our positioning within diverse social categories

[343] The single-axis model of anti-discrimination law refers to the structures of most legal frameworks that view discrimination grounds "as single-issue and mutually exclusive" thereby "failing to address the complex lived realities of those who experience intersectional discrimination"; Waruguru Gaitho, 'Challenging the Single Axis from the Nexus: Operationalizing Intersectionality in International Human Rights Law to Adequately Address the Corrective Rape of Black Lesbians in South Africa' (2022) 31 Tulane Journal of Law and Sexuality: A Review of Sexual Orientation and Gender Identity in the Law 1 <https://heinonline.org/HOL/Page?handle=hein.journals/lsex31&id=9&div=&collection=> accessed 15 July 2024, 9.
[344] Interview with E3.
[345] Kimberlé Crenshaw, 'Demarginalizing the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics' (1989) University of Chicago Legal Forum <https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/uchclf1989§ion=10> accessed 15 July 2024.
[346] Pok Chow, 'Has Intersectionality Reached its Limits? Intersectionality in the UN Human Rights Treaty Body Practice and the Issue of Ambivalence' (2016) 16(3) Human Rights Law Review 453 <https://academic.oup.com/hrlr/article/16/3/453/2452831?login=true> accessed 15 July 2024, 468.
[347] Nira Yuval-Davis, 'Situated Intersectionality and Social Inequality' (2015) 58(2) Raisons politiques 91.

based on gender, ethnicity, class, sexuality, disability, religion, age, marital status, etc. means that we experience oppression differently."[348]

Considering this intersectional reality in the post-colonial context, only a multidimensional analysis and inclusive strategies can provide effective perspectives and bring enduring change.

Compared with other human rights systems, the AHRS exhibits distinctive features that are tailored to the specific needs of the African population.[349] Consequently, the AHRS challenges some of the usual structures of the law through integration on the normative, institutional and procedural levels of the concept of intersectionality. For example, the Maputo Protocol recognises the lived realities of women who are exposed to intersecting forms of discrimination, such as elderly women (Article 22) or women with disabilities (Article 23). In this regard, the Maputo Protocol has proven to be more inclusive and progressive than its counterpart at the UN level: CEDAW.[350] Nevertheless, the integration of intersectionality in the regional framework faces constraints. These arise from what Nyeck has called priority-setting practices that rank some topics, such as SOGIESC issues, as less important and urgent than others. In situations where SOGIESC rights find their way into the AHRS, they are often framed in the context of a social problem[351] or focused on sex life only, while the main issue being the rights of women, children, employees, elderly, disabled or individuals in distress. The frameworks need to be expanded in order to acknowledge that LGBTIQ+ individuals, just like anyone else, have multiple identities.[352] Only by reframing queerness beyond this negative and confined narrative can a shift away from current priority-setting practices towards a truly intersectional agenda take place. Embracing this trajectory would help substantially to dismantle the constraining structures of the law, benefiting not only queer people but everyone.

Decolonisation continues to be a paramount struggle in Africa, encompassing all aspects of life, including the law. The state-centred legal frameworks in Africa, including the

[348] Tamale, *Decolonization and Afro-feminism* (n 129), 63.
[349] Heyns, 'The African Regional Human Rights System: The African Charter' (n 79).
[350] Johanna Bond, *Global intersectionality and contemporary human rights* (Oxford University Press 2021).
[351] Serawit Debele has mapped different contexts of such framed social problems, for example, around the mothering of so-called "improper" women. See for example, Serawit Debele, 'Revolutionary Mothering' (2023) 35(2) Journal of African Cultural Studies 135, 138.
[352] Ontario Human Rights Commission, 'An Intersectional Approach to Discrimination: Addressing Multiple Grounds in Human Rights Claims' (2001) <https://www3.ohrc.on.ca/sites/default/files/attachments/An_intersectional_approach_to_discrimination%3A_Addressing_multiple_grounds_in_human_rights_claims.pdf> accessed 30 September 2022.

AHRS, continue to be characterised by Western concepts. As already pointed out,[353] this does not mean that their applicability must be contested, nor that there is a complete absence of Africa-specific characteristics, but there is a need to rethink and challenge some of the current provisions of the AHRS.

African traditional legal systems vary widely across the continent and are shaped by diverse cultures, religions, and historical contexts. Nonetheless, they share some key principles and philosophies, such as communalism *(Ubuntu)*, consensus-building, restorative justice, dispute resolution, spirituality and flexibility.[354] Today, African traditional legal systems are often discussed in terms of their conflict potential with international and national human rights standards. This framing must be contested, not only because of its limited effectiveness, but also because of its colonial connotation. I would argue that some of the principles and philosophies of African traditional legal systems can be applied in IHRL, and especially in the AHRS, to make the existent frameworks more just and applicable to minoritised groups such as LGBTIQ+ people.[355] This decolonial approach is informed by an understanding of the relationships and practices between institutions and individuals in former African societies and States today.

Thus, using intersectionality and decoloniality as argumentative instruments shall not do wrong to the manifoldness of the concepts but support the concept of claiming in relation to human rights by encouraging a process of transformation.

4.3.2. Societal-related claiming

"I think if you are a queer person, you are claiming your rights just by existing."[356] This remark was made by one of my interview partners when discussing different understandings of claiming human rights in the context of SOGIESC. Everyday claiming in relation to human rights takes place outside courtrooms and is detached from legal arguments and frameworks. Claiming is a process, attitude, fight and approach of individuals, groups, and organisations that show resistance and, therefore, claim spaces. In the context of SOGIESC, seemingly small acts, such as holding hands in public,[357] going to a specific

[353] See Chapter 2, 25 et seqq.
[354] For more about African traditional legal systems, see Peter Onyango, *African Customary Law: An Introduction* (LawAfrica Publishing (K) Ltd 2013).
[355] See argument above in Chapter 3, 64 et seqq.
[356] Interview with E12.
[357] See above: This example was brought forward in one of my interviews by a white South African. I acknowledge that it might not be feasible in all African contexts. In many African societies, a man may hold hands with another man simply to show that they are good friends, but they would not show affection to their wives in public.

bar, expressing one's gender identity through one's choice of clothes or just talking about SOGIESC topics, are fundamental to one's existence, dignity and identity.[358] Another interview partner describes ways of (re-)claiming[359] in their private, non-professional life as follows:

> "In my normal life, it's just something I carry, like in the background of my unconsciousness. And it presents itself in the way I choose things; the way I walk, the way I talk in my gender expression, in my music preferences, in the places I go and visit, in the colours I choose for my dresses."[360]

At the same time, these seemingly small acts can have far-reaching implications. Claiming one's rights is closely connected to becoming visible as part of a 'category' that is usually invisible due to the system's legal, political and societal construction. But visibility is attached to risks created by State and/or non-State structures. In the context of SOGIESC advocacy at the African Commission, Sekyiamah says

> "you have to be respectable in the space – you cannot cuss out people or be loud in your objections to a process, particularly when you are queer and have already been too loud in your presence and expression."[361]

One of my interview partners, with advocacy experience on the national, regional and international level, highlighted the importance of knowing how to navigate specific spaces so as to protect oneself and one's colleagues.[362] Thus, claiming relates to making a choice among various options, including refraining from pursuing specific actions.

NGOs regularly support the promotion and protection of SOGIESC rights through awareness campaigns, distribution of materials, trainings and capacity-building events, as well as creating safe spaces, and building and collecting knowledge. One interview partner from South Africa reflects on their own experiences in this area:

---

[358] Interview with E12.
[359] The interview partner explained that they prefer the term reclaim because it indicates that something is inherently theirs. See Chapter 3, 68 et seq.
[360] Interview with E3.
[361] Nana Sekyiamah, 'After Years of Activism CAL Attains Observer Status at ACHPR' (2015) <https://www.awid.org/news-and-analysis/after-years-activism-cal-attains-observer-status-achpr> accessed 30 March 2024.
[362] Interview with E3.

> "I like the concept of having pride marches and similar events to come together as communities to claim rights. To claim your individual rights, but also to claim your rights as a community."[363]

The available mechanisms depend on the formal or informal structures at the organisation's local, national, or international levels. In the context of mainstream organisations that demonstrate solidarity, Mohammed has emphasised the importance of appropriate language, and the need for these organisations to be held accountable for their actions.[364] One interview partner, working at one of the main organisations fostering SOGIESC advocacy on the continent, says:

> "It's about capacity building of civil society movements that then work with different vulnerable groups, such as women, children, persons with disabilities, sexual and gender minorities that then can start claiming rights. […] It's about empowering these civil society organisations."[365]

Through daily and seemingly small acts of claiming, people seek to transform the political, legal, societal, religious and historical frameworks affecting and threatening LGBTIQ+ individuals. In the context of Africa, this process of claiming SOGIESC rights by showing resistance and claiming spaces contributes to freeing people from persisting precolonial, colonial and postcolonial restrictions relating to issues of sex and gender.

4.4. Claiming as analytical framework of the thesis

The concept of claiming developed in this chapter also serves as the analytical framework for the entire thesis. The following questions, which arise from the concept, have structured my research on promoting and protecting SOGIESC rights within the AHRS, using the example of sexual orientation: What does claiming in relation to human rights mean? Are the normative, institutional and procedural frameworks of the AHRS a fit framework for claiming? How can the promises of the normative and institutional frameworks of the AHRS be realised through claiming? Who can claim SOGIESC rights at the three regional institutions? Against whom can claims be made?

---

[363] Interview with E12.
[364] Wunpini Mohammed, 'Feminist accountability: deconstructing feminist praxes, solidarities and LGBTQI+ activisms in Ghana' (2022) 15(4) Communication, Culture and Critique 455 <https://www.academia.edu/83969165/Feminist_accountability_deconstructing_feminist_praxes_solidarities_and_LGBTQI_activisms_in_Ghana> accessed 15 July 2024.
[365] Interview with E10.

That law is not self-contained and cannot be enacted from an ivory tower is not a novel idea; however, its general acceptance remains limited. The structural struggles involved in claiming rights connected with issues such as child labour, racism or human trafficking show that doctrinal law alone does not offer satisfactory solutions to non-doctrinal questions, i.e. questions of societal relevance. To achieve satisfactory solutions, the law must take social, political, and historical realities into account. Only then can transformative pathways for change be created. Thus, claiming in relation to human rights demands the integration of societal realities into existent normative frameworks, and serves here as an analytical framework for investigating the regional human rights system within its social context.

This analytical framework is reflected in the structure of the coming chapters, the analytical approach of the analysis and my choice of research methods, specifically the fieldwork-based research I have undertaken. I have avoided making a purely doctrinal analysis of the normative, institutional and procedural mechanisms available through the AHRS. Instead, I have engaged with policymakers, human rights advocates and scholars who are (potential) users of the regional mechanisms. I aim to understand their strategies for enhancing SOGIESC rights as well as give ear to their reasons for deciding whether or not to approach the AHRS in this matter. In concrete terms, I have interviewed regional policymakers to learn about their institutional experience with the mechanisms and SOGIESC-related issues; I have talked to members of NGOs about their engagement, or lack of engagement, with the AHRS concerning the protection of LGBTIQ+ persons; and I have conducted interviews with scholars who research on SOGIESC rights and the AHRS. The interview partners willing to engage with me on this research project had developed different mechanisms for claiming SOGIESC rights. These range from denial or adaptation to political activism. However, the interview partners all have in common their decision to share their personal experiences, which can involve legal, political and societal risks. I would say that for them, participating in the interviews was a kind of claiming. In this way, they showed resistance and claimed space, symbolising their aspiration to create hostility-free spaces, and thus claiming visibility and protection of SOGIESC rights. This means that the concept of claiming is inseparable from my methodological approach.

4.5. Who can claim through the AHRS?

The concept of claiming is inevitably connected with the question of who can claim. I have identified four other human rights actors within the AHRS who can appear as claimants. These are States, NHRIs, civil society and individuals. The AHRS has important and fixed relations with these actors who play a critical role in claiming, promoting, and protecting human rights in the region. Each of these actors brings a unique perspective and set of resources to the table, and their collaboration is essential for achieving meaningful progress in the field of human rights in Africa and transformation of the system. Overall, the AHRS is strengthened by the collective efforts of these diverse actors, who complement the system through their different relations and roles. By working together, these actors contribute significantly to promoting and protecting human rights throughout the region, creating a more just and equitable society for all.

4.5.1. States

States are the predominant and most important actors in ensuring and executing the protection of human rights since they are obliged to uphold the rights of individuals and groups. The other actors only step in when the State cannot or will not ensure the protection of someone's rights. Thus, regional and international human rights frameworks would not be needed in an ideal scenario where the State does not violate anyone's rights and infringement is remedied through national mechanisms. In reality, such scenarios do not exist, and States are sometimes even accused of not being interested in the protection of human rights. However, rather than reprimanding States, it is important that efforts should be made to motivate them to ensure that human rights are respected. And even though the engagement of States in regional systems does not necessarily result in a direct reduction of human rights violations, it strengthens civil society in these States.[366]

States ratify human rights treaties, such as the African Charter, and thus commit themselves to upholding the specific human rights standards of that treaty. They agree to the use of various mechanisms to ensure the promotion and protection of these rights, such as judicial procedures and periodic reviews.[367]

[366] Lennart Wohlgemuth and Ebrima Sall, *Human rights, regionalism and the dilemmas of democracy in Africa* (CODESRIA Books 2006).
[367] Viljoen, *International Human Rights Law in Africa* (n 3), 22.

Due to the nature of human rights systems, claims are usually made against the State when the State fails to protect its citizens. States can also act as claimants against other States, as provided for in Article 47 of the African Charter (inter-State complaint), which says,

> "if a State party to the present Charter has good reasons to believe that another State party to this Charter has violated the provisions of the Charter, it may draw, by written communication, the attention of that state to the matter".[368]

In this respect, the State can take on different roles in relation to the AHRS.

4.5.2. National Human Rights Institutions

According to the website of the African Commission,

> "NHRIs are statutory bodies established by governments in Africa and charged with the responsibility of promoting and protecting human rights institutions in their respective countries. The establishment and operations of this institution must conform to the UN Principles relating to the Status and Functioning of National Institutions for the Protection and Promotion of Human Rights (Paris Principles)."[369]

The Pretoria Declaration on Economic, Social and Cultural Rights in Africa (2004) provides detailed input on the mandate of NHRIs. As of May 2024, 46 African countries have established NHRIs.[370] In Article 26 and Article 45 (1) c of the African Charter, the relationship between the African Commission and NHRIs is laid out. NHRIs can receive Observer Affiliate Status according to the Resolution on Granting Observer Status to National Human Rights Institutions in Africa (1998 Resolution on Affiliate Status).[371] This affiliation can be compared to NGOs with observer status at the African Commission (see below). NHRIs can submit and present shadow reports complementing their State's periodic report to the African Commission.[372] So far, NHRIs have rarely submitted such shadow reports to the African Commission, which throws doubt on the independence of

[368] Article 47 African Charter
[369] Corina Lacatus and Valentina Carraro, 'National human rights institutions: independent actors in global human rights governance?' 2023 (99)3 International Affairs 1167.
[370] African Commission on Human and Peoples' Rights, 'National Human Rights Institutions' <https://achpr.au.int/en/nhris> accessed 15 July 2024.
[371] Granting Observer [Afiliate] Status to National Human Rights Institutions in Africa (1998 Resolution on Affiliate Status), adopted at the Commission's 24th session, Banjul, The Gambia, 22-31 October 1998; See also Rule 71 (1) of the Rules of Procedure of the African Commission.
[372] For more details, see Chapter 6, 179 et seqq.

the NHRIs in practice.[373] In addition, NHRIs with affiliate status can "request that the African Commission include in its agenda for an Ordinary Session a discussion on any human rights issue"[374] according to Rule 63 (1) of the Rules of Procedure of the African Commission on Human and Peoples' Rights 2020 (Rules of Procedure of the African Commission).

While the potential of the NHRIs is immense, their active and critical participation has so far been minimal.

4.5.3. Civil society

The importance of civil society, and specifically NGOs, in supporting and informing the work of the AHRS cannot be overestimated. Firstly, NGOs have expertise on specific human rights issues in individual African countries. Sharing their expertise with the AHRS institutions enhances the system's effectiveness. Secondly, NGOs often give a more realistic view of human rights issues and specific incidents than State governments and their official reports. In specific cases, governments may be driven by political considerations and may be reluctant to acknowledge the severity of human rights violations in their own countries. In these cases, NGOs can expose human rights violations and hold governments accountable for their actions or omissions. Thirdly, most NGOs provide continuity and expertise in their work and gather institutional knowledge over time, unlike State actors and institutional representatives, who change frequently and do not always possess the same set of skills. Finally, NGOs focus on specific, non-mainstream agendas which they believe the institutions should engage with. At the same time, NGOs can support the institutions' promotional mandate by raising awareness, distributing information, and providing training.

NGOs are recognised in the legal and procedural framework of the AHRS and can enter into official relationships with the institutions of the system. For example, in accordance with the African Commission's Resolution on the Criteria for Granting and Maintaining Observer Status to Non-Governmental Organizations working on Human and Peoples' Rights in Africa (Resolution 572)[375] and Rule 72 of the Rules of Procedure of the African

[373] On the discussion on the (in)dependence of the NHRIs, see Lacatus and Carraro (n 369); Karin Sundström, *Human Rights Institutions in Africa: Design and Effectiveness* (2022).
[374] Rule 63 (1) Rules of Procedure of the African Commission
[375] Resolution on the Criteria for Granting and Maintaining Observer Status to Non Governmental Organizations working on Human and Peoples' Rights in Africa 2023, ACHPR/Res. 572 (LXXVII) 2023 (African Commission on Human and Peoples' Rights)

Commission, NGOs can be granted observer status with the African Commission. They can then file shadow reports and complaints, conduct studies, and provide technical secondments. As of May 2024, over 550 NGOs have observer status with the African Commission.[376]

NGOs can take on various forms, differing in their organisational structures, geographic reach and areas of operation. They may exist as informal alliances or formal institutions and operate at the international, transnational or grassroots level. Depending on the character of the NGO, the relationships and connections with the people and institutions will differ. According to one of my interview partners, the more formal and international organisations are, the more detached they are from the people, even though they are seeking to improve their living conditions.[377] The operations of international organisations in Africa need to be evaluated critically in the light of power relations, capital and neo-colonial traits. Conversely, grassroots organisations work closely with the people on the ground but rarely use national or international legal and political structures to advocate for formal change. Engagement with international institutions, such as those of the AHRS, requires financial capacity, and the allocation of funds depends on donors, who are too often detached from the realities on the ground and permeated by political interests. Thus, building a connection between the people and international institutions, such as the African Commission, is difficult. However, it can be facilitated through the work of NGOs, especially where there is cooperation between international NGOs and grassroots groups, as well as transnational collaborations.

At the same time, the AHRS needs to critically evaluate its efforts to engage with the people, especially in terms of its geographical, linguistic and procedural distance. Civil society is currently experiencing a shrinking of its space, which comes from decreasing engagement by international human rights institutions. Civil society is adapting to this situation and working on innovative ways to address the emerging challenges, one of which is funding.

4.5.4. Individuals

Affected individuals have different mechanisms available to them for claiming recognition and protection of their rights through the AHRS. However, the process of claiming

[376] African Commission on Human and Peoples' Rights, 'Non-governmental organizations' <https://achpr.au.int/en/network/ngos/> accessed 15 July 2024.
[377] Interview with E9.

one's rights requires an individual to reveal personal information, such as their gender identity. This makes people vulnerable, and exposes them to security risks, especially in a hostile setting.[378] However, civil society and governmental organisations can claim recognition of the rights of a specific group, for example through public campaigns.

In the legal context, the admissibility of claims is strictly regulated and depends on the level approached. At the regional and international levels, individual appeals are only possible under specific legal instruments. For example, the African Court has jurisdiction to hear cases brought by individuals and NGOs[379] with observer status before the African Commission, but only when the relevant State has accepted this jurisdiction by making a declaration under Article 34 (6) together with Article 5 (3) of the African Court Protocol. As of November 2021, the African Court has jurisdiction to receive complaints by individuals and NGOs against eight States: Burkina Faso, the Gambia, Ghana, Guinea Bissau, Malawi, Mali, Niger, and Tunisia. However, as a quasi-judicial instrument, the African Commission may consider all individual complaints regarding alleged human rights violations according to Article 55 of the African Charter when local remedies have been exhausted.[380] By comparison, Article 61 (1) of the American Convention on Human Rights states that the Inter-American Court of Human Rights can only hear cases submitted by State parties and the Inter-American Commission on Human Rights, but not individuals and organisations.

4.6. Concluding remarks

In this thesis, I introduce the concept of claiming in relation to human rights and argue that the promotion and protection of SOGIESC rights can be claimed in and through the normative, institutional and procedural frameworks of the AHRS. Even though the normative framework does not explicitly mention SOGIESC rights, the mechanisms available through the concept of claiming can facilitate the enhancement of the systems' jurisdiction and thus transform the regional legal framework.

The concept of claiming incorporates a broad approach to the promotion and protection of human rights which I have structured into law-related and societal-related mechanisms.

[378] Interview with E3.
[379] NGOs can also act as claimants in communications and cases. They can claim self-affected lawsuits (freedom of association) and strategic litigation with and on behalf of affected individuals (litigation status, counsel), as well as acting as amicus curiae.
[380] Sabelo Gumedze, 'Bringing communications before the African Commission on Human and Peoples' Rights' (2003) 3(1) African Human Rights Law Journal 118 <https://www.ingentaconnect.com/content/sabinet/juahrlj/2003/00000003/00000001/art00008> accessed 15 July 2024, 120.

Nevertheless, the concept of claiming in relation to human rights has limitations in respect of transforming society into a more socially just environment, given the limits and insufficiencies of the law. In this regard, claiming does not aim at a specific status to be attained; instead, it describes an ongoing process that aligns with the continuous developments in society and the living character of human rights frameworks. As one of my interview partners rightly argued:

> "claiming can be a framework, but it should also be understood as a process. It will be an ever-evolving process. […] It will be in the state of becoming. And the eternal state of becoming. It's a moving target. It will continue to change. It will continue to evolve. It's a process that will go on and on."[381]

The progress and success of claiming endeavours depend on many factors, such as the specific nature of the rights claimed, and the timing and location where they are claimed.[382] The concept of claiming in relation to human rights is intertwined with spaces that have been arrogated. Attaining a right to these spaces always requires a successful engagement with power.[383] Therefore, one needs to understand the complex forms and interrelations of claimants or activists with power. Arrogated spaces are "opportunities, moments and channels"[384] for peaceful existence and joint activism.

The concept of claiming in relation to human rights entails risks and difficulties.[385] Claiming requires visibility in contexts where exposure can have dangerous impacts on the individuals concerned and their family and friends. In relation to legal and policy interventions, the risk of pushbacks is necessarily part of the process of claiming and has been described as a 'tug of war' or 'battle'.[386] We need, however, to differentiate between the individual stories attached to pushbacks and the societal progress gained through the process of claiming. Accordingly, together with Kaime, I have argued that "disentanglement

[381] Interview with E9.
[382] Anne Hellum and others, 'Rights claiming and rights making in Zimbabwe: a study of three human rights NGOs' in Bård Andreassen and Gordon Crawford (eds), *Human rights, power and civic action: Comparative analyses of struggles for rights in developing societies* (Routledge 2013), 36.
[383] Gaventa, 'Finding the Spaces for Change: A Power Analysis' (n 298).
[384] Ibid., 26.
[385] On pushbacks, see for example Chapter 2, 42 et seq.
[386] Mariel Reiss, 'War-of-Tug: LGBTIQ+ Rights in the African Regional Human Rights Architecture' (Conference on the Decriminalisation of Same-Sex Laws and Eradication of Conversion Practices in Africa, Centre for Human Rights, Faculty of Law, University of Pretoria, 24 November 2022).

and change towards social justice are part of a continuous process in which even assumed pushbacks can initiate moments of hope".[387]

5. Conclusion

This chapter has introduced the concept of claiming in relation to human rights, locating it within concepts such a queer theory and strategic litigation. This concept provides the analytical framework for this thesis which is an investigation of the normative, institutional and procedural framework's effectiveness for and how best to claim SOGIESC rights through the AHRS.

[387] Kaime and Zundel, *Let's (not) talk about the gays: Malawi's stalled attempts at decriminalisation of same-sex laws* (n 179) (forthcoming).

Chapter 4: Is the normative framework of the African human rights system fit for claiming SOGIESC rights?

1. Introduction

At the moment, the normative framework of the AHRS does not explicitly address SOGIESC rights in any of its documents. Nevertheless, it aspires to be a dynamic cluster of treaties continually evolving to meet the specific needs of African people. As I have argued in Chapter 3, the promotion and protection of SOGIESC rights are crucial and inherent requirements for the well-being of African people.[388] The concept of claiming in relation to human rights emerges as a systematic tool for the expansion and transformation of the protection of SOGIESC rights in Africa. The main question addressed in this chapter is whether and how the normative framework of the AHRS is fit for claiming SOGIESC rights. To answer this question, I present a jurisprudential, philosophical, and argumentative analysis of selected examples, guided by the concept of law-related claiming.[389] While the examples primarily focus on instances within the African Charter, they provide valuable insights into the nuances of the normative framework of the AHRS. These insights, though not exhaustive, shed light on factors contributing to the claimability of SOCIESC rights through the normative framework. I will draw from teleological normative arguments, African philosophies and queer intersectionality[390] to expand the understanding of, and offer new perspectives on, the normative framework of the AHRS in relation to claiming SOGIESC rights, especially law-related claiming.

The chapter is structured into five sections. After the introduction, in the second section, I will consider an effective normative framework for claiming, identifying specific characteristics that encourage claimability and thereby protect human rights. I will focus on evaluating the established normative framework of the AHRS in terms of its openness and effectiveness in providing opportunities for claiming SOGIESC rights that can facilitate the system's transformation. I will not delve into other matters, such as findings from the drafting processes of the documents or implementation at the national level, to highlight only the potential of the current regional normative framework. In the third section,

[388] See Chapter 3, 66 et seq.
[389] See Chapter 3, 74 et seqq.
[390] Kirichenko, 'Queer Intersectional Perspective on LGBTI Human Rights Discourses by United Nations Treaty Bodies' (n 258), 59.

I will present a typology of the normative framework of the AHRS, which will serve as an overview for the subsequent analysis. The fourth section explores various examples that have significance for the claimability of SOCIESC rights under the normative framework. Upon closer examination of these examples, it becomes evident that establishing a sharp distinction in the analysis between the normative, institutional, and procedural frameworks is not always feasible when exploring the claimability of rights in the regional system. In the conclusion, I assess the examples towards an evaluation of the normative framework of the AHRS in relation to the features and structures that facilitate the claiming of SOGIESC rights.

2. What is an effective normative framework for claiming?

The characteristics of an effective normative (and subsequently institutional and procedural) framework for claiming SOGIESC rights emerge from a basket analysis based on the analytical concept of claiming. This involves a historical comparative analysis by assessing how well certain mechanisms of other IHRL frameworks align with the functions and current limitations of the system at stake. By examining some cases and developments from the past, this analysis highlights factors that either enhance or hinder the effectiveness of these frameworks. The identification of the characteristics is further informed and refined by insights gathered from the interviews conducted with relevant stakeholders.

While there is no generally agreed and effective normative framework for claiming human rights, I argue that any normative framework in IHRL should have or strive towards having the following characteristics: being adaptive and flexible, context-specific, sustainable, inclusive, and providing comprehensive institutional and procedural structures.

a. **Adaptive and flexible:** The normative framework has to be flexible and adaptive regarding the contexts it aims to accommodate, thus ensuring its relevance across diverse circumstances and times. Kaime argues in the context of children's rights that

> "[…] any proposed framework for the promotion and protection of their rights must be flexible enough to take into account and be of relevance to the specific circumstances of each particular child. In this regard, the

> [African Children's Charter] must be robust enough to provide adequate protection for children situated across all the different cultural milieus".[391]

Kaime argues further that the normative framework must

> "[…] propound principles which are general enough to address the multiple configurations of meaning and perspectives that are and inform children's rights and which emerge from the situated contexts in which children live."[392]

Expanding on these aspirations regarding normative frameworks for children's rights, it becomes evident that any normative human rights framework must be general and flexible enough to account for each person's specific circumstances, in the sense of their particular cultural, religious, national, geographic and economic milieu. In addition, the framework must be able to adapt and transform to evolving societal values and challenges, thus ensuring its continued relevance over time.[393]

b. Context-specific: The normative framework should be based on and incorporate historical, cultural, societal, political and philosophical characteristics. They must reflect the lived realities of the people the framework aims to govern, thus ensuring that the law is relevant and applicable to their society.[394] Such a context-specific framework can be achieved by moving beyond a mere legal transplant from allegedly more developed and superior normative human rights frameworks. Salaymeh and Michaels, introducing their research project on decolonial comparative law, point out that, "implicit in this idea of legal transplant, more often than not, is the assumed superiority of Global North law over Global South law."[395] Hence, it is particularly important in the African context not only to draw on the UNHRS and the EHRS, but also to integrate African philosophies, beliefs, and practices. Such decolonial thinking can help to make the normative framework more effective and relevant for African people.

---

[391] Thoko Kaime, *The African Charter on the Rights and Welfare of the Child: A socio-legal perspective* (Pretoria University Law Press 2009), 93.
[392] Ibid., 93.
[393] See for example, women's rights in Chapter 3, 76.
[394] For more details of the relation between law in books and law in practice, see Tamale, *Decolonization and Afro-feminism* (n 129), 132.
[395] Salaymeh and Michaels, 'Decolonial Comparative Law: A Conceptual Beginning' (n 210), 174.

c. **Sustainable:** The normative framework should be designed to withstand the test of time, adapting to societal changes while maintaining its core principles and values. Recognising that a normative framework is never comprehensive in terms of its content, achieving its sustainability becomes possible by incorporating open-ended norms and designing a framework that is constantly evolving. Especially for rights, topics and developments that were not considered at the time of drafting, such as SOGIESC rights or the climate crisis, it is crucial to establish a sustainable framework that encompasses and addresses new developments.

d. **Inclusive:** The normative framework should explicitly prohibit discrimination and reflect the needs and perspectives of various social groups, especially those that are regularly marginalised and need special support, such as children, individuals with disabilities and LGBTIQ+ persons. This inclusive character must be achieved through different measures, such as non-discrimination and equality clauses, along with thematic treaties specifically addressing the concerns of distinct groups of people. Beyond this, an inclusive framework must depart from the "incongruence of the traditional single-axis model around which discrimination in [IHRL] is built and the overall protective function and intent of IHRL."[396] This is essential in order to recognise intersectional discrimination that is too often not visible in law.

e. **Comprehensive structures:** For a normative framework to be effective, it must establish comprehensive institutional and procedural structures that facilitate the realisation and enforcement of the rights outlined within it. The different human rights actors[397] can then engage with these structures and claim the protection of rights through versatile, independent mechanisms. Only under such conditions does the normative framework become truly relevant for the people it seeks to serve. This will then strengthen the independence and enforceability of the whole system.

[396] Gaitho (n 343), 5.
[397] For details of the other human rights actors of the AHRS, see Chapter 3, 83 et seqq.

3. A typology of the normative framework of the African human rights system[398]

The normative framework of the AHRS emanates from the African Charter, serving as its primary legal document. Established in 1981, the African Charter officially came into force in 1986, marking the official end of struggles against colonialism.[399] Initially met with "slow and ambivalent acceptance", the African Charter is now ratified by 54 Member States.[400] Notably, the African Charter has some distinctive features that are absent in other international documents, some of which have evolved over time and other African specifics.[401] For example, it uniquely enshrines all three categories of rights: civil and political rights, economic, social, and cultural rights, as well as group rights.[402] In addition to the African Charter, the normative framework encompasses additional normative instruments, such as various Charters and Protocols, with particular emphasis on four thematic protocols: Maputo Protocol, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons (The Older Persons Protocol), Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (The African Disability Rights Protocol), and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Citizens to Social Protection and Social Security (The Social Assistance Protocol Africa). Despite the Maputo Protocol having secured ratification from 44 countries by May 2024[403], the remaining protocols encounter challenges in garnering signatures.[404] Beyond these thematic protocols, more thematic and organisational supplementary standards have been established, including the African Charter on Democracy, Elections, and Governance.

---

[398] See also Chapter 2, 21 et seqq.

[399] Despite the official end of colonialism, African countries experience its effects in all areas of life up to today. For details of its impacts on law and sexuality, see Tamale, *Decolonization and Afro-feminism* (n 129).

[400] Mariam Kamunyu, 'Exploring the Impact of State Behaviour on the African Commission's Autonomy' (2021) <https://achprindependence.org/exploring-the-impact-of-state-behaviour-on-the-african-commissions-autonomy/> accessed 14 March 20239.

[401] Rose M D'Sa, 'Human and Peoples′ Rights: Distinctive Features of the African Charter' (1985) 29(1) Journal of African Law 72.

[402] Manisuli Ssenyonjo, 'Economic, Social and Cultural Rights in the African Charter' in Manisuli Ssenyonjo (ed), *The African regional human rights system: 30 years after the African charter on human and peoples' rights* (Nijhoff 2012), 55.

[403] African Commission on Human and Peoples' Rights, 'Maputo Protocol on the Rights of Women in Africa: Commemorating 20 years' (2023) <https://au.int/en/newsevents/20230705/maputo-protocol-20-years> accessed 5 July 2024.

[404] Centre for Human Rights, Faculty of Law, University of Pretoria, 'Guide to the African human rights system: Celebrating 40 years since the adoption of the African Charter on Human and Peoples' Rights 1981-2021' (2021).

The African Charter on the Rights and Welfare of the Child, also known as the African Children's Charter, was adopted by the AU in 1990.[405] After an initially slow ratification process, the African Children's Charter had been ratified by 50 African Member States[406] as of May 2024 and serves as the legal framework for the promotion and protection of the rights of African children without discrimination.[407] This comprehensive instrument outlines the rights and protections that African children are entitled to receive, such as the right to life, education, health, and protection from abuse, exploitation, and neglect. Beyond that, it considers African historical and societal specifics by recognising the special role of the family, community, and government in ensuring children's full enjoyment of these rights.[408]

Over the years, the substantive rules of the AHRS on the regional level have developed into a comprehensive normative framework that prioritises the promotion and protection of human and peoples' rights and addresses specific African and emerging topics. The regional level is underpinned by the sub-regional level, which is structured by RECs,[409] such as the Southern African Development Community (SADC), the EAC and the ECOWAS. RECs are intergovernmental organisations that were initially established to promote economic growth and regional integration among a group of Partner States within specific geographic regions, thereby fostering regional peace and stability within their blocs.[410] Over time, these RECs have, to varying degrees, developed human rights jurisdictions that are today part of the AHRS.[411] Today, eight RECs are recognised by the AU,[412] each with its own normative, institutional and procedural framework.[413] In the

[405] Frans Viljoen, 'From a cat into a lion? An overview of the progress and challenges of the African human right system at the African Commission's 25 year mark' (2013) 17 Law, Democracy and Development 298, 300.
[406] African Union, 'List of countries which have signed, ratified/acceded to the African Charter on the Rights and Welfare of the Child' <https://au.int/sites/default/files/treaties/36804-sl-AFRICAN_CHARTER_ON_THE_RIGHTS_AND_WELFARE_OF_THE_CHILD.pdf> accessed 5 July 2024.
[407] Ibid.
[408] Thoko Kaime, 'The Foundations of Rights in the African Charter on the Rights and Welfare of the Child: A Historical and Philosophical Account' (2009) 3(1) African Journal of Legal Studies 120 <https://brill.com/view/journals/ajls/3/1/article-p120_7.xml> accessed 15 July 2024.
[409] Hagabimana, 'African Regional Economic Communities and Human Rights' (n 72).
[410] Ibid., 2 et seq.
[411] Nkatha Murungi and Jacqui Gallinetti, 'The role of sub-regional courts in the African human rights system' (2010) 7 Sur - International Journal on Human Rights 119 <https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/surij7§ion=24> accessed 15 July 2024.
[412] However, more RECs exist on the African continent.
[413] Arab Maghreb Union (AMU), Common Market for Eastern and Southern Africa (COMESA), Community of Sahel-Saharan States (CEN-SAD), East African Community (EAC), Economic Community of Central African States (ECCAS), Economic Community of West African States (ECOWAS), Intergovernmental Authority on Development (IGAD) and Southern African Development Community (SADC).

following, I will only focus on the EAC and ECOWAS as they currently play the most relevant role in protecting human rights within their respective regions.

The EAC currently comprises eight Partner States, these being Tanzania, Kenya, Uganda, Rwanda, Burundi, South Sudan, Democratic Republic of Congo and Somalia.[414] This regional organisation was initially established in 1967 but collapsed ten years later due to insuperable political differences between the Partner States.[415] In 1999, the EAC was revived through the Treaty for the Establishment of the East African Community (EAC Treaty), which the governments of Kenya, Tanzania and Uganda signed; Burundi and Rwanda joined in 2007. Since then, the EAC has been actively pursuing regional integration across multiple sectors, including trade, agriculture, health, and education.[416] Article 6 (d) of the EAC Treaty provides that one of the fundamental principles of the community is to promote and protect human and peoples' rights in accordance with the provisions of the African Charter. Based on the EAC Treaty, the EAC has further developed its normative framework, for example through protocols concluded by the Partner States to strengthen their cooperation in the agreed areas. According to Article 151 of the EAC Treaty, each protocol becomes an integral part of the EAC Treaty after signature and ratification following approval by the Summit on the recommendation of the Council.[417] In relation to human rights, the EAC has made such efforts through the EAC Human and Peoples' Rights Bill 2011,[418] the EAC Sexual and Reproductive Health Bill 2021 which aims to protect and facilitate attainment of the life-course sexual and reproductive health and rights of all persons in the Community,[419] or the EAC Counter-trafficking in Persons Bill.[420] Thus, the EAC Treaty recognizes the importance of promoting and protecting human rights in the region and has been the entry point for the establishment of further mechanisms to further that cause.

---

[414] For more about Somalia's path into the EAC, see René Brosius, 'Somalia Becomes the Eighth Member of the EAC – Back to the Roots?' *African Legal Studies* (8 December 2023) <https://africanlegalstudies.blog/2023/12/08/somalia-becomes-the-eighth-member-of-the-eac-back-to-the-roots/> accessed 14 March 2024.

[415] Gilbert Hagabimana, 'A legal analysis of the relationship between state sovereignty and regional integration: A comparative study of the European Union and the East African Community' (2021), 83.

[416] For more about the development of the EAC, see James Otieno-Odek, 'Law of Regional Integration - A Case Study of the East African Community' in Johannes Döveling and others (eds), *Harmonisation of laws in the East African Community: The state of affairs with comparative insights from the European Union and other regional economic communities* (TGCL series vol 5. LawAfrica 2018); Johannes Döveling, *Das Recht der Ostafrikanischen Gemeinschaft: Eine kritische Analyse* (Mohr Siebeck 2019).

[417] Emmanuel Ugirashebuja and others, *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (2017), 110.

[418] The EAC Human and Peoples Rights Bill 2011 (East African Community)

[419] The East African Community Sexual and Reproductive Health Bill 2021 (East African Community)

[420] The EAC Counter-trafficking in Persons Bill 2016 (East African Community)

ECOWAS is another REC situated in the Western African region and was established in 1975 with the primary objective of fostering economic integration and cooperation among its 15 Member States.[421] The organisation's headquarters are today located in Abuja, Nigeria. A fundamental goal of ECOWAS is to establish and bolster a common market among its Member States, with the longtime goal of creating a single currency for the region.[422] To this end, the organisation has undertaken steps to eliminate trade barriers and facilitate the unrestricted movement of goods, services, and people within the region.

The Treaty of the Economic Community of West African States (ECOWAS Treaty) builds the basis of the normative framework of the regional organisation in Western Africa. When the ECOWAS Treaty was signed into existence in 1975, it did not provide for the protection of human rights and the establishment of a respective institutional body. The ECOWAS Treaty was primarily focused on economic development and did not originally include components related to peace, security, stability and governance.[423] Only in 1991 did the ECOWAS Revised Treaty introduce a human rights mandate in Article 4 (g) and the creation of an international court to interpret Community legal instruments and related disputes.[424] According to Article 4(g) of the ECOWAS Revised Treaty, the "recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights" are fundamental principles. Amendments to the original protocol in the Court's 2005 Additional Protocol extended the jurisdiction of the ECOWAS Community Court of Justice (ECOWAS Court) to cases of human rights violations in ECOWAS Member States.[425] In line with its commitment to protecting human rights, ECOWAS has developed further normative instruments aimed at promoting and protecting human rights in the region. These include the ECOWAS Protocol on Democracy and Good Governance, which sets out standards for free and fair elections, the rule of law, and the protection of human rights. In

[421] The Member States are Benin, Burkina Faso, Cabo Verde, Côte d'Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo.
[422] Abdullahi Yusuf, Abdullahi Ahmad and Maisara Nuhu, 'ECOWAS Single Currency and the Political Constraints' (2018) 8(9) International Journal of Academic Research in Business and Social Sciences 537 <https://www.semanticscholar.org/paper/ECOWAS-Single-Currency-and-the-Political-Constraints-Yusuf-Ahmad/b9815e0acd8278bf5bf09e205b03606bafe6e00b?p2df> accessed 15 July 2024.
[423] For more about the development of ECOWAS, see Yansané Aguibou, 'West African economic integration: Is ECOWAS the answer?' (1977) 24(3) Africa Today 43 <https://www.jstor.org/stable/4185706> accessed 15 July 2024.
[424] Nneoma Nwogu, 'Regional Integration as an Instrument of Human Rights: Reconceptualizing ECOWAS' (2007) 6(3) Journal of Human Rights 345.
[425] Karen Alter, Laurence Helfer and Jacqueline McAllister, 'A new international human rights court for West Africa: The ECOWAS Community Court of Justice.' (2013) 107(4) American Journal of International Law 737.

conclusion, the ECOWAS Revised Treaty recognises the importance of protecting human rights in the region. ECOWAS has thus played a key role in advancing human rights and democracy in West Africa.

The normative frameworks of the different RECs all share the foundational principles of the rule of law, good governance and human rights. Over time, in tandem with the regional level, the prominence and importance of human rights protection has increased. Today, the principle of human rights is enforced to varying degrees by the established institutional bodies.[426] Although not founded for this purpose, the RECs serve as protectors of human rights within their respective regions. Through their normative, institutional and procedural frameworks, they ensure that human rights are respected, protected, and fulfilled in Africa.

SOGIESC rights are not explicitly addressed in any of the documents within the normative framework of the AHRS.[427] In the following section, I will explore whether and how the protective mechanisms inherent in the normative framework (can) nevertheless encompass and apply to individuals belonging to the LGBTIQ+ community, and thus whether the normative framework is fit for claiming SOGIESC rights.

4. Exploring the effectiveness of the normative framework of the AHRS

The normative framework of the AHRS, especially the African Charter, has a number of specific characteristics that facilitate the claiming of SOGIESC rights. During my research, I have come across different examples which encompass well-known teleological normative arguments, interpretations of fundamental rights and philosophical arguments. The examples are not comprehensive, but offer impulses for an inclusive and different reading of the normative framework of the AHRS.

[426] Jjuuko, 'The protection and promotion of LGBTI rights in the African regional human rights system: opportunities and challenges' (n 6), 266.
[427] On the African Charter, ibid., 267.

4.1. Non-discrimination and equality

Non-discrimination and equality "are two of the most important precepts of human rights"[428], recognised by IHRL and embedded in numerous normative documents of the AHRS, such as Article 2 of the Maputo Protocol or Article 4 of the Convention Governing the Specific Aspects of Refugee Problems in Africa.[429] The Maputo Protocol, in particular, was instituted to address and counteract discrimination against women, with a specific focus on promoting and protecting their rights. The right to be treated fairly and equally without discrimination on any grounds[430] is the foundational principle of the entire framework of human rights protection.[431] Non-discrimination and equality are interconnected concepts. According to Kälin and Künzli, "the principle of equality before the law and equal protection of the law constitutes the starting point for conceptualizing non-discrimination"[432]. Ensuring the existence of these rights is vital for guaranteeing that individuals have equal opportunities, enabling full participation in society. Failure to uphold them can have various consequences, including exclusion, marginalisation, and violation of economic and social rights, political rights, and civil liberties. The High Court of Botswana remarked in relation to the right to non-discrimination:

> "Any discrimination against a member of the society is a discrimination against all. Any discrimination against a minority or class of people is discrimination against the majority. Plurality, diversity, inclusivity and tolerance are quadrants of a mature and enlightened democratic society."[433]

The African Charter addresses the principles of non-discrimination and equality before the law in Article 2 and Article 3.[434] Article 2 grants every individual the right to enjoy the rights and freedoms defined in the African Charter without any distinction. While SOGIESC are not explicitly listed among the possible grounds for distinction, scholars have argued extensively and persuasively for their inclusion.[435] Firstly, the grounds enumerated are not exhaustive; the use of phrases like "such as" and "or other status" implies

[428] David Weissbrodt and Connie de la Vega, *International human rights law: An introduction* (University of Pennsylvania Press 2007), 34.
[429] For example, in Daniel Moeckli, 'Equality and Non-Discrimination', *Equality and Non-Discrimination under International Law 2017*
[430] Walter Kälin and Jörg Künzli, *The law of international human rights protection* (Oxford University Press 2009), 345.
[431] Javaid Rehman, *International human rights law* (Longman 2009), 401.
[432] Kälin and Künzli (n 430), 345.
[433] *Letsweletse Motshdiemang v The Attornay-General (LEGABIBO as amicus curiae)* (n 3), para. 173.
[434] As well as under Article 2 UDHR.
[435] For example, Viljoen, *International Human Rights Law in Africa* (n 3), 264 et seq.

that the listed grounds are illustrative, leaving room for the inclusion of other, unmentioned categories.[436] This is particularly relevant considering the clause's function as a safeguard for vulnerable groups, which would be compromised if certain vulnerable groups were excluded merely because they were not explicitly mentioned.

Secondly, the African Charter is considered a living document,[437] and its interpretation goes beyond a literal application of the wording, taking into account the evolving societal landscape. A progressive and expansive interpretation aligns with the international law principle of dynamic interpretation, corresponding to the intended protective scope of Article 2. This approach has been affirmed in various international, regional and national decisions, such as in *Botswana Attorney-General v Dow* by the Court of Appeal.[438]

Thirdly, in cases like *Toonen v Australia*[439], the Human Rights Committee has clarified that within the UNHRS, the term "sex" includes sexual orientation.[440] During the drafting process of international human rights treaties like the UDHR and the African Charter, terms like gender, sexuality, and sexual orientation were not explicitly used. However, one must argue that these concepts are inherently interconnected, and that all SOGIESC rights are thus covered.[441] Decisions such as *Toonen v Australia* find entrance into the AHRS via Article 60 of the African Charter.

Jjuuko has rightly observed that the African Commission has interpreted Article 2 in the same inclusive manner.[442] Examples of this inclusive interpretation can be found in several soft law mechanisms, such as the Resolution 275[443] or the Communication on *Zimbabwe Human Rights NGO Forum v Zimbabwe.*[444]

---

[436] Murray and Viljoen (n 7).
[437] Jjuuko, 'The protection and promotion of LGBTI rights in the African regional human rights system: opportunities and challenges' (n 6), 271.
[438] *Botswana Attorney-General v Dow,* Appeal Court 1994 (6) BCLR 1 (locus standi) (Court of Appeal of the Republic of Botswana), para. 158.
[439] *Toonen v Australia* [1994] CCPR/C/50/D/488/1992 (Human Rights Committee) (n 44), para. 8.7.
[440] Further, gender is consistently interpreted as including gender identity.
[441] Murray and Viljoen (n 7), 92.
[442] Jjuuko, 'The protection and promotion of LGBTI rights in the African regional human rights system: opportunities and challenges' (n 6), 269.
[443] The African Commission on Human and Peoples' Rights "Resolution on protection against violence and other human rights violations against persons on the basis of their real or imputed sexual orientation or gender identity": Adopted at the African Commission meeting at its 55th Ordinary Session held in Luanda, Angola, from 28 April to 12 May 2014, <https://achpr.org/sessions/resolutions?id=322> accessed on 14 January 2022.
[444] *Zimbabwe Human Rights NGO Forum v Zimbabwe* [2006] AHRLR 128 (ACHPR 2006) (21st Activist Report), para. 169.

Thus, the right to non-discrimination, especially in the African Charter is designed and has been interpreted to be inclusive of SOGIESC rights. These rights can therefore be claimed under the normative framework, as has already been done.

4.2. Right to privacy

The right to privacy refers to one's individual freedom and autonomy and encompasses many different aspects, such as the right to data protection or personal autonomy.[445] The right to privacy is entangled with the right to dignity, as Badkur states in *National Legal Service Authority v Union of India*: "One cannot protect the dignity of an individual without protecting his or her right to privacy."[446]

The right to privacy is explicitly recognised in various international instruments, such as Article 12 of the UDHR, Article 17 of the ICCPR, Article 10 of the African Children's Charter, and Part IV of the Declaration of Principles on Freedom of Expression 2019 African Union Principles on Freedom of Expression[447] and more.[448] However, the right to privacy is not explicitly enshrined in all legal documents, such as the African Charter. The document is, nevertheless, considered as a living document "able to respond to changing circumstances".[449] This perspective implies that the interpretation and application of the African Charter can evolve to address new and emerging issues, providing flexibility to adapt to the evolving needs and dynamics of society. In this understanding, the right to privacy can be derived from a combination of other rights enshrined in the African Charter, especially the right to "respect for his life and the integrity of his person", the right to "respect of the dignity inherent in a human being" and the right to "liberty and security of his person."[450] Singh and Power highlight that such a reading of the African Charter was practised by the African Commission in the context of the right to housing or shelter in case of *The Social and Economic Rights Action Center (SERAC) & the Center for Economic and Social Rights v. Nigeria (SERAC Case)*.[451]

[445] Weissbrodt and de la Vega (n 428), 67.
[446] Vivek Badkur, 'Natural justice theory: what it means for the right to privacy and LGBT rights in India' (2020) 14(1) Novum Jus 241, 247.
[447] Explicitly addressing the right to access information on the internet.
[448] Avani Singh and Michael Power, 'The privacy awakening: the urgent need to harmonise the right to privacy in Africa' (2019) 3 African Human Rights Yearbook 202; Yohannes Ayalew, 'Untrodden paths towards the right to privacy in the digital era under African human rights law' (2022) 12(1) International Data Privacy Law 16.
[449] Murray and Viljoen (n 7), 89.
[450] Ibid., 90.
[451] Singh and Power (n 448), 212.

> "Although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions […] reads into the Charter a right to shelter or housing which the Nigerian government has apparently violated."[452]

This practice of reading rights into the African Charter is not new and has been undertaken by the African Commission. In the context of the right to privacy, this practice is further reinforced by other legal documents in the regional and sub-regional normative framework that have explicitly included the right to privacy.[453] Further, Article 60 of the African Charter, also known as the 'flexibility clause',[454] allows the African Commission to "draw inspiration from international law on human and peoples' rights".[455]

The right to dignity allows individuals to make choices about their lives without fear of surveillance, discrimination, or other forms of interference.[456] For example, the choice of one's sexual partner is an inherent aspect of personal identity and a fundamental element of privacy. Such consensual choices are personal decisions that do not impose harm or coercion on others.[457] Consequently, any intrusion into these private matters violates the right to privacy.

The right to privacy is a vital safeguard against potential abuses of power by governments and other entities, fostering democratic principles, accountability, and transparency within society. By protecting individuals from unwarranted intrusions, this right plays a crucial role in upholding democratic values and ensuring a balance between personal autonomy and societal interests. In *Letsweletse Motshidiemang v Attorney General*, the High Court of Botswana argued that "privacy is context based"[458] and differs according to the characteristics of the society concerned. It must therefore be interpreted in the light of the current place and time. However, this contextualisation must not be equated with the influence of public opinion in relation to the protection of minorities. Both the High Court of Botswana and the Supreme Court of India have highlighted that societal and

[452] *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria, Communication* (2001) SERAC v Nigeria, Decision, Comm. 155/96 Fifteenth Activity Report (African Commission on Human and Peoples' Rights), para. 60.
[453] See above.
[454] Ayalew (n 448), 24.
[455] See below in Chapter 4, 112 et seqq.
[456] Kälin and Künzli (n 430), 383.
[457] de Vos, 'Mind the gap: Imagining new ways of struggling towards the emancipation of sexual minorities in Africa' (n 115), 48. The author describes a discussion with students about possible ways in which one's sexual orientation and living out of the same can potentially harm others.
[458] *Letsweletse Motshdiemang v The Attorney-General (LEGABIBO as amicus curiae)* (n 16), 58.

public notions are important for interpreting constitutional rights but are not dispositive for the interpretation.[459] This becomes important in the context of the widespread proposition that homosexuality is un-African.[460] The right to privacy is an inviolable human right that must be interpreted in relation to the rights and freedoms of others or the public interest and is therefore not absolute. Any limitation of the right to privacy must take place under the aegis of a law.[461]

The incorporation of the right to privacy in the African Charter showcases its flexibility and openness towards new rights.

4.3. Reading human dignity through Ubuntu[462]

Human dignity is a pivotal concept in legal discourse, encompassing notions of self-respect, self-worth, and the individual's physical and psychological well-being. Human dignity is often seen as the bedrock for the (universal) application of human rights. Conversely, fulfilling and protecting human rights is integral to ensuring human dignity. While the relationship between human dignity and human rights is the subject of extensive debate, the undeniable interconnectedness between these concepts remains undisputed.[463] The principle is universally acknowledged and applied in legal documents, such as the UDHR, scholarly discussions,[464] and judicial mechanisms,[465] extending its protection to all individuals, including those within the LGBTIQ+ community. For example, in *Letsweletse Motshidiemang v Attorney General*, the High Court of Botswana stated that

[459] *Navtey Singhjohar and others v Union of India, Ministry of Law and Justice* [2018] Writ Petition No. 76 of 2016 (Supreme Court of India); *Letsweletse Motshdiemang v The Attorney-General (LEGABIBO as amicus curiae)* (n 16); *Mmusi and Others v Ramantele and Others* (n 183).
[460] See Chapter 2, 30 et seqq.
[461] *Letsweletse Motshdiemang v The Attorney-General (LEGABIBO as amicus curiae)* (n 16), 852.
[462] Parts of this sub-section have been developed in Debele and Zundel (n 138) (forthcoming).
[463] Doris Schroeder, 'Human Rights and Human Dignity' (2012) 15(3) Ethical Theory and Moral Practice 323 <https://idp.springer.com/authorize/casa?redirect_uri=https://link.springer.com/article/10.1007/s10677-011-9326-3&casa_token=wrunobmnw7maaaaa:-qpk-meyhuerbxdwqmhbix8duzbd_cz-fftyfhkrl-1yodnemdyefn3bk3erfk9fn9hxuusvoxx6y1phy> accessed 15 July 2024.
[464] For example, Oliver Sensen, 'Human dignity in historical perspective: The contemporary and traditional paradigms' (2011) 10(1) European Journal of Political Theory 71 <https://www.researchgate.net/publication/241647240_Human_dignity_in_historical_perspective_The_contemporary_and_traditional_paradigms> accessed 15 July 2024.
[465] For example, *Attorney General v Rammoge* [2016] CACGB-128-14 (2016) (Supreme Court Botswana), para. 51.

> "[the] applicant's sexual orientation lies at the heart of his fundamental right to dignity. It is his way of expressing his feelings, by the only mode available to him. His dignity ought to be restricted unless lawfully restricted".[466]

The court manifests the credo that persons with non-heterosexual orientations are entitled to respect for their dignity like everyone else. The African Charter reinforces this commitment by emphasising in Article 5 that "every individual shall have the right to the respect of the dignity inherent in a human being". In a broader context, the Preamble of the African Charter articulates the imperative of

> "taking into consideration the virtues of their [African Member States'] historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights".

In light of this invitation to contextualise the African Charter within the continent's historical, philosophical and cultural specifics, I argue that the human dignity enshrined in the African Charter finds its anchorage in the renowned African philosophy known as Ubuntu.[467]

Ubuntu is tied to a rich tradition of African socialism and humanism,[468] prevailing in diverse forms across many African societies.[469] Defining Ubuntu proves challenging given its widespread presence and evolving notions influenced by time and space.[470] Nevertheless, at its core, Ubuntu encapsulates fundamental principles: the understanding of what it means to be human, the acknowledgement of collective humanity, and the embodiment of attributes such as generosity, hospitality, friendliness, care, and compassion.[471] In pre-colonial times, Ubuntu functioned as a catalogue of rights for many sub-Saharan African peoples.[472] This historical context unveils a multi-faceted relationship between Ubuntu and human dignity,[473] highlighting that the underlying theories of human dignity are closely connected to and have deep roots in African philosophy. This can facilitate

---

[466] *Letsweletse Motshdiemang v The Attorney-General (LEGABIBO as amicus curiae)* (n 16), para. 153.
[467] This philosophical concept has different names in different cultures and societies. See Tamale, *Decolonization and Afro-feminism* (n 129), 221 et seq.
[468] Drucilla Cornell, 'Is there a difference that makes a difference between uBuntu and dignity?' (2010) Southern African Public Law 149, 150.
[469] Murithi (n 91), 281.
[470] Desmond Tutu, *No future without forgiveness* (Doubleday 2000), 29.
[471] Murithi (n 91), 281.
[472] Fungisai Gcumeni, 'The value of pre-colonial conflict resolution methods in addressing sexual violations committed in internal conflict situations in Zimbabwe: The value of pre-colonial conflict resolution methods in addressing sexual violations committed in internal conflict situations in Zimbabwe' (2022), 45.
[473] Even though sharp contrasts have been drawn, and differences between the two concepts have been vigorously exchanged.

interpreting and applying the concept of human dignity in the African Charter within unique African contexts.[474]

The concept of Ubuntu reflects a strong collective humanistic and communitarian philosophy, encapsulated in the well-known maxim 'I am because we are'. This maxim underscores the interdependence of individuals within a community and is paired with an individual's obligation not to inflict harm upon the community or fellow individuals. The expectations placed on individuals extend beyond this, requiring each person to adhere to the community's established norms and contribute to the same community[475]. The contributory aspect of the relationship between community and individual is closely related to the duties of individuals enshrined in the concept of Ujamaa.[476]

As articulated by Mawerenga, the "community's moral life is lived in conformity to established practices".[477] Any deviations from these norms, customs, and regulations within a community – such as (re)production, intricately linked to the norm of heterosexuality[478] – are not tolerated per se. While this understanding would restrict someone's human dignity, Mbiti highlights the importance of hospitality, welfare, humanity and care of the individual in relation to the community, which can be summarised as 'the welfare of one person is tied to the wellbeing of the other'.[479] Van Klinken and Chitando argue that "[…] any societal norms that marginalise and oppress certain members of the community"[480] contradict the concept of Ubuntu. The interdependence between the community and the individual is mutual. The concept of Ubuntu posits that communities and their members cannot experience true harmony when individuals within them are undergoing suffering and marginalisation because of their sexual orientation. This understanding fosters protection and inclusion. While the diverse and multifaceted nature of African concepts of humanness might not always have been fully realised in pre-colonial communities,[481] acknowledging and embracing this aspect of the concept of Ubuntu has become even more

[474] See Edwin Cameron, 'Sexual Orientation and the Constitution: A Test Case for Human Rights*', *Sexual Orientation and Rights* (Routledge 2017); Sylvie Namwase and Adrian Jjuuko (eds), *Protecting the human rights of sexual minorities in contemporary Africa* (Pretoria University Law Press 2017); Cornell (n 468).
[475] For more about expectations placed on individuals within African communities to adhere to established norms and contribute to the community, see John Mbiti, *African religions & philosophy* (2. rev. and enlarg. ed. 18. impr, Heinemann 2010).
[476] On the duties of individuals in the concept of Ujamaa, see Chapter 4, 107 et seqq.
[477] Mawerenga (n 122), 172.
[478] See Chapter 2, 32.
[479] Mbiti (n 475).
[480] Adriaan van Klinken and Ezra Chitando, 'Race and Sexuality in Desmond Tutu's Theology of Ubuntu' in Sarojini Nadar and others (eds), *Ecumenical Encounters with Desmond Mpilo Tutu: Visions for Justice, Dignity and Peace* (2021), 9.
[481] See Chapter 2, 30 et seqq.

urgent in contemporary times, and made possible by an extensive reading of Article 5 of the African Charter. In alignment with this perspective, Tutu's interpretation of Ubuntu is that the concept is closely related to the celebration of human diversity, including sexual diversity.[482]

In the context of 'utu/ubuntu rooted scholarship',[483] Mũgo argues that

> "knowledge can either be colonizing, alienating and enslaving; or alternatively, they can be conscientizing, humanizing and liberating, creating new human beings with the agency to transform the world for the better".[484]

Reading human dignity in the African Charter through the concept of Ubuntu "offers modes of inclusion and affirmation, which originate from African indigenous philosophies".[485] This makes it possible to claim SOGIESC rights through the normative framework of the AHRS.

4.4. Duties of individuals[486]

International human rights documents regularly assign to State parties and their institutions the duty of safeguarding the human rights of individuals. The African Charter uniquely manifests duties of individuals in the Preamble and in Chapter 2. For instance, Article 27 (1) of the African Charter states that "every individual shall have duties towards his family and society […]". Today, it is widely acknowledged that the rights and duties of individuals laid down in the African Charter are not dependent on or connected to each other. This means that if an individual disregards any of the duties listed in Chapter 2 of the African Charter, this does not lead to restriction of the individual's rights.[487] I argue that this normative interpretation of the duties of individuals anchored in the African Charter resonates with Nyerere's understanding of an individual's role in the community as elaborated in the concept of Ujamaa.

---

[482] van Klinken and Chitando (n 480).
[483] Besi Muhonja and Babacar M'Baye (eds), *Gender and Sexuality in Kenyan Societies: Centering the Human and the Humane in Critical Studies* (Rowman & Littlefield 2022); Babacar M'Baye, 'Conclusion: Utu/Ubuntu: Centering the Human and the Humane in Critical Approaches to Africana Studies' in Besi Muhonja and Babacar M'Baye (eds), *Gender and Sexuality in Kenyan Societies: Centering the Human and the Humane in Critical Studies* (Rowman & Littlefield 2022), 223 et seq.
[484] Mĩcere Mũgo, *The Imperative of Utu/Ubuntu in Africana Scholarship* (Daraja Press 2021).
[485] In the context of utu/ubuntu, M'Baye (n 483), 224.
[486] This sub-section has been developed in Debele and Zundel (n 138) (forthcoming).
[487] Introduction into the discussion: Makau wa Mutua, 'The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties', *Human Rights* (Routledge 2017), 373 et seq.

The duties of individuals are anchored in and originate from the societal conception of traditional African communities. Ujamaa, an African Socialist philosophy, was coined during the leadership of Julius Nyerere in Tanzania.[488] Nyerere defines Ujamaa in various ways, such as an attitude of the mind, familyhood, care for the well-being of others, and shared responsibilities and duties. It is the basis of African Socialism, which aims to reduce the dominance of capitalism by "organising society whose possibility is sought outside of class war".[489] Nyerere draws upon the egalitarian values and structures inherent in 'traditional African societies'. For Nyerere, one crucial element of familyhood and societal organisation is to 'care for each other's welfare' as a moral and ethical responsibility all must share.[490] Integral to Nyerere's philosophy of Ujamaa is the belief in the humanity of all that underscores the notion of the well-being of others, which everyone deserves, and the community is obligated to realise. He reminds us of the conception of life as a practice of care that community members owe each other:

> "[…] we were individuals within a community. We took care of the community, and the community took care of us. We neither needed nor wished to exploit our fellow men."[491]

Thus, Nyerere teaches us that welfare and care are neither exclusive nor limited to a certain group of people; everyone, regardless of their age or gender, deserves well-being and care, while they are expected to discharge their responsibilities towards others. Humanity in its fullness is inherently tied to the duty of caring for others.

Nyerere also emphasised the correlation between an all-encompassing community and individuals obliged to contribute their skills and labour. He states,

> "a society which fails to give its individuals the means to work, or, having given them the means to work, prevents them from getting a fair share of the products of their own sweat and toil, needs putting right."[492]

In other words, a community has to allow its members to fulfil their obligations and become a part of their community through their work. At the same time, he stresses that contributions to the community vary, depending on each individual's capacity, thus

[488] Nyerere, *Ujamaa: Essays on Socialism* (n 73).
[489] Serawit Debele and Semeneh Aswaf, 'Ujama Socialism: Towards Cohering Tradition and Modernity' (African Legal Studies, University of Bayreuth, Bayreuth, Germany, 17 November 2021).
[490] Julius Nyerere, 'Ujamaa: The basis of African socialism' [1987] The Journal of Pan African Studies 4 <http://jpanafrican.org/edocs/e-docujamma3.5.pdf> accessed 15 May 2024, 4.
[491] Ibid., 7.
[492] Ibid., 6.

ensuring inclusion of those unable to participate actively, such as older persons. Everyone can be a dignified member of the community by virtue of their humanity deserving care and well-being of others through social roles that go beyond reproduction. The very old and the very young can still make a contribution to the community. So, by this logic, the inability or the choice not to procreate does not exclude a person from membership in the community, as long as they do other things.

Coming back to the African Charter, the duties and responsibilities of individuals towards their community or State presuppose that the community has the responsibility to ensure the individual's well-being, by cultivating an atmosphere in which individual members can do their part for the community, the society, and the country in which they live. This is reflected in the African Charter, which imposes an obligation on the State to recognise and protect the rights of minoritised groups. In line with the African Charter's provisions on the duties of the individual, the State must provide minoritised groups, such as LGBTIQ+ individuals, with suitable conditions for fulfilling their duties under the African Charter and as anchored in society. African polities owe every citizen the right to be free to fulfil their obligations to their communities and be an active part of the community. Any restriction of this right makes them unable to "contribute to the promotion of the moral well-being of society" and thus to fulfil their duty.[493] In this case, the State would violate its obligations under the African Charter, which is embedded in and has arisen from the concept of Ujamaa.

Nevertheless, the current lived reality of LGBTIQ+ individuals forces them into a dilemma: either they must deny their inherent nature and dignity, or they must face accusations of failing to fulfil their responsibilities to their community.

This philosophical interpretation of the duties of individuals anchored in the African Charter shows that a reading based on the concept of African socialism once again counters the notion of homosexuality being un-African. Even though this argumentation has not yet become established, there can be no doubt that the normative framework of the AHRS, especially the African Charter, is context-specific and provides instruments for claiming SOGIESC rights.

[493] Article 29 (7) African Charter

4.5. Peoples' Rights[494]

One of the unique categories incorporated in the African Charter is that of 'peoples'.[495] Peoples' rights are defined in Articles 19 to 24. For example, Article 19 says: "All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another." This concept was incorporated into the African Charter in the context of liberation and decolonisation.[496]

It can be described as the embodiment of the African conception and philosophical understanding of an individual in society.[497] The concept is closely connected to the objectives of the African philosophy of Negritude propounded by Leopold Sedar Senghor and Aime Cesaire.[498] Negritude was based on the idea of cultivating the dignity of Black people through reclaiming African cultural traditions and civilisations as an anti-colonial project.[499] The movement rejected Eurocentrism, a perspective that denies the humanity of others. Instead, the movement envisioned and embraced a novel humanism that unequivocally affirmed the humanity of Black people. This integration of Negritude in the legal framework through the concept of peoples, advocated for by Senghor[500], reflects the resistance of African peoples against foreign domination and acknowledges the fragmentation of ethnicity on the continent, which became a problem due to arbitrary border demarcation in colonial times.[501] Therefore, in the past, the interpretation and application of the term peoples have been closely connected to questions of sovereignty, self-determination and territory, which is reflected in large parts of the legal text.

Over the years, the priorities of Africans have changed, moving away from immediate postcolonial needs, which is reflected in the developing interpretation and application of the African Charter. The concept of peoples has been expanded to include minoritised

[494] This sub-section has been developed in Debele and Zundel (n 138) (forthcoming).
[495] Richard Kiwanuka, 'The Meaning of "People" in the African Charter on Human and Peoples' Rights' (1988) 82(1) American Journal of International Law 80, 81.
[496] Viljoen, *International Human Rights Law in Africa* (n 3), 219 et seqq. On different ways of looking at the concept of people in the African Charter, see Kiwanuka (n 495), 82 et seq.
[497] Kiwanuka (n 495), 82.
[498] Léopold Senghor, 'Negritude: A Humanism of the Twentieth Century' in Peter Cain and Mark Harrison (eds), *Imperialism: Critical concepts in historical studies* (Routledge 2023); Yohann C Ripert, 'Rethinking négritude: Aimé Césaire & Léopold Sédar Senghor and the imagination of a global postcoloniality' (2017).
[499] Munyaradzi Murove, 'Politics of Tradition and African Identity' in Munyaradzi Murove (ed), *African Politics and Ethics: Exploring New Dimensions* (Palgrave Macmillan 2020), 89.
[500] Viljoen, *International Human Rights Law in Africa* (n 3), 219. On Senghor's involvement in the drafting process of the African Charter in relation to socio-economic rights, see Anneth Amin, 'A teleological approach to interpreting socio-economic rights in the African Charter: Appropriateness and methodology' (2021) 21(1) African Human Rights Law Journal, 216 et seq.
[501] Viljoen, *International Human Rights Law in Africa* (n 3), 221.

groups within a State, such as indigenous communities in land and environmental disputes.[502] That is why Ouguergouz has described peoples as a 'chameleon-like term'[503], illustrating its versatile application according to need. This resonates well with Viljoen's analysis:

> "the term 'peoples' (or 'a people') may also denote sub-state groups, or distinct minority groups, such as linguistic, ethnic, religious, or other groups sharing common characteristics, consisting of individuals who are usually – but not necessarily – inhabitants of the same state."[504]

Over time, the African Commission and African Court have elaborated upon the concept of peoples in several cases, effectively formulating a broader understanding of the term. According to this understanding, the term peoples is an identifiable group of individuals that share common characteristics. Furthermore, as a result of the case of *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions vs Sudan* (*Darfur*), a set of criteria for defining the term has been established, including elements such as "language, religion, culture, the territory they occupy in a state, common history, ethno-anthropological factors, race, and ethnicity"[505].

The jurisprudence of the African Commission and African Court has evolved towards a more flexible understanding and expanded the scope of the term peoples. Nevertheless, applying the term continues to require demarcation features, such as the ones mentioned above. This demands a specific link to the notions of autonomy and belonging and imposes a necessary compartmentalisation. Consequently, the term remains exclusive for some groups and results in an inadequate and, therefore, problematic notion of the term peoples. These deficiencies are evident in the writings of the Working Group on Indigenous Populations/Communities and Minorities in Africa of the African Commission, which has yet to critically examine its understanding of the communities it is working for. The inadequacy of the current interpretation of the term peoples in the African Charter affects the incorporated notion of humanity, which has gaps as a result. This emanates

---

[502] Ibid., 228 et seq.; *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya* (2009) 276/03, ACmHPR Nov. 25 2009 (African Commission on Human and Peoples' Rights); *The African Commission on Human and Peoples' Rights v Republic of Kenya* (2017) Application 006/2012, ACHPR, May 26, 2017 (African Court on Human and People's Rights).
[503] Fatsah Ouguergouz, *The African Charter of Human and People's Rights: A Comprehensive Agenda for Human Dignity And Sustainable Democracy In Africa* (Martinus Nijhoff Publishers 2003), 211.
[504] Viljoen, *International Human Rights Law in Africa* (n 3), 222.
[505] Decision Communication *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan* (2013) 279/03-296/05 (African Commission on Human and Peoples' Rights), para. 220.

from the notion of peoples in the African Charter, trapped by the problematic conception of the human discussed before.[506]

Despite the limits of the concept of peoples in the African Charter, the fact that it is embedded in a unique historical context may encourage us to reimagine and rethink it, in order to obtain an understanding of the term that goes beyond the needs and concerns of that time. Thus, although certain human rights, such as SOGIESC rights, are currently not included, the concept of peoples can serve as an argumentative tool for claiming and showing the flexibility and sustainability of the normative framework of the AHRS.[507]

4.6. Article 60 and Article 61 of the African Charter

Article 60 and Article 61 of the African Charter are interpretative provisions which locate the AHRS within international human rights standards and African practices.[508] According to Article 60, the "African Commission shall draw inspiration from international law on human and peoples' rights" in interpreting the African Charter. This provision shows that the African Charter, despite addressing human rights concerns in Africa, clearly recognises and positions itself in the broader domain of IHRL and explicitly allows the use of different international instruments, such as the UDHR. Rudman describes the provision as an opportunity to "use sources that do not fall within its material jurisdiction to assist in providing meaning and contents to norms that fall within its material jurisdiction".[509]

According to Article 61 of the African Charter, other sources may contribute to interpreting the African Charter as "subsidiary means of determining the applicable legal principles"[510], such as "African customs and practice insofar as they represent binding legal rules".[511] With regard to African customs, the African Commission only considers

[506] See Chapter 3, 70 et seqq.
[507] In Debele and Zundel (n 138), Debele and I have argued that through Ujamaa the concept of peoples can be expanded to include LGBTIQ+ communities.
[508] It is debatable to what extent these provisions also apply to the African Court or if Article 7 of the African Court Protocol can be interpreted as having a similar function. Christof Heyns, 'The African regional human rights system: In need of reform' (2001) 1 African Human Rights Law Journal 155 <https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/afrhurlj1§ion=16> accessed 15 July 2024.
[509] Annika Rudman, 'The African Charter: Just one treaty among many? The development of the material jurisdiction and interpretive mandate of the African Court on Human and Peoples' Rights' (2021) 21(2) African Human Rights Law Journal 699 <http://www.scielo.org.za/scielo.php?pid=s1996-20962021000200004&script=sci_arttext> accessed 15 July 2024.
[510] D'Sa (n 401), 73.
[511] Ibid., 73.

customs and practices consistent with international norms relating to human and peoples' rights. At the same time, in the SERAC Case, the African Commission argued that

> "the uniqueness of the African situation and the special qualities of the African Charter's Rights imposes on the African Commission an important task. International law and human rights must be responsive to African circumstances."[512]

The challenge of the African Commission lies in striking a balance between the distinctive features of African contexts and the norms of international human rights, all within the overarching framework of the universal application of human rights.[513]

Concerning the correlation between Article 60 and Article 61 of the African Charter, Rudman points out that the African Charter is

> "presenting a dual approach, where article 60 specifically refers to international law and human and peoples' rights and article 61 leaves the subject-matter and sources of law open for interpretation. This approach clearly distinguishes the two articles from each other as the instruction in article 60 serves to instruct the Commission to draw inspiration from international human rights treaties beyond its mandate in applying the Charter; while article 61 serves to indicate that the Commission may consider sources outside the human rights domain that can contribute towards the interpretation of the Charter."[514]

Both provisions are entry points for strategically claiming the protection of SOGIESC rights and crack open the current limitations of the AHRS through the argumentative tool of comparative analysis, inspiration and inclusion, especially taking into account the "double victimization by [heteronormative] colonial hegemonies and postcolonial"[515] legacies that Africa is trapped in. Through Article 60, the crucial developments in the field of SOGIESC rights made in the UNHRS[516] and other regional human rights systems over the past decades can permeate the AHRS. Still grappling with its colonial entanglements concerning sex and gender, the AHRS can thus benefit from incorporating advancements in this area to endorse the philosophical, historical, and cultural arguments presented earlier in this study through a comparative analysis. Article 61 encourages the

[512] *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria, Communication* (n 452), 68.
[513] On the balance between the universal and relative application of human rights, see Chapter 2, 25 et seqq.
[514] Rudman, 'The African Charter: Just one treaty among many? The development of the material jurisdiction and interpretive mandate of the African Court on Human and Peoples' Rights' (n 509), 720.
[515] Nyeck (n 118), 22.
[516] On their advancement in the UNHRS, see Chapter 2, 14 et seqq.

African Commission to explore alternative sources for interpretation, including African customs and practices. This provision further confirms and reinforces the philosophical, historical, and cultural arguments presented above, such as understanding human dignity through Ubuntu, connecting the concept of peoples to Negritude and interpreting the duties of individuals through Ujamaa. It emphasises that the legal principles embedded in the African Charter must be understood, interpreted and applied in the African context.

In this regard, Article 60 and Article 61 of the African Charter are important anchors that allow the claiming of rights, thereby purposefully transforming the normative framework.

4.7. Clawback Clauses

One well-known and extensively debated feature of the African Charter, which has received substantial criticism,[517] is the inclusion of clawback clauses. These provisions suggest the restriction of rights by States to comply with their national law, with phrases like "within the law" and "provided that individual abides by the law".[518] The absence of inherent external control mechanisms in the African Charter for restrictions initiated by States[519] suggests that the realisation of human rights hinges upon national legal frameworks and authorities. For example, the right to freedom is articulated in Article 6 of the African Charter in the following manner: "[…] no one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained."[520]

Over time, for example in *Constitutional Rights Project v Nigeria*[521], the African Commission has addressed and clarified the interpretation of the role of clawback clauses. Concerning the right of freedom of expression (Article 9 (2) African Charter), the African Commission states:

> "40. […] This does not however mean that national law can set aside the right to express and disseminate one's opinions guaranteed at the international level; this

[517] For example, Loveness Mapuva, 'Negating the promotion of human rights through "claw-back" clauses in the African charter on human and people's rights' (2016) 51 International Affairs and Global Strategy 1 <https://core.ac.uk/download/pdf/234670951.pdf> accessed 15 July 2024.
[518] There has been extensive academic discussion around clawback clauses. See for example, Heyns, 'The African Regional Human Rights System: The African Charter' (n 79).
[519] Gino Naldi, 'Limitation of Rights Under the African Charter on Human and Peoples' Rights: The Contribution of the African Commission on Human and Peoples' Rights' (2001) 17(1) South African Journal on Human Rights 109, 110.
[520] Article 6 African Charter
[521] *Constitutional Rights Project [CRP] v Nigeria* (1999) Communication 140 of 1994; Communication 141 of 1994; Communication 145 of 1995) (African Commission on Human and Peoples' Rights).

would make the protection of the right to express one's opinion ineffective. To permit national law to take precedence over international law would defeat the purpose of codifying certain rights in international law and indeed, the whole essence of treaty making.

41. In contrast to other international human rights instruments, the African Charter does not contain a derogation clause […] The justification of limitations must be strictly proportionate with and absolutely necessary for the advantages which follow."[522]

As a result, the fundamental rights enshrined in the African Charter can only be restricted under highly limited conditions determined by and contingent upon IHRL. It is a fallacy to believe that national law can limit IHRL; on the contrary, national law is bound by IHRL. Thus, the clawback clauses enshrined in the African Charter do not allow the restriction of international human rights standards by national laws, such as those recently enacted that criminalise the existence of LGBTIQ+ individuals.[523]

Furthermore, in *Constitutional Rights Project v Nigeria*,[524] the African Commission decided that clawback clauses can, in the Nigerian context, "[…] render local remedies non-existent, ineffective or illegal. They create a legal situation in which the judiciary can provide no check on the executive branch of government".[525] In general, access to regional (quasi-)judicial mechanisms is limited in various ways,[526] including the requirement that the State concerned must have a primary opportunity to "address the alleged violation of human rights [and] thus make use of its sovereign judicial system without interference"[527] by regional and international institutions.[528] The African Commission has characterised local remedies in the African Charter as "[…] any domestic legal action that may lead to the resolution of the complaint at the local or national level".[529] However, exceptions exist, such as when "it is obvious that this procedure is unduly prolonged".[530]

---

[522] *Constitutional Rights Project [CRP] v Nigeria* (n 521), para. 40 et seq.
[523] See for example, Thoko Kaime and Isabelle Zundel, 'Anti-Homosexuality Bills are an Abuse of the Law' *African Legal Studies* (2023) <https://africanlegalstudies.blog/2023/08/11/anti-homosexuality-bills-are-an-abuse-of-the-law/> accessed 24 February 2024.
[524] *Constitutional Rights Project [CRP] v Nigeria* (n 521), para. 50.
[525] *Constitutional Rights Project [CRP] v Nigeria* (n 521), para. 50.
[526] Article 56 African Charter and Rule 118 Rules of Procedure of the African Commission
[527] Kaime and Zundel, *Let's (not) talk about the gays: Malawi's stalled attempts at decriminalisation of same-sex laws* (n 179) (forthcoming).
[528] For more details on the exhaustion of local remedies, see Chapter 6, 183 et seqq.
[529] *Anuak Justice Council v Ethiopia* [2006] ACHPR 69 Communication No. 299/05 (African Commission on Human and Peoples' Rights).
[530] Article 56 (5) African Charter

The decision of the African Commission that clawback clauses "prevent the ordinary courts from taking up cases placed before the special tribunals or from entertaining any appeals from the decisions of the special tribunals"[531] can render the local remedies non-existent, ineffective or illegal. This aligns with the African Commission's general stance, adopting a tolerant and permissive approach towards the requirement that local remedies must first be exhausted.[532] The inference drawn from clawback clauses, mitigating the need to exhaust local remedies before approaching the African Commission facilitates easier access to regional mechanisms and enhances the prospects of obtaining redress. This is particularly important in contexts where national law regularly contradicts IHRL, as in the case of SOGIESC rights.

In this regard, the African Commission's interpretation of clawback clauses anchored in the African Charter invalidates the initial critique and transforms them into an advantage. This further facilitates the claimability of SOGIESC rights through the regional normative framework by interpreting the African Charter as a more accessible system that holds States accountable and gives individuals a tool to claim in the classical sense.

4.8. Transgender women in the Maputo Protocol

The Maputo Protocol was adopted on 11 July 2003 and became effective on 25 November 2005.[533] The Protocol was created under Article 66 of the African Charter and can be considered as the African Charter's offspring due to its supplementary status.[534] The Maputo Protocol has been described as a "comprehensive and landmark instrument"[535], which addresses topics such as abortion in a radical manner. The necessity to draft the Maputo Protocol emerged out of increasing concern over the persistent violations of women's human rights in Africa.[536] Despite the existence of CEDAW at the international level, these violations continue to occur. As of May 2024, the Protocol has been ratified

[531] *Constitutional Rights Project [CRP] v Nigeria* (n 521). Special tribunals in this context are judicial bodies which are established to handle specific types of cases or issues, such as human rights violations or war crimes, that are different from those handled by the regular judiciary.
[532] Viljoen, 'From a cat into a lion? An overview of the progress and challenges of the African human right system at the African Commission's 25 year mark' (n 405), 309.
[533] Introduction to the Maputo Protocol, Frans Viljoen, 'An Introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 16 Washington and Lee Journal of Civil Rights and Social Justice 11 <https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/walee16§ion=6> accessed 15 July 2024.
[534] Adetokunbo Johnson, 'Barriers to fulfilling reporting obligations in Africa under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2021) 21(1) African Human Rights Law Journal, 177; Viljoen, 'From a cat into a lion? An overview of the progress and challenges of the African human right system at the African Commission's 25 year mark' (n 405), 300.
[535] Johnson (n 534), 189.
[536] Preamble of the Maputo Protocol

by 44 States, some of which have made reservations. For example, Ethiopia has made several reservations which mainly revolve around topics such as the inheritance rights of widows.[537]

The Maputo Protocol doesn't mention SOGIESC topics directly, just like most international human rights documents. Yet, like CEDAW, the Maputo Protocol is acknowledged for its potential to protect the rights of LGBTIQ+ individuals, a potential that to date has been underutilised.[538] Snyman and Rudman propose an "inclusive reading of the Maputo Protocol" to protect transgender women through the AHRS, on which I build my argument. They argue that

> "Article 1(k) of the Maputo Protocol defines 'women', the legal subjects of the Protocol, as persons of the female gender. [...] gender is distinct from sex, as it is a social notion through which one identifies themself.[539] From this point of departure, a person's gender identity is the terminology used to describe their gender. Thus, transgender women, because of their gender identities, are women based on their gender. Accordingly, because the definition of women in Article 1(k) is established based on gender, transgender women can and should arguably be recognised and protected under the Maputo Protocol."[540]

This reading suggested by Snyman and Rudman utilises "post-modern intersectional feminist legal theory and queer legal theory together with the teleological method of treaty interpretation".[541] The key norms in the Maputo Protocol, such as the right to non-discrimination in Article 2, the right to health in Article 14 or the prohibition of all forms of violence according to Article 4, offer a framework of protection for women, including transgender women. The right to dignity in Article 3 (3) of the Maputo Protocol "creates an obligation for State parties to recognise and protect the dignity of African transgender women".[542]

Overall, the reading of the Maputo Protocol introduced by Snyman and Rudman is a law-related form of claiming that uses an argumentative approach to crack open the normative

[537] Alebachew Birhanu, 'Reflections on Ethiopia's Reservations and Interpretive Declarations to the Maputo Protocol' (2019) Journal of Ethiopian Law 121.
[538] Tegan Snyman and Annika Rudman, 'Protecting transgender women within the African human rights system through an inclusive reading of the Maputo Protocol and the proposed Southern African Development Community Gender-Based Violence Model Law' (2022) 33(1) Stellenbosch Law Review 57, 60.
[539] See a clarification of the terms sex and gender in Annex 1, 202 et seqq.
[540] Snyman and Rudman (n 538), 67.
[541] Ibid., 59.
[542] Ibid., 68.

framework of the AHRS towards a more comprehensive promotion and protection of SOGIESC rights, in this context especially the rights of transgender women. Even though this argument has not yet been utilised in practice it is promising.

4.9. Intersectionality: Priority setting concerns[543]

Compared with other human rights systems, the AHRS exhibits distinctive features, as explored above, that are more adaptive and tailored to the specific needs of the African population.[544] This contributes to the AHRS challenging some of the usual structures of the law, such as the single-axis approach of discrimination law[545] and gives it some characteristics of effectiveness.

While the normative framework of the AHRS does not directly mention or refer to intersectionality, some provisions actively address and reflect on the lived experiences of individuals facing multiple forms of discrimination.[546] For example, the Maputo Protocol intentionally recognises the lived realities of women exposed to intersecting forms of discrimination, such as elderly women (Article 22) or women with disabilities (Article 23). In this regard, the Maputo Protocol has proven to be more inclusive and progressive than its counterpart at the UN level: CEDAW.[547] Equally, the African Disability Protocol recognises intersecting forms of discrimination for specific groups of people, such as women and girls with disabilities (Article 27), children with disabilities (Article 28), youth with disabilities (Article 29) or older persons with disabilities (Article 30).

De Beco argues that

> "while existing research affirms the potential of international human rights law to address intersectionality, it has been mainly expository and has fallen short in offering solutions to better frame, encompass and deal with instances of intersectionality".[548]

[543] Parts of this sub-section have been developed in Zundel, *A Queer Critique: Intersectionality in the African human rights system* (n 342) (forthcoming).
[544] Heyns, 'The African Regional Human Rights System: The African Charter' (n 79).
[545] Gaitho (n 343).
[546] Bond (n 350), 82.
[547] Ibid.
[548] Gauthier de Beco, 'Protecting the Invisible: An Intersectional Approach to International Human Rights Law' (2017) 17(4) Human Rights Law Review 633, 633; See also Fareda Banda and Lisa Fishbayn Joffe (eds), *Women's Rights and Religious Law: Domestic and International Perspectives* (Taylor and Francis 2016).

It is evident that the normative framework of the AHRS strives to challenge the limitations of the single-axis approach inherent in current (international human rights) law. Yet, the system selectively incorporates specific intersections, emphasising those deemed more significant and pressing for the protection of the rights of African people. Visibility of and engagement with intersecting forms of discrimination in the legal framework should be available to everyone. However, Nyeck draws attention to the prevailing priority-setting practices.[549] These also exist in the regional framework, with the result that specific groups, particularly LGBTIQ+ persons, are left vulnerable to discrimination, marginalisation, criminalisation and violence. In the human rights discourse in Africa, SOGIESC rights are not regarded as an urgent topic and are therefore not given adequate attention. In alignment with Nyeck, I emphasise the urgent need for polities to understand that SOGIESC rights are not a matter for a distant future when apparently more pressing issues, such as poverty, women's rights and child labour, have been solved.[550] The current practice ranks some issues (and people) over others in importance and urgency, ignoring the intersections and necessary concomitance of human concerns. Therefore, any genuine attempt to address the prevailing limits of the law by engaging with and adopting intersectional realities cannot see these issues as isolated points on the agenda but must realise them in their multiplicity, relationality and locationality. The AHRS must eliminate priority-setting practices and include SOGIESC rights in the normative framework in a way that does not leave it up to the engagement of individuals to see that these rights are fulfilled. The framework must reflect the fact that society's needs are manifold and intersecting. In the end, such comprehensive protection of human rights will benefit everyone, not only LGBTIQ+ people.

In general, the normative framework of the AHRS demonstrates an understanding of inclusivity that enhances its effectiveness in respect of claiming. Unfortunately, this inclusivity, especially in the sense of acknowledging intersectional realities, does not extend to SOGIESC rights. In view of the general absence of SOGIESC topics in the normative framework, it ultimately has the opposite effect.

[549] Nyeck (n 118), 121.
[550] Ibid., 121.

5. Conclusion

The above analysis of specific features of the normative framework of the AHRS, incorporating well-known interpretations of fundamental rights and unique African societal, historical and philosophical elements, reveals its general effectiveness as a normative framework not only for claiming SOGIESC rights but also for countering narratives that label such rights as un-African.[551] Especially intersectionality remains a contested space, embodying both inclusivity and limitations at the same time.

It is noteworthy that while the normative framework contains features conducive to claiming SOGIESC rights, many of these have not yet been used in practice. It remains to be seen whether the normative framework, particularly the African Charter, will be applied in the context of SOGIESC rights, or whether the perceived limitations will continue to be at the forefront. This also depends on the extent to which the institutional and procedural frameworks of the AHRS are fit for claiming. In the following chapter, I will delve into some aspects of the institutional framework.

[551] A similar observation has been made by Kaime in the context of the African Children's Charter: Kaime, 'The Foundations of Rights in the African Charter on the Rights and Welfare of the Child: A Historical and Philosophical Account' (n 408).

Chapter 5: Are the institutions of the African human rights system fit for claiming SOGIESC rights?

1. Introduction

Framed and validated by the AU institutions, three main regional institutions emerge from the normative framework of the AHRS: the African Commission, the African Court, and the African Children's Committee. These are complemented by the REC institutions. Together, all these institutions bring to life, and build upon, the normative framework and realise their mandates through procedural mechanisms. The institutional framework is confronted with the presence of systemic and systematic mass human rights violations all over the continent. These include, but are not limited to, SOGIESC rights.

According to Wachira and Ayinla, "a human rights guarantee is only as good as its system of supervision."[552] The crucial question emerges as to whether the institutions of the AHRS are fit, in their current state, for claiming SOGIESC rights. To address this, I identify the characteristics of effective institutions based on the analytical concept of claiming through the analysis of various IHRL institutions, and assess how well they align with the functions and current limitations of the institutions at stake.

The chapter is organised into five sections. After the introduction, I explore, in the second section, specific characteristics of effective institutions that promote claimability and, in turn, safeguard human rights. In the third section, I give an overview of the main institutions of the AHRS, which is not comprehensive but designed as a basis for the later analysis of the institutional framework. The fourth section analyses the institutional framework in respect of its suitability for claiming SOGIESC rights, on the basis of significant examples. In the last section, I conclude by evaluating the features and structures of the institutional framework that facilitate the claiming of SOGIESC rights.

2. What are effective institutions for claiming?

This section considers overarching characteristics that enhance the effectiveness of international human rights institutions for claiming human rights, especially SOGIESC rights.

[552] George Wachira and Abiola Ayinla, 'Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples' Rights: A possible remedy' (2006) African Human Rights Law Journal 465, 466.

As emphasised in Chapter 4, the normative, institutional, and procedural frameworks of the AHRS are closely interconnected, leading to overlaps in the analysis and characterisation of the system. This is the case because the normative framework determines the character of the institutions. As discussed above, the characteristics identified result from a basket analysis based on the analytical concept of claiming, spotlighting factors that either enhance or hinder the institution's effectiveness.[553] It is important to note that the following characteristics are not exhaustive. However, I contend that every institution should strive towards embodying these characteristics, as they are crucial for enhancing the claimability of SOGIESC rights within the regional framework.

a. **Accessible:** Institutions must be accessible to the citizens. This means direct access through the procedural mechanisms of the institutions, as well as indirect accessibility in linguistic, geographical, resource- and safety-related terms. Limitations in the accessibility of human rights institutions render the system ineffective for claiming human rights.

b. **Independent:** IHRL systems are established to promote and protect human rights in specific areas, among other objectives, by holding States accountable and providing citizens with a supra-national avenue for remedies. The realisation of this function relies on the independence of IHRL institutions. Effective IHRL institutions must operate independently, free from undue political influence, especially from State actors. This autonomy empowers them to address sensitive and contentious topics, such as SOGIESC rights, challenging the system's current state.

c. **Cooperative:** An effective architecture of institutions in IHRL systems is characterised by constant, well-functioning and inclusive cooperation among the partner institutions, as well as various other human rights actors in the system,[554] such as States, NHRIs, civil society and individuals, so that human rights challenges can be addressed in a comprehensive, intersectional and flexible manner. Such cooperation is possible only when the actors within the system are protected, facilitated, and encouraged in their interactions. These forms of cooperation allow adaptability to evolving human rights issues, enabling effective responses to emerging challenges and protecting a comprehensive spectrum of rights.

[553] See Chapter 4, 92.
[554] For more details, see Chapter 3, 83 et seqq.

d. **Expert**: The representatives of the institutions and the secretariat staff need to possess the necessary expertise in human rights law and related fields to carry out the mandate of their respective institutions effectively. Moreover, they must be adequately provided with resources to ensure they can fulfil their mandate. An institution lacking expertise and capacity cannot fulfil its mandates, making it ineffective for claiming human rights.

e. **Context specific:** The institutional framework must respond to the lived realities of the citizens it aims to govern. This is possible when the institutions are designed in light of and through historical, cultural, societal, political and philosophical characteristics. In the case of SOGIESC rights in Africa, the institutions are confronted with systemic and systematic mass human rights violations. An effective institution must adapt to such circumstances by finding context-specific solutions that advance past legal institutional transplants from allegedly more developed and superior human rights frameworks.

In the analysis below, I will examine the extent to which African regional human rights institutions embody these characteristics of effective institutions and assess whether the institutional framework is fit for claiming SOGIESC rights.[555]

3. Architecture of the institutions of the African human rights system

The normative framework is realised, applied and interpreted by its institutions. In the following section, I will give an overview of the institutional framework of the AHRS by introducing the different institutions, their mandates and working structures.

3.1. African Union institutions

The Constitutive Act of the African Union (AU Constitutive Act) establishes several intergovernmental institutions. While they are not the primary institutions of the AHRS, the following have a human rights mandate or are relevant for promoting and protecting human rights on the continent in some other way.

The Assembly of Heads of State and Government (AU Assembly) emerges from Article 6 of the AU Constitutive Act. It is the highest governing body within the AU framework,

[555] See Chapter 5, 130 et seqq.

comprising all Heads of State and Government or their representatives.[556] It ratifies human rights treaties and supervises the activities of the African Commission as stipulated in Articles 45 (4), 52, 53, 58, and 59 of the African Charter. Additionally, it holds the authority to appoint members to the African Commission by Article 33 of the African Charter, the members of the African Children's Committee according to Article 34 of the African Children's Charter and the judges of the African Court according to Article 14 of the African Court Protocol.

The Executive Council is instituted under Article 10 (1) of the AU Constitutive Act and consists of foreign ministers or other designated ministers. As outlined in Article 13 (1) of the AU Constitutive Act, it is a forum for coordinating and making decisions on policies related to common interests among Member States. In practice, the Executive Council takes over most of the AU Assembly's workload and is thus also the primary body responsible for reviewing the annual activity reports from the institutions.[557]

The Permanent Representatives Committee (PRC) is institutionalised through Article 21 of the AU Constitutive Act and consists of Permanent Representatives to the AU and additional representatives from Member States. Its primary role involves preparing the Executive Council's work. In essence, the PRC serves as a crucial intermediary body that facilitates the smooth functioning of the Executive Council by organising and executing its mandated responsibilities.[558]

The Pan African Parliament (PAP) is established through Article 17 of the AU Constitutive Act and operates under the provisions outlined in the Protocol to the Treaty establishing the African Economic Community concerning the Pan-African Parliament (PAP Protocol). Among its functions and powers, articulated in Article 11 (1) of the PAP Protocol, PAP has the authority to scrutinise, deliberate, or express opinions on various matters, including making recommendations on issues of human rights. Nevertheless, Ncube

[556] For more details on the AU Assembly, see Joram Biswaro, 'Structure and Organs of the African Union The Assembly, Executive Council and Commission' in Abdulqawi Yusuf and Fatsah Ouguergouz (eds), *The African Union: Legal and institutional framework, a manual on the Pan-African Organization* (Brill 2012).
[557] African Union, 'The Executive Council' <https://au.int/en/executivecouncil> accessed 6 July 2024.
[558] For more details on the importance of the PRC, see Jacob Lisakafu, 'Exploring the role and place of the Permanent Representative Committee within the African Union' (2016) 23(2) South African Journal of International Affairs 225.

argues that its normative framework is weak and does not currently have the capacity to contribute "meaningfully to the human rights agenda on the continent".[559]

The AU Commission, established under Article 20 of the AU Constitutive Act, undertakes the day-to-day activities of the AU and thus functions as its secretariat. The AU Assembly elects the Chairperson of the AU Commission and has established the AU Commission's functions and working structures.[560] One of the functions of the AU Commission is to manage the AU budget and harmonise programmes and policies.

The Peace and Security Council (PSC) is a "standing decision-making organ for the prevention, management and resolution of conflicts" as stipulated in Article 2 (1) of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union. The protocol was adopted by Article 5 (2) of the AU Constitutive Act. Consisting of 15 members elected from among the AU Member States, the PSC holds a crucial mandate concerning governance, democracy, and human rights.[561]

Overall, the AU institutions are integral to the regional human rights architecture. An effective institutional framework for claiming human rights must ensure the seamless coordination, collaboration and dedication of all institutions involved. These efforts must converge and function cohesively to uphold and protect human rights effectively.

3.2. African Commission on Human and Peoples' Rights

The African Commission is the central institutional pillar on the regional level, established through Articles 30 et seq. of the African Charter. It was inaugurated in 1987 and is located in Banjul, the Gambia. The institution has eleven Commissioners, whom the AU Assembly elects for six years[562] from a list of nominees provided by the State parties.[563]

[559] Swikani Ncube, 'Human rights enforcement in Africa: Enhancing the Pan-African Parliament's capacity to promote and protect human rights' (2020) 20(1) African Human Rights Law Journal 103, 103.
[560] For more about the AU Commission and its staffing and recruitment situation, see Thomas Tieku, Stefan Gänzle and Jarle Trondal, 'People who run African affairs: staffing and recruitment in the African Union Commission' (2020) 58(3) The Journal of Modern African Studies 461.
[561] See Solomon Dersso, 'The Role and Place of Human Rights in the Mandate and Works of the Peace and Security Council of the AU: An Appraisal' (2011) 58(01) Netherlands International Law Review 77; Kathryn Sturman and Aïssatou Hayatou, 'The Peace and Security Council of the African Union: From Design to Reality' in Ulf Engel and Joao Porto (eds), *Africa's new peace and security architecture: Promoting norms, institutionalizing solutions* (Routledge 2016).
[562] Article 36 African Charter
[563] Article 33 African Charter

The Secretariat of the African Commission is responsible for providing administrative and technical support. Appointed by the Chairperson of the AU Commission, the Secretary, along with other support staff, play a vital role in ensuring that the African Commission can carry out its mandate effectively.[564] This includes close cooperation with other human rights actors to promote awareness and understanding of human rights issues.[565]

The African Commission is responsible for monitoring the implementation of the African Charter and its subsidiary Protocols.[566] According to Article 45 of the African Charter, its mandate is divided into four parts. Firstly, it promotes human and peoples' rights through various activities, such as information dissemination and organisation of seminars. Secondly, it protects human and peoples' rights "under conditions laid down by the present Charter".[567] This responsibility includes overseeing the communication procedure and implementing special mechanisms. In the realm of the communication procedure, the African Commission functions as a quasi-judicial body, issuing recommendations to the AU Assembly, according to Articles 52, 53 and 58 (2) of the African Charter.[568] Thirdly, the African Commission interprets and clarifies the African Charter and the Maputo Protocol upon request. Fourthly, the African Commission undertakes any other task that the AU Assembly has entrusted it with.[569] Overall, realising the African Commission's mandates becomes possible through the procedural mechanisms available to the institution.

The African Commission's operational framework primarily centres on Sessions, which encompass Ordinary and Extraordinary Sessions. The first part of the Ordinary Session is held publicly, allowing NGOs, observers, and other interested parties to participate. The second part is conducted privately and is only open to the Commissioners and the Secretariat.[570] The agenda is pre-determined due to the African Commission's fixed activities, such as considering periodic reports in the public part. Between the Sessions, the African Commission undertakes activities such as promotional and fact-finding missions or the organisation of stakeholder meetings.[571]

[564] Article 41 African Charter
[565] Interview with E11.
[566] Amnesty International, 'A guide to the African Commission on human and peoples' rights' (2007) <https://www.amnesty.org/en/wp-content/uploads/2021/07/ior630052007en.pdf> accessed 30 March 2023.
[567] Article 45 (2) African Charter
[568] Viljoen, *International Human Rights Law in Africa* (n 3), 411.
[569] Article 45 (4) African Charter
[570] Murray and Viljoen (n 7), 101.
[571] Amnesty International (n 566), 17.

3.3. African Court on Human and Peoples' Rights

In 1994, the Secretary General was tasked with examining the creation of the African Court to further develop the AHRS, especially enhancing the African Commission's efficiency.[572] Four years later, the African Court Protocol establishing the African Court was adopted. The African Court Protocol entered into force in 2004 with the ratification of 15 States, and the African Court commenced its activities in 2006 with the inauguration of eleven judges in Arusha, Tanzania.[573] As of May 2024, 33 Member States have ratified the African Court Protocol.[574]

According to Article 2 of the African Court Protocol, the African Court is intended to "complement the protective mandate of the African Commission".[575] The judicial body of the AHRS has jurisdiction to hear all cases and disputes related to the interpretation and application of the African Charter, the African Court Protocol and other relevant human rights instruments ratified by the State concerned, establishing a wide jurisdiction.[576]

3.4. African Committee of Experts on the Rights and Welfare of the Child

The African Children's Committee is a specialised body established under Article 32 of the African Children's Charter. It was formed in 2001 and became operational in 2003.[577] Since 2020, its headquarters have been in Maseru, Lesotho, and by May 2024 it had garnered 51 ratifications. Overall, its structures and mandates are similar to those of the African Commission. Therefore, the possibilities to utilise and interact with the treaty body are similar, only that the African Children's Committee focuses thematically on children's rights.

Its primary mandate is to promote and protect implementation of the African Children's Charter by the State parties.[578] Regarding its promotional mandate, the African Children's Committee raises awareness and understanding of the African Children's Charter, encourages research on children's rights and provides technical assistance to State parties

[572] Resolution on the African Commission on Human and Peoples' Rights 1994, AHG/Res.230 (XXX) (Assembly of Heads of State and Government of the Organization of African Unity)
[573] Viljoen, *International Human Rights Law in Africa* (n 3), 413.
[574] African Court on Human and People's Rights, 'Basic Information: The African Court on Human and Peoples' Rights (the African Court) in brief' <https://www.african-court.org/wpafc/basic-information/#ratification> accessed 14 March 2024.
[575] Viljoen, *International Human Rights Law in Africa* (n 3), 414.
[576] Article 3 (1) African Court Protocol
[577] Amanda Lloyd, 'Evolution of the African Charter on the Rights and Welfare of the Child and the African Committee of Experts: Raising the gauntlet' (2002) 10(2) The International Journal of Children's Rights 179, 187.
[578] Articles 42 et seq. African Children's Charter

upon request. It receives periodic State reports on the implementation of the African Children's Charter and conducts inquiries into violations of children's rights.[579] Additionally, under its protective mandate, the African Children's Committee is entrusted with receiving communications from individuals, NGOs, or groups of individuals who wish to claim that their rights under the African Children's Charter have been violated by a State party.[580] According to Article 45 (2) of the African Children's Charter, all these activities have to be reported to the AU Assembly.

3.5. Regional Economic Community Institutions

Among the key institutions established by sub-regional normative frameworks are the respective judicial bodies.[581] They enforce and uphold the normative principles embedded in the treaties.[582] The East African Court of Justice (EACJ), the ECOWAS Court, and formerly the SADC Tribunal, have played an important role in protecting human rights within their respective regions by hearing cases and issuing judgments that uphold human rights principles.[583] In the following discussion, I will continue to focus on the judicial bodies of the EAC and ECOWAS to explore the institutional framework at the sub-regional level.

According to Article 27 (2) of the EAC Treaty, the "Court shall initially have jurisdiction over the interpretation and application of this Treaty" and "shall have such other original, appellate human rights and other jurisdiction as will be determined by this Council at a suitable subsequent date".[584] Thus, the EACJ does not have human rights jurisdiction in the first place, but Partner States can confer jurisdiction in human rights issues. As of May 2024, the EACJ has not yet been given such explicit human rights jurisdiction. Article 27 (1) of the EAC Treaty confers jurisdiction upon the EACJ for the "interpretation and application of this Treaty". Article 6 (d) of the EAC Treaty outlines the "fundamental

[579] Kaime, *The African Charter on the Rights and Welfare of the Child: A socio-legal perspective* (n 391), 143.
[580] Article 44 African Children's Charter
[581] In addition to the judicial bodies, the RECs have established other institutions, such as the Summit of the Heads of States, which provide guidance and direction on human rights issues as high-level political forums or legislative assemblies and ensure the conformity of national laws and policies with human rights standards.
[582] Jjuuko, 'The protection and promotion of LGBTI rights in the African regional human rights system: opportunities and challenges' (n 6), 266.
[583] Ibid; Murungi and Gallinetti (n 411), 119.
[584] The EAC operates through various institutions, including the EAC Secretariat, the Council of Ministers, the East African Legislative Assembly, and the EACJ. For more about the institutions of the EAC, see Hagabimana, 'A legal analysis of the relationship between state sovereignty and regional integration' (n 415), 262 et seq.

principles governing the achievement of the objectives of the Community", which include the "promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights".[585] This calls into question the extent of the EACJ's jurisdiction concerning human rights issues. In *Katabazi and others v Secretary General of the East African Community and Another (Uganda)*, the EACJ determined that it could "consider human rights issues by virtue of Article 6 (d) if what is raised is not a violation of human rights per se but rather a violation of the treaty provision".[586]

The second example of the institutional framework at the sub-regional level is ECOWAS.[587] The ECOWAS Court is a judicial body established under Article 15 of the ECOWAS Treaty and Protocol A/P.1/7/91 on the Community Court of Justice (ECOWAS Court Protocol). Through the Supplementary Protocol L A/SP.1/01/05 Amending the Preamble and Articles 1, 2, 9 and 30 of Protocol A/P.1/7/91 relating to the Community Court of Justice and Article 4 Paragraph 1 (2005 Supplementary Protocol), the mandate of the ECOWAS Court has been expanded to "determine case[s] of violation of human rights that occur in any Member State"[588] and hear disputes between Member States, as well as disputes between individuals and Member States.[589]

3.6. Concluding remarks

The institutional framework of the AHRS has been designed and further developed over the years, so that it has evolved into a comprehensive architecture mirroring its international and regional counterparts to promote and protect human and peoples' rights. The institutional framework of the AHRS is based on three main institutions: the African Commission, the African Children's Committee, and the African Court, which

[585] Article 6 (d) EAC Treaty
[586] *Katabazi and others v Secretary General of the East African Community and Another (Uganda)* (2007) AHRLR 119 (East African Court of Justice).
[587] The institutional framework of ECOWAS consists of the Commission of the Economic Community of West African States (ECOWAS Commission), the ECOWAS Parliament, the ECOWAS Court, and more specialised agencies. The ECOWAS Commission was transformed from the ECOWAS Secretariat in 2007 to adapt to economic growth and create an environment conducive to development and integration. Today, the ECOWAS Commission executes ECOWAS policies, decisions, and programmes; Gilles Yabi, 'The role of ECOWAS in managing political crisis and conflict' (2010) <https://library.fes.de/pdf-files/bueros/nigeria/07448.pdf> accessed 15 July 2024.
[588] Article 3 (4) of the 2005 Supplementary Protocol
[589] Article 4 of the 2005 Supplementary Protocol

complement each other and partly overlap in their mandates.[590] They are framed above and below by the AU and REC institutions. In the following section, I will analyse the effectiveness of the institutional framework for the claimability of human rights on paper and in practice. While I put a special focus on the African Commission and the African Court, the African Children's Committee and the REC Courts will also form part of the analysis.

4. Analysis of the (in)effectiveness of the institutional framework

Above, I have identified characteristics that are important for the effectiveness of institutional frameworks for claiming SOGIESC rights. I will now examine the institutional framework of the AHRS through the lens of some of these criteria.

4.1. Indirect Accessibility

The institutions of the AHRS and their procedures must be accessible to African citizens to facilitate their ability to claim SOGIESC rights. I distinguish here between direct and indirect access. This chapter will only focus on indirect accessibility, as direct accessibility will be discussed in relation to the protective mandate in the procedural framework.[591] Through my interviews, I have identified four factors that indirectly impact the accessibility of the institutions: linguistic, geographical, resource- and safety-related considerations.[592] I will explore these four factors and their interconnectedness before making some concluding remarks.

4.1.1. Language barrier

Language is a determining factor in shaping distance or fostering proximity. While the continent is home to countless different languages, its institutions have, by default, decided on a fixed number of working languages. According to Rule 21 of the Revised Rules of Procedure of the African Committee of Experts on the Rights and Welfare of the Child (Rules of Procedure of the African Children's Committee), the working languages are those of the AU. The working languages of the African Commission are also those of

[590] For example, by establishing the African Court, certain constraints faced by the African Commission have been effectively addressed. Nevertheless, the African Court is continuously criticised regarding its caseload, effectiveness, and accessibility. See for example, Tom Daly and Micha Wiebusch, 'The African Court on Human and Peoples' Rights: mapping resistance against a young court' (2018) 14 International Journal of Law in Context 294.
[591] See Chapter 6, 181 et seqq.
[592] I do not claim that there are no other factors.

the AU according to Rule 38 (1) of the Rules of Procedure of the African Commission. According to Article 11 of the Protocol on the Amendments to the AU Constitutive Act, the official languages of the AU and all its institutions are Arabic, English, French, Portuguese, Spanish, Kiswahili and any other African language. The Executive Council is responsible for determining "the process and practical modalities for the use of official languages as working languages".[593] The African Court differentiates between official and working languages. While the official languages of the African Court are those named above, its working languages are only Arabic, English, French and Portuguese.[594] People appearing before the African Court can use a language of their choice if they do "not have sufficient knowledge of any of the working languages".[595] The arrangements and costs for translation lie then with the African Court.[596] This provision is accommodative and inclusive and reflects a general tendency towards a more inclusive use of languages. However, in practice, all institutions continue to use English as the primary language for documentation and communication. While efforts are made to translate certain documents into additional languages, typically French, Arabic and Portuguese, this continues to be an exception, which significantly impedes access for many individuals across Africa. While the administrative costs of translation are an obvious factor, the inherent language barrier seriously affects access to the institutions.

The language barrier also restricts the dissemination of and access to information. I believe that a more versatile and proactive use of African languages, as provided for in the normative framework, could significantly enhance the dissemination of information among African citizens. Regarding information and knowledge about human rights, one of my interview partners comments:

> "The entire AU architecture is very distant from African citizens. One realises that African citizens don't know much about the African Union. They don't know much about the AU organs and what they do. […] I think before we talk about the [geographical] distance […] we actually have to know about that lack of information amongst African citizens."[597]

[593] Article 11 (2) Protocol on the Amendments to the Constitutive Act of the African Union
[594] Rule 27 Rule of the Court
[595] Rule 27 (3) Rule of the Court
[596] Rule 27 (3) Rule of the Court
[597] Interview with E11.

The absence of courses on the AHRS in the law curriculum of most African countries further exacerbates the knowledge gap in respect of aspects of the AHRS.[598] The lack of information is also a central aspect of the narrative shared by one of my interview partners regarding their colleague:

> "I was talking to my colleague who went this week [to the Session of the African Commission], and he told me the first time he went, he felt like someone who didn't know how to swim and was just thrown into the river. […] He was learning by coming to these spaces over and over. Actually, the first time he felt like he knew what he was doing was the third time he was in this space. Nobody even gave him any training or anything about what was going on there. What should one expect? What should one be aware of? What are the spaces?"[599]

There is a deficiency in focus and understanding of the regional system, highlighting an urgent requirement across the continent for dissemination of information through training and workshops on the operation of these institutions, tailored to the respective circumstances of the audience. Overall, the persistent language barrier, which IHRL institutions worldwide have to overcome, significantly affects accessibility to information about the AHRS and to the institutions themselves for most African citizens, which in turn reduces the effectiveness of the institutional framework for claiming SOGIESC rights.

4.1.2. Physical distance

The second factor impacting the accessibility of the institutions is physical distance. IHRL institutions typically have a permanent location. For example, the African Commission is located in Banjul, the Gambia. While the choice of locations for the institutions of the AHRS surely has political merits, their distance from the majority of African citizens, particularly in the case of the African Commission, makes access a permanent concern. "The Gambia is physically a very distant place from most places",[600] and at the same time, "physical presence is so important for civil society"[601] and advocacy work. This raises the question of what opportunities exist to mitigate the challenges posed by physical distance that IHRL institutions worldwide face. The COVID-19 pandemic has forged

[598] Interview with E10.
[599] Interview with E3.
[600] Interview with E11.
[601] Interview with E6.

new avenues for remote engagement and collaboration. In the context of regional human rights systems, one of my interview partners says:

> "COVID offered an opportunity because many more things have moved online. Consequently, society can engage much more with regional human rights systems than before. There's always a possibility of engaging in hybrid mode in one way or another. For example, in the Inter-American system, COVID has offered an opportunity that is not present in the African system, mostly because of accessibility and infrastructure. In Africa, not many people have good internet access to engage. So basically, it's a question of resources. It's always a question of resources first."[602]

Recent public Ordinary Sessions of the African Commission have been officially live-streamed, making them accessible online. This aligns with Rule 27 (3) of the Rules of Procedure of the African Commission, which says, "whenever possible, session proceedings may be made available to the public through live transmission". While this represents a significant advancement in accessibility, attention must be given to the technical infrastructure and commitment of the institutions, as well as the necessary resources of the individuals and civil society involved. Otherwise, the opportunity offered to follow the sessions from any place is rendered ineffective and physical distance remains a problem.

The African Court, located in Arusha, Tanzania, can, according to Rule 24 of the Rules of the Court, "[…] decide to sit [during sessions] in the territory of any other Member State of the African Union, or in exceptional circumstances or *force majeure*, hold a Virtual Session". This provision offers a possibility to mitigate the challenges posed by physical distance, for example, through a system of periodic relocation. I believe such a system provides the opportunity when used to establish specific outreach programmes that enhance accessibility and engagement with IHRL institutions and thus reduce the real and perceived distance from the African people. The African Commission also holds its Sessions at different locations from time to time. For example, the 60th Ordinary Session in May 2017 took place in Niamey, Niger, the 22nd Extraordinary Session in August 2017 in Dakar, Senegal, the 62nd Ordinary Session in May 2018 in Nouakchott, Mauritania, the 64th Ordinary Session in May 2019 in Cairo, Egypt and the 77th Ordinary Session in November 2023 in Arusha, Tanzania.[603] This shows that the regional institutions are taking

[602] Interview with E6.
[603] African Commission on Human and Peoples' Rights, 'Past Sessions' <https://achpr.au.int/en/sessions/past> accessed 30 March 2024.

initial steps to address the physical distance by holding their sessions in various locations and live-streaming them. It will be necessary to strengthen these efforts in line with the African context to mitigate the problem of physical distance and make the institutional framework more effective.

4.1.3. Resource-related considerations

The third factor, closely linked to physical distance, is the availability of resources. This affects individuals and NGOs at various levels, raising the following questions: Who can afford the expenses of travelling and attending sessions of a regional institution? Which organisations possess the personnel, financial, and time resources to participate in regional advocacy and litigation? Most NGOs must align their operations with the international funding landscape, and only a select few have the financial and personnel capabilities to engage in regional SOGIESC advocacy. One of my interview partners expands on this:

> "There is a disconnect between these bodies, where they sit and what they say to the actual people on the ground. So even for LGBTIQ+ people, even for other communities in Africa, even those of us who go to these bodies, we are alien and removed from our communities. Who can buy an air ticket to Banjul, New York or Geneva to discuss human rights? No common person. And so, I think it is important for the human rights system to work but also, they have to think within the parameters of the countries as such."[604]

Another perspective highlights resource constraints in terms of time:

> "There is obviously the question of time. If I am a local civil society organisation or a community-based organisation, do I really want to invest in a process that may take, if one is lucky, eight years to reach Resolution 275?"[605]

Most non-international civil society organisations do not have the resources and capacities to engage in such a lengthy process. An interview partner made the following observations concerning the personnel and financial resources of emerging local SOGIESC organisations:

[604] Interview with E1.
[605] Interview with E6.

> "Some of the emerging LGBT organisations have little capacity even to understand how they can use local domestic legal mechanisms. They cannot proactively use those mechanisms unless donors come and say: We have happened to hear about this case. Do you know that you can actually pursue the case in court? Do you know that you can join as friends of the court? Do you know that you can receive observer status in the economic, social and cultural rights committee? Do you know that you can get observer status with the African Commission? Do you know about the mechanisms of the African Commission? […] They [local organisations] don't have the capacity for those human rights mechanisms."[606]

In view of this observation, it is essential for the institutions of the AHRS, the international funding scheme and well-established organisations to facilitate and encourage regional advocacy at the grass-roots level through the allocation of financial, personnel and all other resources.

Focussing on the protective mandate of the African Children's Charter, Kaime provides a critical view of the domestication and justiciability efforts of the African Children's Committee to make the institution and its mechanisms accessible "because of various structural and institutional reasons".[607] Kaime argues that the protective mandate as a model of legal protection is not accessible:

> "Justiciability also assumes that potential victims can afford to pay for or have alternative means of support for access to legal services; that the judiciary is independent and effective; that government officials will comply with judicial orders; and so forth. In the context of children's rights protection in a poor economy such as Malawi and indeed, many other African countries, this model of legal protection is not only limited, exclusive, expensive and inaccessible to most African children and their families, but it is also limited in its ability to inculcate a general culture of respect for the rights and welfare of the child […]."[608]

It becomes evident that regional institutions and their mandates are not accessible to everyone for a multitude of reasons, including resource-related considerations. Only a very limited group of citizens and organisations can access and advocate for rights before these

[606] Interview with E9.
[607] Kaime, *The African Charter on the Rights and Welfare of the Child: A socio-legal perspective* (n 391), 144.
[608] Ibid., 145.

institutions which conflicts with the existence of systemic and systematic massive human rights violations. In line with this observation, another interview partner says:

> "The Commission should transform itself, so that it is available to us in a way that is much easier accessible and more friendly. Of course, they help in attempts through the NHRIs and civil society, but I think it's not enough. It's only the beginning. More needs to be done."[609]

In light of these observations, it becomes obvious that resource-related concerns, especially in the socio-economic contexts of Africa, significantly shape the possibilities for individuals and NGOs to claim SOGIESC rights at the regional level, which ultimately affects the institutions' effectiveness for claiming rights.

4.1.4. Safety at the institutions

Finally, the institutions must be safe spaces, especially for individuals and NGOs working on SOGIESC topics. Only when the spaces are safe, allowing LGBTIQ+ individuals to attend sessions without fearing repercussions upon returning to their home countries, can they truly benefit from the regional system.

> "It's very frustrating. It's not easy to navigate. You always have to compromise something to be in these spaces, whether it's your safety, security, well-being or your mental health. But it is important. We have to challenge these spaces. And there are always hidden opportunities. There is no other way. If you decide not to be in these spaces, you will miss these opportunities."[610]

The same interview partner, who has been engaged in SOGIESC advocacy at the national and international levels for two decades, observes:

> "I'm very passionate about what I am doing but it's crazy. I know it's risky. I think I just developed the sense that I always have to make a balance between my passion to do my activism and my safety and security."[611]

It is evident that regional institutions must confront existing barriers within regional spaces to ensure the safety of human rights actors engaged with them, particularly advocates for SOGIESC rights whose challenges are exacerbated. Failure to do so indirectly

[609] Interview with E11.
[610] Interview with E3.
[611] Interview with E3.

restricts the accessibility of institutions for people wishing to claim SOGIESC rights, making them ineffective for claiming such rights.

4.1.5. Concluding remarks

In conclusion, the analysis has shown that linguistic, geographical, resource- and safety-related considerations significantly shape the indirect accessibility of regional institutions. The institutions of the AHRS are distant in various ways; as a result, awareness of their existence and activities, such as decisions and roles, is limited. In Chapter 6, the results of the analysis of indirect accessibility will be combined with a discussion on the direct accessibility of the procedural mechanisms. It will become even more evident that, for example, the complaint mechanism[612] does not appear to be an accessible and realistic option for most citizens wishing to claim their rights.[613] This is the case in all human rights institutions worldwide but when it comes to the embeddedness of the institutions in the African context, it becomes clear that the institutions have not taken enough measures to adapt to the specific socio-economic background and needs of the continent. In this respect, the institutional framework falls behind the normative framework of the AHRS in terms of its effectiveness for claiming SOGIESC rights. To overcome this distance, ensure better accessibility for all and make the institutional framework more effective for claiming SOGIESC rights, "the voices of the communities, the actual people [have to be brought] to the regional institutions".[614] It falls upon the institutions to facilitate this process through context-specific measures.

4.2. The 'perfect storm': (In)dependence of the African Commission

The institutions of the AHRS must be independent to be effective in respect of claiming SOGIESC rights. Yet, the regional human rights treaty bodies find themselves in a paradoxical situation regarding their relationship with the African Union and their independence.[615] The following discussion will centre on the African Commission, given the past instances of direct threats to its independence, intriguingly linked to SOGIESC advocacy. The question at hand is whether the African Commission is independent (enough) from

[612] For more details, see Chapter 6, 181 et seqq.
[613] Viljoen, 'From a cat into a lion? An overview of the progress and challenges of the African human right system at the African Commission's 25 year mark' (n 405), 308.
[614] Interview with E10.
[615] Kamunyu (n 400), 2.

the political bodies of the AU to effectively carry out its mandates and enable the claiming of SOGIESC rights.

4.2.1. Relationship with the African Union

Article 30 of the African Charter states that the African Commission is "established within the Organization of African Unity". The institution is assigned a number of functions, including the protective mandate to "ensure the protection of human and peoples' rights under conditions laid down by the present Charter," as stated in Article 45 (2) of the African Charter. The African Commission identifies itself in the Rules of Procedure of the African Commission as an independent body free from interference and influence in the execution and implementation of its mandates. Chapter 2, Rule 3 (1) of the Rules of Procedure of the African Commission states that,

> "in accordance with Articles 30 and 45 of the African Charter, the African Commission is an autonomous treaty organ with the mandate of promoting human and peoples' rights and ensuring the protection of human and peoples' rights in Africa".[616]

Yet, the African Commission and its activities do not operate in a vacuum; they are embedded within the AU architecture. For example, according to Article 33 of the African Charter, the Commissioners of the African Commission are nominated by the State parties and elected by the AU Assembly. The Secretariat of the African Commission is appointed by the Chairperson of the AU and financed through the AU.[617] Further, the African Commission has to report its activities under the protective mandate to the AU Assembly, according to Article 52 and Article 59 of the African Charter.[618] Its findings and recommendations have to be considered by the AU Assembly before adoption and publication. When the AU Assembly has adopted the decisions of the African Commission through its Annual Report, they are binding.[619] In view of this, Viljoen argues that the

[616] The African Charter addresses the independence of the Commissioners only in Article 31 of the African Charter.
[617] Article 41 African Charter
[618] For more about the critical interpretation of Article 59, see Magnus Killander, 'Confidentiality versus publicity: interpreting article 59 of the African Charter on Human and Peoples' Rights: recent developments' (2006) African Human Rights Law Journal 572.
[619] Rachel Murray and Elizabeth Mottershaw, 'Mechanisms for the Implementation of Decisions of the African Commission on Human and Peoples' Rights' (2014) 36(2) Human Rights Quarterly 349 <http://www.jstor.org/stable/24518058> accessed 15 July 2024.

> "[African] Commission was not designed to fit the image of a powerful and awe-inspiring sentinel. Especially its ambiguous protective mandate, weakened by the recommendatory status of its findings, the requirement of awaiting an Assembly 'request' before investigating any 'series of massive or serious violations' and the lack of any explicit competence to recommend precautionary or remedial measures, belie this image."[620]

Ssenyonjo further critiques:

> "The insufficient funding of the Commission from the member States budget and human crisis at the Commission's Secretariat, impedes the Commission's capacity to follow-up on implementation as it prevents the Commission from developing effective follow-up of its findings during country visits, and recommendations arising from its findings, resulting in the overall weakening of the effectiveness of the Commission."[621]

It becomes clear that the African Commission is deeply embedded in, and to some extent dependent on, the AU architecture. In this regard, Mute proposes to distinguish between the substantive and functional independence of the African Commission.[622] The normative framework not only exposes ambiguities but also makes the African Commission vulnerable to resistance from State parties, either directly or indirectly through the political bodies of the AU. This resistance will be evident in the culmination of the 'perfect storm' that has been gathering momentum in recent years, demonstrating that the African Commission's functional independence has been under serious threat.

4.2.2. The 'perfect storm'

Kamunyu reasons that at the beginning of its operations, the African Commission acted cautiously, often to the disadvantage and regret of those facing human rights violations by their respective States, and of human rights advocates.[623] However, over time, particularly following the establishment of the AU in 2002, it became stronger and more

[620] Viljoen, 'From a cat into a lion? An overview of the progress and challenges of the African human right system at the African Commission's 25 year mark' (n 405), 299.
[621] Manisuli Ssenyonjo, 'Responding to Human Rights Violations in Africa' (2018) 7(1) International Human Rights Law Review 1, 41.
[622] Mute (n 158).
[623] Kamunyu (n 400), 1.

forward in its behaviour towards the States and the performance of its mechanisms, much to the dissent of some States.[624]

Since the African Commission has only limited enforcement and follow-up mechanisms,[625] the institution must rely on the State party's willingness to cooperate in the first place. In general, promoting and protecting human and peoples' rights should be in everyone's interest. Especially for the States, this results from the commitment they have made by ratifying the African Charter. However, according to Kamunyu, the reality is different. States have different behaviours towards the African Commission and its activities, and hostile, disengaged or indifferent behaviour can be attributed to "insincere ratification or commitment",[626] among other things.[627] This insincere commitment is further evidenced when nations allegedly perceive themselves as targets of scrutiny by the African Commission, prompting them to challenge its independence.

One of my interview partners used the metaphorical concept of a 'perfect storm' to describe the developments around the Coalition of African Lesbians (CAL), accompanied by some incidents that further challenge the African Commission's independence as well as diminish the human rights space in Africa.[628] Unfortunately, SOGIESC rights had to serve as the scapegoat in this 'perfect storm'.

> "That moment [of the CAL decision] coincided with the concern of a number of conservative states around the mandate of the African Commission. That had nothing to do with sexual orientation and gender identity, but it was very convenient to use that argument […]."[629]

During the 44th Ordinary Session 2008, CAL initially applied for observer status with the African Commission.[630] After two referrals, the application was vigorously discussed during the 46th public Ordinary Session and then referred once more. During the next Session, the 'LGBTI lobby' was invited for a discussion with the Commissioners.[631] After the discussion, the African Commission denied the application, arguing in its Activity Report

[624] Viljoen, 'From a cat into a lion? An overview of the progress and challenges of the African human right system at the African Commission's 25 year mark' (n 405), 299 et seq.
[625] Viljoen, *International Human Rights Law in Africa* (n 3), 340 et seq.
[626] Reasons for this could be the expectation of benefits with ratification, such as positive publicity or external funding, or the desire to neutralise and hide internal political or human rights problems.
[627] Kamunyu (n 400), 3.
[628] Interview with E6.
[629] Interview with E6.
[630] Ndashe (n 150), 27.
[631] For more about the discussion, see ibid., 28.

that "the activities of the said Organisation do not promote and protect any of the rights enshrined in the African Charter".[632] According to Viljoen, the decision was "indefensible in light of the developments in the African human rights system and other regional and international systems".[633]

The denial was countered by solidarity from civil society demanding reconsideration of the decision, which ultimately led to the development of a joint and transdisciplinary movement.[634] For example, during the 48th Ordinary Session, many organisations made statements to the African Commission condemning the decision.[635] When Resolution 275 - the outstanding milestone for SOGIESC rights - was adopted in 2014,[636] CAL felt encouraged to reapply for observer status.[637] After the decision on the second application had been made in a private Session, the Chair of the African Commission asked the Commissioners in the subsequent 56th public Ordinary Session to share their thoughts again, effectively reopening the discussion. The contributions in this public discussion revealed "hostility and hate speech by some of the Commissioners".[638] Nevertheless, in the end, five out of the nine Commissioners present voted in support of the application of CAL, and with that, the observer status was granted.

Afterwards, the Executive Council discussed the decision on the 38th Activity Report of the African Commission – which includes the decision on CAL's application for observer status – and requested

> "the [African Commission] to take into account the fundamental African values, identity and good traditions, and to withdraw the observer status granted to NGOs who may attempt to impose values contrary to the African values; in this regard, requests the [African Commission] to review its criteria for granting Observer Status to NGOs and to withdraw the observer status granted to the Organization called CAL, in line with those African Values".[639]

---

[632] African Commission on Human and Peoples' Rights, '28th Activity Report of The African Commission on Human And Peoples' Rights (ACHPR): 28th Activity Report of the ACHPREX.CL/600(XVII)' (2010) <https://www.achpr.org/activityreports/viewall?id=28> accessed 10 February 2021, para. 33.
[633] Viljoen, *International Human Rights Law in Africa* (n 3), 267.
[634] Sekyiamah (n 361).
[635] Ndashe (n 150), 31.
[636] For more about Resolution 275, see Capter 6, 167 et seqq.
[637] Interview with E6.
[638] Sekyiamah (n 361).
[639] Executive Council of the African Union, 'Decision on the thirty-eighth activity report of the African Commission on Human and Peoples' Rights Doc.EX.CL/921(XXVII): EX.CL/Dec.887(XXVII)' <https://portal.africa-union.org/DVD/Documents/DOC-AU-DEC/EX%20CL%20DEC%20887%20(XXVII)%20_E.pdf> accessed 11 February 2021.

In response, the African Commission communicated its review of the criteria for granting observer status in the 43rd Activity Report, but turned down the request by the Executive Council to withdraw the observer status.[640] Thereupon, during its 33rd Ordinary Session, the Executive Council passed a Decision on the Report on the Joint Retreat of the Permanent Representatives' Committee (PRC) and the African Commission (Decision 1015), which set a deadline for the African Commission to withdraw the observer status of CAL by the end of 2018.[641] This put the African Commission in a tricky position. On the one hand, there was the risk of compromising its credibility and independence, which was crucial for fulfilling its mandate. On the other hand, its mandate and resources emanate from the AU architecture and the State parties represented in the Executive Council. In August 2018, the African Commission withdrew the observer status of CAL.[642]

Beyond the matter of the observer status of CAL, Decision 1015 revealed the political dilemma in which the African Commission finds itself, and raised serious concerns about its independence and prospects.[643] Firstly, in Paragraph 5, the Executive Council

> "underlines that the independence enjoyed by [the African Commission] is of functional nature and not independence from the same organs that created the body, while expressing caution on the tendency of the [African Commission] acting as an appellate body, thereby undermining national legal systems".

Secondly, under Paragraph 7 (iii), the Executive Council requests the State Parties to "conduct an analytical review of the interpretative mandate of [African Commission] in the light of a similar mandate exercised by the African Court and the potential for conflicting jurisprudence." Further, in Paragraph 8 (iv) the African Commission was requested to:

> "submit to the policy organs for consideration and adoption the revised criteria for granting and withdrawing observer status for Non-Governmental Organizations

[640] African Commission on Human and Peoples' Rights, '43rd Activity Report of the African Commission on Human and Peoples' Rights'.
[641] Executive Council of the African Union, 'Decision on the Report on the Joint Retreat of the Permanent Representatives' Committee (PRC) and the African Commission: EX.CL/1089 (XXXIII)', II (8).
[642] For more details on the general processes around observer status at the African Commission, see Chapter 6, 173 et seqq.
[643] EX.CL/Dec.1015(XXXIII) – Decision by the Executive Council of the African Union on the Joint Retreat of the Permanent Representatives' Committee (PRC) and the African Commission on Human and Peoples' Rights (ACHPR), DOC.EX.CL/1089(XXXIII).

(NGOs), which should be in line with the already existing criteria on accreditation of NGOs to the AU, taking into account African values and traditions".

Overall, according to a summary analysis of the Coalition for the Independence of the African Commission (CIAC), an organisation that was founded in response to Decision 1015, this decision "threatens the existence of a supra-national, independent regional system, which has been established to oversee compliance with human and peoples' rights".[644] For SOGIESC advocacy, the decision has challenged the engagement of civil society with the AHRS and has triggered the onset of a 'perfect storm', questioning the independence[645] of the African Commission with regard to observer status criteria.[646]

A similar 'perfect storm' related to challenging independence and operations was witnessed by the SADC Tribunal during the landmark case *Mike Campbell and Others v Republic of Zimbabwe*, when Zimbabwe "argued that the judgement of the court is not binding as its founding protocol has not yet been ratified by two-thirds of state parties, [leading] to the suspension of the court".[647]

Alongside the development around the 'perfect storm', several other factors have further fuelled attacks on the human rights space in Africa. For example, in contrast to the above-mentioned potential of virtual spaces, "the pandemic has had a significant impact on the participation and engagement of civil society with the African Commission. It has slowed down significantly the opportunities for advocacy".[648] Further, concerns are mounting regarding the decrease in funding allocated to the African Commission,[649] fuelling concerns that certain mandates or even the entire institution could face closure.[650] These factors collectively contribute to a shrinking of the civil society space and have significantly contributed to the emergence of the 'perfect storm'.

> "The question of CAL was the perfect opportunity, the 'perfect storm', to force the member states to make a decision. Yet, the actual first price, as I call it, is

[644] Executive Council of the African Union, 'Decision on the Report on the Joint Retreat of the Permanent Representatives' Committee (PRC) and the African Commission' (n 641).
[645] Interview with E6.
[646] The following questions have been raised: What should be the criteria for observer status? To what extent should the observer status of the African Commission be different from the AU observer status?
[647] Lena Scheibinger, 'Land Restitution as an Appropriate Instrument for Restoring Social and Economic Justice?' *African Legal Studies* (2021) <https://africanlegalstudies.blog/2021/05/23/land-restitution-as-an-appropriate-instrument-for-restoring-social-and-economic-justice/> accessed 22 February 2023; see also Laurie Nathan, 'The Disbanding of the SADC Tribunal: A Cautionary Tale' (2013) 35(4) Human Rights Quarterly 870.
[648] Interview with E6.
[649] Interview with E10.
[650] Interview with E11.

> something else, and it's what we are seeing now: the AU reform concerning the protection of human rights in the African system."[651]

4.2.3. AU Reform

In 2016, during the Retreat of Heads of State and Government, a decision was made to initiate a process of reforming the AU architecture to address its current weaknesses, such as high fragmentation.[652] This initiative began with the commissioning of a study on the Institutional Reform of the African Union (AU Reform). The President of Rwanda, Paul Kagame, was tasked with preparing a report outlining proposed recommendations, which was subsequently published in 2017.[653]

As of May 2024, preparations for the AU Reform are still ongoing. The specific effects of this Reform on the human rights section have not yet been revealed. However, numerous rumours are circulating about potential changes and their implications. Many revolve around proposals to merge parts of the mandates and working structures of the three human rights bodies. One of my interview partners considers possible changes relating to observer status at the African Commission:

> "I think that the observer status is a closed door, and I don't know exactly if there is a way forward. We don't even know if there will be an observer status next year. Obviously, the opportunity depends significantly on the AU Reform process, whether they will weaken or even strengthen the system. We'll see, but we know that things won't be the same next year, probably. Or maybe they will, because also those processes can just fall apart anytime."[654]

While the consequences of the AU Reform remain unknown in May 2024, many fear an unfortunate outcome for the AHRS. Another interview partner predicts: "It will be a big loss for the human rights system in Africa. It's my belief."[655]

---

[651] Interview with E6.
[652] African Union, 'Overview of Institutional Reforms' <https://au.int/en/aureforms/overview> accessed 30 March 2024.
[653] Paul Kagame, 'The imperative to strengthen our Union: Report on the Proposed Recommendations for the Institutional Reform of the African Union' (29 January 2017) <https://www.tralac.org/images/docs/11191/report-on-the-proposed-recommendations-for-the-institutional-reform-of-the-au-kagame-29-january-2017.pdf> accessed 15 July 2024.
[654] Interview with E6.
[655] Interview with E7.

4.2.4. Concluding remarks

As of May 2024, Decision 1015 is the strongest attempt to undermine the independence of the African Commission, which ultimately hinders its ability and capacity to function effectively and carry out its mandates.[656] It was highlighted by one of my interview partners:

> "If you read Decision 1015, I would say that it's quite clear that the big concern of the Member States is about the communication system and the mandate of the African Commission itself."[657]

As the narrative of the 'perfect storm' illustrates, this is particularly threatening for SOGIESC rights, which are already pushed outside the margins. Further, there is reason to fear that the forthcoming AU Reform may pose additional risks to the regional human rights system, particularly regarding the scope and independence of the institution's activities. In essence, attacks on the independence of the AHRS institutions result in a shrinking space for civil society and seriously undermine the institution's effectiveness in respect of claiming SOGIESC rights.

4.3. Cooperation

The institutions of the AHRS must foster cooperation and interconnectedness both among themselves and with other human rights actors of the system. Their work should transcend silos, promoting collaborative efforts for the institutional framework to be effective and address human rights challenges in a comprehensive, intersectional and flexible manner. Such a cooperative and inclusive approach will lead to more people-centred and relevant operations that look beyond what is currently set and offer more effective responses to massive human rights violations. This section is structured into two parts. The first examines cooperation within the institutional architecture, while the second discusses collaboration with other human rights actors, especially NGOs and NHRIs. Throughout, it is necessary to differentiate between cooperation set by the normative framework and cooperation practised by the institutions.

[656] Kamunyu (n 400), 2.
[657] Interview with E6.

4.3.1. Within the institutional architecture[658]

Realising cooperation within the institutional architecture is becoming increasingly important due to its constant development, its overlapping mandates, and the nature of intersectional discrimination, which is often overlooked due to the single-axis approach to law, a perspective also reflected in the institutional setup of human rights systems.[659] The following section highlights select examples that provide insights into the current cooperative dynamics of the institutional architecture.

The cooperation between the three primary institutions is under constant construction. According to Article 2 of the African Court Protocol, the African Court complements the work of the African Commission, or more precisely its protective mandate as a quasi-judicial body, "by providing legally binding judicial decisions".[660] This has raised questions about the exact division of tasks, interactions, and possible competition between these two bodies. According to Rule 34 (1) of the Rules of the Court, the African Commission and the African Court convene at least once a year to facilitate exchange and cooperation. This managerial relationship is reinforced by various formats; for instance, the 77th Ordinary Session of the African Commission in 2023 was held at the premises of the African Court in Arusha, Tanzania.[661] On a procedural level, the relationship between the African Commission and the African Court is a two-way road. The African Commission can refer cases to the African Court per Article 58 of the African Charter, along with Article 5 (1) (a) of the African Court Protocol and Rules 130 et seqq. of the Rules of Procedure of the African Commission.[662] This occurs when the African Commission determines that the case involves serious and widespread human rights violations. Further, the African Commission can submit communications to the African Court in the case of a State's failure or unwillingness to comply with its decisions or provisional measures.[663] In the other direction, the African Court can request the opinion of the African Commission,[664] request it to conduct investigations in a case,[665] or even transfer cases to it where

[658] Parts of this sub-section have been developed in Zundel, *A Queer Critique: Intersectionality in the African human rights system* (n 342) (forthcoming).
[659] Gaitho (n 343).
[660] Manisuli Ssenyonjo, 'Responding to Human Rights Violations in Africa' (2018) 7(1) International Human Rights Law Review 1 <https://brill.com/view/journals/hrlr/7/1/article-p1_1.xml> accessed 15 July 2024.
[661] African Commission on Human and Peoples' Rights (n 603).
[662] As of May 2024, only three cases have been transferred to the African Court.
[663] African Court on Human and People's Rights, 'African Court & African Commission' <https://www.african-court.org/wpafc/african-court-african-commission/> accessed 30 March 2024.
[664] Article 6 (1) African Court Protocol
[665] Rule 36 (4) Rules of Court

it feels that the matter requires an amicable settlement instead of adversarial adjudication.[666]

While the relationship is formalised in the normative framework, scholars have raised concerns about potential competition between the two institutions. Thomas argues that the application of the concept of complementarity between the institutions continues to encounter significant obstacles: "The main hurdles being the ambiguity of, and minimum recourse to the complementarity provisions by the two institutions."[667] Viljoen argues that "even if the African Court on Human and Peoples' Rights has been established to complement the Commission's protective mandate, it has not rendered redundant the Commission's complaints mandate".[668] This is already the case because only a few countries have ratified the African Court Protocol and made the special declaration.[669] Therefore, most African citizens still have 'direct' access only to the African Commission.[670]

The African Children's Committee is less integrated with the African Commission and African Court. For instance, according to Article 5 of the African Court Protocol, the African Children's Committee is not one of the entities that are entitled to submit cases to the African Court. However, notably, the African Commission and the African Children's Committee collaborated on a joint General Comment in 2017 addressing the State parties' obligations to take measures to prohibit child marriage emerging from the Maputo Protocol and African Children's Charter.[671] This example shows that the institutions can work together on shared and overlapping concerns beyond the structures set by the normative framework. Such collaboration fosters not only exchange between the institutions, but also overlapping and intersectional thematic areas.

On the regional level, cooperation within the institutional architecture is primarily governed by the African Commission and the African Court. Apart from this, the regulation and practice of cooperation have been relatively cautious thus far, with clear potential for

[666] Article 6 (3) African Court Protocol
[667] Irene Thomas, 'The application of the principle of complementarity in the relationship between the African Court and the African Commission under the Regional African Human Rights System' (Dissertation, Stellenbosch University 2021), ii.
[668] Viljoen, 'From a cat into a lion? An overview of the progress and challenges of the African human right system at the African Commission's 25 year mark' (n 405), 300.
[669] Article 34 (6) Court Protocol
[670] For more details, see Chapter 6, 181 et seqq.
[671] African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), 'Joint General Comment of the African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on ending child marriage'.

both formal and informal exchanges to be expanded. This would enhance the effectiveness of the institutional framework in claiming human rights.

4.3.2. The potential of the ECOWAS Community Court of Justice

"Maybe the RECs can mitigate some of the challenges that we are facing at the regional level?"[672] Realising the difficulties the regional institutions face in ensuring their effectiveness for claiming human rights, one of my interview partners invited me to explore the cooperation with REC institutions further.

ECOWAS does not have its own comprehensive normative human rights framework.[673] However, the ECOWAS Court can draw upon and apply various human rights instruments and statutes, especially the African Charter and other IHRL instruments, such as the ICCPR and the UDHR.[674] Therefore, the ECOWAS Court can exercise jurisdiction to examine the human rights situation in its Member States, if there is an alleged violation of human rights.[675] Unlike other human rights systems, the ECOWAS Commission does not consider complaints first and grant optional jurisdiction, but individuals and NGOs can bring cases to the ECOWAS Court directly.[676] This human rights mandate provides a high degree of flexibility in applying IHRL to decide cases, especially for a judicial body that was originally founded to decide on questions of the implementation of the Community's treaties. Effoduh argues that this special flexibility presents challenges in delineating the boundaries and limits of the ECOWAS Court's human rights mandate.[677] However, this perspective reveals a conservative understanding of the current needs for human rights protection on the continent. There is an urgent need for a decentralised institutional structure that can be accessed by ordinary people. The jurisdictional scope and geographical positioning of the REC Courts make them more accessible to the citizens. However, this structure must be capable of managing a caseload that reflects the scale of human rights violations across the continent. While it remains unclear whether such a fit-for-purpose structure can be shaped within the current framework, the ECOWAS Court

[672] Interview with E10.
[673] See Chapter 5, 98 et seq.
[674] Article 3 (4) of the 2005 Supplementary Protocol. For more about the development of the human rights mandate of the ECOWAS Court, see Alter, Helfer and McAllister (n 425).
[675] Solomon Ebobrah, 'Critical Issues in the Human Rights Mandate of the ECOWAS Court of Justice' (2010) Journal of African Law 1, 13.
[676] Article 3 of the 2005 Supplementary Protocol
[677] Okechukwu Effoduh, *The ECOWAS Court, activist forces, and the pursuit of environmental and socio-economic justice*, 26; Ebobrah, 'Critical Issues in the Human Rights Mandate of the ECOWAS Court of Justice' (n 675), 12.

brings the institutional human rights framework and its mechanisms closer to the citizens, thereby showing potential for greater effectiveness within the institutional framework.

Despite this positive characteristic of the ECOWAS Court in respect of claiming, the relationship between the REC Courts and the three main regional institutions needs to be formalised and developed. In the process of the AU Reform, it has been pointed out that one of the current significant challenges of the AU is the lack of coordination between the regional and sub-regional levels.[678] This is regrettable, having seen that sub-regional institutions possess features that could greatly benefit the AHRS and enhance its effectiveness with regard to claiming rights. In the context of the EAC, one of my interview partners says that,

> "the East African Court of Justice has a very unique character that you will not find in any other Court. For example, it does not require the exhaustion of local remedies. This is very good for the people whose rights have been violated because they don't need to waste time in exhausting local remedies. It is possible to go to Court directly. This is an advantage. In this area, I believe cooperation can help. It's a very good thing."[679]

Given the institutional and procedural potential of the yet relatively undeveloped relationship, many procedural questions arise when thinking about a potentially closer relationship. One of the questions is whether cases admitted or decided upon by REC judicial bodies could or should be referred to the African Commission or African Court.[680] According to Article 56 (7) of the African Charter, combined with Article 6 (2) of the African Court Protocol, cases that other international bodies have already decided are not admissible for the African Commission and the African Court. In agreement, Ali argues in favour of a restricted handling of this question for reasons such as capacity concerns or the finality of the decisions of the REC Courts.[681] According to the concept of claiming, solutions to all these questions must be driven by the aspiration to make the institutional framework as effective as possible for claiming human rights. In the specific question, I believe the urgency of accessibility convincingly suggests a 'the more, the merrier'

[678] African Union (n 652).
[679] Interview with E7.
[680] For more about the admissibility of cases that are pending or decided before other international judicial or quasi-judicial organs, see Abdi Ali, 'The Admissibility of Subregional Courts' Decisions before the African Commission or African Court' (2013) 6(2) Mizan Law Review 241 <https://www.ajol.info/index.php/mlr/article/view/86525> accessed 15 July 2024.
[681] Ali puts forward five arguments why the African Commission and the African Court should not admit cases decided by REC Courts: Ibid.

approach.[682] In this regard, while acknowledging the disadvantages coming with it, I argue that the regional and sub-regional judicial mechanisms should not be in a hierarchical relationship, but instead, they should provide citizens with opportunities for forum shopping.[683]

In essence, the relationship between the regional and sub-regional institutions must be determined, expanded, and formalised to make the institutional framework more comprehensive, contextualised, and accessible. In other words, if more efforts are made to enhance cooperation and tackle the problem of physical distance by amplifying engagement at the sub-regional level, the REC Courts will become integral components of the regional framework. This enhances the effectiveness of the institutional framework in claiming human rights.

4.3.3. The potential of NGOs and NHRIs

The institutions of the AHRS have other human rights actors with whom they have established relations and who play a crucial role in claiming, promoting, and protecting human rights in Africa.[684] The official relationship between the actors and institutions is set in the normative framework[685] through instruments such as observer status and affiliation. However, the practices and approaches of the actors, especially NGOs, and the institutions, especially the African Commission, differ. I argue that fruitful cooperation will be possible only when the actors within the system are protected, facilitated, and encouraged in their interactions.

The story of NHRIs is one of similarities. The mandate of the NHRIs is similar to the mandates of the regional institutions. As Mute argues, "NHRIs and the African Commission have analogous mandates and indeed face comparable adversities, respectively, at the domestic and continental levels".[686] This calls for joint collaborative efforts to realise the promotion and protection of human rights in Africa. At the same time, the state of NHRIs is comparable to that of the RECs in that they currently both represent untapped potential for the regional human rights framework.

---

[682] For more details, see Chapter 6, 98 et seq.
[683] For more about forum shopping in law at different levels, see Laurence Helfer, 'Forum Shopping for Human Rights' (1999) 148(2) University of Pennsylvania Law Review 285; Keebet von Benda-Beckmann, 'Forum Shopping and Shopping Forums: Dispute Processing in a Minangkabau Village in West Sumatra' (1981) 13(19) The Journal of Legal Pluralism and Unofficial Law 117.
[684] For more details, see Chapter 3, 83 et seqq.
[685] For more details, see Chapter 3, 83 et seqq.
[686] Mute (n 158), 1.

NHRIs are "sub-state human rights actors located within state structures, but independent of government".[687] Their frameworks are determined by the Principles relating to the Status of National Institutions (The Paris Principles), and together, they build the Network for African Human Rights Institutions (NANHRI). Regarding the IAHRS, Pegram and Rodriguez argue that NHRIs are "well-placed to serve as compliance intermediaries within" the respective regional institution "to link international human rights standards with domestic legal and political processes, institutions and actors".[688] This can be applied to Africa, where they are intended to play a similar role in bridging the gap between IHRL and domestic realities. Consequently, they can establish an official relationship with the African Commission by receiving affiliate status, as outlined in the Resolution on the Granting of Affiliate Status to National Human Rights Institutions and specialized human rights institutions in Africa (Resolution 370).[689]

While the structure of the NHRIs and their rules for cooperation are set, their realization falls behind their potential. Important factors enabling fruitful cooperation are not hindering NGOs and NHRIs from interacting with the AHRS institutions and carrying out their duties with regard to the regional system by providing accessibility to information.[690] In the recent past, especially the African Commission has not been sharing information on its website in time, thereby limiting access to those with direct connections to the Secretariat of the African Commission. With regard to the reporting mechanism,[691] Rule 79 (2) of the Rules of Procedure of the African Commission says that the Secretariat of the African Commission "shall promptly publish [the periodic report] on the Commission's website and indicate when the Report will be examined by the Commission". The timely and consistent publication of this information has been a shortcoming of the Secretariat for a while.[692] Repeatedly, periodic reports have not been promptly published on the website. Often, this jeopardises the chances of NHRIs and NGOs to submit shadow reports. If they have only a short time to submit a shadow report, these are researched and written in a hurry and cannot engage effectively with the issues treated in the periodic reports.

[687] Tom Pegram and Nataly Rodriguez, 'Bridging the Gap: National Human Rights Institutions and the Inter-American Human Rights System' in Par Engstrom (ed), *The Inter-American Human Rights System: Impact beyond compliance* (Palgrave Macmillan 2019), 168.
[688] Ibid., 169.
[689] Resolution on the Granting of Affiliate Status to National Human Rights Institutions and specialized human rights institutions in Africa, ACHPR/Res.370(LX) 2017 (African Commission on Human and Peoples' Rights)
[690] For more details, see Chapter 6, 180.
[691] For more details, see Chapter 6, 176 et seqq.
[692] Murray and Viljoen (n 7).

These shortcomings favour established institutions, as they benefit from informal information transfer through their networks. This means they can receive the periodic reports through their direct contacts, and use the same channels to submit a shadow report before the Opening of the Ordinary Session in a time that is significantly shorter than the prescribed 30 days.[693] By contrast, local organisations with first-hand insights into human rights violations and developments in a specific country are often unable to submit shadow reports. Compliance with the Rules of Procedure of the African Commission is important in order to grant all organisations a chance to meaningfully contribute to evaluating the reports. The present situation prevents institutions from collaborating effectively with the African Commission through this mechanism. The seemingly easy solution is that institutions must adhere strictly to the regulations and take all necessary measures to facilitate and promote cooperation with all actors across the continent.

4.3.4. Concluding remarks

Cooperation within the institutional architecture and with the relevant human rights actors is an important factor influencing the claimability of SOGIESC rights within the regional framework. The above analysis shows that institutional cooperation and collaboration leaves room for improvement on paper and in practice. While the African Commission remains the pivotal institution in the architecture, this position, as well as its current practice in respect of cooperation with the actors, limits the effectiveness of the institutional framework for claiming rights. Efforts to overcome and challenge this limitation, such as closer cooperation with the REC Courts, fall short of what is needed.

4.4. Expertise and structure of the institutions

One important characteristic that institutions need for effective claiming of SOGIESC rights is possessing the requisite expertise in human rights law and related fields. This expertise enables the effective fulfilment of the mandates of the respective institutions. The need for expertise goes hand in hand with the adequate provision of resources, ensuring the capacity to fulfil mandates effectively. Further, the structural composition and organisation of institutions, particularly in terms of functional division, are critical determinants in assessing their effectiveness for claiming human rights. In essence, an

[693] Interview with E4.

institution lacking expertise, capacity and structure is unable to fulfil its mandates, making it ineffective for claiming human rights.

Moving from the threat to the independence of the African Commission to the need for expertise,[694] one of my interview partners says:

> "The problem we have is that in trying to hold states accountable using international systems, we realise that the international system itself has become more or less subsumed by state interests and political influences. Therefore, we need to sanitise the regional human rights system by ensuring, for example, that the people selected as Commissioners, are people who have the merits, who know the work, who understand human rights and who have an understanding of what the issues are."[695]

This call for expertise is anchored in the normative framework. The eleven Commissioners of the African Commission must be Africans "of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights".[696] According to Article 11 (1) of the African Court Protocol, the eleven judges of the African Court must be "jurists of high moral character and of recognized practical, judicial or academic competence and experience in the field of human and peoples' rights"[697] and balanced in their gender and geographical representation.[698] These judges are identified through nominations by State parties to the Protocol.[699] In the next step, the Secretary General provides a list of the nominations, and the election takes place in the AU Assembly. The African Children's Committee comprises eleven independent experts with specialised knowledge of children's rights.[700] The AU Assembly elects the experts for a term of five years and they can be re-elected once.[701]

The AU institutions must adhere to and embrace these guidelines in the normative framework to ensure human rights expertise, withstand political influences as much as possible, and enhance the effectiveness of the institutional framework. This applies even more to the sub-regional level, where the primary mandate of the REC Courts is to adjudicate on

[694] For more about independence as one of the characters, see Chapter 5, 137 et seqq.
[695] Interview with E8.
[696] Article 31 (1) African Charter
[697] Article 11 (1) African Court Protocol
[698] Article 14 (2) and (3) African Court Protocol
[699] Article 12 (1) African Court Protocol
[700] Article 33 African Children's Charter
[701] Article 37 (1) African Children's Charter; Chapter 1 Rule 2 (1) Revised Rule of Procedures

matters related to the implementation of the Community's treaties. Consequently, expertise in human rights law and related fields within the sub-regional institutions is limited, which in turn affects the REC Courts' effectiveness for claiming human rights.

The above statement by one of my interview partners highlights concerns regarding political influence and the level of human rights expertise among members of the three regional institutions. These concerns are compounded by recent political threats against the institutions of the AHRS, particularly targeting the African Commission.[702] In view of this situation, civil society initiatives, such as the African Human Rights Mechanisms Nomination and Selection Initiative (African Court Coalition), strive "to mobilize and coordinate the diverse stakeholders […] to support building of an institutionally strong and independent Court that delivers effectively and efficiently on its mandate".[703] In preparation for the elections to the African Court in July 2024, they have launched the Arusha Initiative together with other organisations. This initiative aims to "help identify qualified candidates […] to assist the State Party-led nomination process by identifying experts who meet the criteria for serving at the African Court".[704] For this purpose, "members of the public are invited to share information about qualified experts".[705] This initiative seeks to make the process more transparent, ensure the presence of human rights expertise within the institutions, and bring the human rights framework closer to the citizens. Consequently, the effectiveness of claiming human rights in the institutional framework, particularly the African Court, will be guaranteed.

Beyond the expertise of the members of the three regional institutions, another interview partner, who served as a legal officer at the Secretariat of the African Commission, offers insights into the internal structure of the institutions:

> "We don't necessarily have a specialisation among the legal officers at the African Commission. Some of us do everything at once, which is very different from what I heard from the Inter-American Court […] Let me give you one example of a communication at the African Commission. You find that the alleged violation

[702] See Chapter 5, 139 et seqq.
[703] African Court Coalition, 'African Court Coalition: The Coalition for an Effective African Court on Human and Peoples' Rights' <https://africancourtcoalition.org/> accessed 14 June 2024.
[704] Arusha Initiative, 'Arusha Initiative Launches Campaign to Identify Experts for upcoming elections to the African Court on Human and Peoples' Rights' <https://www.chr.up.ac.za/latest-news/3700-arusha-initiative-launches-campaign-to-identify-experts-for-upcoming-elections-to-the-african-court-on-human-and-peoples-rights#:~:text=About%20the%20Arusha%20Initiative%20The%20African%20Human%20Rights,of%20members%20of%20human%20rights%20mechanisms%20in%20Africa.> accessed 14 June 2024.
[705] Ibid.

> involves a list of rights falling under the Charter's main provisions. It is not easy to divide among the legal officers each of the rights involved. Therefore, there is no such division of labour specialisation among the legal officers."[706]

Collaborative efforts and shared responsibilities within the Secretariat are regularly put forward as arguments for the absence of strict division of tasks. The structural makeup of the institution's secretariat is also closely linked to its resource allocation.[707] Irrespective of the specific organisational arrangements within the Secretariat, it is essential to ensure comprehensive expertise across all human rights areas, particularly focusing on marginalised groups that are often overlooked. Creating dedicated task forces can help prioritise rights and groups requiring special consideration, such as SOGIESC rights. At the African Commission level, this is realised by creating special mechanisms.[708] Looking ahead, initiatives like the AU Reform and the establishment of the African Court of Justice and Human Rights risk further straining expertise within institutions due to resource constraints.[709] This underscores the intricate link between expertise in human rights law within the institutional framework and the availability of resources, as well as independence from political influence.

NGOs which have the privilege to cooperate with the institutions of the AHRS share "broad goals of advancing human rights for vulnerable and marginalised communities on the continent, but their approaches are different".[710] Some prioritise collaborative capacity strengthening, closely partnering with the regional institutions. At times, this extends to assuming the role of a technical partner to the AHRS, assisting in research, publications, and drafting resolutions and other documents.[711] By contrast, others consciously keep a distance and adopt a strategy emphasising the transformative potential of law, particularly in courtrooms. By consistently holding States accountable for human rights violations, jurisprudence development is fostered, ensuring that the regional system operates as intended. In essence, the NGOs want to "force the system in a sense to act the way it has been designed and empower civil society to be able to hold the system accountable".[712]

[706] Interview with E7.
[707] For more about resources and independence of institutions, see Chapter 5, 137 et seqq.
[708] For more details, see Chapter 6, 171 et seqq.
[709] See Chapter 5, 144 and 6, 187 et seqq.
[710] Interview with E8.
[711] Interview with E8.
[712] Interview with E8.

Obviously, it is important to establish structures in the Secretariats of the institutions that ensure the institutions have the expertise and capacity to address currently neglected topics. Only then can these institutions effectively advocate for SOGIESC rights. Civil society can contribute to and demand such structures through approaches such as the African Court Coalition.

5. Conclusion

The institutions of the AHRS are confronted with massive and widespread human rights violations all over the continent. These include but are not limited to SOGIESC rights. The institutions are well established according to international standards, but the conception and current application of the institutional framework of the AHRS make it not as effective as it should be for claiming human rights. Most of the shortcomings in respect of addressing human rights violations on the continent can be traced back to general and well-known characteristics of IHRL institutions, such as distance from the local realities and political influence on the independence of the institutions. The institutional framework of the AHRS has not been sufficiently adapted to African philosophical, cultural, historical and socio-economic realities and mechanisms, but predominantly consists of institutions that can be found in any other international or regional human rights regime. I have identified potential ways to enhance the effectiveness of the institutions but this potential is currently not being fully realised. A radical institutional reimagination and reinvention is needed to make the system more responsive, effective, and aligned with the local realities and needs of citizens across the continent. Only then can the institutions be more effective for claiming specific rights and better address and challenge the widespread human rights violations.

In the following chapter, I will build on the findings in this and the previous chapter to analyse how the normative and institutional frameworks find application in the procedural framework of the AHRS.

Chapter 6: Is the procedural framework of the African human rights system fit for claiming SOGIESC rights?

1. Introduction

After analysing the normative and institutional frameworks of the AHRS regarding their effectiveness, the focus now shifts to the procedural framework. The procedural mechanisms of the AHRS can be related to the promotional and the protective mandates of the institutions. The concept of claiming in relation to human rights is clearly related to the effectiveness of the procedural framework for enhancing the protection of SOGIESC rights and for catalysing the system's transformation. So far, SOGIESC rights have been referred to repeatedly, even though not consistently, in the context of the promotional mandate of the African Commission. Whether the procedural framework is effective for claiming SOGIESC rights in light of the systematic and systemic massive human rights violations on the continent will be analysed in this chapter.

The chapter is organised into five sections. Following the introduction, the second section will outline the characteristics of an effective procedural framework for claiming SOGIESC rights, derived from the concept of claiming. In the third section, I will provide an overview of the procedural framework of the AHRS. This will offer insights into the available procedural mechanisms without focusing on specific institutions. The fourth section explores different examples that have significance for the claimability of rights within the procedural framework. These examples are not exhaustive or equally balanced between the institutions but reflect my research journey. In the conclusion, I evaluate these examples to assess the effectiveness of the procedural framework for claiming SOGIESC rights, considering the framework’s features and structures.

2. What is an effective procedural framework for claiming?

I have identified several characteristics that are essential for the effectiveness of procedural frameworks for claiming human rights within IHRL systems, and particularly SOGIESC rights. Due to the interconnectedness of the frameworks, some characteristics of the procedural framework may already be familiar, as they overlap with elements from the normative and institutional frameworks. As demonstrated in Chapter 4, the identification of the characteristics emerges from a basket analysis based on the analytical

concept of claiming, which includes a historical comparative analysis of IHRL.[713] I argue that any procedural framework in IHRL should be, or strive towards being: enforceable, timely, inclusive, accessible and cooperative.

a. **Accessible:** The procedural mechanisms of the respective IHRL system must be accessible to individuals and NGOs without unnecessary legal or non-legal barriers. Under such conditions, the system can effectively empower individuals to claim their human rights. This is especially important regarding the protective mandate. Accessibility of the procedural mechanisms is closely tied to the accessibility of the corresponding institutions and the need for context-specific responses in the system.[714]

b. **Timely:** Procedures must be conducted promptly to avoid undue delay in addressing human rights violations. This is especially critical for violations that become irreversible after a certain time. The timeliness of procedures is often closely linked to the resources available to the institutions responsible for conducting them. Undue delay undermines the respective IHRL system's ability to safeguard the well-being of individuals and, therefore, the possibility for individuals to claim their rights through the respective IHRL system. Such delays not only render the selected procedures ineffective, but also render the entire human rights system meaningless.

c. **Inclusive:** The procedural framework should prioritise inclusivity in the procedures allocated to various institutions. This inclusivity should reflect people's diverse realities and needs, particularly those who frequently experience intersectional discrimination that is too often invisible in the legal structures.[715] One way to achieve such inclusivity is by fostering cooperation among institutions through joint procedures, such as resolutions. With such approaches, violations of human rights of these people, such as children with disabilities, transgender women or elderly women, can be effectively addressed. This collaborative effort can lead to a transformation of the system towards formalised inclusivity and visibility of rights that have not yet been fully recognised.

[713] See Chapter 4, 92.
[714] See Chapter 5, 130.
[715] Gaitho (n 343).

d. **Cooperative:** The procedural framework of the respective IHRL system should allow NHRIs, NGOs and individuals to actively participate in procedures that impact their rights. This participation in and cooperation with the executing institutions should be constant, inclusive, context-specific and flexible. Such engagement is essential to equip the IHRL system with the requisite contextual understanding, external insights, and connection to the people and challenges it aims to address. Hence, cooperation with individuals enhances the effectiveness of the procedural framework.

e. **Enforceable:** Mechanisms for enforcing decisions and ensuring compliance with human rights standards should be in place. A crucial aspect in ensuring this is the necessity of implementing follow-up mechanisms. The existence and effectiveness of such follow-up mechanisms are closely tied to the resources, the incentives available, and the proximity of the institutions responsible for their implementation and enforcement. All procedural mechanisms for ensuring the promotion and protection of human rights are only useful if their implementation for the people concerned is secured and not left to the State's goodwill only.

In the analysis below, I will examine the extent to which the procedural framework embodies these characteristics of effectiveness and assess whether it is fit for claiming SOGIESC rights.[716]

3. Overview of the procedural framework of the African human rights system

In this section, I provide an overview of the procedural framework of the AHRS. The procedural framework is the toolkit used by the institutions to fulfil their mandates as established in the normative framework. By nature, these procedures often serve as mechanisms through which individuals and NGOs can directly claim their human rights. The different procedural mechanisms of the institutions are related to the promotional and protective mandates of the institutions. The following overview serves as a foundation

[716] See Chapter 6, 167 et seqq.

for the subsequent analysis of the effectiveness of the procedural framework in claiming human rights in Africa.

3.1. Promotional mandate

According to Article 45 (1) of the African Charter and Article 42 of the African Children's Charter, the African Commission and the African Children's Committee possess a promotional mandate. This promotional mandate encompasses the following procedures that are available to the institutions: special mechanisms, promotional visits, resolutions, seminars and conferences, publication and dissemination of information, as well as distinct relationships with NGOs and NHRIs. In the following section, I will introduce some procedures of the promotional mandate relevant to the later analysis. The promotional mandates of the African Commission and African Children's Committee largely overlap. Given its prominent role in addressing SOGIESC rights within the AHRS, the following overview will dominantly refer to the procedures of the African Commission, which, if not mentioned otherwise, correspond to those of the African Children's Committee.

3.1.1. Reporting mechanisms

The State reporting mechanism is designed to create a constructive dialogue between the institutions and the State parties.[717] The requirement for States to periodically report on their human rights records, coupled with the issuance of concluding observations and recommendations by the African Commission, aims to foster accountability and transparency.

According to Article 62 of the African Charter, all State parties must submit national periodic reports "on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the present Charter". After ratification, the State is required to submit an initial report, providing an overview of the human rights situation within the country. This is followed by periodic reports every second year that discuss developments on progress and obstacles experienced.[718] Those States that have also ratified the Maputo Protocol[719] have to report on the measures they have taken to realise human rights according to Article 26 (1) of the Maputo Protocol.

[717] Viljoen, *International Human Rights Law in Africa* (n 3), 350.
[718] Malcolm Evans and Rachel Murray, 'The Reporting Mechanism of the African Charter' in Malcolm Evans and Rachel Murray (eds), *The African Charter on Human and Peoples' Rights* (Cambridge University Press 2008), 57.
[719] As of May 2024, 44 States have ratified the Maputo Protocol.

According to the Guidelines on State Reporting under the Maputo Protocol, the report is incorporated into the main periodic reports.[720]

After examination of the report, the African Commission adopts concluding observations and recommendations, which the State then has to implement. To enable a continuous conversation on how to promote and protect human and peoples' rights best, Rule 83 (2) of the Rules of Procedure of the African Commission calls for the African Commission to provide for follow-up measures within its promotional activities.[721]

The State reporting mechanism is not only a conversation between the respective State and the institution. According to Rule 79 (3) of the Rules of Procedure of the African Commission, "institutions, organisations or any interested party wishing to contribute to the examination of the report and the human rights situation in the country concerned, shall send their contributions". Beyond this, the Resolution on the Co-Operation between the African Commission on Human and Peoples' Rights and NGOs having Observer Status with the Commission (Resolution 30)[722] recognises that NGOs with observer status can prepare shadow reports on the human rights situation in a specific State, which allows the African Commission to have a "constructive dialogue with a State representative when that country's periodic report is being considered".[723] The Guidelines on Shadow Reports of the African Commission on Human and Peoples' Rights (2022) define the shadow report in Article 1b as follows:

> "a report aimed at addressing perceived omissions, deficiencies, or inaccuracies as well as providing supplementary information to that provided in the official State Report. Shadow reports are presented to the African Commission by NHRIs, NGOs with Observer Status, institutions, and any other interested party".

These shadow reports provide an alternative perspective to the national periodic reports. The International Commission of Jurists (ICJ) has noted that

---

[720] The combined report consists of two parts: Part A reports on the rights of the African Charter and Part B focuses on the rights of the Maputo Protocol. The Centre for Human Rights has published, in cooperation with the African Commission, Guidelines for State Reporting under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2016 (Centre for Human Rights, Faculty of Law, University of Pretoria).

[721] The State reporting process is well illustrated by the Centre for Human Rights: Centre for Human Rights, Faculty of Law, University of Pretoria, 'The State Reporting Process under the African Commission' <https://www.maputoprotocol.up.ac.za/state-reporting> accessed 2 May 2024.

[722] Resolution on the Co-Operation between the African Commission on Human and Peoples' Rights and NGOs having Observer Status with the Commission 1998, ACHPR/Res.30(XXIV)98 (African Commission on Human and Peoples' Rights)

[723] Ibid., para. 5.

> "shadow reports submitted by NGOs and other civil society organisations are a valuable source of information for the [African] Commission and can assist in identifying areas where the state report may be incomplete or misleading".[724]

3.1.2. Special mechanisms

According to Rule 25 of the Rules of Procedure of the African Commission, the African Commission has created subsidiary bodies to fulfil their promotional mandate.[725] These subsidiary bodies are Special Rapporteurs, Working Groups and Committees, each dedicated to specific thematic areas.[726] The African Commission appoints Special Rapporteurs from among its Commissioners to address specific human rights topics, especially for identifying and addressing human rights violations and promoting human rights standards and norms in African countries.[727] The Committees and Working Groups are composed of three to five Commissioners and external experts who have all been appointed by the African Commission.[728] Their mandate includes conducting research, monitoring and reporting on human rights situations and recommending specific actions to the African Commission.[729]

The African Children's Committee has also established special mechanisms according to Article 38 (1) of the African Children's Charter and Rule 57 of the Rules of Procedure of the African Children's Committee. The African Children's Committee's special mechanisms are thematic rapporteurs, country rapporteurs and working groups.

---

[724] International Commission of Jurists, 'Shadow Reporting under the African Charter on Human and Peoples' Rights: A Handbook' (2015).
[725] For more about the special mechanisms, see Chapter 6, 171 et seqq.
[726] The African Commission has, in addition to the thematic mechanisms also established internal technical mechanisms; Viljoen, *International Human Rights Law in Africa* (n 3), 369.
[727] As of May 2024, five Special Rapporteurs are working on different human rights issues: Special Rapporteur on Human Rights Defenders and Focal Point on Reprisals in Africa, Special Rapporteur on Freedom of Expression and Access to Information, Special Rapporteur on Refugees, Asylum Seekers, Internally Displaced Persons and Migrant in Africa, Special Rapporteur on Rights of Women and Special Rapporteur on Prisons, Conditions of Detention and Policing in Africa.
[728] Viljoen, 'From a cat into a lion? An overview of the progress and challenges of the African human right system at the African Commission's 25 year mark' (n 405), 313.
[729] As of May 2024, two Committees and five Working Groups have been established by the African Commission: Committee on the Protection of the Rights of People Living With HIV (PLHIV) and Those at Risk, Vulnerable to and Affected by HIV; Committee for the Prevention of Torture in Africa; Working Group on Extractive Industries, Environment and Human Rights Violations; Working Group on the Rights of Older Persons and People with Disabilities in Africa; Working Group on Death Penalty, Extra-Judicial, Summary or Arbitrary Killings and Enforced Disappearances in Africa; Working Group on Economic, Social and Cultural Rights and Working Group on Indigenous Populations/Communities and Minorities in Africa.

3.1.3. Resolutions

Resolutions attempt to clarify specific provisions and offer new interpretations of particular aspects of the normative framework, express concerns of human rights violations, or introduce administrative standards to even better realise the procedures of, and mandates given by, the normative framework.[730] Overall, resolutions can be divided into three different groups: thematic, country-specific and administrative resolutions.[731] Resolutions are not legally binding for State parties. However, they are a powerful soft law mechanism to address critical situations and urge States to act within their obligations under regional and international human rights law.[732]

3.1.4. Relationship with NHRIs and NGOs

As mentioned in Chapter 5, the institutions have formalised relationships with NHRIs and NGOs, which are realised through various mechanisms. One of these mechanisms for the African Commission is the NGO Forum.[733] It convenes for around three days before each Ordinary Session of the African Commission, providing an opportunity for organisations to collaborate, exchange ideas, and develop joint strategies at the regional level. [734] The first NGO forum took place in 2000.[735] Today, it is organised by the African Centre for Democracy and Human Rights Studies[736] and is usually attended by national, regional and international NGOs, irrespective of whether they have observer status with the African Commission. Some Commissioners even participate in selected parts of the event. Organisations share information and experiences and develop joint strategies to engage the African Commission in specific human rights issues in Africa. Organisations conduct workshops on different human rights issues during the event and meet in plenary sessions. The outputs of this regular initiative are the following: the Forum discusses and drafts Recommendations and Resolutions on crucial human rights issues, which are adopted by the plenary and then presented to the African Commission at the Ordinary Session for its consideration.[737] If the African Commission adopts such Draft Resolutions, they are

[730] Rachel Murray, *The African Charter on Human and Peoples' Rights: A commentary* (Oxford University Press 2020), 776.
[731] Nibogora (n 18); Centre for Human Rights, Faculty of Law, University of Pretoria, 'A guide to the African human rights system' (BusinessPrint 2016), 175 et seq.
[732] Nibogora (n 18), 176.
[733] The equivalent for the African Children's Committee is the CSO Forum.
[734] Amnesty International (n 566), 11.
[735] Amnesty International (n 566), 11.
[736] African Centre for Democracy and Human Rights Studies, 'NGO Forum' <https://www.acdhrs.org/ngo-forum/> accessed 4 May 2024.
[737] Amnesty International (n 566), 11.

equivalent to the other African Commission Resolutions adopted.[738] The NGO Forum has also initiated the launching of reports on specific human rights issues to raise awareness.

In addition to the official CSO body, the ACHPR CSOs' Side Events (ACSE)[739] has been established as an alternative forum which

> "contributes to strengthening CSO engagement with the ACHPR by hosting workshops that deepen and inform popular understanding of the Commission; creating incubation spaces for coalitions to build strategic and coherent advocacy strategies; and fostering the development of CSO priorities and implementation plans".[740]

3.1.5. Observer Status

According to Rule 72 of the Rules of Procedure of the African Commission and Resolution 572,[741] NGOs can be granted Observer Status by the African Commission. After the 73rd Ordinary Session of the African Commission in 2023, 544 NGOs were granted observer status.[742]

According to Article 42 (a) (iii) of the African Children's Charter, the African Children's Committee must "cooperate with other African, international and regional Institutions and organizations concerned with the promotion and protection of the rights and welfare of the child". Rules 34, 37, 81, and 82 of the Rules of Procedure of the African Children's Committee delineate the cooperation framework between the African Children's Committee and NGOs. Further, the African Children's Committee has established Criteria for Granting Observer Status to NGOs.[743] 36 NGOs were granted observer status after the 41st Ordinary Session of the African Children's Committee in 2023.[744]

---

[738] Nibogora (n 18), 179.
[739] ACHPR is an alternative abbreviation for the African Commission.
[740] ACHPR Civil Society Organisations' Side Events (ACSE), 'ACHPR Civil Society Organisations' Side Events (ACSE): Invitation' (2020) <https://synergiaihr.org/wp-content/uploads/2020/09/ACSE-Public-Invite_Final.pdf> accessed 18 June 2024.
[741] Resolution 572 (n 375)
[742] African Commission on Human and Peoples' Rights, 'Final Communiqué of the 73rd Ordinary Session of the African Commission on Human and Peoples' Rights' (Banjul, Gambia 18 November 2022) <https://achpr.au.int/en/news/final-communiques/2022-11-18/final-communique-73rd-ordinary-session/> accessed 15 July 2024.
[743] Guidelines on Observer Status of Non-Governmental Organisations (NGOS) and Associations (African Children's Committee).
[744] African Children's Committee, 'CSOs' <https://www.acerwc.africa/en/networks/csos?page=1> accessed 4 May 2024.

NGOs with observer status have specific participatory rights in the proceedings of the African Commission and the African Children's Committee. In the case of the African Commission, they are allowed to actively participate in and contribute to fulfilling its mandate. More precisely, they are invited "to be present at the opening and closing sessions of the Commission".[745] Additionally, they have access to the documents of the African Commission under specific circumstances.[746] They can be invited to private Sessions that deal with particular topics of interest to the NGO.[747] They can be allowed to make a public statement on a topic of specific interest. [748] NGOs with observer status can also be addressed in a Session and given the chance to respond orally.[749] They can request the inclusion of a discussion on any human rights issue to the agenda 45 days before the Ordinary Session[750] or the addition of specific points to the provisional agenda of the African Commission.[751]

The procedure of applying for observer status at the African Commission is specified in Resolution 572.[752] The respective NGO has to submit a "documented application to the Secretariat of the Commission, with a view to showing their willingness and capability to work for the realisation of the objectives of the African Charter"[753] three months before the Ordinary Session.[754] The application is then handled by a specific Commissioner and examined in a (public) Ordinary Session of the African Commission. After being granted observer status, the NGO has to submit an activity report every two years.[755]

3.2. Protective mandate

The African Commission, the African Children's Committee, the African Court, and the REC Courts all have protective mandates. The procedural mechanisms of the institutional

[745] Resolution 572 (n 375), Chapter 2 (1) a
[746] Ibid., Chapter 2 (2)
[747] Ibid., Chapter 2 (3)
[748] Ibid., Chapter 2 (4)
[749] Ibid., Chapter 2 (5)
[750] Rule 68 (1) e of the Rules of Procedure of the African Commission
[751] Resolution 572 (n 375), Chapter 2 (6); Rule 33 (3) e of the Rules of Procedure of the African Commission
[752] Resolution 572 (n 375)
[753] Ibid., Chapter I (1)
[754] The application must consist of the following nine parts: a letter of application addressed to the Secretariat of the African Commission, a list of the Board Members as well as other members of the NGO, a signed and authenticated version of the Constitutive Statute of the NGO, a certificate proving the legal status of the NGO issued by the relevant Government authority, proof of the sources of funding in the country in which the NGO is based, the latest independently audited financial statement of the NGO, the latest Annual Activity Report of the NGO, and a signed and approved Plan of Action or Strategic Plan which covers a minimum of two years. Ibid., Chapter I (3).
[755] African Commission on Human and Peoples' Rights, 'NGOs' <https://achpr.au.int/en/ngos> accessed 4 May 2024.

framework to realise the protective mandate are individual communications, inter-State communications, and on-site protective and fact-finding missions "in response to specific allegations of human rights violations".[756] In the following section, I will introduce the protective mandate of the African Commission as an example. The access to the protective mandates of the other institutions will be discussed later.[757]

Viljoen states that "the communication procedure provides the clearest possibility of holding states accountable".[758] The African Commission can receive cases, also known as communications, from State parties according to Article 47 of the African Charter, and from actors other than State parties according to Article 55 (1). The latter, also known as other communications, allows individuals and groups holding individual and/or collective rights to submit complaints or information about alleged human rights violations committed by African States, and to seek redress for these violations. This procedure is introduced in Articles 55-59 of the African Charter and further specified in Chapter III of the Rules of Procedure of the African Commission and in Information Sheet No. 3 on the Communication Procedure. The African Commission can give advisory opinions and recommendations on communications when rights protected under the African Charter have been violated.

The procedural structure in respect of the "other communications" consists of six main stages: registration, seizure, admissibility, consideration, decision and implementation. The African Commission decides if a violation of the African Charter has been found, either on the merits or by default. According to Article 54 of the African Charter, the decision will be included in the Annual Activity Report of the African Commission, which is sent to the AU Assembly. When the AU Assembly adopts the report, the decision becomes binding on State parties. According to Rule 120 (4) of the Rules of Procedure of the African Commission, the respective States are only informed about the decision after adoption by the AU Assembly.

However, there are also other ways to conclude the communication. According to Rule 123 of the Rules of Procedure of the African Commission, the African Commission may offer its services to support the parties in finding an amicable settlement at any point in the process. In the case of a successful settlement, a decision would then no longer be needed. In urgent situations, the African Commission can, before determining the merits,

[756] Viljoen, *International Human Rights Law in Africa* (n 3), 344.
[757] See Chapter 6, 181 et seqq.
[758] Viljoen, *International Human Rights Law in Africa* (n 3), 300.

decide on provisional measures. According to Rule 100 (1) of the Rules of Procedure of the African Commission, this measure prevents "irreparable harm to the victim or victims of the alleged violation" and is to be carried out "as urgently as the situation demands".

3.3. Concluding remarks

As shown, the procedural framework of the AHRS offers numerous mechanisms for the institutions to realise their mandates. In the African context, these mechanisms are faced with and have to respond to systematic and systemic mass human rights violations. In this regard, I will investigate in the following section whether some of these mechanisms, established within the normative framework and realised by the institutional framework, can effectively facilitate claiming SOGIESC rights.

4. Analysis of the procedural framework with regard to claimability

Unlike in the previous chapters, the analysis of the procedural framework is based on instances where SOGIESC rights have already found entrance into the AHRS.[759] I have chosen this approach because the effectiveness of the procedural framework is not solely determined by the normative construction of the procedural mechanisms but especially by how the institutions realise it. The following examples do not claim to provide a comprehensive view of the procedural framework, but reflect the procedural mechanisms of the institutions, especially the African Commission, in relation to SOGIESC rights. Thus, they suggest ways of seeing and evaluating the effectivity of the procedural framework through the lens of SOGIESC rights.

4.1. Resolution 275 and Resolution 552[760]

Bond claims that the AU falls short of its commitment to intersectionality as far as SOGIESC rights are concerned and argues that as long as the AHRS neglects or insufficiently attends to LGBTIQ+ rights, its intersectional approach will remain deficient.[761] In alignment with this analysis, the next part will focus on two occasions when SOGIESC rights have found entrance into the procedural framework of the AHRS, but as a social problem. I will argue that SOGIESC issues must not be seen as a problem, either for the

[759] For a compact overview of these instances, see Annex 3, 224 et seqq.
[760] Parts of this section have been developed in Zundel, *A Queer Critique: Intersectionality in the African human rights system* (n 342) (forthcoming).
[761] Bond (n 350), 89.

individual or for society. Only with this understanding can a shift take place from the prevailing practices of prioritisation towards adopting a genuinely intersectional agenda. This will make the procedural framework more effective for claiming SOGIESC rights.

There have been significant strides in the regional framework concerning the protection of SOGIESC rights, particularly through Resolution 275[762] and the Resolution on the Promotion and Protection of the Rights of Intersex Persons in Africa (Resolution 552).[763] Further, the African Commission has adopted more Resolutions that refer to specific SOGIESC issues, such as the Resolution on the Situation of Human Rights Defenders in Africa (Resolution 376).[764] The advocacy leading to the establishment of the two main soft law instruments, coupled with their importance due to what Ambani has termed the "second wave of criminalization",[765] cannot be overstated. They build the most robust and formal integration of SOGIESC rights in the regional framework. Especially, Resolution 275 is a "manifestation of the virtues of Africa's historical traditions and the values of a civilization based on humanness 'Ubuntu', inclusiveness and respect for human dignity in our differences".[766] However, a closer examination of the contexts of the Resolutions reveals a more critical attitude.

Resolution 275 was framed in the context of violence and torture, and its interpretation varies among activists, scholars and lawyers. While some critiqued Resolution 275 as unambitious and a missed opportunity, others have praised it as a smart move in the present context.[767] For example, Nibogora has identified three advantages:[768] Firstly, the violence faced by LGBTIQ+ citizens is relatively well-documented. Secondly, violence against LGBTIQ+ citizens is the least controversial topic and is condemned by society, even by homophobes. Thirdly, the circle of persons experiencing violence is not limited to LGBTIQ+ citizens but includes their defenders and family members. While acknowledging Nibogora's argument, it can hardly be overlooked that in Resolution 275

[762] Resolution on the Protection against Violence and other Human Rights Violations against Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity 2014, ACHPR/Res.275(LV) (African Commission on Human and Peoples' Rights)
[763] Resolution on the Promotion and Protection of the Rights of Intersex Persons in Africa 2023, ACHPR/Res.552 (African Commission on Human and Peoples' Rights)
[764] This Resolution of 2017 urges the implementation of particular legal provisions to acknowledge the "status of human rights defenders and protect their rights and the rights of their colleagues and family members, including women human rights defenders and those working on issues such as [...] sexual orientation and gender identity".
[765] Ambani (n 124).
[766] Nibogora (n 18).
[767] For example, Sogunro and Surajpal, 'Resolution 275 and the realisation of LGBTIQ+ rights in Africa' (n 152).
[768] Nibogora (n 18), 177.

SOGIESC issues are exclusively framed in negative terms, being solely associated with the physical violence, attacks and abuse experienced by LGBTIQ+ persons. These daily inhuman experiences are unacceptable and must be addressed and fought against. However, solely focusing on these negative aspects, which consciously or unconsciously portrays LGBTIQ+ persons as being problematic, risks further marginalising and problematising LGBTIQ+ communities and pushing them to the outskirts of society.

In 2023, the African Commission adopted Resolution 552, a significant soft law mechanism focusing on protection of the rights of intersex persons.[769] The document places particular emphasis on the discrimination faced by intersex children, even though it does not explicitly use that wording. This intersection mirrors the current efforts of the Centre for Human Rights before the African Children's Committee, advocating for a Resolution on intersex children.[770] However, a careful examination of Resolution 552 reveals that the African Commission employs problematic language. According to the Resolution, the African Commission "recogniz[es] that intersex persons [...] are born naturally with a chromosomal abnormality" and "that intersexuality is an inherent handicap at birth".[771] Thus, the African Commission has categorically and wrongly situated intersex persons within a framework of disabilities. The Centre for Human Rights urged in their press statement the following:

> "It is important to acknowledge that while many struggles are intersectional intersex identities should not be pathologized as an 'abnormal' medical condition or illness as this contributes to invasive procedures done on intersex persons without their consent"[772].

Overall, the language employed by the African Commission classifies both intersex individuals and, indirectly, those with disabilities as anomalies.

Both resolutions, by addressing SOGIESC issues are framed in terms of a social problem. Here, I refer to Debele's work, which has mapped different contexts of issues framed as

[769] Resolution 552 (n 763)
[770] Centre for Human Rights, Faculty of Law, University of Pretoria, 'Promotion and protection of the rights of intersex children under the African human rights system' (n 155).
[771] Resolution 552 (n 763)
[772] Centre for Human Rights, Faculty of Law, University of Pretoria, 'CHR commends African Commission on adoption of first resolution on intersex persons in Africa' (22 March 2023) <https://www.chr.up.ac.za/latest-news/3265-chr-commends-african-commission-on-adoption-of-first-resolution-on-intersex-persons-in-africa> accessed 20 January 2024.

social problems, for example, around the mothering of so-called "improper" women.[773] In my analysis, I apply this concept of 'social problems' to illustrate and categorise how LGBTIQ+ citizens are consciously or unconsciously portrayed in the AHRS with negative connotations. Resolution 275, as the first-ever resolution focusing on SOGIESC issues in the AHRS, addresses SOGIESC issues only in the context of violence and torture. Resolution 552 frames persons as an abnormality. Without conflating disabilities with social problems, I argue that this framing implies a deviation from what society considers as normal and thus, suggests that being intersex is a problem. Such representations reflect and perpetuate negative stereotypes, affecting societal perceptions and interactions. While the AHRS incorporates SOGIESC issues in the two resolutions to protect and support LGBTIQ+ citizens, providing essential soft law mechanisms for advancing SOGIESC rights, the negative framing in the legal texts can entrench discrimination and inhibit meaningful progress toward equality.

These two examples illustrate the institutional influence on procedural mechanisms, demonstrating that while a specific procedural mechanism can be well-established within the regional system, its effectiveness also depends on how it is applied by the institutions.

In light of this realisation, I argue that Nyeck's call to "Africanize queerness" instead of "queering Africa"[774] can be extended to the context of problematising queerness in human rights settings. Queerness is currently not associated with joy, strength and agency, but with narratives of suffering, abnormality, problems and violence. As soon as it becomes possible to see beyond these negative narratives of how to be and who is queer and accept that being queer is not a problem, either for the individual or for society, it is possible to start moving away from the current practices of priority-setting towards an agenda that is truly protective of human rights. When the institutions embark on this path, it will render the procedural framework more effective and will make it possible to claim SOGIESC rights through the concept of claiming, benefiting not only LGBTIQ+ individuals but everyone.

[773] See Serawit Debele, 'Trans(forming) Archives: Speculative Biographies of Ethiopians Between and Beyond Genders' (2022) 81(3-4) African Studies 340; Debele, 'Revolutionary Mothering' (n 351).
[774] Nyeck (n 118). For more about my interpretation of this statement, see Chapter 3, 64.

4.2. Special Mechanisms[775]

As of May 2024, the African Commission has established twelve special mechanisms, yet none are explicitly dedicated to or focused on SOGIESC issues.[776] In 2020, the African Commission expanded the mandate of the Working Group on Indigenous Populations/Communities in Africa and changed its name to the Working Group on Indigenous Populations/Communities and Minorities in Africa. According to the Resolution on the Renewal of the Mandate, Appointment of the Chairperson, Reconstitution and Expansion of Mandate of the Working Group on Indigenous Populations/Communities in Africa 2020 (Resolution 455), this was a result of recognising

> "the need to promote and protect the rights of non-dominant minorities who are distinct from indigenous populations/communities but suffer similar conditions of discrimination, marginalization, dispossession, domination, non-recognition and lack of representation, threat of loss of identity and poverty".[777]

The Working Group was entrusted with the additional mandate to "monitor rights issues relating to ethnic, cultural, linguistic, religious and regional minorities in Africa with all its ramifications".[778] According to one of my interview partners, a legal officer at the African Commission, "the concept of minorities in Africa is not so well elaborated".[779] The interview partner reflects as follows on the questions currently being asked:

> "The minorities we're talking about are religious and linguistic minorities. […] But should we only concentrate on linguistic and religious minorities? Should we reconsider our understanding of minorities? Should we have people also reconsider their minority [status]?"[780]

Regrettably, the Working Group's current understanding of the concept of minorities in Africa is limited, restricting the scope of its activities.[781] This limited understanding is

[775] Parts of this section have been developed in Zundel, *A Queer Critique: Intersectionality in the African human rights system* (n 342) (forthcoming).
[776] African Commission on Human and Peoples' Rights, 'Special Mechanisms' <https://achpr.au.int/en/special-mechanisms> accessed 4 May 2024.
[777] Resolution on the Renewal of the Mandate, Appointment of the Chairperson, Reconstitution and Expansion of Mandate of the Working Group on Indigenous Populations/Communities in Africa 2020, ACHPR/Res. 455 (LXVI) 2020 (African Commission on Human and Peoples' Rights)
[778] Ibid.
[779] Interview with E13.
[780] Interview with E13.
[781] For more details of the concept of minorities in Africa, see Samia Slimane, 'Recognizing minorities in Africa' <https://minorityrights.org/app/uploads/2023/12/download-43-recognizing-minorities-in-africa.pdf> accessed 15 July 2024; Solomon Dersso, 'The African human rights system and the issue of minorities in Africa' (2012) 20(1) African Journal of International and Comparative Law 42.

closely related to the current inadequate interpretation of the term peoples in the African Charter, trapped by the problematic conception of the human discussed above.[782] The Working Group has overlooked the potential to move away from the original demarcation feature to broaden its mandate to encompass other minorities urgently needing human rights protection, such as minorities based on SOGIESC. On a broader level, this outlook of the Working Group mirrors the current priority-setting practices of the AHRS.[783]

The mandate of some bodies comprises more than one thematic area, such as the Working Group on the Rights of Older Persons and People with Disabilities in Africa. By definition, this Working Group also focuses on older persons with disabilities, thus fostering intersectional inclusiveness. The members of some other special bodies have taken the opportunity to work on topics that intersect with and extend beyond their immediate mandate. Adopting such an intersectional approach in their routine responsibilities empowers them to challenge existing legal frameworks and consequently prioritise narratives that otherwise would have no space. For example, in 2014, the Special Rapporteur on Human Rights Defenders and Focal Point on Reprisals in Africa issued two press releases in which she strongly critiqued the anti-homosexuality legislation in Nigeria and Uganda.[784] In particular, she pointed out the increasing sense of insecurity among LGBTIQ+ persons and those who defend their rights since the promulgation of the law. She also denounced the invasion of the privacy of LGBTIQ+ persons and the cases of intimidation, threats, harassment, and acts of violence against them.[785] In 2017, the Special Rapporteur on Prisons, Conditions of Detention and Policing in Africa issued Draft Principles on the Declassification and Decriminalization of Petty Offences in Africa in which countries were called on to address the root causes of other petty offences, including measures which criminalise same-sex sexual relations, drug use and sex work.[786]

Overall, the African Commission's special mechanisms are pivotal in fulfilling its promotional mandate. Despite the absence of a dedicated mechanism for addressing SOGIESC

[782] See Chapter 4, 110 et seqq and Chapter 3, 70 et seqq.
[783] For more about priority-setting concerns, see Chapter 4, 118 et seq.
[784] African Commission on Human and Peoples' Rights, 'Special Rapporteur on Human Rights Defenders and Focal Point on Reprisals in Africa' <https://achpr.au.int/en/mechanisms/special-rapporteur-human-rights-defenders-and-focal-point-reprisals-africa> accessed 4 May 2024.
[785] International Federation for Human Rights, 'Anti-Homosexuality law in Uganda: Strong position of the ACHPR's Special Rapporteur on Human Rights Defenders' (18 March 2018) <https://www.ref-world.org/docid/534bd8e112.html> accessed 15 July 2024.
[786] Resolution leading to these draft principles, Resolution on the Need to Develop Principles on the Declassification and Decriminalization of Petty Offences in Africa 2017, ACHPR/Res.366(EXT.OS/XX1)2017 (African Commission on Human and Peoples' Rights)

issues, the above analysis suggests that some of the current special mechanisms harbour the potential to advance SOGIESC rights. Ultimately, the effectiveness of these special mechanisms in promoting SOGIESC rights hinges upon the commitment of the individuals involved.

In addition to supporting the need for a special mechanism relating to SOGIESC rights, I concur with Viljoen's view which advocates the appointment of expert Special Rapporteurs.[787] This would be in line with the practices of the UNHRS.[788] I firmly believe that maximising expertise, ensuring sustainability beyond electoral terms, and promoting independence from the AU is paramount for the effectiveness of such mechanisms. One of the recent interventions by the African Commission towards realising such effectiveness was the 1st Joint Forum of the Special Mechanisms (Working Groups and Committees) entitled "Advancing the Protection and Promotion of Human Rights in Africa: Strengthening Commitments, Overcoming Challenges and Reinforcing Opportunities" held in 2024. This event was attended by stakeholders from academia, civil society, human rights organisations and policy groups. However, here too, SOGIESC topics were not at the forefront of the discussion.

In essence, the special mechanisms are well established and play a pivotal role in promoting human rights on the African continent. However, regarding their effectiveness for claiming SOGIESC rights, they currently rely too much on the Commissioner's initiative to ensure claimability. In other words, the current set of mechanisms and their interpretation are not likely to encourage the claiming of SOGIESC rights, and there is room for strengthening their effectiveness.

4.3. Observer Status and SOGIESC Rights

Having observer status is one of the most important procedural opportunities for claiming SOGIESC rights in the AHRS, as it develops an official relationship between the African Commission and NGO concerned. While Resolution 572 has established sound procedures for granting observer status, the institution's current practice contradicts the values enshrined in the African Charter and renders the mechanism ineffective for claiming SOGIESC rights.

[787] Viljoen, *International Human Rights Law in Africa* (n 3), 369 et seq.
[788] Joanna Naples-Mitchell, 'Perspectives of UN special rapporteurs on their role: inherent tensions and unique contributions to human rights' (2011) 15(2) The International Journal of Human Rights 232, 232.

After the 'perfect storm' around CAL, developments regarding observer status at the African Commission are ongoing.[789] During the 73rd Ordinary Session in October 2022, the African Commission rejected applications for observer status from three NGOs with varying degrees of focus on SOGIESC issues: Alternative Côte d'Ivoire, Human Rights First Rwanda Association, and Synergía. The African Commission argued that sexal orientation is not an "expressly recognized right" in the African Charter and is contrary to "African values".[790]

Viljoen correctly points out that the African Commission based its decisions on three arguments.[791] Firstly, the African Commission assumes that all three NGOs focus their advocacy work (solely) on SOGIESC rights.[792] Secondly, it argues that the NGOs and their work have no basis in the African Charter, as sexual orientation is not expressly mentioned as a right.[793] Thirdly, the African Commission believes the work of the NGOs is against African values.[794]

Viljoen further argues that the African Commission overlooks several points based on these arguments. Firstly, it neglects the intersectional reality reflected in civil society's advocacy work, where NGOs focusing on women's and children's rights also address SOGIESC topics.[795] Secondly, the African Commission itself has acknowledged that the right to equal treatment regardless of sexual orientation is one of the rights enshrined in the African Charter.[796] Thirdly, the argument that sexual orientation is not mentioned in Article 2 of the African Charter overlooks the non-exhaustive nature of the list, as other grounds for non-discrimination, like age or disability, are also absent.[797] Fourthly, the African Commission displays a simplistic view of African values, presuming the existence of a "single set of values".[798] However, the diversity of values across the continent is evident, as seen in the 22 countries that currently do not criminalise same-sex sexual

[789] On the 'perfect storm' around CAL, see Chapter 5, 139 et seqq.
[790] African Commission on Human and Peoples' Rights, 'Final Communiqué of the 73rd Ordinary Session of the African Commission on Human and Peoples' Rights' (n 742), para. 58.
[791] Frans Viljoen, 'LGBTQ+ rights: African Union watchdog goes back on its own word' *The Conversation* (2023) <https://theconversation.com/lgbtq-rights-african-union-watchdog-goes-back-on-its-own-word-197555> accessed 2 April 2023.
[792] Ibid.
[793] Ibid.
[794] Ibid.
[795] Ibid.
[796] For example, *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128 (African Commission on Human and Peoples' Rights).
[797] Viljoen, 'LGBTQ+ rights: African Union watchdog goes back on its own word' (n 791).
[798] Ibid.

relationships. Moreover, this narrow understanding of African values overlooks principles such as tolerance which are embedded in the African Charter.[799]

The decision to reject the applications reveals once more the ambivalence of the African Commission in relation to SOGIESC rights and confirms that the granting of observer status to organisations is the crux of SOGIESC advocacy at the regional level. Firstly, the rejection of applications for observer status created a situation of double standards in which

> "NGOs with observer status are allowed to raise issues pertaining to sexual orientation and gender identity during Commission sessions, while CAL [and other SOGIESC-focused organisations are] prevented from doing the same".[800]

Secondly, the current practice of the African Commission is contrary to other SOGIESC-related practices, especially Resolution 376.

The decision to reject the applications has significantly restricted accessibility and cooperation with the African Commission, thus diminishing the effectiveness of the procedural framework of the AHRS. Reflecting on the reasons for direct rejection by the African Commission, as opposed to 'preliminary' granting as was the case with CAL, would be futile. It may have been due to political pressure, differing understandings and support of SOGIESC rights, or personnel constellations in the African Commission. However, it is interesting to consider the remarks in the African Commission's 43rd Activity Report (2017),[801] which says

> "b. The Commission is mandated to give effect to the African Charter under which everyone is entitled to the rights and subject to the duties spelt out in the Charter, and it is the duty of the Commission to protect those rights in line with the mandate entrusted to it under Article 45 of the Charter, without any discrimination because of status or other circumstances.
>
> c. While fulfilling this mandate, the Commission remains alive to and mindful of the imperative not to encroach on domestic policy matters that fall outside its purview.

[799] Ibid.
[800] Viljoen, 'From a cat into a lion? An overview of the progress and challenges of the African human right system at the African Commission's 25 year mark' (n 405), 310.
[801] See Chapter 5, 139 et seqq.

d. The Commission will continue to scrutinize the notion of 'African Values' within the framework of its mandate to interpret the African Charter."

At any rate, it prompts considerations of what implications this holds for the future of the said procedural mechanism. Definitely, the granting of observer status has become a contentious issue, perhaps even a closed door for SOGIESC organisations. According to Rule 72 (3) of the Rules of Procedure of the African Commission, the African Commission can take measures against NGOs with observer status if they no longer fulfil the criteria or default on their obligations. In the current setting, this poses a real threat to those NGOs with observer status advocating for SOGIESC rights. In light of such a worst-case scenario, the African Commission must be urged in the strongest way possible not to regress from the standards established through its procedural framework. Instead, it must utilise these standards and other procedural mechanisms to resist political pressure and counter the shrinking of civil space.

In essence, observer status with the African Commission is currently seriously restricted with regard to claiming SOGIESC rights. Only NGOs with existing observer status can strategically use this official relationship with the main institution of the AHRS, and even then, they must do so cautiously in light of Rule 72 (3) of the Rules of Procedure of the African Commission. For all others, the institution's current practice renders this mechanism ineffective for claiming SOGIESC rights.

4.4. Reporting mechanism[802]

The following section will explore the influence of shadow reports on the African Commission's reporting mechanism, focusing on shadow reports by NGOs to assess the mechanism's effectiveness.

4.4.1. Past instances of SOGIESC rights in the reporting mechanism

Shadow reports were first used strategically to engage with SOGIESC rights on the regional level during the 39th Ordinary Session of the African Commission in 2006.[803] The International Gay and Lesbian Human Rights Commission (IGLHRC), together with CAL, Behind the Mask (BTM) and All-Africa Rights Initiative (AARI), met during this

[802] Regrettably, specific shadow reports cannot be obtained upon request from the African Commission. Despite contradicting the Shadow Reporting Guidelines, it is argued that these reports can only be published with the consent of the respective NGO, and this consent is not routinely sought. Therefore, I can only outline those reports relevant to SOGIESC that NGOs themselves have published or mentioned.
[803] Ndashe (n 150).

Session to discuss the options of the regional mechanisms for the protection of LGBTIQ+ people.[804] During the same event, the group drafted a statement on the situation for LGBTIQ+ people in Cameroon to complement the outstanding periodic report from Cameroon.[805] This statement was then presented as a shadow report through the Legal Defence and Assistance Project (LEDAP), which holds observer status. The report influenced the discussion of the periodic report afterwards, as several Commissioners referred to LGBTIQ+ rights.[806] In the concluding observations and recommendations of Cameroon's 1st Periodic Report (2001-2003), the African Commission raises concerns due to the "upsurge of intolerance against sexual minorities" that remains despite "the efforts of Cameroon to promote and protect human rights and to promote awareness of the principles and provisions of the African Charter". [807]

At the 40th Ordinary Session in 2006, Uganda's periodic report was discussed. Sexual Minorities of Uganda (SMUG) and IGLHRC prepared a shadow report on aspects of discriminatory laws and arbitrary arrests in Uganda.[808] In response, Commissioner Mumba Malila asked in the concluding observations about the status of the continued existence of the penal law criminalising consensual same-sex acts in Uganda and the nature of human rights violations against Victor Julie Mukasa by the Ugandan authorities.[809]

For the 55th Ordinary Session in 2014, Stop AIDS in Liberia (SAIL), together with other organisations, drafted a shadow report addressing the legal status of sexual orientation in the Republic of Liberia. The report identifies Articles 2, 3, 4, 5, 6, 7, 10, 15, 16 and 28 of the African Charter as violated by Liberia.[810] In response, the African Commission's concluding observations on the Initial and Combined Periodic Reports (1982-2012) of Liberia referred to SOGIESC rights.

[804] Ibid., 18.
[805] African Commission on Human and Peoples' Rights, 'Concluding Observations and Recommendations Cameroon: 1st Periodic Report, 2001-2003: Adopted at 39th Ordinary Session May 11 to May 25, 2006 Banjul, Gambia.' (2006) <https://www.achpr.org/sessions/concludingobservation?id=41> accessed 10 February 2021.
[806] Ndashe (n 150), 18.
[807] African Commission on Human and Peoples' Rights, 'Concluding Observations and Recommendations Cameroon: 1st Periodic Report, 2001-2003' (n 805).
[808] Ndashe (n 150), 18 et seq.
[809] Ibid., 18.
[810] Stop AIDS in Liberia (SAIL) et al. 'Human Rights Violations Against Lesbian, Gay, Bisexual, and Transgender (LGBT) People in Liberia A Shadow Report on Liberia's Compliance with the African Charter on Human and Peoples' Rights' (April-May, 2014) <https://www.heartlandalliance.org/gihr/wp-content/uploads/sites/12/2016/07/ACHPR-Liberia-Alternative-Report-2014.pdf> accessed 15 July 2024.

AMSHeR and the Centre for Human Rights prepared a shadow report on Eritrea's initial national report from 1999 to 2016 for the 62nd Ordinary Session in May 2018. The authors point out that Article 600 of Eritrea's penal code violates the provisions of Resolution 275 and that criminalisation creates general fear for LGBTIQ+ persons. Therefore, the authors urge the African Commission to recommend to Eritrea that non-discrimination and equal protection under the law be ensured for all Eritreans, regardless of their sexual orientation, gender identity, and expression. They further advocate giving effect to Resolution 275.[811] The concluding observations and recommendations of the African Commission only identify a lack of information on different topics, including MSM in (102) (ii) and urge Eritrea in (120) Iiv. (b) to include information on the same issue in the following report.[812]

At the 63rd Ordinary Session in 2018, a shadow report by the Botswana Network on Ethics, Law and HIV/AIDS (BONELA) highlights positive developments, as the report's authors congratulate Botswana on the decision to allow transgender persons living in the country to change their gender marker.[813] At the same time, they are concerned that the Criminal Code of Botswana in Sections 164 (a) and (b), 165 and 167 perpetuates stigma and discrimination against the LGBTIQ+ community.[814] They recommend improving health care and raising awareness among law enforcement agencies to end stigma. In addition, sexual orientation should be explicitly included as a non-discrimination ground in Section 3 of the Constitution, and specific legislation should be enacted to combat homophobia and hate crimes.[815] In the concluding observations and recommendations, the African Commission raised concerns about the lack of a legal framework that protects persons from discrimination and violence on the basis of their actual or imputed sexual orientation or gender identity. The African Commission urges Botswana to enact laws and policies to ensure the implementation of Resolution 275.[816]

---

[811] African Men for Sexual Health and Rights (AMSHeR) et al. 'The Violations of Human Rights on the Basis of Sexual Orientation and Gender Identity in the Federal Republic of Nigeria under the African Charter on Human and Peoples Rights' (October 2011).
[812] African Commission on Human and Peoples' Rights, 'Concluding Observations and Recommendations on the Initial and Combined Periodic Report of the State of Eritrea, 1999-2016' (1 May 2019) <https://achpr.au.int/en/state-reports/concluding-observations-and-recommendations-initial-and-combined-periodic> accessed 4 May 2024.
[813] The Botswana Network on Ethics, Law and HIV/AIDS (BONELA) et al. 'CSO's Comment on the Report submitted by the Republic of Botswana' (2018).
[814] Ibid.
[815] Ibid.
[816] African Commission on Human and Peoples' Rights, 'Concluding Observations and Recommendations Botswana, 2nd and 3rd Combined Periodic Report (2011-2015) at 63rd Session' (2018) <https://achpr.au.int/index.php/en/state-reports/concluding-observations-and-recommendations-botswana-2nd-3rd-periodic-rep accessed 25.04.2023> accessed 4 May 2024, para. 56 and 77.

The examples above demonstrate that the African Commission pays attention to concerns from the shadow reports regarding SOGIESC topics. It also mentions the positive efforts of States from time to time, such as the murder investigation initiated after the death of David Kato in Uganda in 2011.[817] However, it has also repeatedly not addressed SOGIESC issues, even though NGOs have reported specific situations or developments in their shadow reports.[818] A pattern of when these topics are addressed and when they are not picked up cannot be identified. Overall, the African Commission is inconsistent in addressing SOGIESC issues through its concluding observations.[819] This raises further questions about the efficiency of the shadow reporting mechanism in informing the African Commission.

4.4.2. Perspectives from NGOs

Three factors are crucial for shadow reports. National and grass-roots organisations with knowledge about local human rights must have observer status.[820] These organisations must possess the knowledge and expertise to write effective shadow reports.[821] The African Commission must ensure that all information related to the State reporting mechanism is made accessible in a timely manner so that the shadow reports can be well researched, comprehensive, and context-specific.[822]

The Centre for Human Rights' approach provides an example for further analysis of the evolution and strategies surrounding shadow reports. Over time, the Centre for Human Rights has adopted a more deliberate strategy for the shadow reporting mechanism, coinciding with the African Commission's efforts to develop and endorse Shadow Report Guidelines. The Centre for Human Rights endeavours to submit a shadow report on each pending periodic report.[823] To this end, it has devised a template and procedure for shadow reports, to which all thematic units of the Centre for Human Rights contribute,

[817] Centre for Human Rights, Faculty of Law, University of Pretoria, 'A Guide to LGBTIQ+ rights in the UN and African Human Rights Systems' (n 154).
[818] For example, Malawi Concluding Observations and Recommendations on the 2nd and 3rd Combined Periodic Report of the Republic of Malawi, 2015-2019 & Shadow Report from the Centre for Human Rights for the 69th Session; Namibia 72nd Session Concluding Observations and Recommendations-Namibia: 7th Periodic Report, 2015-2019 & Shadow Report from the Intersectional Network of Namibia, International Service for Human Rights.
[819] Jjuuko, 'The protection and promotion of LGBTI rights in the African regional human rights system: opportunities and challenges' (n 6), 277.
[820] For more about observer status for NGOs focussing on SOGIESC, see Chapter 6, 164 et seqq.
[821] The Centre for Human Rights regularly provides training on how to write shadow reports.
[822] For more about the accessibility of information at the African Commission, see Chapter 5, 151.
[823] Interview with E4.

culminating in a comprehensive combined report.[824] Previously, shadow reports often centred on one or two thematic issues, depending on the individual efforts of the respective Unit. While the thematic reports were neither consistently submitted nor comprehensive in their content, they facilitated broader engagement and left a more significant impact on specific topics. Particularly regarding contentious issues like SOGIESC rights, one of my interview partners assumes that a focused shadow report on this subject makes it more difficult for the African Commission to entirely disregard the concerns raised.[825] Thus, in certain circumstances, such as alarming legal developments in a country, an organisation may strategically choose to issue a shadow report solely addressing a single issue.

In essence, the shadow reporting mechanism of the AHRS is a crucial tool which enables NHRIs, NGOs with observer status, institutions, and other interested parties to participate in monitoring and assessing human rights situations in African countries. It provides an independent and alternative perspective, which can help identify gaps in implementing the African Charter and inform the African Commission's concluding observations. The more information is available, and the more pressure is exerted on the African Commission, the greater the chances of addressing a specific situation. However, resource-related accessibility on both sides poses challenges for most organisations, limiting the flow of information to the African Commission. Especially, insufficient resources within the Secretariat of the African Commission lead to delays in considering the reports, which makes continuous conversation significantly more difficult.[826] As discussed in Chapter 5, the procedures around the reporting mechanism must be characterised by transparency and cooperation.[827] It is essential that the African Commission remains committed to this mechanism and facilitates and implements these procedures, as this ultimately determines the mechanism's effectiveness.[828] Only when the African Commission shares all information in time and it is accessible to everyone on the website according to the Rules of Procedure of the African Commission – which is currently too often not the case[829] – can the mechanism be effective for claiming SOGIESC rights.

[824] For more about the structure of the Centre for Human Rights, see Chapter 3, 54.
[825] Interview with E5.
[826] The Secretariat is responsible for reviewing periodic reports, preparing draft concluding observations, and coordinating with State parties.
[827] Bonolo Dinokopila, 'Beyond paper-based affiliate status: National human rights institutions and the African Commission on Human and Peoples' Rights' (2010) 10(1) African Human Rights Law Journal 26, 50; see also Chapter 5,
[828] See Evans and Murray, 'The Reporting Mechanism of the African Charter' (n 718), 261.
[829] Interview with E5.

4.5. Accessibility of the protective mandate[830]

"The communications procedure provides the clearest possibility of holding states accountable."[831] I argue that the more easily and directly individuals and NGOs can access the protective mandate of the institutions, the more effective the institutional and procedural framework will be for claiming. Especially with regard to SOGIESC rights in Africa, access to regional institutions is essential in order to overcome and counter the often-deadlocked avenues of national jurisdictions. Otherwise, the paramount purpose of the IHRL framework is rendered ineffective. Despite this, at the moment, the (quasi-)judicial mechanisms of the African Commission, African Children's Committee, African Court, and REC Courts remain primarily unexplored in respect of SOGIESC rights. The following section is structured into four parts. Firstly, I determine how to access the protective mandates of the institutions with a special focus on the African Court. Secondly, I specify the circumstances under which a case/communication is deemed admissible. Thirdly, I look at the few times the protective mandate of the institutions has been targeted to assess the effectiveness and potential for claiming of the protective mandates and with a view to expanding and transforming the AHRS. Finally, I explore possible ways forward for the African Court of Justice and Human Rights in light of the current ambivalences at the African Commission.

4.5.1. How can individuals and NGOs access the protective mandates?

In Article 55 (1) of the African Charter, direct access to the African Commission by individuals and NGOs through communications is titled "communications other than those of State parties to the present Charter". According to Article 44 (1) of the African Children's Charter, the African Children's Committee can receive communications from

> "any person, group or non-governmental organization recognized by the Organization of African Unity, by a Member State, or the United Nations relating to any matter covered by this [African Children's] Charter".

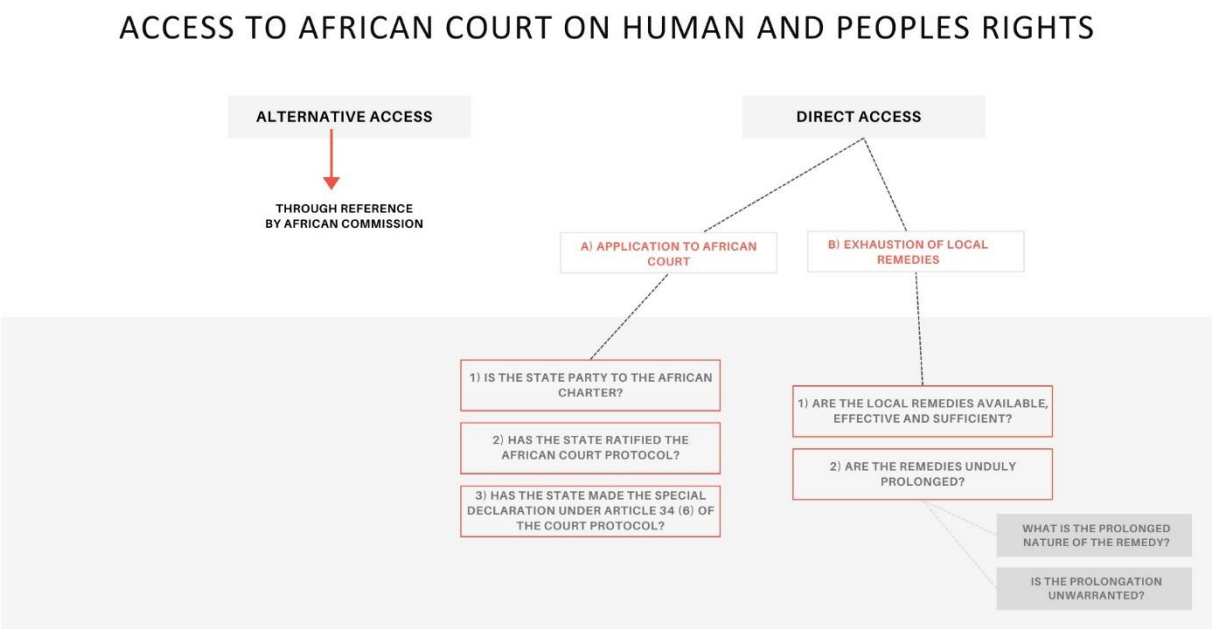
The path to the African Court for individuals and NGOs wishing to file a complaint against a State is more restricted. Firstly, the respective State must be a party to the African Charter.[832] Secondly, the respective State must have ratified the African Court

[830] Parts of this sub-section originate from Kaime and Zundel, *Let's (not) talk about the gays: Malawi's stalled attempts at decriminalisation of same-sex laws* (n 179) (forthcoming).
[831] Viljoen, *International Human Rights Law in Africa* (n 3), 300.
[832] All 54 AU Member States are parties to the African Charter.

Protocol. As of May 2024, 34 States have ratified and not withdrawn from the African Court Protocol.[833] Thirdly, the respective State has made a special declaration under Article 34 (6) together with Article 5 (3) of the African Court Protocol, accepting the competence of individuals and NGOs – those enjoying observer status with the African Commission – to directly access the African Court.[834] As of May 2024, only eight States have made the special declaration and not withdrawn it.[835] These are Burkina Faso, Gambia, Ghana, Guinea Bissau, Malawi, Mali and Tunisia.

Without the special declaration, individuals and NGOs can access the African Court only through the African Commission, which can refer communications to the African Court per Article 58 of the African Charter, along with Article 5 (1) (a) of the African Court Protocol and Rules 130 et seqq. of the Rules of Procedure of the African Commission.[836] In that case, the African Commission is the applicant before the Court.[837] However, the channelling of cases through the African Commission restricts access to the African Court and the autonomy of individuals to claim their rights strategically before the Court.

[833] African Court on Human and People's Rights, 'The African Court on Human and Peoples' Rights (the African Court) in brief: Ratification & Declaration' <https://www.african-court.org/wpafc/basic-information/#ratification> accessed 30 March 2024.
[834] Otherwise, the bodies authorised to access the African Court to submit a case are only the African Commission, the State party which has lodged a complaint to the African Commission, the State party against which the complaint has been lodged at the African Commission, the State party whose citizen is a victim of human rights violation and African intergovernmental organisations according to Article 5 (1) of the African Court Protocol.
[835] African Court on Human and People's Rights, 'Declarations' <https://www.african-court.org/wpafc/declarations/> accessed 30 March 2024.
[836] See Chapter 5, 146.
[837] For more details, see Chapter 5, 146 et seq.



Graphic 3: Access to the African Court on Human and Peoples' Rights

At the sub-regional level, individuals and NGOs can access the protective mandate of the EACJ according to Article 30 of the EAC Treaty and the ECOWAS Court according to Article 3 of the ECOWAS Court Protocol. In comparison to the African Court, this is a distinguishing feature that ensures the direct access of individuals and NGOs to justice for human rights violations in the respective region.[838]

In essence, the question of who can directly access the institutions is primarily characterised by the fact that access to the African Court is significantly limited due to the given framework and the reluctance of States.

4.5.2. Under which conditions is a case/communication deemed admissible?

The next consideration is the conditions under which the protective mandates can be accessed. A common threshold for accessing regional or international (human rights) jurisdiction is the requirement to exhaust local remedies.[839] With this requisite, regional institutions guarantee that they are not interfering with a sovereign judicial system but instead give the respective State the initial opportunity to address the alleged violation of human

[838] Article 3 of the 2005 Supplementary Protocol
[839] See Chittharanjan Amerasinghe, *Local Remedies in International Law* (Cambridge University Press 2004).

rights.[840] Accordingly, the protective mandate applies only to cases that have not been solved on the national level. This is in line with the overall picture and role of the State as the paramount actor in ensuring the protection of human rights.[841]

The African Commission considers communications under specific conditions, such as the exhaustion of local remedies, as outlined in Article 56 of the African Charter. For the African Court to admit a case, the applicant must have exhausted all local remedies according to Article 56 (6) of the African Charter, combined with Article 50 (2) (e) of the African Court Protocol. The African Children's Committee, in its Revised Guidelines for the Consideration of Communications of 2014, stipulates that a communication is only admissible under certain conditions, including that the "communication is submitted after exhausting available and accessible local remedies unless it is evident that this procedure is unreasonably prolonged or ineffective", as outlined in Section IX No. 1 d.

The African Commission has interpreted local remedies as "[…] any domestic legal action that may lead to the resolution of the complaint at the local or national level".[842] Chenwi elaborates on the existence of different kinds of remedies, namely judicial, parliamentary and administrative remedies, of which the African Court has made clear that it primarily considers judicial remedies.[843]

However, there are exceptions to the rule to exhaust local remedies. For example, Article 50 (2) (e) of the African Court Protocol, in combination with Article 56 (6) of the African Charter, says that local remedies do not have to be exhausted if "it is obvious that this procedure is unduly prolonged". The African Court has specified that this requires the domestic procedure "to take place within a reasonable time" and not to be excessively or unjustifiably delayed.[844] No fixed period is identified as undue prolongation by the African Court or the African Commission. However, past communications have shown that the more serious the violation, the more likely the African Commission may find the communication admissible within a shorter period. The African Commission found on

[840] Lilian Chenwi, 'Exhaustion of Local Remedies Rule in the jurisprudence of the African Court on Human and Peoples' Rights' (2019) 41 Human Rights Quarterly 374 <https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/hurq41&id=384&men_tab=srchresults> accessed 15 July 2024.
[841] For more about exhaustion of local remedies in international law, see Dinah Shelton, *Remedies in international human rights law* (Oxford University Press 2015).
[842] *Constitutional Rights Project [CRP] v Nigeria* (n 521).
[843] Chenwi, 'Exhaustion of Local Remedies Rule in the jurisprudence of the African Court on Human and Peoples' Rights' (n 840).
[844] *Beneficiaries of the Late Norbert Zongo v Burkina Faso* [2014] No. 013/2011 (African Court on Human and People's Rights), 55; *Nganyi v United Republic of Tanzania* [2016] No. 006/2013 (African Court on Human and Peoples' Rights), 95.

two separate occasions that cases pending for twelve and five years, respectively, were deemed unjustifiable thus the requirement to exhaust domestic remedies did not apply.[845] Whether the domestic procedure is unduly prolonged is to be determined on a case-by-case basis and by the doctrine of a "reasonable man's test"[846] In this regard, the following two considerations are important: what constitutes undue prolongation of the remedy and when is the prolongation unwarranted?

In addition, the African Court has specified that the local remedies must be available, effective and sufficient.[847] Firstly, the African Court aligns with the view of the African Commission that availability means that the remedy "[…] can be pursued by the Applicant without any impediment".[848] In this context, other international and regional human rights institutions, which the African Court cites regularly, have pointed out that "special circumstances of the present case", such as socio-economic circumstances, are also to be considered.[849] Secondly, according to the African Court, effective in respect of remedies means

> "that which produces the expected result and therefore the effectiveness of a remedy as such is measured in terms of its ability to solve the problem raised by the complainant".[850]

Lastly, domestic remedies may be deemed insufficient if, for example, the complainant cannot rely on their country's judiciary because they believe that their life or that of their relatives is in danger.[851] This is the case when human rights violations are so extensive or pervasive that pursuing domestic remedies is neither practical nor advisable.[852] In line with the analysis on clawback clauses in Chapter 4, SOGIESC cases on the continent must carefully be analysed on a case-to-case basis to assess whether local remedies are

---

[845] *Enga Mekongo v Cameroon* [1995] Communication No. 59/91 (African Commission on Human and Peoples' Rights); *Oudjouriby Cossi Paul v Benin* [2004] Communication No. 199/97 (African Commission on Human and Peoples' Rights).
[846] *Nganyi v United Republic of Tanzania* (n 844), 28.
[847] *Mtikila v United Republic of Tanzania* [2013] No. 009/2011 & 011/2011 (African Court on Human and Peoples' Rights), 28.
[848] *Konaté v Burkina Faso* [2014] No. 004/2013 (African Court on Human and Peoples' Rights), 26.
[849] For example, *D.H. and Others v the Czech Republic*, Application No. 57325/00 [2007] 57325/00 (European Court of Human Rights).
[850] *Beneficiaries of the Late Norbert Zongo v Burkina Faso* (n 844), 24.
[851] *Gabriel Shumba v Zimbabwe* [2012] No. 288/2004 (African Commission on Human and Peoples' Rights) 63,74; *Rights International v Nigeria* [1999] No. 215/98 (African Commission on Human and Peoples' Rights), 24; *John D. Ouko v Kenya* [2000] No. 232/99 (African Commission on Human and Peoples' Rights), 19, 39.
[852] Examples of these human rights violations are widespread torture, institutionalised practices of human rights violations, extrajudicial executions and restriction of fundamental freedoms.

truly available, effective and sufficient or if an exception to the requirement to exhaust local remedies may be applicable. Although such a SOGIESC case has not yet been considered by any of the three institutions, it is worth exploring, considering other previous jurisdiction of the African institutions, especially *Constitutional Rights Project v Nigeria*, as well as jurisdiction in other regional and international human rights frameworks.[853] It has the potential to impact the accessibility of the protective mandate and, therefore, the effectiveness of the mechanisms and institutions for claiming SOGIESC rights.

In contrast to the regional level, the ECOWAS Court and EACJ have no requirement that applicants must exhaust local remedies as a prerequisite for bringing cases before the respective Court.[854] Within the EAC, the 2005 Supplementary Protocol provides only for 'non-anonymity' and 'non-pendency' as the two conditions for admissibility.[855] However, according to Article 30 (2) of the EAC Treaty, the individual who initiates proceedings must lodge their complaint within two months of the decision or act complained of.[856] One of the ECOWAS Court's jurisprudential principles is the non-exhaustion of domestic remedies, which makes it a judge of the first instance.[857]

To conclude, examining the direct accessibility of institutions for individuals and NGOs reveals different criteria for the admissibility of cases/communications between the regional and sub-regional levels. This divergence may be attributed to the fundamental nature of these bodies; regional institutions primarily function as human rights judicial entities, whereas REC Courts have assumed human rights jurisdiction only as a secondary responsibility. Not needing to exhaust local remedies at the sub-regional level greatly improves direct access to protective mechanisms, thus enhancing the effectiveness of the system for claiming SOGIESC rights. At the regional level, the need to exhaust local remedies has a significant impact on the accessibility of the (quasi-)judicial mechanisms of the institutions. Yet, the exception to this requirement in distinct cases is an important feature of the system. It offers good prospects for the protection of SOGIESC rights and enhancing the effectiveness of the protective mandate. In this regard, this aspect must be

[853] *Constitutional Rights Project [CRP] v Nigeria* (n 521); On the right to an effective remedy in the European Convention on Human Rights in the context of sexual orientation as a factor influencing the effectiveness of local remedies, see European Court of Human Rights, 'Guide on Article 13 of the European Convention on Human Rights: Right to an effective remedy' (2024) <https://ks.echr.coe.int/documents/d/echr-ks/guide_art_13_eng-pdf> accessed 6 July 2024.
[854] On the EACJ, see Hagabimana, 'African Regional Economic Communities and Human Rights' (n 72).
[855] 2005 Supplementary Protocol
[856] The Treaty for the Establishment of the East African Community 1999 (East African Community)
[857] Oji Umozurike, 'The African Charter on Human and Peoples' Rights' (1983) 77(4) American Journal of International Law 902.

further explored through suitable cases and research, such as through innovative exploration of clawback clauses.

4.5.3. Prospects for the African Court of Justice and Human Rights[858]

There have been several attempts to merge the African Court with the African Court of Justice and create an overarching African Court of Justice and Human Rights. In 2008, the Protocol on the Statute of the African Court of Justice and Human Rights initiated such a process and was amended by the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) in 2014.[859] The Malabo Protocol has yet to come into effect due to insufficient ratifications.[860] The construction of the African Court of Justice and Human Rights would be special as it is planned to have three sections consisting of general affairs, human and peoples' rights and international criminal law.

Merging the currently active courts comes with prospects and concerns for promoting and protecting human rights on the continent.[861] According to Annex 1 Article 4 (3) of the Malabo Protocol, 6 out of 16 judges will serve at the human rights chamber of the African Court on Justice and Human Rights. This will be a significant decrease from the current 11 judges at the African Court exclusively responsible for human rights cases. However, I argue that the African Court of Justice and Human Rights would also offer interesting new avenues for claiming SOGIESC rights. For example, it would allow NHRIs and the African Children's Committee to file cases before the African Court of Justice and Human Rights, which is currently not the case at the African Court. This would expand the

[858] The impulse for this argument came from a discussion in one of Kaime's classes in 'Human rights in Africa' at the University of Bayreuth.
[859] See Ademola Abass, 'Historical and Political Background to the Malabo Protocol' (2017) 10 The African Criminal Court 11 <https://link.springer.com/chapter/10.1007/978-94-6265-150-0_2> accessed 15 July 2024.
[860] Current status of ratifications: African Union, 'List of Countries which have signed, ratified/acceded to the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights' <https://au.int/sites/default/files/treaties/36398-sl-PROTOCOL%20ON%20AMENDMENTS%20TO%20THE%20PROTOCOL%20ON%20THE%20STATUTE%20OF%20THE%20AFRICAN%20COURT%20OF%20JUSTICE%20AND%20HUMAN%20RIGHTS.pdf> accessed 14 March 2024.
[861] For more about the prospects and concerns, see Michael Ogwezzy, 'Challenges and prospects of the African Court of Justice and Human Rights' (2014) 6 Jimma University Journal of Law 1 <https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/jimma6§ion=5> accessed 15 July 2024; Gino Naldi and Konstantinos Magliveras, 'The African Court of Justice and Human Rights: A Judicial Curate's Egg' (2012) 9(2) International Organizations Law Review 383 <https://brill.com/view/journals/iolr/9/2/article-p383_4.xml> accessed 15 July 2024. One of the concerns is that the Malabo Protocol includes an immunity clause in its Annex under Article 46 A, which would significantly threaten the accountability of high-ranking politicians.

circle of actors that can claim SOGIESC rights through the protective mandate of the judicial body of the AHRS.

Given the current ambivalences of the African Commission towards SOGIESC rights, particularly the refusal to grant observer status to several organisations, the question arises of whether and how the institution could be held accountable. The protective mandate of the African Court of Justice and Human Rights could potentially provide such accountability if the following three conditions are given: Firstly, the African Commission must be an institution of the AU. Article 5 of the AU Constitutive Act defines the organs of the AU. The human rights institutions, including the African Commission, are not directly listed. However, in Article 5 (2) it says the AU Assembly can decide to establish other organs. I argue, by virtue of the African Commission's integral role in the AU institutional framework, that it must be recognised as an organ under the AU according to Article 5 (2) of the AU Constitutive Act. Secondly, the African Commission must be found to have breached the AU Constitutive Act. According to Article 3 (h) of the AU Constitutive Act, one of the objectives of the AU is to "promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments". Based on the above observations, it is clear that the African Commission has failed to protect human rights in accordance with the African Charter by withdrawing or refusing observer status to the organisations.[862] This is a breach of the AU Constitutive Act. Finally, the African Court of Justice and Human Rights must possess jurisdiction to adjudicate such a case. This scenario will become particularly significant if the violation persists after the African Court of Justice and Human Rights has commenced its operations. The African Court of Justice and Human Rights, within its general affairs section, will have jurisdiction over the "interpretation and application of the [AU] Constitutive Act" according to Article 28 (a) and "all acts, decisions, regulations and directives of the organs of the Union" according to Article 28 (e) of the Protocol on the Statute of the African Court of Justice and Human Rights together with Annex Article 14 of the Malabo Protocol. Further, if the withdrawal or refusal of observer status has not been reversed by the time the African Court of Justice and Human Rights commences its operations, the effect is continuous, the violation persists, and therefore the case is admissible.

[862] See Chapter 5, 139 et seqq. and Chapter 6, 173 et seqq.

In essence, the African Court of Justice and Human Rights could enhance the effectiveness of the institutional and procedural framework of the AHRS in respect of claiming SOGIESC rights by serving as a control mechanism for implementation of the procedures by the other institutions, should it become operational.[863]

4.5.4. Past examples of the protective mandate in SOGIESC advocacy

In 1994, William A. Courson submitted a communication to the African Commission challenging the legal status of homosexuals in Zimbabwe. Courson argued that the criminalisation of sexual contact between consenting adult homosexual men in private violated Articles 1-6, 8-11, 16, 20, 22 and 24 of the African Charter. During the process, Courson withdrew the communication *William A. Courson v Zimbabwe,* leading to the African Commission discontinuing the case, as it did not see a reason to continue with it.[864]

Presumably, Courson decided to withdraw the communication after consultation with other stakeholders in the community.[865] It was assumed that this move could jeopardise the broader efforts of the Zimbabwean SOGIESC community, while at the same time, "there is little to be gained" with the communication at the African Commission.[866] In other words, this advocacy effort was deemed untimely and misplaced, as apparently it was not made before the appropriate institution at the right time.

More than a decade later, in 2006, the African Commission stated in *Human Rights NGO Forum v Zimbabwe* that Article 2 of the African Charter "provides the foundation for the enjoyment of all human rights" and, therefore, that equality of treatment is guaranteed "irrespective of […] sexual orientation".[867] The communication itself did not directly address SOGIESC rights. Although, or precisely because, it was made as an *obiter dictum*, this statement was significant.[868] It was the first instance of the African Commission addressing outstanding questions concerning SOGIESC rights through the communication procedure.

---

[863] As of May 2024, this remains a theoretical examination due to the lack of ratifications for the Malabo Protocol.
[864] *William A. Courson v Zimbabwe* [2000] AHRLR 335 (African Commission on Human and Peoples' Rights).
[865] GALZ an Association of LGBTI People in Zimbabwe, 'Courson Complaint' <https://galz.org/courson-complaint/> accessed 4 May 2024.
[866] Ibid.
[867] *Zimbabwe Human Rights NGO Forum v Zimbabwe* (n 796), para. 169.
[868] Rudman, 'The protection against discrimination based on sexual orientation under the African human rights system' (n 69), 8.

In May 2024, the African Commission has still not received another communication relating to SOGIESC rights. However, the African Court has received a request from the Centre for Human Rights and CAL for an advisory opinion.[869] The two NGOs wished to clarify whether the Executive Council exceeded its power to review the African Commission's activity reports, according to Article 59 (3) of the African Charter, when it asked the African Commission to reverse its decision to grant observer status to CAL.[870] On 28 September 2017, the African Court rejected the request. The African Court is entitled to give advisory opinions on "any legal matter relating to the Charter or any other relevant human rights instruments" upon the request of a Member State of the AU, any of its organs, or any African organisation recognised by the AU according to Article 4 (1) of the African Court Protocol. The two NGOs argued that they have observer status with the African Commission and are, therefore, African organisations recognised by the AU. However, in line with the much-discussed decision in the advisory opinion *The Socio-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria*,[871] the African Court held that this would require the respective organisation to have observer status under the AU's "Criteria for granting observer status and for a system of accreditation within the AU", which were adopted in 2005. The two NGOs did not meet these criteria. According to the Centre for Human Rights' press statement after the rejection, "by reading the term 'AU' restrictively, as only referring to the AU as a separate legal entity and not also as the AU acting through its organs, the Court's finding leads to an absurdity".[872] In 2017, around the time of the rejection, no NGO had "secured this form of observer status," largely due to a lack of information about it.[873] This was evidenced by the lack of public awareness of the AU Guidelines.[874] Consequently, the Centre for Human Rights concludes that this situation "[…] leads to the absurd consequence that no NGO is in fact able to submit a request".[875]

[869] *Request for Advisory Opinion by the Centre for Human Rights of the University of Pretoria and the Coalition of African Lesbians* [2017] Nr. 002/2015 (African Court on Human and People's Rights).
[870] Centre for Human Rights, Faculty of Law, University of Pretoria, *African Court rejects Centre for Human Rights and CAL request, leaving political tension within AU unresolved* (2017).
[871] Anthony Jones, 'Form over substance: The African Court's restrictive approach to NGO standing in the SERAP Advisory Opinion' (2017) 17(1) African Human Rights Law Journal 320.
[872] Centre for Human Rights, Faculty of Law, University of Pretoria, *African Court rejects Centre for Human Rights and CAL request, leaving political tension within AU unresolved* (n 870).
[873] Ibid.
[874] Ibid.
[875] Ibid.

At the sub-regional level, the case *Human Rights Awareness and Promotion Forum v Attorney General of Uganda* was heard by the EACJ on 27 September 2016.[876] This case challenged Uganda's Anti-Homosexuality Act 2014 on the grounds of an alleged violation of the rule of law and good governance as enshrined in the EAC treaty.

The case, which was also brought before the Constitutional Court of Uganda in a similar form, was the first to bring such LGBTIQ+ restrictive laws before a (sub-)regional court in Africa. This was the result of deliberate and careful planning and lobbying before the Constitutional Court of Uganda and the EACJ, where the two cases were filed almost simultaneously.[877] The strategy was the following: because it was feared that the case would be delayed at the Constitutional Court of Uganda, it was decided to also use international and regional mechanisms to challenge the Act. As the African Commission requires the exhaustion of local remedies first, the EACJ seemed the best option.[878]

Contrary to what was expected, the Anti-Homosexuality Act was swiftly nullified by the Constitutional Court of Uganda on procedural grounds.[879] Nevertheless, it was decided to proceed with the case before the EACJ. It was recognised that a decision from the EACJ would have implications for Uganda and other Partner States in the EAC.[880] To avoid mootness, the case was amended, and it was argued that nullification of the law did not remove the fact that its enactment violated EAC Treaty provisions.[881] Moreover, it was argued that the subject matter of the reference differed from the Constitutional Court of Uganda's decision. While the Constitutional Court of Uganda focused on the constitutionality of the Act, the case before the EACJ was concerned with whether or not the passing of the Act had violated provisions of the EAC Treaty. This change in the argumentation did not bring any success.[882] The EACJ decided the case was moot since the Constitutional Court of Uganda had already nullified the Act.[883] Furthermore, the EACJ found there was insufficient evidence to consider the public interest exception to its general rule.[884] This decision by the EACJ was a missed opportunity for the REC Court to

[876] *Human Rights Awareness and Promotion Forum v Attorney General of Uganda* [2016] EACJ 133 (Reference No. 6 of 2014) (East African Court of Justice).
[877] Nancy Nicol and others, *Envisioning Global LGBT Rights: (Neo)Colonialism, Neoliberalism, Resistance and Hope* (Human Rights Consortium, School of Advanced Study, University of London 2018), 284.
[878] Ibid.
[879] For more about the Anti-Homosexuality Act and the decision of the Constitutional Court of Uganda, see ibid., 270 et seq.
[880] Nicol and others (n 877), 294.
[881] Nicol and others (n 877), 295.
[882] *Human Rights Awareness and Promotion Forum v Attorney General of Uganda* (n 876).
[883] Ibid., para. 25 et seqq.
[884] Ibid., para. 66.

deliver a landmark decision and, therefore, manifest its relevance in the regional human rights system.

Overall, analysis of the cases brought before the (sub-)regional human rights institutions reveals three things. Firstly, the attempts to apply the protective mandate of the regional human rights system suggest that institutions tend to avoid direct decisions on SOGIESC rights whenever possible. If such convenient exits without substantial engagement with a case were to become an established practice, it would render the protective mandate and, consequently, the procedural framework of the AHRS, ineffective for claiming SOGIESC rights. The essence of the protective mandate, which offers mechanisms to address human rights violations, is one of the most crucial aspects of claiming as a systematic tool. Secondly, in light of the concept of claiming, the African Court's decision to apply such a literalist interpretation again in *Centre for Human Rights and Coalition of African Lesbians, Advisory Opinion 2/2015* also signifies a choice to further restrict the opportunities for NGOs to access the African Court.[885] This is particularly significant in the context of the 'perfect storm' where SOGIESC rights became a political pawn, as the restriction imposed by the African Court severely undermines the effectiveness of the procedural framework and the ability to claim SOGIESC rights. Thirdly, while the analysis reveals severe limitations in the effectiveness of the institutions' protective mandates, particularly regarding their accessibility, it is essential to note that the protective mandate of these institutions has rarely been targeted by advocates and activists. Considering the risk of (societal) pushback with regard to promoting and protecting human and peoples' rights irrespective of the actual court ruling, it's a valid question to ask which institution is the appropriate one, and when is the right time to act? Nevertheless, with Kaime, I have argued that the African Court and other institutions should not be declared untouchable in respect of SOGIESC rights.[886] The institutions have not had a recent opportunity to express their standpoint concerning SOGIESC rights. If an actor has the unique possibility, despite the limitations, to target the protective mandate of one of the institutions with a case (communication) that is suitable both formally and content-wise, this could significantly contribute to the promotion and protection of SOGIESC rights through claiming

[885] Lilian Chenwi, 'The Advisory Proceedings of the African Court on Human and Peoples' Rights' (2020) 38(1) Nordic Journal of Human Rights 61.
[886] Kaime and Zundel, *Let's (not) talk about the gays: Malawi's stalled attempts at decriminalisation of same-sex laws* (n 179) (forthcoming).

and thus expand and transform the current framework.[887] Such a case would show the effectiveness of applying the mechanism.

Having said this, the current configuration of the (quasi-)judicial mechanism remains suited for landmark decisions rather than addressing the systematic and systemic widespread human rights violations on the continent. Most African people cannot bring their cases to the regional institutions due to the several factors explored in Chapters 5 and 6. This limitation renders the mechanism ineffective in certain contexts despite the individual opportunities I have highlighted.

5. Conclusion

My analysis of instances when SOGIESC rights have been subject to procedural mechanisms in the AHRS reveals that the procedural framework has a solid normative foundation and has made important advancements in respect of SOGIESC rights.

With regard to the promotional mandate, it is evident that its interpretation and application by the institutions are often marked by restrictions that limit the framework's effectiveness for claiming SOGIESC rights. Further, I have identified restrictions stemming from external factors, like resource constraints. Nevertheless, the procedural framework has the potential to be effective and fit for claiming SOGIESC rights. It is hoped that the institutions will realise this potential by challenging their current practices, understandings, and structures. One positive step forward could involve expanding the mandate of the Working Group on Indigenous Populations/Communities and Minorities in Africa or even establishing a dedicated mechanism specifically focused on SOGIESC rights.

Regarding the protective mandate, I have identified both limitations and opportunities within the current procedural framework. However, the overarching question emerging from the above analysis concerns the effectiveness of this framework for addressing systematic and systemic mass human rights violations on the continent. If it is to be effective, how should it be structured? The current procedural framework is clearly not equipped to handle the volume of cases arising from the existing systematic and systemic widespread human rights violations. The structure of the protective mandate of the AHRS must be reimagined in light of the challenges it is faced with in Africa. This reimagining should closely align with necessary reforms within the institutional framework, as I believe

[887] Ibid. (forthcoming).

enhanced cooperation between institutions also holds promise for expanding the scope and effectiveness of the protective mandate.

To achieve such a transformation of the procedural framework and its application, it will be crucial for the human rights actors in the AHRS to actively engage with and challenge the system rather than withdrawing out of fear of pushbacks. I strongly believe that utilising the procedural mechanisms of the AHRS holds the potential to make important parts of the regional system more effective for claiming SOGIESC rights.

Chapter 7: Conclusion

1. Introduction

This thesis addresses the question of whether the AHRS is fit to effectively promote and protect SOGIESC rights on the African continent. It does this by an analysis of aspects of the normative, institutional and procedural frameworks through the lens of the concept of claiming, using the example of sexual orientation. Following the introduction, Chapter 2 presents an overview of IHRL, the AHRS, SOGIESC rights in the African context and the relation between law and society through a comprehensive literature review. In Chapter 3, I introduce the concept of claiming as the analytical framework of the thesis and outline the methods employed to address the research question. In particular, I have contextualised the concept of claiming within existing theoretical frameworks, including strategic litigation and queer theory, while also situating it within the unique socio-cultural and legal landscape of Africa. Chapters 4 to 6 adhere to a consistent structure, exploring whether the normative, institutional and procedural frameworks of the AHRS are fit for claiming SOGIESC rights. While the analyses and findings of each of the three chapters are different, they all discuss aspects of claiming SOGIESC rights. Alongside addressing the question of whether the AHRS is fit to effectively promote and protect SOGIESC rights, these chapters also identify pathways that allow stakeholders to actively engage with the regional system through claiming, thus fostering better protection of SOGIESC rights. I argue that such engagement contributes to the transformation of the system itself, making it more effective for claiming human rights. In this concluding chapter of the thesis, I revisit my initial hypotheses and place them against the discussions presented in the various chapters. Through this process, I aim to summarise the main findings of the thesis. After that, I will identify areas for possible further research.

2. Summary of the main findings

The main findings of the thesis revolve around the analysis of the normative, institutional and procedural framework of the AHRS. In light of the initial hypotheses, my selective analysis has revealed the following: The normative, institutional and procedural frameworks of the AHRS add up to a well-established IHRL system. However, in terms of SOGIESC rights, the system has no consistent focus or specific framework and its current

engagement with these rights is currently almost exclusively limited to the African Charter and the African Commission. The findings in relation to claiming SOGIESC rights differ for each of the frameworks:

a. The normative framework is characterised, among other things, by its flexibility and context-specificity, given the incorporation of specific African societal notions into the African Charter. This makes the normative framework, despite its shortcomings, effective for claiming SOGIESC rights.

b. The institutions of the AHRS face severe challenges in terms of their effectiveness with regard to claiming, which, however, can be traced back to features that are common to all IHRL institutions. While the normative framework of the AHRS has incorporated a number of particularities to account for societal, historical, economic and political contexts, such customization is currently lacking in the institutional framework, which limits its effectiveness for claiming significantly. Beyond this, the institutions, especially the African Commission, are currently facing several external threats which they have not been able to oppose or bypass.

c. The mechanisms available in the procedural framework are well designed. However, my study has revealed two main limitations. Firstly, the effectiveness of claiming the procedural mechanisms largely depends on the commitment and practices of individuals and institutions, which is a limiting factor. Therefore, there is a need for systematic and lasting structures within the procedural framework to facilitate effective claiming. Secondly, it has become evident that the protective mandate, despite some promising opportunities, is not designed to address the systemic and widespread human rights violations on the African continent. Therefore, it must be reimagined to be effective for claiming SOGIESC rights in Africa.

From the beginning, my research has been guided by the question of how the AHRS can be best utilised to promote and protect rights related to SOGIESC on the African continent. The answer to the question has been determined by the analysis of the framework's effectiveness for claiming. This analysis has shown that the AHRS has several severe shortcomings, but that it also has important features of the AHRS that are effective. These effective aspects of the framework show where and how to claim SOGIESC rights.

In relation to improving and transforming the normative, institutional, and procedural frameworks of the AHRS, my recommendations are diverse. For example, one significant challenge in the quest for change in claiming SOGIESC rights is the lack of accessibility to the African Court for NGOs and individuals. This limitation renders one part of the institutional framework practically ineffective. As discussed in Chapter 2, various options exist for effecting change in IHRL systems, each with its own set of advantages and disadvantages. One evident recommendation is to amend the African Court Protocol to grant all individuals and NGOs access to the African Court without any requirement for a special declaration by the State. In general, however, recommendations for improving and transforming IHRL systems often appear detached from the political realities, unrealistic in the respective setting, and extend beyond the possibilities of PIL. Instead, I want to share some thoughts on the concept of claiming within and through engagement with the AHRS in alignment with the analytical framework of the thesis and the findings in Chapters 4-6.

My initial hypothesis was that claiming as a concept can fill the existing gaps of the regional system and actively and permanently transform it, which would benefit not only LGBTIQ+ individuals but everyone. I have chosen the concept of claiming as the lens through which to analyse SOGIESC rights in the AHRS in order to contribute to challenging and countering the shrinking civil space. This approach, influenced by Heyn's struggle approach, puts a spotlight on individuals and civil society, empowering them to advocate for their human rights. It provides a new and people-centred perspective on legal systems that is particularly important for rights that are not yet fully accepted. I have grounded the philosophical framework of claiming on the relationality of the human being and human rights (systems), acknowledging the current insufficiencies of the notion of the human person. This has raised the question of how African LGBTIQ+ persons can obtain freedom to live out their sexual orientations and identities as humans. I have argued that the concept of claiming, as a systematic tool for the expansion and transformation of a specific legal framework, can provide assistance in this regard when the construction of the legal framework is effective for claiming SOGIESC rights. Effective frameworks do not necessarily need to be crafted as perfect constructions but must have characteristics that enable them to evolve and adapt to changing needs and circumstances. My analysis has revealed that, in addition to the design and construction of the framework, its application by the institutions ultimately determines whether SOGIESC rights can be claimed through a specific IHRL system at a specific time. This underscores the importance of

designing IHRL frameworks in a manner that obligates their institutions to ensure and enforce the protection of the rights of individuals who are otherwise deprived of their human dignity and human rights. If the IHRL framework is not constructed in such a manner, the ability to claim human rights depends on the institutions, which exacerbates the existing insufficiencies of notions of the human person. My analysis of the AHRS has shown the strengths and weaknesses of the normative, institutional and procedural frameworks with regard to claiming, as well as pathways for further advocacy in respect of SOGIESC rights. Beyond this, it has provided initial insights into a new framework that offers a perspective on the development and transformation of IHRL frameworks, considering people wishing to defend their human dignity and human rights.

The example of SOGIESC rights in the AHRS has shown that the transformation of any system towards the systematic protection of a specific category of people is a lengthy and rocky process with many pushbacks. The examples provided, where civil society has advocated for SOGIESC rights at the regional level, underscore the challenges and struggles inherent in this endeavour. However, they also highlight instances of responsiveness, albeit not consistent, on the part of regional institutions. In this context, Resolution 275 serves as a notable achievement, currently standing as a stronghold against external threats and external hostility.

Analysing the AHRS in terms of the claimability of SOGIESC rights is only one way to explore how to better protect such rights. It needs to be complemented by a broader examination of alternative forms of advocacy and a critical appraisal of the law's role in shaping societal norms. In this regard, Cassel argues as follows:

> "to appreciate its effectiveness and potential, international human rights law must be understood as part of a broader set of interrelated, mutually reinforcing processes and institutions – interwoven strands in a rope – that together pull human rights forward, and to which international law makes distinctive contributions. Thus understood, international law can be seen as a useful tool for the protection of human rights, and one which promises to be more useful in the future."[888]

When contextualising the role of the AHRS, the following questions come up: What is the influence of regional legal developments on the people? How effective is law for the

[888] Douglas Cassel, 'Does international human rights law make a difference' (2001) 2(1) Chicago Journal of International Law 121 <https://chicagounbound.uchicago.edu/cjil/vol2/iss1/8/> accessed 15 July 2024, 135.

improvement of lived realities? Especially, the shortcomings of the institutions' effectiveness highlight the gap between the regional system and the people. The majority of African people do not encounter the AHRS in their daily lives, nor are they familiar with the rights and concepts it encompasses. Nevertheless, this lack of direct engagement does not diminish the importance of these rights for them, and does not negate the impact of the AHRS on their lives. Importantly, it does not imply a disregard for the realities and practices of their society.

Finally, it is time to reflect on the inherent ambivalence between law and queerness within the context of the analytical framework I have employed. Can the concept of claiming lead the way to a queered framework that delivers an intersectional understanding of rights and provides better protection for categories of rights such as SOGIESC rights? Or is this a failed attempt that merely dilutes the essence of queering through the human rights industry without effecting significant transformation for the communities it seeks to serve? As the regional human rights framework undergoes constant development and the protection of SOGIESC rights through the law remains an ongoing struggle, arriving at a definitive conclusion is not feasible. A number of scholars, such as Audre Lorde, have argued, using different formulations, that "the Master's tools will never dismantle the Master's house" or "the one that hurts us, cannot protect us".[889] In the context of this thesis, this suggests that the legal frameworks employed to discriminate against and marginalise LGBTIQ+ citizens cannot serve as the frameworks to protect their rights. Currently, the AHRS is characterised by ambivalence in relation to SOGIESC rights. However, my analysis of the frameworks of the AHRS, especially the normative framework, has revealed that avenues do exist that make it possible to utilise specific aspects of the frameworks to (re)interpret and (re)conceptualise the regional human rights framework. In essence, the law limits and enables at the same time. This thesis has delved into the effectiveness of the AHRS for claiming SOIGESC rights, offering impulses for better protection of SOGIESC rights and, ultimately, the opportunity for transformative changes within the system over time through active, collaborative and strategic advocacy.

[889] Audre Lorde and Mahogany Browne, *Sister Outsider: Essays and Speeches* (Penguin vitae, Penguin Books 2020).

3. Areas for further research

The scope of this study is restricted to establishing whether the normative, institutional and procedural frameworks of the AHRS are fit to effectively promote and protect SOGIESC rights. Certainly, there is more research that needs to be done in the following areas, which the study does not address:

a. This study primarily focuses on the fitness of normative, institutional, and procedural frameworks for protecting rights related to sexual orientation. While significant parts of the analysis of the institutional and procedural frameworks refer to SOGIESC rights in general, there remains a need to explore these frameworks specifically with regard to gender identity, gender expression, and sex characteristics. Future research should be devoted to assessing whether the findings of this thesis are applicable to gender identity, gender expression, and sex characteristics. This would also contribute to identifying gaps or shortcomings in the protection and promotion of SOGIGESC rights through the AHRS.

b. In this thesis, I have focused on constructing an analytical framework around the concept of claiming in the context of SOGIESC. This framework seeks to extend promotion and protection beyond judicial and quasi-judicial rights claiming. To facilitate this, I have utilised empirical legal research methods. Future research could explore how the concept of claiming can be applied in the resolution of other pressing human rights questions that also need space in specific legal frameworks. It would be possible to focus on other human rights topics in different parts of the world. Such further explorations could lead to a general theory of claiming in the field of human rights.

c. This thesis discusses SOGIESC rights in the AHRS. It is not a handbook on the AHRS or even IHRL. A promising avenue for future research would be to delve deeper into specific aspects of the normative, institutional and procedural frameworks of the AHRS, such as the African Children's Committee. This would enable researchers to gain more detailed insights into the intersection between children's rights and SOGIESC rights.

d. This thesis explores the protection of SOGIESC rights through the AHRS. For further research, it would be interesting to explore other legal and non-legal avenues to improving the situation of LGBTIQ+ people on the continent. This would provide a more comprehensive understanding of the possibilities for claiming SOGIESC rights.

e. Another interesting and underexplored topic for further research would be conducting a more targeted anthropological analysis of how NHRIs and NGOs act and react to regional institutions.

4. Conclusion

The AHRS provides a framework for addressing human rights concerns. These concerns necessarily include those of LGBTIQ+ citizens. While the regional human rights framework is currently not a perfectly effective framework for solving the many problems faced by LGBTIQ+ persons, the concept of claiming presents an opportunity to advocate for specific rights to address and mitigate a significant number of the identified substantive and procedural problems. The task ahead for the institutions of the AHRS and all other human rights stakeholders is to unlock the potential of the framework and transform it for the benefit of LGBTIQ+ citizens. This will be possible through innovation, context-specific solutions, cooperation and inclusivity among all stakeholders in SOGIESC advocacy, which are essential for transforming the current state of the regional system and developing an even more effective framework for SOGIESC rights and all African people. Without the full incorporation of SOGIESC rights, the AHRS will remain incomplete, leaving LGBTIQ+ citizens on the margins of humanity.

Appendices

Annex 1: Introduction to SOGIESC concepts and terms

The use of language has real-world implications. Therefore, it is important to understand the key concepts around SOGIESC rights and identify terms that do justice to the diverse groups whose rights are at stake. Along with the steadily growing acceptance of these groups, various terminologies have emerged in academia, in politics and in civil society, which differ in their comprehensiveness. Language is not static and reflects ongoing developments. Individuals experience either stigmatisation or empowerment, depending on the historical, political and societal application of terms used to describe their reality. This phenomenon is evident in the process of reclaiming and redefining terms.

The definitions in this glossary have been adapted from various sources. The thesis is written in English and the available terms are not always adequate to describe the notions and identifications of individuals. Consequently, assumptions have to be made about how individuals identify with specific concepts.

Sex and gender

Sex is a category which is assigned at birth based upon physical characteristics, such as body parts. The categories that can be assigned are male, female, and intersex. The assigned sex comes with expectations of one's gender identity and gender expression created by society, even though sex and gender are neither the same nor necessarily consistent.

By contrast, **genders** are socially constructed roles, behaviours, activities and attributes considered appropriate for men and women at a given time in a specific context. This societal construction, unsurprisingly dominated by Western influences, exhibits a constricting nature. It is important to note that there is a difference between gender identity and gender expression.

SOGIESC

Sexual orientation refers to a person's physical, romantic and emotional attraction towards other persons. Everyone has a sexual orientation as it is an integral part of a person's identity. Some categories of sexual orientation are homosexual, bisexual, pansexual

and heterosexual.[890] Gay men and lesbian women are attracted to individuals of the same sex as themselves. Heterosexual people (also known as 'straight') are attracted to individuals of a different sex from themselves. Bisexual people may be attracted to individuals of the same sex or of a different sex.[891] Additionally, it is important to note that a person's sexual orientation may not always coincide with their sexual practice.

Gender identity reflects a deeply felt and experienced sense of one's own gender(s) that every individual has. A person's gender identity typically corresponds with the sex assigned to them at birth. However, for transgender people, their sense of their own gender(s) does not correspond to the sex they were assigned at birth. In some cases, their appearance, mannerisms and other outward characteristics may conflict with society's expectations based on gender norms.[892]

Gender expression is a person's external way of showing their gender(s), based on traditional gender roles of feminism and masculism. This is done in different ways, such as through physical appearance, interactions, behaviour or mannerisms.[893] Gender fluidity refers to a person's flexibility about their gender(s) and emphasizes the unboundedness of gender(s).

Sex characteristics are the biological traits that identify the sex of individuals, these being genitalia, hormones, internal reproductive organs, chromosomes and gonads.[894] At birth, a child's sex is usually only determined according to the genitalia.

LGBTIQ+

LGBTIQ+ is an umbrella term that stands for lesbian, gay, bisexual, transgender, intersex and queer.[895] The plus sign is put at the end in order to signify the openness of this term

[890] This and similar definitions are used frequently. For example, Centre for Human Rights, Faculty of Law, University of Pretoria, 'A Guide to LGBTIQ+ rights in the UN and African Human Rights Systems' (n 154).
[891] For more discussions around bisexuality in Africa, see Marc Epprecht, '"Bisexuality" and the Politics of Normal in African Ethnography' (2006) 48(2) Anthropologica 187 <http://www.jstor.org/stable/25605310> accessed 15 July 2024.
[892] This and similar definitions are used frequently. For example, Centre for Human Rights, Faculty of Law, University of Pretoria, 'A Guide to LGBTIQ+ rights in the UN and African Human Rights Systems' (n 154).
[893] Ibid.
[894] Ibid.
[895] In the literature, one can find the following acronyms: LGBT, LGBTI, LGBTQ, LGBTQI+, LGBTIQ or LGBTQIA+.

to include other non-binary identities.[896] This inclusion provides a significantly improved spectrum of perspectives on genders and sexual orientation, aligning more closely with reality.

Lesbian refers to women who are physically, romantically and/or emotionally attracted to individuals of the same sex as themselves.[897]

Gay refers to men who are physically, romantically and/or emotionally attracted to individuals of the same sex as themselves.[898]

Bisexual refers to people who are emotionally, romantically, sexually, or relationally attracted to individuals of the same or a different sex.[899]

Transgender (sometimes shortened to 'trans') is an umbrella term used to describe a wide range of identities – including transsexual people, cross-dressers, people who identify as third gender, and others whose appearance and characteristics do not correspond with the sex assigned to them at birth and/or are perceived as gender atypical. For example, transwomen identify as women but were classified as male when they were born. Some transgender people seek surgery or take hormones to bring their bodies into alignment with their gender identity; others do not.[900]

Intersex is an umbrella term used to describe people who are born with natural sex characteristics (including genitals, gonads and chromosome patterns) that do not fit typical binary notions of male or female bodies.[901] Being intersex is not a disorder and any such comment not only wrongly suggests that something needs to be corrected but is also stigmatising.

Queer is an umbrella term used by some LGBTIQ+ persons to describe themselves. It is valued because of its inclusiveness.[902]

Queer/Queerness

According to Nyeck,

---

[896] This and similar definitions are used frequently. For example, Centre for Human Rights, Faculty of Law, University of Pretoria, 'A Guide to LGBTIQ+ rights in the UN and African Human Rights Systems' (n 154).
[897] Ibid.
[898] Ibid.
[899] Ibid.
[900] Ibid.
[901] Ibid.
[902] See above and ibid.

> "the term queerness simply means 'out of order', something that if it previously existed is no longer recognized or needed as such; it has ceased to be in line with expected dominant conventions regarding matters of taste and (re)presentation".[903]

In the past, the term has had several meanings and has been regularly used as an insult. However, members of the community have started using the term queer in a critical sense and are thereby reclaiming it.[904] While some members of the community continue to reject the term due to its continuous offensiveness, the term is today also met with respect as it is regularly used as self-identification. It reflects the boundless and fluxionary reality of individuals and represents inclusivity. As a result, it has even evolved into a radical agenda that seeks to challenge and disrupt various aspects of life through the concept of queering.

Other concepts and terms

The European Institute for Gender Equality has defined **homosexuality** in accordance with the European Court of Human Rights (ECtHR) as "sexual, emotional and/or romantic attraction to persons of the same sex".[905] In a global context, the term is often associated with a particular Western concept of homosexuality and thus with a specific lifestyle of a white middle-class person.[906] In the struggle for the protection of homosexuals in Africa, the use of this term is often a hindrance because it seems, or is systematically used, to strengthen the well-known argument of being "un-African".

De Vos has used the term **sexual minority** as an

> "all-encompassing term referring to individuals who identify as homosexual, or gay and lesbian as well as men who have sex with or desire men and women who have sex with or desire women, as well as gender non-conforming individuals, and individuals who identify as intersex or transgender".[907]

[903] Nyeck (n 118), 11.
[904] Jagose, *Queer Theory* (n 257).
[905] European Institute for Gender Equality, 'Glossary and thesaurus: homosexuality' (2023) <https://eige.europa.eu/publications-resources/thesaurus/terms/1391> accessed 7 September 2023.
[906] Tony Silva, *Still straight: Sexual flexibility among White men in rural America* (New York University Press 2021); De Vos, 'Mind the gap: Imagining new ways of struggling towards the emancipation of sexual minorities in Africa' (n 115).
[907] de Vos, 'Mind the gap: Imagining new ways of struggling towards the emancipation of sexual minorities in Africa' (n 115), 50.

Yet, the term "minorities" often carries stereotypical assumptions that can have disempowering effects by not fully recognising the experiences of individuals within this category. Moreover, the term does not acknowledge that these individuals have not chosen their disadvantaged position but have been marginalised into it. Alternatives like "minoritised" and "marginalised" also run the risk of being disempowering because they highlight the absence of agency. These terms do, however, reflect the power dynamics that individuals encounter. De Vos acknowledges that aspects of the term are problematic. Nevertheless, he deliberately does not use other terms, such as homosexual which is often associated with a white middle-class (see above), or MSM which is often associated with people who are marginalised due to their race, ethnicity or class.[908] Alternatively, one could opt for similar but potentially more inclusive terms, such as "sexually diverse people" or "sexual and gender minorities".

The terms **men who have sex with men** (MSM) and **women who have sex with women** (WSW) refer to sexual behaviour which is not necessarily connected with the sexual orientation of the individuals concerned. Tony Silva has investigated the frequent occurrence of MSM and still identify as heterosexual.[909] This reveals the importance of differentiating between the sexual act and sexual orientation, especially when analysing how legal norms are interpreted and exploited by the active but false fusion of concepts and identifications. The term MSM carries a specific connotation as it has been commonly employed in the context of individuals who are marginalised based on their race, ethnicity, or socio-economic class.[910]

[908] Ibid.
[909] Silva (n 906).
[910] de Vos, 'Mind the gap: Imagining new ways of struggling towards the emancipation of sexual minorities in Africa' (n 115), 50.

Annex 2: Interviews

A. List of interviews/conversations

No.	Date	Abbreviation	Categorisation	Location of interview
1.	08 July 2020	E1	Activist or lawyer advocating for SOGIESC rights on the continent	Online
2.	03 October 2022	E2	Lawyer working at or with the African Commission	Online
3.	21 October 2022	E3	Activist or lawyer advocating for SOGIESC rights on the continent	Bayreuth, Germany
4.	13 March 2023	E4	Researcher focussing on the AHRS or SOGIESC rights in their research	Pretoria, South Africa
5.	04 April 2023	E5	Researcher focussing on the AHRS or SOGIESC rights in their research	Pretoria, South Africa
6.	13 October 2023	E6	Activist or lawyer advocating for SOGIESC rights on the continent	Online

7.	08 November 2023	E7	Lawyer working at or with the African Commission	Online
8.	10 November 2023	E8	Activist or lawyer advocating for SOGIESC rights on the continent	Online
9.	10 November 2023	E9	Activist or lawyer advocating for SOGIESC rights on the continent	Online
10.	18 November 2023	E10	Researcher focussing on the AHRS or SOGIESC rights in their research	Online
11.	25 November 2023	E11	Lawyer working at or with the African Commission	Online
12.	28 November 2023	E12	Activist or lawyer advocating for SOGIESC rights on the continent	Online
13.	14 December 2023	E13	Lawyer working at or with the African Commission	Online
14.	14 December 2023	E14	Lawyer working at or with the African Commission	Online

B. Interview Guide

I. Interview Guide for activist or lawyer advocating for SOGIESC rights on the continent

Claiming SOGIESC rights through the African human rights system

Questionnaire for investigating the interaction with the legal mechanisms available through the African human rights system to claim the protection of SOGIESC rights in Africa

Hello! Thank you for agreeing to participate in this study. My name is Isabelle Zundel, and I conduct my doctoral research on the normative, institutional and procedural frameworks available through the AHRS to identify strategies to better promote and protect SOGIESC rights with a focus on sexual orientation.

As part of this study, I am interested in understanding the strategies and modes of operation of NGOs and individuals working towards the promotion and protection of SOGIESC rights in Africa. An important part of this research is to listen to your individual experiences with the respective mechanisms and understand the context and motivation of your choices and strategies. This interview will take about 40 minutes. This is a semi-structured interview. The following questions are provided only as a guide for the conversation. All of your responses will remain completely confidential and anonymous if you wish so. There are no right or wrong answers. If you need to take a break, please just let me know and I will stop when you wish. If you decide not to continue with the interview at any point, you are free to do so. You may omit any question if you don't want to answer it. Your participation in this interview is purely voluntary, and at your convenience. There is no payment or reward for taking part.

Thank you for taking the time to listen to my introduction. If you are willing to participate in this interview, please answer "Yes" to the following question. If you do not want to participate, please answer "No" to the question.

Participant CONSENT: Are you voluntarily willing to participate in the survey?

- o Yes, I am willing to participate voluntarily

- No, I am not willing to participate

GENERAL

What organisation are you associated with?

What is your role in the organisation?

Towards the promotion and protection of which specific rights have you already worked on?

What has been your personal journey towards advocating for the promotion and protection of SOGIESC rights?

What do you believe are the most promising strategies to create a legally and socially safe environment for LGBTIQ+ communities?

What programmes does your organisation run in relation to the protection of SOGIESC rights?

Does your organisation/Do you have an overarching advocacy strategy on SOGIESC topics?

What are the key goals and how shall these be achieved?

Is your organisation/Are you part of a network of organisations and people working on issues of SOGIESC? If yes, which one?

How would you describe your (organisation's) role between the daily struggles of the marginalised communities and the existent legal frameworks governing sex and gender?

What are common obstacles you or your organisation experiences in their work for and with LGBTIQ+ communities?

What are the non-legal tools your organisation has used in the past to promote and protect SOGIESC rights?

LEGAL MECHANISMS

What are the legal tools your organisation has used in the past to promote and protect SOGIESC rights?

What have been your experiences with this (these) legal mechanism(s)?

To what extent has the utility of this (these) legal mechanism(s) been successful?

Which hurdles have you faced in applying legal mechanisms for the protection of individuals or/and LGBTIQ+ communities?

How would you describe the role of the law in improving the lives of LGBTIQ+ individuals?

AFRICAN HUMAN RIGHTS SYSTEM

Are you aware of …?

	YES?	NO?
State reporting mechanisms		
Shadow reports		
The communication procedure, i.e. the possibility to submit complaints/cases to the regional institutions		
The mechanisms of Special Rapporteurs, Working Groups and Committees		
Working Group on Indigenous Populations/Communities and Minorities in Africa		
General Comments and Resolutions		
Resolution 275		
The observer status for NGOs at the African Commission		
The case of the application of observer status by CAL		
NGO Forum/ACSE		

Have you already engaged with some of these procedural mechanisms of the AHRS yet? (e.g. observer status, shadow reporting)

If yes, which are they?

If no, what are the reasons for non-engagement with possibilities of the AHRS yet?

If yes, what have been your experiences in approaching and using the AHRS?

What are your thoughts about the mechanisms available in the AHRS? Do you think they are suitable to protect SOGIESC rights, especially sexual orientation?

Which of the following mechanisms do you believe are the most important to further protect SOGIESC rights, with a specific focus on sexual orientation? (1 = not important at all 5 = the most important and urgent to be established)

	Number (1-5)
Special Rapporteur on Sexual Orientation and Gender Identity	
New Resolution furthering Resolution 275	
Case on (de-)criminalisation of same-sex sexual relations decided by African Commission or African Court	
General Comment by the African Commission specifically including sexual orientation and gender identity in Article 2	
Any other:	

Are you concerned about a potential decision by the African Commission or African Court that could create a backlash against the latest advocacy achievements around topics of SOGIESC?

What other action would you expect from the AHRS in relation to the protection of LGBTIQ+ persons? (Resolutions…)

THE SUB-REGIONAL LEVEL

Are you aware of the mandates of the RECs to promote and protect human rights? If yes, what are the mandates?

What are your thoughts about the RECs? Would they be better equipped to promote and protect SOGIESC rights?

Does your organisation engage with the RECs as one part of its advocacy strategy?

If yes, what have been your experiences in approaching and using the mechanisms of the RECs?

To what extent has the utility of these legal mechanisms been successful?

Which hurdles have you faced in approaching and using the mechanisms of the RECs?

What are factors that make accessibility less or more difficult in comparison to the regional institutions?

Are you aware of any cases before the RECs that challenged SOGIESC issues?

INTERNATIONAL LEVEL

What other international systems promoting human rights do you know?

Do you follow the developments of the following centres of regulation in regard of the protection of LGBTIQ+ communities?

	YES?	NO?
AHRS		
UNHRS		
Other African States		
Other non-African States		

How are they relevant for protection of LGBTIQ+ communities in Africa?

Does your organisation/Do you lean on developments and cases in other countries/systems to further SOGIESC rights in your space of operation?

If yes, which?

CLAIMING

What do you understand under the term claiming in the context of human rights?

Does your organisation/Do you use the term claiming in your work?

Considering the legal and/or societal hostility towards non-conforming sexual orientations in your spaces of operation, how do you create and demand spaces in society?

Thank you for your participation!

II. Interview Guide for researcher focussing on the AHRS or SOGIESC rights in their research

Claiming SOGIESC rights through the African human rights system

Questionnaire for investigating the academic perspectives on the legal mechanisms to claim SOGIESC rights through the African human rights system

Hello! Thank you for agreeing to participate in this study. My name is Isabelle Zundel, and I conduct my doctoral research on the normative, institutional and procedural frameworks available through the AHRS to identify strategies to better promote and protect SOGIESC rights with a focus on sexual orientation.

As part of this study, I am interested in understanding your research analyses and opinions on legal and non-legal mechanisms in the AHRS towards better protecting of SOGIESC rights. An important part of this research is to listen to your thoughts on the respective mechanisms, understand the context of your arguments and tap on your expertise. The survey will take about 40 minutes. This is a semi-structured interview. The following questions are provided only as a guide for the conversation. All of your responses will remain completely confidential and anonymous. There are no right or wrong answers. If you decide not to continue with the survey at any point, you are free to do so. You may omit any question if you don't want to answer it. Your participation in this survey is purely voluntary, and at your convenience. There is no payment or reward for taking part.

Thank you for taking the time to listen to my introduction. If you are willing to participate in this survey, please answer "Yes" to the following question. If you do not want to participate, please answer "No" to the question.

Participant CONSENT: Are you voluntarily willing to participate in the survey?

- o Yes, I am willing to participate voluntarily
- o No, I am not willing to participate

GENERAL

What is your country of origin?

What University and Department are you currently associated with?

At what stage of your academic career are you currently?

What is your research focus?

Towards the promotion and protection of which specific rights have you already researched on?

What has been your personal journey to researching the AHRS/SOGIESC rights?

What do you believe is the most promising strategy to create a legally and socially safe environment for LGBTIQ+ communities?

What hurdles do you experience in researching on SOGIESC rights?

Do you follow the developments of the following centres of regulation in regard of the protection of SOGIESC rights?

	YES?	NO?
Your country of origin		
Your current residence		
Other African States		
Other non-African States		
AHRS		
UNHRS		

LEGAL MECHANISMS

What legal and non-legal mechanisms do you think are the most promising in claiming the protection of SOGIESC rights?

Utility of legal mechanisms

	Strongly agree	Agree	Uncer-tain	Disa-gree	Strongly disagree

I believe the application of and research on legal mechanisms is important to ensure the protection of SOGIESC rights, especially sexual orientation.					
I believe that judicial decisions (e.g. decriminalisation of same-sex sexual relations) can bring long lasting change for individuals and society.					
Judicial or legislative developments can change the perceptions and modes of operation of a society.					
Societal developments are necessary to bring legal change.					

AFRICAN HUMAN RIGHTS SYSTEM

Are you aware of …?

	YES?	NO?
State reporting mechanisms		
Shadow reports		
The communication procedure, i.e. the possibility to submit complaints/cases to the regional institutions		
The mechanisms of Special Rapporteurs, Working Groups and Committees		
Working Group on Indigenous Populations/Communities and Minorities in Africa		
General Comments and Resolutions		
Resolution 275		
Observer status for NGOs at the African Commission		

The case of the application of observer status by CAL		
NGO Forum/ACSE		

Have you done research on mechanisms available through the AHRS?

Individual Communication Procedure (Article 50 African Charter)

Contribution to reports (State or Shadow)

Observer in African Commission's Session (through NGO)

Other: _____

If yes, what have been your findings about the mechanisms?

What are your thoughts about the mechanisms available in the AHRS? Do you think they are suitable to achieve non-discrimination for and protection of LGBTIQ+ individuals?

How do you imagine an effective regional human rights system? What are characteristics of an effective AHRS?

The relevance of the AHRS

	Strongly agree	Agree	Uncertain	Disagree	Strongly disagree
The AHRS is instrumental for the protection of LGBTIQ+ individuals in Africa					
The AHRS, esp. the African Commission exploits their possibilities for the protection of LGBTIQ+ individuals fully.					
NGOs should engage with the AHRS more intensively to claim the engagement with topics of SOGIESC.					
The AHRS has a radiating effect beyond the legal decisions which enable the promotion of					

SOGIESC rights through the continent.					
The AHRS is an important system on the continent that has an influencing effect on national developments					
The AHRS should be more proactive in relation to the protection of LGBTIQ+ individuals.					

CLAIMING

What do you understand under the term claiming in the context of human rights?

Do you use claiming as a specific term or concept in our writings?

Considering the legal and/or societal hostility towards non-conforming sexual orientations in your country, how do you create and demand spaces in society? How do you claim the acceptance of your sexual orientation(s) and the protection of the same?

Do you understand your research and your activities as researcher as a process of claiming SOGIESC rights? Please explain.

Would you understand the participation in this questionnaire as a way of claiming rights and spaces? Please explain.

Thank you for your participation!

III. Interview Guide for lawyer working at or with the African Commission

Claiming SOGIESC rights through the African human rights system

Questionnaire for investigating the interaction with the legal mechanisms available through the African human rights system to claim the protection of SOGIESC rights in Africa

Hello! Thank you for agreeing to participate in this study. My name is Isabelle Zundel, and I conduct my doctoral research on the normative, institutional and procedural frameworks available through the AHRS to identify strategies to better promote and protect SOGIESC rights with a focus on sexual orientation.

As part of this study, I am interested in the modes of operation at the African Commission. An important part of this research is to listen to your individual experiences with the respective mechanisms and understand the practical context in which the institutions operate. This interview will take about 40 minutes. This is a semi-structured interview. The following questions are provided only as a guide for the conversation. All of your responses will remain completely confidential and anonymous if you wish so. There are no right or wrong answers. If you need to take a break, please just let me know and I will stop when you wish. If you decide not to continue with the interview at any point, you are free to do so. You may omit any question if you don't want to answer it. Your participation in this interview is purely voluntary, and at your convenience. There is no payment or reward for taking part.

Thank you for taking the time to listen to my introduction. If you are willing to participate in this interview, please answer "Yes" to the following question. If you do not want to participate, please answer "No" to the question.

Participant CONSENT: Are you voluntarily willing to participate in the survey?

□ Yes, I am willing to participate voluntarily

□ No, I am not willing to participate

GENERAL

What is/has been your role with the African Commission?

What tasks are/were you given in your role?

What has been your personal journey to this position at the African Commission?

Towards the promotion and protection of which specific rights have you worked on at the African Commission?

Have you worked on SOGIESC rights specifically already?

How would you describe the approach of the African Commission towards SOGIESC rights?

Is this an issue that is regularly discussed amongst your colleagues?

What do you believe are the most promising procedures within the AHRS to create a legally safe environment for everyone, including LGBTIQ+ individuals?

How would you assess the possible effects of the AU Reform on the regional human rights system?

AFRICAN HUMAN RIGHTS SYSTEM

How would you rate the following procedures and events in terms of their strength to promote and protect human rights, especially SOGIESC rights?

PROCEDURES
State reporting mechanisms
Shadow reports
The communication procedure, i.e. the possibility to submit complaints to the African Commission
The mechanisms of Special Rapporteurs, Working Groups and Committees
Working Group on Indigenous Populations/Communities and Minorities in Africa
General Comments and Resolutions
Resolution 275
The observer status for NGOs at the African Commission
The case of the application of observer status by CAL
NGO Forum/ACSE

What have been your experiences with these or other mechanisms?

What are your thoughts about the mechanisms available in the AHRS? Do you think they are suitable to protect human rights?

Which of the following mechanisms do you believe are the most important and promising to further protect SOGIESC rights? (1 = not important at all 5 = the most important and urgent to be established)

	Number (1-5)
Special Rapporteur on Sexual Orientation and Gender Identity	
More Resolutions furthering Resolution 275	
Case on (de-)criminalisation of same-sex sexual relations decided by African Commission or African Court	
General Comment by the African Commission specifically including sexual orientation and gender identity in Article 2	
Any other:	

What procedural or political changes would facilitate the approach of NGOs to the AHRS?

THE SUB-REGIONAL LEVEL

What are your thoughts about the RECs? What role can the RECs play in the promotion and protection of human rights? Are they better equipped to promote and protect human rights?

Does the African Commission actively engage/cooperate with the RECs? Are you aware of any successful cooperation?

If yes, what have been your experiences in approaching and using the mechanisms of the RECs?

To what extent has the utility of these legal mechanisms been successful?

What are factors that make accessibility less or more challenging in comparison to the African Commission?

CLAIMING

What do you understand under the term claiming in the context of human rights?

Does the African Commission use the term claiming explicitly in their work?

Thank you for your participation!

Annex 3: Archive of SOGIESC developments in the AHRS[911]

State reporting mechanism at the African Commission[912]			
Date	**Mechanism**	**State**	**Focus**
29th Ordinary Session (2001)	Concluding observations and recommendations on the 2nd Periodic Report	Namibia	Commissioner Pityana expressed concern "for the upsurge of intolerance towards sexual minorities".
38th Ordinary Session (2005)	Concluding observations and recommendations on the 1st Periodic Report	South Africa	Commissioner El Hassan asked about the possibility of marriage between people of the same sex.
39th Ordinary Session (2006)	Concluding observations and recommendations on the 1st Periodic Report	Cameroon	Several Commissioners raised concerns about the treatment of 'gays' in the Cameroonian legal and penal system.
40th Ordinary Session (2006)	Concluding observations and recommendations on the 2nd Periodic Report	Uganda	Commissioner Malila asked what the status of the continued existence of the penal code is, which criminalises consensual same-sex sexual

[911] The following lists of SOGIESC developments are based on my non-comprehensive research, focusing on the African Commission up to December 2023, and do not claim to be exhaustive.
[912] Unfortunately, not all concluding observations and recommendations are made publicly accessible.

			relations, and the nature of the violations of Victor Julie Mukasa's human rights by the Ugandan authorities. The respective case dealt with the human rights violations of two individuals who were identified as lesbians and had been subjected to arbitrary arrest, detention, and physical mistreatment by law enforcement officers.[913]
45th Ordinary Session (2009)	Concluding observations and recommendations on the 2nd, 3rd, 4th and 5th Periodic Reports (para. 15)	Mauritius	Commendation on Equal Opportunity Act which includes sexual orientation as non-discrimination ground.
49th Ordinary Session (2011)	Concluding observations and recommendations on the 4th Periodic Report	Uganda	The African Commission commended Uganda for the investigation and prosecution of the perpetrator of the offender who committed the murder of David Kato, an activist for the rights of LGBTIQ+ persons.[914]

[913] Ndashe (n 150), 18 et seq.
[914] Centre for Human Rights, Faculty of Law, University of Pretoria, 'A Guide to LGBTIQ+ rights in the UN and African Human Rights Systems' (n 154).

54th Ordinary Session (2013)	Concluding observations and recommendations on the 3rd Periodic Report	Cameroon	The African Commission found that the judicial harassment and offences against life and other violations of the rights of human rights defenders, in particular the rights of defenders working in the area of sexual orientation were one of the factors that restrict the enjoyment of the rights guaranteed by the Charta in Cameroon. The African Commission then urged the government of Cameroon to "take appropriate measures to ensure the safety and physical integrity of all persons irrespective of their sexual orientation and maintain an atmosphere of tolerance towards sexual minorities in the country".[915]
55th Ordinary Session (2014)	Concluding observations and recommendations on Initial Periodic Report	Liberia	The African Commission urged Liberia to ensure equal rights to all its citizens without discrimination on the basis of their sexual orientation or

[915] Centre for Human Rights, Faculty of Law, University of Pretoria 2022, 18 et seq.

			gender identity. Further, Liberia should enact laws prohibiting all forms of violence including violence against persons based on their real or imputed sexual orientation.[916]
56th Ordinary Session (2015)	Concluding observations and recommendations on the Initial & Combined Periodic Reports, 1995 - 2013 (para. 28)	Malawi	The African Commission commends the efforts to investigate claims of violation of access to health rights by 'sexual minorities'.
56th Ordinary Session (2015)	Concluding observations and recommendations on the 6th Periodic Report (para. 50 and 68)	Nigeria	The African Commission is concerned about the lack of details in the report regarding the measures taken by the Nigerian Government to ensure access to HIV prevention, treatment and care services by sexual minorities. The African Commission urges the Nigerian Government to adopt measures to ensure access to HIV prevention, treatment and care services by sexual

[916] Centre for Human Rights, Faculty of Law, University of Pretoria, 'A Guide to LGBTIQ+ rights in the UN and African Human Rights Systems' (n 154).

			minorities. Furthermore, they encourage Nigeria to review the Same-Sex (Prohibition) Act to prohibit violence and discrimination and to bring the law in line with international human rights instruments protecting the rights of sexual minorities.
58th Ordinary Session (2016)	Concluding observations and recommendations on the 6th Periodic Report	Namibia	The African Commission called on Namibia to end the discrimination and stigma affecting access to health care for vulnerable groups, including the LGBTIQ+ community.[917]
23rd Extraordinary Session (2018)	Concluding observations and recommendations on the 14th Periodic Report (para. 45)	Niger	The African Commission welcomes the education and awareness programmes to promote equality, non-discrimination and respect for human dignity in order to facilitate the population's access to HIV-related health services, in particular the programme to combat HIV among men

[917] Ibid.

			who have sex with other men.
63rd Ordinary Session (2018)	Concluding observations and recommendations on the 2nd and 3rd Combined Periodic Report (para. 56 and 77)	Botswana	The African Commission is concerned about the lack of a legal framework that protects persons from discrimination and violence based on their actual or imputed sexual orientation or gender identity. The African Commission strongly urges Botswana to enact laws and policies to ensure the implementation of Resolution 275.
31st Extraordinary Session (2023)	Concluding observations and recommendations on the 9th to 17th Combined Periodic Report	Egypt	The African Commission congratulates Egypt on the HIV prevention education including "information on the male and female genitalia in secondary school science curricula, and educating students about sexually transmitted diseases and how to prevent them, while emphasizing that unnatural sexual practices are among the main causes of transmission of diseases such as AIDS".

Shadow reporting mechanism at the African Commission			
Date	**Organisation/s**	**State**	**Focus**
39th Ordinary Session (2006)	LEDAP	Cameroon	Shadow report on the situation of LGBTQI+ people in Cameroon.[918]
40th Ordinary Session (2006)	SMUG & IGLHRC	Uganda	Shadow report on arbitrary arrests, short-term detentions, discriminatory laws and policies, and a lack of access to health care services, particularly HIV prevention, treatment and care services.
50th Ordinary Session (2011)	AMSHeR, CAL, Harvard Law School International Human Rights Clinic, Heartland Alliance for Human Needs & Human Rights et al.	Nigeria	Report on the rights of sexual minorities in Nigeria.
55th Ordinary Session (2014)	SAIL, The Association of Liberian People Living with HIV and AIDS (ALL+), Liberian Initiative for the Promotion of Rights, Identity and Diversity (LIPRID) et al.	Liberia	The authors point out that Liberia has violated the non-discrimination and equality guarantees of Articles 2 and 3 of the African Charter by criminalising the sexual conduct of adult,

[918] Ndashe (n 150), 18.

			consenting same-sex couples. This criminalisation has led to arbitrary arrests and detention of persons suspected of engaging in same-sex conduct and contributed to a homophobic climate. The report describes violations of Articles 2, 3, 4, 5, 6, 7, 10, 15, 16 and 28 of the African Charter. The report recommends amending the penal code and repealing the Sections that criminalise consensual same-sex relations. One of the proposed questions for Liberia includes what steps the government intends to take to repeal this law.
61st Ordinary Session (2017)	Mouvement pour la promotion du respect et égalité des droits et santé (MOPREDS), Jeunialissime, Oasis Club Kinshasa, Rainbow Sunrise Mapambazuko, Mouvement pour les libertés individuelles (MOLI), Synergía, AMSHeR	Democratic Republic of Congo	Report on human rights violations based on imputed or actual sexual orientation and gender identity in the Democratic Republic of the Congo.

62nd Ordinary Session (2018)	Synergía, Afrique Arc-En-Ciel Togo, AMSHeR	Togo	Alternative Report on the human rights situation of lesbian, gay, bisexual and transgender persons in Togo.
62nd Ordinary Session (2018)	Amnesty International	Togo	Part of the shadow report focusses on the rights of lesbian, bisexual, transgender and intersex persons. The authors are concerned about the revised penal code, which raises the penalty for same-sex relationships up to three years imprisonment. They recommend repealing the provisions which criminalise consensual same-sex relationships.
62nd Ordinary Session (2018)	AMSHeR & Centre for Human Rights	Eritrea	Article 600 of Eritrea's penal code violates the provisions of Resolution 275. The report points out that this criminalisation creates a general fear for LGBTIQ+ persons. Thus, the authors urge the African Commission to recommend Eritrea to ensure non-discrimination and equal protection by the law

			to all Eritreans, regardless of their sexual orientation or gender identity and expression and to give effect to Resolution 275.
63rd Ordinary Session (2018)	BONELA, Community Media Foundation, DITSHWANELO – The Botswana Centre for Human Rights, Lesbians Gays & Bisexuals of Botswana (LeGaBiBo), Centre for Human Rights, Southern Africa Litigation Centre (SALC), International Federation for Human Rights (fidh)	Botswana	The authors of the report congratulate Botswana for the decision to allow change of gender marker for transgender persons living in the country. At the same time, they hope that this sets an example for other countries. However, they are concerned that Section 164 (a), 165 & 167 of the penal code perpetuates stigma and discrimination against the LGBTIQ+ community. They encourage the government to initiate community dialogues around the decriminalisation of same-sex relations, to repeal the above-mentioned penal code sections, to work more closely with NGOs, and to initiate protective laws for LGBTIQ+ persons. Furthermore, they recommend improving the available health care and the awareness of law

			enforcement agencies to end stigma. As well as to include sexual orientation explicitly as listed ground of non-discrimination in Section 3 of the Constitution and to enact specific laws that are addressing homophobia and hate crimes.
64th Ordinary Session (2019)	Centre for Human Rights	Egypt	The proposed question for the Egyptian delegation was how to bring the restrictions on the LGBTIQ+ community, including on assemblies, into line with the provisions of the Egyptian Constitution, which stipulates in Article 92 that rights shall not be suspended or restricted and no law shall restrict the exercise of rights and freedoms in a manner that violates their essence and basis? In addition, they wanted to know what steps Egypt has taken to implement Resolution 275 and how to create a climate conducive to its effective implementation. The recommendations included that Egypt should

			verify that no law, including the law on the criminalisation of homosexual acts, violates the rights and freedoms protected by the Egyptian Constitution.
68th Ordinary Session (2021)	Centre for Human Rights	Malawi	One part of the shadow report focuses on discrimination on the basis of sexual orientation.
69th Ordinary Session (2021)	Centre for Human Rights, OTUWA Affiliates, the Solidarity Centre	Benin	One part of the shadow report focuses on non-discrimination (Article 2) and LGBTIQ+ persons.
69th Ordinary Session (2021)	Centre for Human Rights	Kenya	One part of the shadow report focuses on decriminalisation of consensual same-sexual activities.
69th Ordinary Session (2021)	Human Rights awareness and promotion Forum (HRPAF)	Uganda	HRPAF criticises the police and military authorities for using the COVID-19 prevention measures to harass and criminalise LGBTIQ+ persons. Of particular concern are the mass arrests of LGBTIQ+ persons. In addition, Parliament passed a Sexual Offences Bill that further

			criminalises same-sex relationships and introduces provisions that would make anal examinations almost mandatory when arresting suspected LGBTIQ+ persons. HRPAF, therefore, urges the Ugandan government not to use the COVID-19 crisis as an excuse to violate the human rights of marginalised and criminalised minorities.
69th Ordinary Session (2021)	Centre for Human Rights	Eswatini	The whole shadow report focussed on LGBTIQ+ rights in Eswatini.
69th Ordinary Session (2021)	The Intersectional Network of Namibia, International Service for Human Rights (ISHR)	Namibia	The report focuses on the situation of the LGBTIQ+ community and defenders in Namibia. The risks for LGBTIQ+ human rights defenders include discrimination and the non-recognition of same-sex marriages. Sexual and gender based violence remains a big challenge for Namibia and specifically, for the LGBTIQ+ community as there is a lack of protection of domestic relationships amongst LGBTIQ+

			partnerships and their domestic setting. Although Namibia does not criminalise sexual orientation and gender identity, consensual same sex sexual practices between two males are still illegal and criminalised under common law sodomy under Section 299 of the Criminal Procedure Act 25 of 2004, while the law is silent on consensual sex between two women. The authors urge Namibia to abolish its criminalising laws.
73rd Ordinary Session (2022)	Centre for Human Rights	Cote d'Ivoire	One part of the shadow report focuses on decriminalisation of consensual same-sexual activities and other LGBTIQ+ topics.
73rd Ordinary Session (2022)	Centre for Human Rights	Mauritania	One part of the shadow report focuses on decriminalisation of consensual same-sexual activities.

Communication procedure at the African Commission			
Date	**Title**	**State**	**Focus**
1995	*William A Courson v Zimbabwe* (2000) AHRLR 335 (ACHPR 1995)	Zimbabwe	Communication queried the domestic legislation passed by Zimbabwe criminalising sexual contact between consenting adult men in private. The applicant withdrew the communication, and subsequently, the African Commission saw no need to proceed further.
2006	*Human Rights NGO Forum v Zimbabwe* AHRLR 128 (ACHPR 73), para. 169	Zimbabwe	Obiter dictum: African Commission states the aim of the principle of equality and non-discrimination "is to ensure equality of treatment for individuals irrespective […] sexual orientation".

Special mechanisms at the African Commission			
Special Rapporteur			
Date	**Special Rapporteur**	**State**	**Focus**
2001	Special Rapporteur on the Rights of Women in Africa	Cameroon	The Special Rapporteur on the Rights of Women in Africa reported together with the Committee on the Protection of the Rights of People Living With HIV (PLHIV) and Those at Risk, Vulnerable to and Affected by HIV on responses to questions raised on the rights of sexual minorities in the report on the visit to Cameroon.
2014	Special Rapporteur on Human Rights Defenders in Africa	Uganda	The Special Rapporteur issued a press release on the implications of the Anti-Homosexuality Act on the work of human rights defenders in Uganda.[919]
2014	Special Rapporteur on Human Rights Defenders in Africa	Nigeria	The Special Rapporteur issued a press release condemning Nigeria's enactment of the

[919] Reine Alapini-Gansou, 'Press Release on the implications of the anti-homosexuality Act on the work of Human Rights Defenders in the Republic of Uganda' (2014) <https://achpr.org/pressrelease/detail?id=228> accessed 10 February 2021.

			Same-Sex Marriages (Prohibition) Act 2013.[920]
2017	Special Rapporteur on prisons, conditions of detention and policing in Africa		Presentation of Draft Principles on the Declassification and Decriminalization of Petty Offences in Africa, calling on countries to address "the root causes of other marginalisation, including measures which criminalize same-sex conduct, drug use and sex work".[921]
2017	Special Rapporteur on Human Rights Defenders in Africa		Presentation of intersession activity report which focuses on harassment against human rights defenders working on SOGIE and sexual and reproductive health rights. The report recommends countries to "remove punitive and restrictive laws, policies and practices that undermine the rights to freedom of association and assembly," including those based on "sexual orientation, identity and expression of gender".[922]

[920] Reine Alapini-Gansou, 'Press Release on the Implication of the Same Sex Marriage [Prohibition] Act 2013 on Human Rights Defenders in Nigeria' (2014) <https://achpr.org/pressrelease/detail?id=232> accessed 10 February 2021.
[921] Resolution on the Need to Develop Principles on the Declassification and Decriminalization of Petty Offences in Africa (n 786); Wendy Isaak, 'African Commission Tackles Sexual Orientation, Gender Identity' (2017) <https://www.hrw.org/news/2017/06/01/african-commission-tackles-sexual-orientation-gender-identity> accessed 15 July 2024.
[922] Wendy Isaak 2017; Intersession Report is not available on the website of the African Commission.

Special mechanisms at the African Commission			
Committees			
Date	**Committee**	**State**	**Focus**
2001	Committee on PLHIV and Those at Risk, Vulnerable to and Affected by HIV	Cameroon	The Committee together with the Special Rapporteur on the Rights of Women in Africa addressed the responses to questions raised on the rights of sexual minorities in his report on his visit to Cameroon.
2002	Follow-Up Committee on the Robben Island Guidelines (Prohibition of Torture)		The Follow-up Committee provides guidance to African States on the implementation of the provisions of the African Charter on the Prohibition and Prevention of Torture. The Follow-Up Committee urged the States to take legislative measures to prohibit all forms of violence, including violence targeting persons on the basis of their imputed or actual sexual orientation or gender identity.

2010	Committee on PLHIV and Those at Risk, Vulnerable to and Affected by HIV		Committee extends its scope to men who have sex with men.
2022	Committee on PLHIV and Those at Risk, Vulnerable to and Affected by HIV	Namibia	One Commissioner of the Committee asked the Namibian authorities about the legal status of LGBTIQ+ people in Namibia.

Special mechanisms at the African Commission			
Working Groups			
Date	**Working Group**	**State**	**Focus**
2000	Working Group on Indigenous Populations/ Communities in Africa		Establishment of the Working Group with a focus on promoting and protecting the rights of indigenous populations/communities in Africa
2020	Working Group on Indigenous Populations/Communities and Minorities in Africa		Expansion of the mandate of the Working Group through Resolution 455.[923] Regrettably, the Working Group has overlooked the potential to broaden its mandate to encompass other minorities urgently needing human rights protection, such as minorities based on SOGIESC.

[923] Resolution on the Renewal of the Mandate, Appointment of the Chairperson, Reconstitution and Expansion of Mandate of the Working Group on Indigenous Populations/Communities in Africa (n 777)

Resolutions of the African Commission			
Date	**Resolution**	**State**	**Focus**
2014	Resolution 275 on protection against violence and other human rights violations against person on the basis of their real or imputed sexual orientation or gender identity		Resolution 275 focuses on violence against persons on the basis of their real or imputed sexual orientation or gender identity.[924]
2017	Resolution 376 on the situation of human rights defenders in Africa		Resolution 376 focuses on the "status of human rights defenders and protect their rights and the rights of their colleagues and family members, including women human rights defenders and those working on issues such as [...] sexual orientation and gender identity".[925]
2023	Resolution 552 on the Promotion and Protection of the Rights of Intersex Persons in Africa		Resolution 552 focuses on the promotion and protection of intersex persons, particularly intersex children.[926]

[924] Resolution 275 (n 762)
[925] Resolution on the Situation of Human Rights Defenders in Africa 2017, ACHPR/Res.376(LX)2017 (African Commission on Human and Peoples' Rights)
[926] Resolution 552 (n 763)

General Comments of the African Commission			
Date	**General Comment**	**State**	**Focus**
52nd Ordinary Session (2012)	General Comment on Article 14 (1) (d) and (e) of Maputo Protocol, para. 4		"[…] multiple forms of discrimination based on various grounds such as: race, sex, sexuality, sexual orientation […] the African Commission recognises that these forms of discrimination, individually or collectively, prevent women from realising their right to self-protection and to be protected."[927]
55th Ordinary Session (2014)	General Comment No. 2 on Art 14 (1) (a), (b), (c) and (f) and Art 14 (2) (a) and (c) of the Maputo Protocol		The General Comment provides States with interpretative guidance and specific instructions to be implemented to ensure the promotion and protection of the provisions of Article 14, particularly in relation to safe abortion.[928] It does not mention SOGIESC rights, but the emphasis must be interpreted,

[927] General Comments on Article 14 (1) (d) and (e) of the Protocol to theAfrican Charter on Human and Peoples' Rights on the Rights of Women inAfrica (African Commission on Human and Peoples' Rights)
[928] General Comment No. 2 on Article 14.1 (a), (b), (c) and (f) and Article 14. 2 (a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Commission on Human and Peoples' Rights)

			regardless of sexual orientation or gender identity.
21st Extra-Ordinary Session (2017)	General Comment No. 4: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5)		"Any person regardless of their gender may be a victim of sexual and gender-based violence. […] Acts of sexual violence against men and boys, persons with psychosocial disabilities, and lesbian, gay, bisexual, transgender and intersex persons are of equal concern, and must also be adequately and effectively addressed by State Parties."[929]

[929] General Comment No. 4: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5) 2017 (African Commission on Human and Peoples' Rights)

Guidelines and Principles of the African Commission			
Date	**Guideline/Principle**	**State**	**Focus**
2010	Guidelines and Principles on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and People's Rights		African Commission defines the term prohibited grounds of discrimination to include the ground of sexual orientation and defines the term vulnerable and disadvantaged groups to include LGBTI persons.[930]
2014	Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (Luanda Guidelines)		"Measures designed to protect the rights of persons with special needs, such as children, women (especially pregnant and breast-feeding women), persons with albinism, the elderly, persons with HIV/AIDS, refugees, sex workers, on the basis of gender identity, […] shall not be considered discriminatory or applied in a manner that is discriminatory." (Part 7

[930] Guidelines and Principles on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and People's Rights 2011 (African Commission on Human and Peoples' Rights)

			Vulnerable Groups, 29. General Provisions)[931]
2017	Guidelines on Freedom of Association and Assembly in Africa		"The state shall not discriminate against assemblies on the basis of other illegitimate grounds, including […] sexual orientation or gender identity."[932]
2017	Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa		The African Commission recognizes that "particular individuals and groups are especially vulnerable to experiencing limitations on their right to freedom of assembly and to other human rights violations in the context of policing assemblies due to their status or to an intersection of one or more statuses, such as […] sexual orientation and gender identity".[933]
2018	Principles on the Declassification and Decriminalization of Petty Offences in Africa		In 2018, the African Commission adopts the Principles as there is concern about the disproportionate

[931] Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa 2014 (African Commission on Human and Peoples' Rights)
[932] Guidelines on Freedom of Association and Assembly in Africa 2017 (African Commission on Human and Peoples' Rights)
[933] Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa 2017 (African Commission on Human and Peoples' Rights)

			impact of laws that create petty offences on the poor and persons who are otherwise marginalised or vulnerable within the criminal justice system. The African Commission defines that the term 'vulnerable persons' refers amongst other to persons marginalised on the basis of sexual orientation or gender identity.[934]

[934] Principles on the Declassification and Decriminalization of Petty Offences in Africa 2018 (African Commission on Human and Peoples' Rights)

Activity and Intersession Reports of the African Commission[935]			
Date	**Title**	**State**	**Focus**
2017	HIV, The Law and Human Rights in the African Human Rights System: Key challenges and opportunities for rights-based responses		The Report identifies as key populations among others "gay men and other men who have sex with men" as well as "transgender people".[936]
2019	46th Activity Report of the African Commission	Kenya	The African Commission positively remarks the recognition and identification of immediate, medium- and long-term reforms necessary to protect the rights of intersex people in Kenya by the Working Group on Policy, Legal, Institutional and Administrative Reforms.[937]
2021	48th and 49th Activity Report of the African Commission	Gabon and Sudan	The African Commission commends the positive developments concerning the decriminalisation of same-sex sexual relations in Gabon and the Repeal of the

[935] Most Intersession Activity Reports of Special Mechanisms are not publicly accessible.
[936] African Commission on Human and Peoples' Rights, 'HIV, The Law and Human Rights in the African Human Rights System: Key challenges and opportunities for rights-based responses' (2017) <https://achpr.au.int/index.php/en/special-mechanisms-reports/hiv-law-human-rights-key-challenges-opportunities-rights-based-responses> accessed 3 July 2024.
[937] African Commission on Human and Peoples' Rights, '46th Activity Report 2019' (26 August 2019) <file:///C:/Users/Collins%20Ajibo/Downloads/46thactivityreportachprfre.pdf> accessed 15 July 2024.

			death penalty for certain crimes, including homosexuality, in Sudan.[938]
2022	50th and 51st Activity Report of the African Commission	Ghana	African Commission reports that it has sent an urgent appeal letter to the Republic of Ghana on the arrest of human rights defenders who attended a training for the protection of sexual minorities. Furthermore, the African Commission recommends that the State parties respect and protect the rights of persons or groups exposed to a high risk of acts of torture and other ill-treatments in particular […] LGBTIQ+ persons.[939]
2022	Intersession Activity Report of the Committee for the Prevention of Torture in Africa	Cameroon	Committee reports on a case in which a Cameroonian court punishes anti-LGBTIQ+ violence and points out that LGBTIQ+ groups in Africa are constantly faced with

[938] African Commission on Human and Peoples' Rights, '48th & 49th Activity Report' (21 April 2021) <https://achpr.au.int/en/documents/2021-04-21/48th-and-49th-activity-reports-combined> accessed 15 July 2024.
[939] African Commission on Human and Peoples' Rights, '50th and 51st Combined Activity Reports' (29 March 2022) <https://achpr.au.int/index.php/en/documents/2022-03-29/50th-and-51st-combined-activity-reports> accessed 15 July 2024.

			institutional violence and other human rights issues.[940]
2022	Intersession Activity Report of the Committee for the Prevention of Torture in Africa		Committee reports on attacks on LGBTIQ+ persons which point out that LGBTIQ+ groups in Africa are constantly faced with human rights issues as well as institutional violence.[941]
2023	Intersession Activity Report of the Committee for the Prevention of Torture in Africa		Committee reports on incidences of violence against the LGBTIQ+ community.

[940] Committee for the Prevention of Torture in Africa, 'Intersession Activity Report 2022/1' (25 April 2022) <https://achpr.au.int/en/intersession-activity-reports/committee-prevention-torture-africa-cpta> accessed 15 July 2024.
[941] Committee for the Prevention of Torture in Africa, 'Intersession Activity Report 2022/2' (29 October 2022) <https://achpr.au.int/en/intersession-activity-reports/committee-prevention-torture-africa-3> accessed 15 July 2024.

Observer Status with the African Commission			
Date	**Name Organisation**	**State**	**Focus**
1993	Centre for Human Rights	South Africa	Today, the Centre for Human Rights has a strong focus on SOGIESC issues through its SOGIESC Unit. This shows NGOs working on and with LGBTIQ+ persons (can) have observer status with the African Commission.[942] [Exemplary]
2009	Alternatives Cameroun	Cameroon	The mission of Alternatives Cameroun is to advocate for the human rights protection of the LGBTI population. [Exemplary]
2008 (First Application)	CAL	South Africa	The developments on CAL's observer status with the African Commission took ten years and have turned into a symbol for the state of the regional human rights space. In 2018, the African Commission withdrew CAL's observer status

[942] Frans Viljoen, 'Africa's rights commission can – and should – do more for sexual minorities' (2019) <https://www.chr.up.ac.za/sogiesc-news/1511-op-ed-africa-s-rights-commission-can-and-should-do-more-for-sexual-minorities> accessed 15.07.2024.

			after pressure from the Executive Council.[943]
2022	Alternative Côte d'Ivoire	Côte d'Ivoire	In 2022, rejection of observer status on the ground that "sexual orientation is not an expressly recognized right or freedom under the African Charter" and is "contrary to the virtues of African values". NGO focuses on the fight against the discrimination of LGBTIQ+ populations.
2022	Human Rights First Rwanda Association	Rwanda	In 2022, the African Commission rejected observer status. The NGO is not solely but also focussing on SOGIESC rights.
2022	Synergía		In 2022, the African Commission rejected observer status. The organisation focuses on human rights advocacy and not primarily LGBTQI+ rights.

[943] Viljoen, 'LGBTQ+ rights: African Union watchdog goes back on its own word' (n 791).

Statements of NGOs with observer status at Sessions of the African Commission[944]			
Date	**Organisation/s**	**State**	**Focus**
67th Ordinary Session (2020)	HRAPF	Uganda	Statement on violation of human rights of LGBTIQ+ persons, especially in the context of COVID-19 pandemic and the brutality of police.
69th Ordinary Session (2021)	HRAPF	Uganda	Statement on COVID-19 pandemic and LGBTIQ+ persons as well as practices of NGO Bureau.
73rd Ordinary Session (2022)	Centre for Human Rights	Ghana	Concerns about the possible adoption of Ghanaian Promotion of Proper Human Sexual Rights and Ghanaian Family Values Bill 2021 and call on Member States to end all acts of violence and discrimination against LGBTIQ+ persons.

[944] The following list is only a very small and exemplary excerpt of recent statements.

75th Ordinary Session (2023)	The Institute for Human Rights and Development in Africa (IHRDA)		Concerns about the denial of observer status to three NGOS on the grounds that "sexual orientation is not an explicitly recognised right or freedom under the African Charter". Call on the African Commission to grant observer status to these NGOS.[945]

[945] Institute for Human Rights and Development in Africa (IHRDA), 'Statement on ACHPR refusal of observer status to CSOs' (Mai 2023) <https://www.ihrda.org/2023/05/achpr-75th-os-ihrda-statement-on-achpr-refusal-of-observer-status-to-csos/> accessed 15 July 2024.

NGO Forum at the African Commission			
Date	**Title**	**State**	**Focus**
41st Ordinary Session (2007)	Draft Resolution on Human Rights Defenders		First Resolution of the NGO Forum explicitly referring to sexual orientation and gender identity. The African Commission did not adopt the Resolution with the specific language and removed the words "lesbians and bisexual" women.[946]
42nd Ordinary Session (2007)	Draft Resolution on the situation of women's rights in SADC		Draft Resolution was adopted by NGO Forum and made reference to lesbian and bisexual women. The African Commission amended the Resolution and removed the reference.
43rd Ordinary Session (2008)	Draft Resolution condemning violence against LGBTI people		The African Commission did not adopt the Draft Resolution.
43rd Ordinary Session (2008)	Draft Resolution on impunity on violence against women		Draft Resolution made reference to lesbian and bi-sexual women. The African

[946] Nibogora (n 18), 179.

			Commission did not adopt the Draft Resolution.
44th Ordinary Session (2008)	Proposed Resolution on condemning violence and the culture of impunity of violations of human rights of LGBTI people		The proposed Resolution was not passed by the NGO Forum.
45th Ordinary Session (2009)	Two panels to discuss LGBTIQ+ rights		During the NGO Forum two panels were organised to discuss LGBTIQ+ rights.
46th Ordinary Session (2009)	Resolution by the NGO Forum calls on African Commission to grant CAL observer status.		
47th Ordinary Session (2010)	Two-day meeting outside the NGO Forum focussing on LGBTIQ+ rights		Meeting discussed SOGIESC advocacy in the past four years and strategies in relation to decriminalisation efforts.
66th Ordinary Session (2020)	Draft Resolution on the protection of human rights in Africa during the COVID-19 pandemic		NGO Forum adopted Draft Resolution which recalls Resolution 275 and raises concerns about violence against LGBTQI+ persons.

Others			
Date	**Title**	**Author**	**Focus**
2023	Press Statement on the tragic murder of Edwin Chiloba in Kenya	Commissioner Dersso, Rapporteur for the Republic of Kenya	Chiloba was a queer activist and a celebrated designer and model. The press statement recalled Resolution 275 and Articles 1, 4, 5 of the African Charter.

References

List of Laws and Bills

Anti-Homosexuality Act of Uganda (2023)

Constitution of Botswana (1996)

Constitution of the Arab Republic of Egypt (2014)

Criminal Procedure Act Namibia (Act 25 of 2004)

Penal Code of Botswana (Amendments 2021)

Penal Code of the State of Eritrea (2015)

Promotion of Proper Human Sexual Rights and Ghanaian Family Values Bill of Ghana (2021)

Same-Sex Marriage (Prohibition) Act of Nigeria (2013)

Sexual Offences Bill of Uganda (2021)

List of Cases

Attorney General v Rammoge [2016] CACGB-128-14 (Supreme Court Botswana)

Botswana Attorney-General v Dow [1994] Appeal Court 1994 (6) BCLR 1 (locus standi) (Court of Appeal of the Republic of Botswana)

Jade September v Subramoney N.O. and others [2019] EC 10/2016 (Equality Court of South Africa, Western Cape Division)

Letsweletse Motshdiemang v The Attorney-General (LEGABIBO as amicus curiae) [2019] MAHGB-000591-16 (High Court of Botswana held at Gaborone)

Mmusi and Others v Ramantele and Others [2013] CACGB-104-12 (High Court of Botswana)

National Legal Service Authority v Union of India [2014] 5 SCC 438 (Supreme Court of India)

Navtey Singhjohar and others v Union of India, Ministry of Law and Justice [2018] Writ Petition No. 76 of 2016 (Supreme Court of India)

Decision of International Courts and Tribunals

Anuak Justice Council v Ethiopia [2006] ACHPR 69 No. 299/05 (African Commission on Human and Peoples' Rights)

The African Commission on Human and Peoples' Rights v Republic of Kenya [2017] Application 006/2012 (African Court on Human and People's Rights)

Beneficiaries of the Late Norbert Zongo v Burkina Faso [2014] No. 013/2011 (African Court on Human and People's Rights)

Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya [2009] Decision Communication 276/03 (African Commission on Human and Peoples' Rights)

Constitutional Rights Project [CRP] v Nigeria [1999] Communication 140 of 1994 (African Commission on Human and Peoples' Rights)

D.H. and Others v the Czech Republic [2007] Application No. 57325/00 (European Court of Human Rights)

Enga Mekongo v Cameroon [1995] No. 59/91 (African Commission on Human and Peoples' Rights)

Gabriel Shumba v Zimbabwe [2012] No. 288/2004 (African Commission on Human and Peoples' Rights)

Human Rights Awareness and Promotion Forum v Attorney General of Uganda [2016] EACJ 133 No. 6 of 2014 (East African Court of Justice)

John D. Ouko v Kenya [2000] No. 232/99 (African Commission on Human and Peoples' Rights)

Katabazi and others v Secretary General of the East African Community and Another (Uganda) [2007] AHRLR 119 (East African Court of Justice)

Konaté v Burkina Faso [2014] No. 004/2013 (African Court on Human and Peoples' Rights)

Mike Campbell and Others v Republic of Zimbabwe [2008] SADCT 2 (SADC Tribunal)

Mtikila v United Republic of Tanzania [2013] No. 009/2011 & 011/2011 (African Court on Human and Peoples' Rights)

Nganyi v United Republic of Tanzania [2016] No. 006/2013 (African Court on Human and Peoples' Rights)

Oudjouriby Cossi Paul v Benin [2004] Communication No. 199/97 (African Commission on Human and Peoples' Rights).

Request for Advisory Opinion by the Centre for Human Rights of the University of Pretoria and the Coalition of African Lesbians [2017] No. 002/2015 (African Court on Human and People's Rights)

Rights International v Nigeria [1999] No. 215/98 (African Commission on Human and Peoples' Rights)

The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria, [2001] Decision Communication 155/96 Fifteenth Activity Report (African Commission on Human and Peoples' Rights)

Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan 013] 279/03-296/05 (African Commission on Human and Peoples' Rights)

Toonen v Australia [1994] CCPR/C/50/D/488/1992 (Human Rights Committee)

William A. Courson v Zimbabwe [2000] AHRLR 335 (African Commission on Human and Peoples' Rights)

Young v Australia [2003] CCPR/C/78/D/941/2000 (Human Rights Committee)

Zimbabwe Human Rights NGO Forum v Zimbabwe [2006] AHRLR 128 (African Commission on Human and Peoples' Rights)

International Instruments

African Human Rights System

African Charter on Democracy, Elections, and Governance

African Charter on Human and Peoples' Rights

African Charter on the Rights and Welfare of the Child

Convention Governing the Specific Aspects of Refugee Problems in Africa

Constitutive Act of the African Union

EAC Counter-trafficking in Persons Bill 2016

EAC Human and Peoples Rights Bill 2011

EAC Sexual and Reproductive Health Bill 2021

ECOWAS Protocol on Democracy and Good Governance

ECOWAS Revised Treaty

Protocol on the Amendments to the Constitutive Act of the African Union

Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights

Protocol on the Statute of the African Court of Justice and Human Rights

Protocol Relating to the Establishment of the Peace and Security Council of the African Union

Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Citizens to Social Protection and Social Security

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

Protocol to the Treaty establishing the African Economic Community concerning the Pan-African Parliament

Rules of Procedure of the African Commission on Human and Peoples' Rights, 2020

Treaty for the Establishment of the East African Community 1999 (East African Community)

Treaty of the Economic Community of West African States

Supplementary Protocol L A/SP.1/01/05 Amending the Preamble and Articles 1, 2, 9 and 30 of Protocol A/P.1/7/91 relating to the Community Court of Justice and Article 4 Paragraph 1

United Nations Human Rights System

Charter of the United Nations

Convention on the Elimination of all Forms of Discrimination against Women

Convention on the Rights of the Child

International Covenant on Civil and Political Rights

International Covenant on Economic, Social and Cultural Rights

Universal Declaration of Human Rights 1948

Vienna Declaration and Programme of Action

International Soft Law Instruments

African Human Rights System

Declaration of Principles on Freedom of Expression 2019 (African Commission on Human and Peoples' Rights)

General Comments on Article 14 (1) (d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Commission on Human and Peoples' Rights)

General Comment No. 2 on Article 14.1 (a), (b), (c) and (f) and Article 14. 2 (a) and (c)of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Commission on Human and Peoples' Rights)

General Comment No. 4: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5) 2017 (African Commission on Human and Peoples' Rights)

Guidelines and Principles on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and People's Rights 2011 (African Commission on Human and Peoples' Rights)

Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa 2017 (African Commission on Human and Peoples' Rights)

Guidelines on Freedom of Association and Assembly in Africa 2017 (African Commission on Human and Peoples' Rights)

Guidelines on Observer Status of Non-Governmental Organisations (NGOs) and Associations (African Committee of Experts on the Rights and Welfare of the Child)

Guidelines on Shadow Reports of the African Commission on Human and Peoples' Rights 2022 (African Commission on Human and Peoples' Rights)

Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa 2014 (African Commission on Human and Peoples' Rights)

Joint General Comment of the African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on ending child marriage

Pretoria Declaration on Economic, Social and Cultural Rights in Africa 2004 (African Commission on Human and Peoples' Rights)

Principles on the Declassification and Decriminalization of Petty Offences in Africa 2018 (African Commission on Human and Peoples' Rights)

Principles relating to the Status of National Institutions (General Assembly of the United Nations)

Resolution on Granting Observer Status to National Human Rights Institutions in Africa 1998 (African Commission on Human and Peoples' Rights)

Resolution on the African Commission on Human and Peoples' Rights 1994, AHG/Res.230 (XXX) (Assembly of Heads of State and Government of the Organization of African Unity)

Resolution on the Co-Operation between the African Commission on Human and Peoples' Rights and NGOs having Observer Status with the Commission 1998, ACHPR/Res.30 (XXIV) 98 (African Commission on Human and Peoples' Rights)

Resolution on the Criteria for Granting and Maintaining Observer Status to Non Governmental Organizations working on Human and Peoples' Rights in Africa 2016, ACHPR/Res.361 (LIX) 2016 (African Commission on Human and Peoples' Rights)

Resolution on the Criteria for Granting and Maintaining Observer Status to Non-Governmental Organizations working on Human and Peoples' Rights in Africa 2023, ACHPR/Res.572 (LXXVII) 2023 (African Commission on Human and Peoples' Rights)

Resolution on the Granting of Affiliate Status to National Human Rights Institutions and specialized human rights institutions in Africa 2017, ACHPR/Res. 370 (LX) 2017 (African Commission on Human and Peoples' Rights)

Resolution on the Need to Develop Principles on the Declassification and Decriminalization of Petty Offences in Africa 2017, ACHPR/Res.366 (EXT.OS/XX1) 2017 (African Commission on Human and Peoples' Rights)

Resolution on the Promotion and Protection of the Rights of Intersex Persons in Africa 2023, ACHPR/Res.552 (African Commission on Human and Peoples' Rights)

Resolution on the Protection against Violence and other Human Rights Violations against Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity 2014, ACHPR/Res.275 (LV) 2014 (African Commission on Human and Peoples' Rights)

Resolution on the Renewal of the Mandate, Appointment of the Chairperson, Reconstitution and Expansion of Mandate of the Working Group on Indigenous Populations/Communities in Africa 2020, ACHPR/Res. 455 (LXVI) 2020 (African Commission on Human and Peoples' Rights)

Resolution on the Situation of Human Rights Defenders in Africa 2017, ACHPR/Res.376 (LX) 2017 (African Commission on Human and Peoples' Rights)

Revised Guidelines for the Consideration of Communications of 2014 (African Committee of Experts on the Rights and Welfare of the Child)

Revised Rules of Procedure of the African Committee of Experts on the Rights and Welfare of the Child (African Committee of Experts on the Rights and Welfare of the Child)

United Nations Human Rights System

General Comment No. 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child 1 July 2003, CRC/GC/2003/4 (Committee on the Rights of the Child)

General Recommendation No. 28 on the Core Obligations of State Parties under Article 2 of the Convention on the Elimination of all Forms of Discrimination against Women 2010 CEDAW/C/GC/28 (Committee on the Elimination of Discrimination against Women)

Resolution Human Rights Council 2006, 60/251 (General Assembly of the United Nations)

Resolution Institution-building of the United Human Rights Council, 5/1 (Human Rights Council)

Resolution of protection against violence and discrimination based on sexual orientation and gender identity 2016, A/HRC/RES/32/2 (Human Rights Council)

Resolution on discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity 2011, A/HRC/19/41(Human Rights Council)

Resolution on Extrajudicial, Summary or Arbitrary Executions 2003, A/RES/57/214 (General Assembly of the United Nations)

Resolution on Extrajudicial, Summary or Arbitrary Executions 2004, A/RES/59/197 (General Assembly of the United Nations)

Resolution on Extrajudicial, Summary or Arbitrary Executions 2006, A/RES/61/173 (General Assembly of the United Nations)

Resolution on Extrajudicial, Summary or Arbitrary Executions 2008, A/RES/63/182 (General Assembly of the United Nations)

Resolution on Extrajudicial, Summary or Arbitrary Executions 2010, A/RES/65/208 (General Assembly of the United Nations)

Resolution on Extrajudicial, Summary or Arbitrary Executions 2012, A/RES/67/168 (General Assembly of the United Nations)

Resolution on Extrajudicial, Summary or Arbitrary Executions 2014, A/RES/69/182 (General Assembly of the United Nations)

Resolution on Mandate of Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity 2022, A/HRC/RES/50/10 (Human Rights Council)

Resolution on Mandate of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity 2019, A/HRC/RES/41/18 (Human Rights Council)

Resolution on Strengthening the role of the United Nations in the promotion of democratization and enhancing periodic and genuine elections 2021, A/RES/76/176 (General Assembly of the United Nations

Yogyakarta Principles plus 10 2017, YP+10

Other Legal Documents

African Commission on Human and Peoples' Rights 'HIV, The Law and Human Rights in the African Human Rights System: Key challenges and opportunities for rights-based responses' (2017) <https://achpr.au.int/index.php/en/special-mechanisms-reports/hiv-law-human-rights-key-challenges-opportunities-rights-based-responses> accessed 3 July 2024.

African Commission on Human and Peoples' Rights, '43rd Activity Report of the African Commission on Human and Peoples' Rights'.

African Commission on Human and Peoples' Rights, 'Concluding Observations and Recommendations - Cameroon: 1st Periodic Report, 2001-2003: Adopted at 39th Ordinary Session' (2006) <https://www.achpr.org/sessions/concludingobservation?id=41> accessed 10 February 2021.

African Commission on Human and Peoples' Rights, '28th Activity Report of the African Commission on Human And Peoples' Rights: 28th Activity Report of the ACHPREX.CL/600(XVII)' (2010) <https://www.achpr.org/activityreports/viewall?id=28> accessed 10 February 2021.

African Commission on Human and Peoples' Rights, 'Concluding Observations and Recommendations – Botswana, 2nd and 3rd Combined Periodic Report, 2011-2015: Adopted at 63rd Session' (2018) <https://achpr.au.int/index.php/en/state-reports/concluding-observations-and-recommendations-botswana-2nd-3rd-periodic-rep> accessed 4 May 2024.

African Commission on Human and Peoples' Rights, 'Concluding Observations and Recommendations on the Initial and Combined Periodic Report of the State of Eritrea, 1999-2016' (2019) <https://achpr.au.int/en/state-reports/concluding-observations-and-recommendations-initial-and-combined-periodic> accessed 4 May 2024.

African Commission on Human and Peoples' Rights, '46th Activity Report of the African Commission on Human and Peoples' Rights' (2019) <file:///C:/Users/Collins%20Ajibo/Downloads/46thactivityreportachprfre.pdf> accessed 15 July 2024.

African Commission on Human and Peoples' Rights, '48th and 49th Activity Report' (2021) <https://achpr.au.int/en/documents/2021-04-21/48th-and-49th-activity-reports-combined> accessed 15 July 2024.

African Commission on Human and Peoples' Rights, '50th and 51st Combined Activity Reports' (2022) <https://achpr.au.int/index.php/en/documents/2022-03-29/50th-and-51st-combined-activity-reports> accessed 15 July 2024.

African Commission on Human and Peoples' Rights, 'Final Communiqué of the 73rd Ordinary Session of the African Commission on Human and Peoples' Rights' (2022) <https://achpr.au.int/en/news/final-communiques/2022-11-18/final-communique-73rd-ordinary-session/> accessed 15 July 2024.

Committee for the Prevention of Torture in Africa, 'Intersession Activity Report 2022/1' (2022) <https://achpr.au.int/en/intersession-activity-reports/committee-prevention-torture-africa-cpta> accessed 15 July 2024.

Committee for the Prevention of Torture in Africa, 'Intersession Activity Report 2022/2' (2022) <https://achpr.au.int/en/intersession-activity-reports/committee-prevention-torture-africa-3> accessed 15 July 2024.

Committee on the Rights of the Child, 'Concluding observations on the combined 3rd to 6th periodic reports of Malta: CRC/C/MLT/CO/3-6' (2019) <https://www.ohchr.org/en/documents/concluding-observations/crccmltco3-6-committee-rights-child-concluding-observations> accessed 4 October 2023.

Executive Council of the African Union, 'Decision on the Report on the Joint Retreat of the Permanent Representatives' Committee (PRC) and the African Commission: EX.CL/1089 (XXXIII)'.

Executive Council of the African Union, 'Decision on the 38th Activity Report of the African Commission on Human and Peoples' Rights Doc.EX.CL/921(XXVII): EX.CL/Dec.887(XXVII)' <https://portal.africa-union.org/DVD/Documents/DOC-AU-DEC/EX%20CL%20DEC%20887%20(XXVII)%20_E.pdf> accessed 11 February 2021.

Office of the High Commissioner for Human Rights, 'Discrimination and violence against individuals based on their sexual orientation and gender identity: A/HRC/29/23'

(2015) <https://www.ohchr.org/en/documents/thematic-reports/ahrc2923-discrimination-and-violence-against-individuals-based-their> accessed 14 May 2022.

Bibliography

Abass A, 'Historical and Political Background to the Malabo Protocol' (2017) 10 The African Criminal Court 11.

ACHPR Civil Society Organisations' Side Events (ACSE), 'ACHPR Civil Society Organisations' Side Events (ACSE): Invitation' (2020) <https://synergiaihr.org/wp-content/uploads/2020/09/ACSE-Public-Invite_Final.pdf> accessed 18 June 2024.

Adorno T, *Negative Dialectics* (Routledge, Taylor & Francis Group 2003).

African Centre for Democracy and Human Rights Studies, 'NGO Forum' <https://www.acdhrs.org/ngo-forum/> accessed 4 May 2024.

African Children's Committee, 'CSOs' <https://www.acerwc.africa/en/networks/csos?page=1> accessed 4 May 2024.

African Commission on Human and Peoples' Rights, 'National Human Rights Institutions' <https://achpr.au.int/en/nhris> accessed 15 July 2024.

African Commission on Human and Peoples' Rights, 'Non-governmental organizations' <https://achpr.au.int/en/network/ngos/> accessed 15 July 2024.

African Commission on Human and Peoples' Rights, 'Maputo Protocol on the Rights of Women in Africa: Commemorating 20 years' (2023) <https://au.int/en/newsevents/20230705/maputo-protocol-20-years> accessed 5 July 2024.

African Commission on Human and Peoples' Rights, 'NGOs' <https://achpr.au.int/en/ngos> accessed 4 May 2024.

African Commission on Human and Peoples' Rights, 'Past Sessions' <https://achpr.au.int/en/sessions/past> accessed 30 March 2024.

African Commission on Human and Peoples' Rights, 'Special Mechanisms' <https://achpr.au.int/en/special-mechanisms> accessed 4 May 2024.

African Commission on Human and Peoples' Rights, ‘Special Rapporteur on Human Rights Defenders and Focal Point on Reprisals in Africa’ <https://achpr.au.int/en/mechanisms/special-rapporteur-human-rights-defenders-and-focal-point-reprisals-africa> accessed 4 May 2024.

African Court Coalition, ‘African Court Coalition: The Coalition for an Effective African Court on Human and Peoples' Rights’ <https://africancourtcoalition.org/> accessed 14 June 2024.

African Court on Human and People's Rights, ‘African Court & African Commission’ <https://www.african-court.org/wpafc/african-court-african-commission/> accessed 30 March 2024.

African Court on Human and People's Rights, ‘Basic Information: The African Court on Human and Peoples’ Rights (the African Court) in brief’ <https://www.african-court.org/wpafc/basic-information/#ratification> accessed 14 March 2024.

African Court on Human and People's Rights, ‘Declarations’ <https://www.african-court.org/wpafc/declarations/> accessed 30 March 2024.

African Court on Human and People's Rights, ‘The African Court on Human and Peoples’ Rights (the African Court) in brief: Ratification & Declaration’ <https://www.african-court.org/wpafc/basic-information/#ratification> accessed 30 March 2024.

African Men for Sexual Health and Rights (AMSHeR) et al. ‘The Violations of Human Rights on the Basis of Sexual Orientation and Gender Identity in the Federal Republic of Nigeria under the African Charter on Human and Peoples Rights’ (2011).

African Men for Sexual Health and Rights (AMSHeR) and Synergia, ‘Application of Resolution 275 by the African Commission on Human and People’s Rights: A six-year assessment’ (2020) <https://www.chr.up.ac.za/images/researchunits/sogie/documents/Report_2020.pdf> accessed 15 July 2024.

African Union, ‘List of Countries which have signed, ratified/acceded to the African Charter on the Rights and Welfare of the Child’ <https://au.int/sites/default/files/treaties/36804-sl-AFRICAN_CHARTER_ON_THE_RIGHTS_AND_WELFARE_OF_THE_CHILD.pdf> accessed 5 July 2024.

African Union, ‘List of Countries which have signed, ratified/acceded to the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights’ <https://au.int/sites/default/files/treaties/36398-sl-PROTOCOL%20ON%20AMENDMENTS%20TO%20THE%20PROTOCOL%20ON%20THE%20STATUTE%20OF%20THE%20AFRICAN%20COURT%20OF%20JUSTICE%20AND%20HUMAN%20RIGHTS.pdf> accessed 14 March 2024.

African Union, ‘Overview of Institutional Reforms’ <https://au.int/en/aureforms/overview> accessed 30 March 2024.

African Union, ‘The Executive Council’ <https://au.int/en/executivecouncil> accessed 6 July 2024.

African Union, ‘About the African Union’ (2021) <https://au.int/en/overview> accessed 22 March 2024.

Aguibou Y, ‘West African economic integration: Is ECOWAS the answer?’ (1977) 24(3) Africa Today 43.

Akbar A, Ashar S and Simonson J, ‘Movement Law’ (2021) 73 Stanford Law Review 821.

Alapini-Gansou R, ‘Press Release on the Implication of the Same Sex Marriage [Prohibition] Act 2013 on Human Rights Defenders in Nigeria’ (2014) <https://achpr.org/pressrelease/detail?id=232> accessed 10 February 2021.

Alapini-Gansou R, ‘Press Release on the implications of the anti-homosexuality Act on the work of Human Rights Defenders in the Republic of Uganda’ (2014) <https://achpr.org/pressrelease/detail?id=228> accessed 10 February 2021.

Ali A, ‘The Admissibility of Subregional Courts’ Decisions before the African Commission or African Court’ (2013) 6(2) Mizan Law Review 241.

Alter K, Helfer L and McAllister J, ‘A new international human rights court for West Africa: The ECOWAS Community Court of Justice.’ (2013) 107(4) American Journal of International Law 737.

Ambani J, ‘A Triple Heritage of Sexuality? Regulation of Sexual Orientation in Africa in Historical Perspective’, *Protecting the human rights of sexual minorities in contemporary Africa*.

Amerasinghe C, *Local Remedies in International Law* (Cambridge University Press 2004).

Amin A, ‘A teleological approach to interpreting socio-economic rights in the African Charter: Appropriateness and methodology’ (2021) 21(1) African Human Rights Law Journal.

Amnesty International, ‘A guide to the African Commission on human and peoples' rights’ (2007) <https://www.amnesty.org/en/wp-content/uploads/2021/07/ior630052007en.pdf> accessed 30 March 2023.

Anleu S, *Law and Social Change* (2009).

An-Na'im A, ‘Religious Minorities under Islamic Law and the Limits of Cultural Relativism’ (1987) 9(1) Human Rights Quarterly 1.

ARC International and CAL, ‘International Dialogue on Gender, Sexuality, and HIV/AIDS: ‘Strengthening Human Rights Responses in Africa and Around the Globe’’ (Johannesburg, 6 December 2007).

Arendt H, ‘Es gibt nur ein einziges Menschenrecht’ (1949) 4 Die Wandlung 754.

Arendt H, Elemente und Ursprünge totaler Herrschaft: Antisemitismus, Imperialismus, Totalitarismus (Piper 1998).

Arusha Initiative, ‘Arusha Initiative Launches Campaign to Identify Experts for upcoming elections to the African Court on Human and Peoples’ Rights’ <https://www.chr.up.ac.za/latest-news/3700-arusha-initiative-launches-campaign-to-identify-experts-for-upcoming-elections-to-the-african-court-on-human-and-peoples-rights#:~:text=About%20the%20Arusha%20Initiative%20The%20African%20Human%20Rights,of%20members%20of%20human%20rights%20mechanisms%20in%20Africa.> accessed 14 June 2024.

Aumann F, ‘Reviewed Work(s): Sociology of Law by Georges Gurvitch: Review’ (1942) 36(4) The American Political Science Review 754.

Ayalew Y, ‘Untrodden paths towards the right to privacy in the digital era under African human rights law’ (2022) 12(1) International Data Privacy Law 16.

Ayeni V, ‘The African Human Rights Architecture: Reflections on the Instruments and Mechanisms within the African Human Rights System’ (2019) 10(02) Beijing Law Review 302.

Badkur V, ‘Natural justice theory: what it means for the right to privacy and LGBT rights in India’ (2020) 14(1) Novum Jus 241.

Baer S, Rechtssoziologie: Eine Einführung in die interdisziplinäre Rechtsforschung (Nomos Verlagsgesellschaft mbH & Co. KG 2017).

Ballakrishnen S, ‘Of Queerness, Rights, and Utopic Possibilities: An Interview with Dr. Swethaa S. Ballakrishnen’ (2023) <https://www.sociolegalreview.com/post/of-queerness-rights-and-utopic-possibilities-an-interview-with-dr-swethaa-s-ballakrishnen> accessed 15 July 2024.

Banda F, ‘Global Standards: Local Values’ (2003) 17(1) International Journal of Law, Policy and Family 1.

Banda F, ‘Protocol to the African Charter on the Rights of Women in Africa’ in Malcolm Evans and Rachel Murray (eds), *The African Charter on Human and Peoples' Rights* (Cambridge University Press 2008).

Banda F and Fishbayn Joffe L (eds), *Women's Rights and Religious Law: Domestic and International Perspectives* (Taylor and Francis 2016).

Battaglia G, Clarke J and Siegenthaler F, ‘Bodies of Archives/Archival Bodies: An Introduction’ (2020) 36(1) Visual Anthropology Review 8.

Beckstrom J, ‘Handicaps of Legal-Social Engineering in a Developing Nation’ (1974) 22 American Journal of Comparative Law 697.

de Beco G, ‘Protecting the Invisible: An Intersectional Approach to International Human Rights Law’ (2017) 17(4) Human Rights Law Review 633.

von Benda-Beckmann K, ‘Forum Shopping and Shopping Forums: Dispute Processing in a Minangkabau Village in West Sumatra’ (1981) 13(19) The Journal of Legal Pluralism and Unofficial Law 117.

Bhuwania A, ‘Competing Populisms: Public Interest Litigation and Political Society in Post-Emergency India’ (2013) <file:///C:/Users/anton/Downloads/Bhuwania_columbia_0054D_11468.pdf> accessed 15 July 2024.

Birhanu A, ‘Reflections on Ethiopia's Reservations and Interpretive Declarations to the Maputo Protocol’ (2019) Journal of Ethiopian Law 121.

Biswaro J, ‘Structure and Organs of the African Union The Assembly, Executive Council and Commission’ in Abdulqawi Yusuf and Fatsah Ouguergouz (eds), *The African Union: Legal and institutional framework, a manual on the Pan-African Organization* (Brill 2012).

Bond J, *Global intersectionality and contemporary human rights* (Oxford University Press 2021).

Bradley A, ‘Human Rights Racism’ (2019) 32 Harvard Human Rights Journal 1.

Brosius R, ‘Somalia Becomes the Eighth Member of the EAC – Back to the Roots?’ *African Legal Studies* (2023) <https://africanlegalstudies.blog/2023/12/08/somalia-becomes-the-eighth-member-of-the-eac-back-to-the-roots/> accessed 14 March 2024.

Brown S, ‘Visibility or Impact? International Efforts to Defend LGBTQI+ Rights in Africa’ (2023) 15(2) Journal of Human Rights Practice 506.

Burt J-M, ‘Strategic Litigation in gross human rights violations in Guatemala: Impact and lessons learned’ (2021) <https://www.impunitywatch.org/wp-content/uploads/2021/05/policy-brief-human-rightsv2.pdf> accessed 15 July 2024.

Butler J, Gender Trouble: Feminism and the Subversion of Identity (Routledge 1990).

Cameron E, ‘Sexual Orientation and the Constitution: A Test Case for Human Rights*’, *Sexual Orientation and Rights* (Routledge 2017).

Carraro V, ‘Promoting Compliance with Human Rights: The Performance of the United Nations’ Universal Periodic Review and Treaty Bodies’ (2019) 63(4) International Studies Quarterly 1079.

Cassel D, ‘Does international human rights law make a difference’ (2001) 2(1) Chicago Journal of International Law 121.

Castelli A, ‘Liberation through violence in Fanon's The Wretched of the Earth: Historical and contemporary criticisms’ (2022) 47(4) Peace & Change 325.

Centre for Human Rights, Faculty of Law, University of Pretoria, ‘Centre for Human Rights, Faculty of Law, University of Pretoria, South Africa’ <https://www.chr.up.ac.za/> accessed 6 September 2023.

Centre for Human Rights, Faculty of Law, University of Pretoria, ‘The State Reporting Process under the African Commission’ <https://www.maputoprotocol.up.ac.za/state-reporting> accessed 2 May 2024.

Centre for Human Rights, Faculty of Law, University of Pretoria, ‘A guide to the African human rights system’ (BusinessPrint 2016).

Centre for Human Rights, Faculty of Law, University of Pretoria, ‘African Court rejects Centre for Human Rights and CAL request, leaving political tension within AU unresolved’ (2017).

Centre for Human Rights, Faculty of Law, University of Pretoria, ‘Guide to the African human rights system: Celebrating 40 years since the adoption of the African Charter on Human and Peoples’ Rights 1981-2021’ (2021).

Centre for Human Rights, Faculty of Law, University of Pretoria, ‘A Guide to LGBTIQ+ rights in the UN and African Human Rights Systems’ (2022) <https://www.chr.up.ac.za/images/researchunits/sogie/documents/A_Guide_to_LGBTIQ_Rights_in_the_UN_and_Africa_V3_27.09.2022_1.pdf> accessed 19 March 2023.

Centre for Human Rights, Faculty of Law, University of Pretoria, ‘Promotion and protection of the rights of intersex children under the African human rights system’ (2023)

<https://www.chr.up.ac.za/images/researchunits/sogie/documents/Intersex_and_Children_s_Rights_pamphlet_design_updated_Page_2.jpg> accessed 4 October 2023.

Centre for Human Rights, Faculty of Law, University of Pretoria, 'CHR commends African Commission on adoption of first resolution on intersex persons in Africa' (2023) <https://www.chr.up.ac.za/latest-news/3265-chr-commends-african-commission-on-adoption-of-first-resolution-on-intersex-persons-in-africa> accessed 20 January 2024.

Chenwi L, 'Exhaustion of Local Remedies Rule in the jurisprudence of the African Court on Human and Peoples' Rights' (2019) 41 Human Rights Quarterly 374.

Chenwi L, 'The Advisory Proceedings of the African Court on Human and Peoples' Rights' (2020) 38(1) Nordic Journal of Human Rights 61.

Chimni B, 'Third World Approaches to International Law: A Manifesto' in Antony Anghie and others (eds), *The Third World and International Order: Law, Politics and Globalization* (Brill Nijhoff 2003).

Chow P, 'Has Intersectionality Reached its Limits? Intersectionality in the UN Human Rights Treaty Body Practice and the Issue of Ambivalence' (2016) 16(3) Human Rights Law Review 453.

Coleman T, Ako E and Kyeremateng J, 'A human rights critique of Ghana's Anti-LGBTIQ+ Bill of 2021' (2023) 23(1) African Human Rights Law Journal 96.

Cornell D, 'Is there a difference that makes a difference between uBuntu and dignity?' (2010) Southern African Public Law 149.

Crenshaw K, 'Demarginalizing the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics' (1989) University of Chicago Legal Forum <https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/uchclf1989§ion=10> accessed 15 July 2024.

Creutzfeldt N, *Routledge Handbook of Socio-Legal Theory and Methods* (Routledge 2020).

Currier A, 'Arrested Solidarity: Obstacles to Intermovement Support for LGBT Rights in Malawi' (2014) 42(3/4) Women's Studies Quarterly 146.

Currier A, *Politicizing sex in contemporary Africa: Homophobia in Malawi (*Cambridge University Press 2019).

Daly T and Wiebusch M, 'The African Court on Human and Peoples' Rights: mapping resistance against a young court' (2018) 14 International Journal of Law in Context 294.

Debele S, 'Trans(forming) Archives: Speculative Biographies of Ethiopians Between and Beyond Genders' (2022) 81(3-4) African Studies 340.

Debele S, 'Provisional thoughts on "Being human as Praxis" in/of revolution' (ASAA 2022, HUMA, Cape Town, 13 April 2022).

Debele S, 'Book Review of African(a) Queer Presence: Ethics and Politics of Negotiation' (2023) 17(2) Journal of the African Literature Association 368.

Debele S, 'Revolutionary Mothering' (2023) 35(2) Journal of African Cultural Studies 135.

Debele S and Aswaf S, 'Ujama Socialism: Towards Cohering Tradition and Modernity' (African Legal Studies, University of Bayreuth, Bayreuth, Germany, 17 November 2021).

Debele S and Zundel I, The human as an intractable problem of the law: a critical appraisal (forthcoming).

DeGooyer S and others, *Vom Recht, Rechte zu haben* (Hamburger Edition 2018).

Demone B, 'LGBT Rights in Malawi: One Step Back, Two Steps Forward? The Case of R v Steven Monjeza Soko and Tiwonge Chimbalanga Kachepa' (2016) 60(3) Journal of African Law 365.

Dersso S, 'The Role and Place of Human Rights in the Mandate and Works of the Peace and Security Council of the AU: An Appraisal' (2011) 58(01) Netherlands International Law Review 77.

Dersso S, 'The African human rights system and the issue of minorities in Africa' (2012) 20(1) African Journal of International and Comparative Law 42.

Deva S, 'Public Interest Litigation in India: A Critical Review' (2009) Issue 1 Civil Justice Quarterly 19.

Dinokopila B, ‘Beyond paper-based affiliate status: National human rights institutions and the African Commission on Human and Peoples' Rights’ (2010) 10(1) African Human Rights Law Journal 26.

Dondoli G, ‘LGBTI Activism Influencing Foreign Legislation’ (2015) 16 Melbourne Journal of International Law 124.

Donnelly J, *Universal Human Rights in Theory and Practice* (Cornell University Press 2013).

Döveling J, *Das Recht der Ostafrikanischen Gemeinschaft: Eine kritische Analyse* (Mohr Siebeck 2019).

D'Sa RM, ‘Human and Peoples′ Rights: Distinctive Features of the African Charter’ (1985) 29(1) Journal of African Law 72.

Duffy H, *Strategic Human Rights Litigation: Understanding and Maximising Impact* (Bloomsbury Publishing 2018).

Durbach A, McNamara L and Rix M, ‘Public interest litigation: making the case in Australia’ (University of Wollongong 2013).

Ebobrah S, ‘Critical Issues in the Human Rights Mandate of the ECOWAS Court of Justice’ (2010) Journal of African Law 1.

Ebobrah S, ‘Human rights developments in African sub-regional economic communities during 2011: recent developments’ (2012) 12(1) African Human Rights Law Journal 223.

Edelman L, ‘Queer Theory: Unstating Desire’ (4) 1995(2) GLQ: A Journal of Lesbian and Gay Studies 343.

Effoduh O, The ECOWAS Court, activist forces, and the pursuit of environmental and socioeconomic justice.

Epprecht M, ‘The ‘unsaying’ of indigenous homosexualities in Zimbabwe: Mapping a blindspot in an African masculinity’ (1998) 24(4) Journal of Southern African Studies 631.

Epprecht M, '"Bisexuality" and the Politics of Normal in African Ethnography' (2006) 48(2) Anthropologica 187.

Epprecht M, 'Sexual minorities, human rights and public health strategies in Africa' (2012) 111(443) African Affairs (Lond) 223.

Esterhuizen T, 'Decriminalisation of consensual same-sex sexual acts and the Botswana Constitution: Letsweletse Motshidiemang v The Attorney-General (LEGABIBO as amicus curiae)' (2019) 19(2) African Human Rights Law Journal 843.

European Court of Human Rights, 'Guide on Article 13 of the European Convention on Human Rights: Right to an effective remedy' (2024) <https://ks.echr.coe.int/documents/d/echr-ks/guide_art_13_eng-pdf> accessed 6 July 2024.

European Institute for Gender Equality, 'Glossary and thesaurus: homosexuality' (2023) <https://eige.europa.eu/publications-resources/thesaurus/terms/1391> accessed 7 September 2023.

Evans M and Murray R (eds), *The African Charter on Human and Peoples' Rights* (Cambridge University Press 2008).

Evans M and Murray R, 'The Reporting Mechanism of the African Charter' in Malcolm Evans and Rachel Murray (eds), *The African Charter on Human and Peoples' Rights* (Cambridge University Press 2008).

Eze C, *Justice and Human Rights in the African Imagination: We, too, are humans* (Routledge 2021).

Eze O, *Human rights in Africa: Some selected problems* (Macmillan Nigeria Publishers Ltd. 1984).

Fanon F, *The Wretched of the Earth* (1963).

Foucault M, *The history of sexuality: An introduction, volume I* (1978).

Friedmann W, *Legal Theory* (1949).

Gaitho W, 'Challenging the Single Axis from the Nexus: Operationalizing Intersectionality in International Human Rights Law to Adequately Address the Corrective Rape of

Black Lesbians in South Africa' (2022) 31 Tulane Journal of Law and Sexuality: A Review of Sexual Orientation and Gender Identity in the Law 1.

GALZ an Association of LGBTI People in Zimbabwe, 'Courson Complaint' <https://galz.org/courson-complaint/> accessed 4 May 2024.

Gardner J, 'The Sociological Jurisprudence of Roscoe Pound (Part I)' (1961) 7(1) Villanova Law Review 1.

Gaventa J, 'Reflections on the Uses of the 'Power Cube' Approach for Analyzing the Spaces, Places and Dynamics of Civil Society Participation and Engagement' (2005) 4 <https://www.participatorymethods.org/sites/participatorymethods.org/files/reflections_on_uses_powercube.pdf> accessed 15 July 2024.

Gaventa J, 'Finding the Spaces for Change: A Power Analysis' (2006) 37(6) IDS Bulletin 23.

Gcumeni F, 'The value of pre-colonial conflict resolution methods in addressing sexual violations committed in internal conflict situations in Zimbabwe: The value of pre-colonial conflict resolution methods in addressing sexual violations committed in internal conflict situations in Zimbabwe' (2022).

Gilliland A and McKemmish S, 'The role of participatory archives in furthering human rights, reconciliation and recovery' (2014) 24 University of California Press 78.

Given L, *The Sage encyclopedia of qualitative research methods* (SAGE 2008).

Gloppen S, 'Conceptualizing Lawfare: A Typology & Theoretical Framework' (2018) Center of Law and Social Transformation Paper, Bergen 6.

Gloppen S, 'Public Interest Litigation, Social Rights and Social Policy', *Inclusive States: Social Policy and Structural Inequalities* (2008) 343.

Gready P, 'The politics of human rights', *Third World Quarterly,* Vol 24, No 4.

Griffith S, 'Kenya: Supreme Court Decision Reaffirms That Human Rights Protection Is for All in Kenya' *All Africa* (2023) <https://allafrica.com/stories/202302260014.html> accessed 27 February 2023.

Griffiths J, ‘What is sociology of law? (On law, rules, social control and sociology)’ (2017) 49(2) The Journal of Legal Pluralism and Unofficial Law 93.

Gumedze S, ‘Bringing communications before the African Commission on Human and Peoples' Rights’ (2003) 3(1) African Human Rights Law Journal 118.

Hagabimana G, ‘A legal analysis of the relationship between state sovereignty and regional integration: A comparative study of the European Union and the East African Community’ (2021).

Hagabimana G, ‘African Regional Economic Communities and Human Rights’ (2021) 10(5) Journal of Civil & Legal Sciences 1.

Hanisch C, ‘The Personal is still political’ 1970 Notes from the Second Year: Womens Liberation.

van Heerden G, ‘LGBTQ Rights in Sub-Saharan Africa: Perspectives of the region from the region’ (2019) <https://cisp.cachefly.net/assets/articles/attachments/80669_lgbtq-rights-in-sub-saharan-africa.pdf> accessed 29 March 2021.

Helfer L, ‘Forum Shopping for Human Rights’ (1999) 148(2) University of Pennsylvania Law Review 285.

Hellum A and others, ‘Rights claiming and rights making in Zimbabwe: a study of three human rights NGOs’ in Bård A Andreassen and Gordon Crawford (eds), *Human rights, power and civic action: Comparative analyses of struggles for rights in developing societies* (Routledge 2013).

von Hesse H, ‘Gender, flexible systems, in Africa’, Global encyclopaedia of lesbian, gay, bisexual, transgender, and queer history.

Heyns C, ‘A “Struggle Approach” to Human Rights’ in Arend Soeteman (ed), *Pluralism and Law* (Springer 2001).

Heyns C, ‘The African regional human rights system: In need of reform’ (2001) 1 African Human Rights Law Journal 155.

Heyns C, ‘The African Regional Human Rights System: The African Charter’ (2003-2004) 108(3) Penn State Law Review (Dickinson) 679.

Heyns C, ‘The African Regional Human Rights System: The African Charter’ (2004) 108(3) Dickinson Law Review (1908-2003) 679.

Heyns C and Killander M, ‘The African Regional Human Rights System’, *International protection of human rights* (2006).

Higginbotham D and Collis-Buthelezi V, *Contested Intimacies: Sexuality, Gender, and the Law in Africa* (Siber Ink 2015).

Hoad N, Martin K and Reid G, *Sex and Politics in South Africa* (2020).

Holtmaat R and Post P, ‘Enhancing LGBTI Rights by Changing the Interpretation of the Convention on the Elimination of All Forms of Discrimination Against Women?’ (2015) 33(4) Nordic Journal of Human Rights 319.

Howard RE, *Human rights in Commonwealth Africa* (Rowman & Littlefield 1986).

Hung B, ‘Movement Lawyering as rebellious Lawyering: Advocating with humility, love and grace’ 23 (2016) Clinical Law Review 663.

ILGA World, ‘Database: A unique knowledge base on laws, human rights bodies, advocacy opportunities, and news related to sexual orientation, gender identity and expression, and sex characteristics issues worldwide’ <https://database.ilga.org/en> accessed 6 September 2023.

Institute for Human Rights and Development in Africa (IHRDA), ‘Statement on ACHPR refusal of observer status to CSOs’ (2023) <https://www.ihrda.org/2023/05/achpr-75th-os-ihrda-statement-on-achpr-refusal-of-observer-status-to-csos/> accessed 15 July 2024.

International Commission of Jurists, ‘Shadow Reporting under the African Charter on Human and Peoples' Rights: A Handbook’ (2015).

International Federation for Human Rights, ‘Anti-Homosexuality law in Uganda: Strong position of the ACHPR's Special Rapporteur on Human Rights Defenders’ (2018) <https://www.refworld.org/docid/534bd8e112.html> accessed 15 July 2024.

Isaak W, ‘African Commission Tackles Sexual Orientation, Gender Identity’ (2017) <https://www.hrw.org/news/2017/06/01/african-commission-tackles-sexual-orientation-gender-identity> accessed 15 July 2024.

Jack Donnelly, ‘Universal Human Rights in Theory and Practice’ in Jack Donnelly (ed), *Universal human rights in theory and practice* (Cornell University Press 2013).

Jagose A, ‘Preview Queer Theory’ (This piece is extracted with permission from her new book, Queer Theory, University of Melbourne Press, 1996. 1996) <https://australianhumanitiesreview.org/1996/12/01/queer-theory/> accessed 4 July 2024.

Jagose A, Queer Theory: An Introduction (NYU Press 1996).

Jammeh Y, President Yahya Jammeh of Gambia on Homosexuality. (PRESSTV tr).

Jjuuko A, ‘Beyond court victories: using strategic litigation to stimulate social change in favour of lesbian, gay and bisexual persons in common law Africa’ (2018).

Jjuuko A and others (eds), *Queer lawfare in Africa: Legal strategies in contexts of LGBTIQ+ criminalisation and politicisation* (Pretoria University Law Press 2022).

Jjuuko A, ‘The protection and promotion of LGBTI rights in the African regional human rights system: opportunities and challenges’ in Sylvie Namwase and Adrian Jjuuko (eds), *Protecting the human rights of sexual minorities in contemporary Africa* (Pretoria University Law Press 2017).

Jjuuko A and others, *Envisioning Global LGBT Human Rights: (Neo)Colonialism, Neoliberalism, Resistance and Hope* (University of London Press 2018).

Jjuuko A, ‘To challenge or not to challenge sodomy laws in courts of law: Re-examining Uganda’s incremental approach towards decriminalisation of homosexuality’ (Conference on the Decriminalisation of Same-Sex Laws and Eradication of Conversion Practices in Africa, Pretoria, 24 November 2022).

Johnson A, ‘Barriers to fulfilling reporting obligations in Africa under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa’ (2021) 21(1) African Human Rights Law Journal.

Jones A, ‘Form over substance: The African Court's restrictive approach to NGO standing in the SERAP Advisory Opinion’ (2017) 17(1) African Human Rights Law Journal 320.

Kagame P, ‘The imperative to strengthen our Union: Report on the Proposed Recommendations for the Institutional Reform of the African Union’ (2017)

<https://www.tralac.org/images/docs/11191/report-on-the-proposed-recommendations-for-the-institutional-reform-of-the-au-kagame-29-january-2017.pdf> accessed 15 July 2024.

Kaime T, The African Charter on the Rights and Welfare of the Child: A socio-legal perspective (Pretoria University Law Press 2009).

Kaime T, 'The Foundations of Rights in the African Charter on the Rights and Welfare of the Child: A Historical and Philosophical Account' (2009) 3(1) African Journal of Legal Studies 120.

Kaime T and Zundel I, African Studies Centres: Observations around the cake theory (forthcoming).

Kaime T and Zundel I, Let's (not) talk about the gays: Malawi's stalled attempts at de-criminalisation of same-sex laws (forthcoming).

Kaime T and Zundel I, 'Anti-Homosexuality Bills are an Abuse of the Law' *African Legal Studies* (2023) <https://africanlegalstudies.blog/2023/08/11/anti-homosexuality-bills-are-an-abuse-of-the-law/> accessed 24 February 2024.

Kälin W and Künzli J, *The law of international human rights protection* (Oxford University Press 2009).

Kallio H and others, 'Systematic methodological review: developing a framework for a qualitative semi-structured interview guide' (2016) 72(12) Journal of Advanced Nursing 2954.

Kamunyu M, 'Exploring the Impact of State Behaviour on the African Commission's Autonomy' (2021) <https://achprindependence.org/exploring-the-impact-of-state-behaviour-on-the-african-commissions-autonomy/> accessed 14 March 2023.

Kapur R, 'The (im)possibility of queering international human rights law', *Otto (Hg.) – Queering International Law* (2017).

Kareithi M and Viljoen F, 'An Argument for the Continued Validity of Woman-to-Woman Marriages in Post-2010 Kenya' (2019) 63(3) Journal of African Law 303.

Killander M, ‘Confidentiality versus publicity: interpreting article 59 of the African Charter on Human and Peoples' Rights: recent developments’ (2006) African Human Rights Law Journal 572.

Kirichenko K, ‘United Nations Treaty Bodies’ jurisprudence on sexual orientation, gender identity, gender expression and sex characteristics: UN Treaty Bodies Strategic Litigation Toolkit – Part 1’ (2019) <https://ilga.org/downloads/Treaty_Bodies_Strategic_Litigation_toolkit_policy_paper_en.pdf> accessed 27 August 2021.

Kirichenko K, ‘Queer Intersectional Perspective on LGBTI Human Rights Discourses by United Nations Treaty Bodies’ (2023) 49(1) Australian Feminist Law Journal 55.

Kiwanuka R, ‘The Meaning of “People” in the African Charter on Human and Peoples’ Rights’ (1988) 82(1) American Journal of International Law 80.

Klein T, ‘Querying medical and legal discourses of queer sexes and genders in South Africa’ (2009) 10(2) Anthropology Matters.

van Klinken A and Chitando E, ‘Race and Sexuality in Desmond Tutu's Theology of Ubuntu’ in Sarojini Nadar and others (eds), *Ecumenical Encounters with Desmond Mpilo Tutu: Visions for Justice, Dignity and Peace* (2021).

Kollmann K, ‘Same-sex Partnership and Marriage: The Success and Costs of Transnational Activism’, *The Ashgate Research Companion to Lesbian and Gay Activism* (2016).

Lacatus C and Carraro V, ‘National human rights institutions: independent actors in global human rights governance?’ 2023 (99)3 International Affairs 1167.

de Lauretis T, ‘Queer Theory: Lesbian and Gay Sexualities: An Introduction’ 1991 Indiana University Press.

Lee T, ‘Rethinking the Personal and the Political: Feminist Activism and Civic Engagement’ (2007) 22(4) Hypatia 163.

Lisakafu J, ‘Exploring the role and place of the Permanent Representative Committee within the African Union’ (2016) 23(2) South African Journal of International Affairs 225.

Lloyd A, ‘Evolution of the African Charter on the Rights and Welfare of the Child and the African Committee of Experts: Raising the gauntlet’ (2002) 10(2) The International Journal of Children's Rights 179.

Loher D, ‘David Loher, Social Anthropologist PhD: Teaching’ <https://www.dloher.ch/page/teaching> accessed 22 June 2022.

Lorde A and Browne M, *Sister Outsider: Essays and Speeches* (Penguin Books 2020).

Luttrell C and others, ‘The Power Cube Explained’ <file:///C:/Users/anton/Downloads/powercube-2.pdf> accessed 19 December 2023.

Machingura F and Shahmanesh M, ‘Uganda's Anti-Homosexuality Act’ (2023) 382 BMJ (Clinical research ed) 1840.

Maldonado-Torres N, ‘On the Coloniality of Human Rights’ in Boaventura d S Santos and Bruno Martins (eds), *The pluriverse of human rights: The diversity of struggles for dignity* (Routledge 2021).

Mapuva L, ‘Negating the promotion of human rights through “claw-back” clauses in the African charter on human and people's rights’ (2016) 51 International Affairs and Global Strategy 1.

Mawerenga H, The Homosexuality Debate in Malawi (2018).

Mazel O, ‘Queer Jurisprudence: Reparative Practice in International Law’ 2022(116) American Journal of International Law 10.

M'Baye B, ‘Conclusion: Utu/Ubuntu: Centering the Human and the Humane in Critical Approaches to Africana Studies’ in Besi Muhonja and Babacar M’Baye (eds), *Gender and Sexuality in Kenyan Societies: Centering the Human and the Humane in Critical Studies* (Rowman & Littlefield 2022).

M'Baye K and Ndiaye B, ‘The organization of African unity (OAU)’, *The International Dimensions of Human Rights*.

Mbiti J, *African religions & philosophy* (Heinemann 2010).

McCann M, ‘Law and Social Movements: Contemporary Perspectives’ (2006) 2(1) Annual Review of Law and Social Science 17.

McClelland S, ‘Intimate Justice’, *Encyclopedia of Critical Psychology* (Springer New York 2014).

Miles P and Zelada C, ‘Introduction to: LGBTQIA+ Rights Claiming in Latin America: Some Lessons from the Global South’ (2021) 40(5) Bulletin of Latin American Research 631.

Moeckli D, ‘Equality and Non-Discrimination’, Equality and Non-Discrimination under International Law 2017.

Mohammed W, ‘Feminist accountability: deconstructing feminist praxes, solidarities and LGBTQI+ activisms in Ghana’ (2022) 15(4) Communication, Culture and Critique 455.

Moore S, ‘Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study’ (1973) 7(4) Law & Society Review 719.

Moore S, *Social facts and fabrications: "customary" law on Kilimanjaro, 1880-1980* (Cambridge University Press 1986).

Msosa A, ‘Human Rights and Same-sex Intimacies in Malawi’ (2017).

Mũgo M, *The Imperative of Utu/Ubuntu in Africana Scholarship* (Daraja Press 2021).

Muhonja B and M’Baye B (eds), *Gender and Sexuality in Kenyan Societies: Centering the Human and the Humane in Critical Studies* (Rowman & Littlefield 2022).

Müller A, ‘Scrambling for access: availability, accessibility, acceptability and quality of healthcare for lesbian, gay, bisexual and transgender people in South Africa’ (2017) 17(1) BMC International Health and Human Rights 16.

Murithi T, ‘A local response to the global human rights standard: the ubuntu perspective on human dignity’ (2007) 5(3) Globalisation, Societies and Education 277.

Murove M, ‘Politics of Tradition and African Identity’ in Munyaradzi Murove (ed), *African Politics and Ethics: Exploring New Dimensions* (Palgrave Macmillan 2020).

Murray R, ‘International Human Rights: Neglect of Perspectives From African Institutions’ (2006) 55(1) International and Comparative Law Quarterly 193.

Murray R, ‘The Special Rapporteurs in the African System’ in Malcolm Evans and Rachel Murray (eds), *The African Charter on Human and Peoples' Rights* (Cambridge University Press 2008).

Murray R, *The African Charter on Human and Peoples' Rights: A commentary* (Oxford University Press 2020).

Murray R and Mottershaw E, ‘Mechanisms for the Implementation of Decisions of the African Commission on Human and Peoples' Rights’ (2014) 36(2) Human Rights Quarterly 349.

Murray R and Viljoen F, ‘Towards Non-Discrimination on the Basis of Sexual Orientation: The Normative Basis and Procedural Possibilities before the African Commission on Human and Peoples' Rights and the African Union’ (2007) 29(1) Human Rights Quarterly 86.

Murray S and Roscoe W (eds), Boy-wives and female husbands: Studies of African homosexualities (Palgrave 2001).

Murungi N and Gallinetti J, ‘The role of sub-regional courts in the African human rights system’ (2010) 7 Sur - International Journal on Human Rights 119.

Mute L, ‘Protecting the mandate and autonomy of the African Commission on Human and Peoples' Rights: leveraging the roles of national human rights institutions’ (2021) <https://achprindependence.org/wp-content/uploads/2021/07/nhris-achpr_en.pdf> accessed 15 July 2024.

Mutua M, ‘Savages, Victims, and Saviors: The Metaphor of Human Rights’ (2001) 42(1) Harvard International Law Journal 201.

Mutua M, ‘The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties’, *Human Rights* (Routledge 2017).

Naidoo T, Interview with Adrian Jjuuko, Centre for Human Rights Pretoria (2020).

Naldi G, ‘Limitation of Rights Under the African Charter on Human and Peoples' Rights: The Contribution of the African Commission on Human and Peoples' Rights’ (2001) 17(1) South African Journal on Human Rights 109.

Naldi G and Magliveras K, ‘The African Court of Justice and Human Rights: A Judicial Curate’s Egg’ (2012) 9(2) International Organizations Law Review 383.

Namwase S and Jjuuko A (eds), *Protecting the human rights of sexual minorities in contemporary Africa* (Pretoria University Law Press 2017).

Namwase S, Jjuuko A and Nyarango I, ‘Sexual minorities' rights in Africa: What does it mean to be human; and who gets to decide?’, *Protecting the human rights of sexual minorities in contemporary Africa*.

Nanima R, ‘NGOs & The Independence of the African Commission’ (2021) <https://achprindependence.org/ngos-the-independence-of-the-african-commission/> accessed 15 July 2024.

Naples-Mitchell J, ‘Perspectives of UN special rapporteurs on their role: inherent tensions and unique contributions to human rights’ (2011) 15(2) The International Journal of Human Rights 232.

Nathan L, ‘The Disbanding of the SADC Tribunal: A Cautionary Tale’ (2013) 35(4) Human Rights Quarterly 870.

Ncube S, ‘Human rights enforcement in Africa: Enhancing the Pan-African Parliament's capacity to promote and protect human rights’ (2020) 20(1) African Human Rights Law Journal 103.

Ndashe S, ‘Seeking the protection of LGBTI rights at the African Commission on Human and Peoples' Rights’ (2011) Feminist Africa 17 <http://www.agi.uct.ac.za/sites/default/files/image_tool/images/429/feminist_africa_journals/archive/15/2_case_study_sibongile_ndashe.pdf> accessed 15 July 2024.

Nibogora B, ‘Advancing the rights of sexual and gender minorities under the African Charter on Human and Peoples' Rights: The journey to Resolution 275’ in Ebenezer Durojaye, Gladys Mirugi-Mukundi and Charles Ngwena (eds), *Advancing Sexual and Reproductive Health and Rights in Africa* (Routledge 2021).

Nicol N and others, *Envisioning Global LGBT Rights: (Neo)Colonialism, Neoliberalism, Resistance and Hope* (University of London 2018).

Nwogu N, 'Regional Integration as an Instrument of Human Rights: Reconceptualizing ECOWAS' (2007) 6(3) Journal of Human Rights 345.

Nyamongo G, 'Woman to woman marriage: the case of female husbands among the Akamba of Kenya' (2020) 7(4) strategicjournalscom.

Nyanzi S and Karamagi A, 'The social-political dynamics of the anti-homosexuality legislation in Uganda' (2015) 29(1 (103)) Agenda: Empowering Women for Gender Equity 24.

Nyeck SN, *African(a) Queer Presence: Ethics and Politics of Negotiation* (Springer eBook Collection, 1st ed. 2021, Springer International Publishing; Imprint Palgrave Macmillan 2021).

Nyerere J, *Ujamaa: Essays on Socialism* (Oxford University Press 1974).

Nyerere J, 'Ujamaa: The basis of African socialism' (1987) The Journal of Pan African Studies 4 <http://jpanafrican.org/edocs/e-docujamma3.5.pdf> accessed 15 May 2024.

Odoyo R, 'From Russia with love: an impact assessment of resolution A/HRC/21/L2 on sexual minorities in Africa' (2013) <https://repository.gchumanrights.org/bitstream/handle/20.500.11825/618/odoyo.pdf?sequence=1> accessed 15 July 2024.

O'Flaherty M, 'The Yogyakarta Principles at Ten' (2015) 33(4) Nordic Journal of Human Rights 280.

O'Flaherty M and Fisher J, 'Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles' (2008) 8(2) Human Rights Law Review 207.

Ogwezzy M, 'Challenges and prospects of the African Court of Justice and Human Rights' (2014) 6 Jimma University Journal of Law 1.

O'Halloran K, *Sexual orientation, gender identity and international human rights law: Common law perspectives* (Routledge 2019).

Ontario Human Rights Commission, ‘An Intersectional Approach to Discrimination: Addressing Multiple Grounds in Human Rights Claims’ (2001) <https://www3.ohrc.on.ca/sites/default/files/attachments/An_intersectional_approach_to_discrimination%3A_Addressing_multiple_grounds_in_human_rights_claims.pdf> accessed 30 September 2022.

Onyango P, *African Customary Law: An Introduction* (LawAfrica Publishing (K) Ltd 2013).

Otieno-Odek J, ‘Law of Regional Integration - A Case Study of the East African Community’ in Johannes Döveling and others (eds), *Harmonisation of laws in the East African Community: The state of affairs with comparative insights from the European Union and other regional economic communities* (TGCL series vol 5. LawAfrica 2018).

Otto D, ‘Introduction: Embracing Queer Curiosity’ in Ratna Kapur and Dianne Otto (eds), *Queering International Law: Possibilities, Alliances, Complicities, Risks* (Routledge 2017).

Otto D, ‘Queering Gender [Identity] in International Law’ (2015) 33(4) Nordic Journal of Human Rights 299.

Otto D (Hg.) *Queering International Law* (Taylor & Francis 2017).

Ouguergouz F, *The African Charter of Human and People's Rights: A Comprehensive Agenda for Human Dignity And Sustainable Democracy In Africa* (Martinus Nijhoff Publishers 2003).

de Pauw M, ‘Interpreting the European Convention on Human Rights in Light of Emerging Human Rights Issues: An Older Person's Perspective’ (2014) 8(2) Human Rights and International Legal Discourse 235.

Pegram T and Rodriguez N, ‘Bridging the Gap: National Human Rights Institutions and the Inter-American Human Rights System’ in Par Engstrom (ed), *The Inter-American Human Rights System: Impact beyond compliance* (Palgrave Macmillan 2019).

Pell S, ‘Radicalizing the Politics of the Archive: An Ethnographic Reading of an Activist Archive’ (2015) Archivaria 33 <https://www.archivaria.ca/index.php/archivaria/article/view/13543> accessed 15 July 2024.

Pollis A, ‘Liberal, Socialist and Third World Perspectives of Human Rights’, *Toward a Human Rights Framework.*

Pound R, ‘Legislation as a Social Function’ (1913) 18(6) American Journal of Sociology 755.

Pound R and Treviño J, *Social control through law* (Routledge, Taylor and Francis Group 2017).

Quinn S, ‘An Activist’s Guide to The Yogyakarta Principles’ (2010) <https://queeramnesty.ch/wp-content/uploads/2010/11/Yogyakarta_Principles_Activists_Guide_201011.pdf> accessed 14 May 2022.

Rehbinder M, *Rechtssoziologie: Ein Studienbuch* (C.H. Beck 2014).

Rehman J, *International human rights law* (Longman 2009).

Reiss M, ‘War-of-Tug: LGBTIQ+ Rights in the African Regional Human Rights Architecture’ (Conference on the Decriminalisation of Same-Sex Laws and Eradication of Conversion Practices in Africa, Centre for Human Rights, Faculty of Law, University of Pretoria, 24 November 2022).

Richard R, ‘The Queer Paradox of LGBTI Human Rights’ (2011) InterAlia: Pismo poświęcone studiom queer <file:///C:/Users/anton/Downloads/6%20Thoreson.pdf> accessed 15 July 2024.

Ripert Y, ‘Rethinking négritude: Aimé Césaire & Léopold Sédar Senghor and the imagination of a global postcoloniality’ (Dissertation, Columbia University 2017).

Röhl KF, *Rechtssoziologie: Ein Lehrbuch* (Heymanns 1987).

Rösch R, ‘Indigenousness and peoples’ rights in the African human rights system: situating the Ogiek judgement of the African Court on Human and Peoples’ Rights’ <https://www.ejiltalk.org/the-ogiek-case-of-the-african-court-on-human-and-peoples-rights-not-so-much-news-after-all/> accessed 15 July 2024.

Rudman A, ‘The protection against discrimination based on sexual orientation under the African human rights system’ (2015) 15(1) African Human Rights Law Journal 1.

Rudman A, ‘The African Charter: Just one treaty among many? The development of the material jurisdiction and interpretive mandate of the African Court on Human and Peoples' Rights’ (2021) 21(2) African Human Rights Law Journal 699.

Salaymeh L and Michaels R, ‘Decolonial Comparative Law: A Conceptual Beginning’ (2022) 86(1) Rabel Journal of Comparative and International Private Law (RabelsZ) 166.

Sanga I and Pagnucco R, ‘Julius Nyerere's understanding of African socialism, human rights and equality’ (2020) 4(2) The Journal of Social Encounters 15.

Satterthwaite M, ‘Crossing Borders, Claiming Rights: Using Human Rights Law to Empower Women Migrant Workers’ (2005) 8 Yale Human Rights & Development Law Journal 1.

Scheibinger L, ‘Land Restitution as an Appropriate Instrument for Restoring Social and Economic Justice?’ *African Legal Studies* (2021) <https://africanlegalstudies.blog/2021/05/23/land-restitution-as-an-appropriate-instrument-for-restoring-social-and-economic-justice/> accessed 22 February 2023.

Schroeder D, ‘Human Rights and Human Dignity’ (2012) 15(3) Ethical Theory and Moral Practice 323.

Sekyiamah N, ‘After Years of Activism CAL Attains Observer Status at ACHPR’ (2015) <https://www.awid.org/news-and-analysis/after-years-activism-cal-attains-observer-status-achpr> accessed 30 March 2024.

Senghor L, ‘Negritude: A Humanism of the Twentieth Century’ in Peter Cain and Mark Harrison (eds), *Imperialism: Critical concepts in historical studies* (Routledge 2023).

Sensen O, ‘Human dignity in historical perspective: The contemporary and traditional paradigms’ (2011) 10(1) European Journal of Political Theory 71.

Sheikh D, ‘A Tale of Two Judgments: The Afterlives of a Defeat and Victory for Queer Rights in India’ (2018) Harvard Kennedy School LGBTQ Policy Journal 8.

Shelton D, *Remedies in international human rights law* (Oxford University Press 2015).

Shepard B, *Queer Political Performance and Protest* (Routledge 2010).

Shivji I, *The concept of human rights in Africa* (Codesria Book Series 1989).

Silva T, *Still straight: Sexual flexibility among White men in rural America* (New York University Press 2021).

Simm G, 'Queering CEDAW? Sexual orientation, gender identity and expression and sex characteristics (SOGIESC) in international human rights law' (2020) 29(3) Griffith Law Review 374.

Simuziya N, 'Universal human rights vs cultural & religious variations: an African perspective' (2021) 8(1) Cogent Arts & Humanities 1988385.

Singh A and Power M, 'The privacy awakening: the urgent need to harmonise the right to privacy in Africa' (2019) 3 African Human Rights Yearbook 202.

Slimane S, 'Recognizing minorities in Africa' <https://minorityrights.org/app/uploads/2023/12/download-43-recognizing-minorities-in-africa.pdf> accessed 15 July 2024.

Smith A, The Concept of Social Change (Routledge Revivals): A Critique of the Functionalist Theory of Social Change (Routledge 2010).

Smith R, *International human rights law* (Oxford University Press 2022).

Smits J (ed), *What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research* (2015).

Snyman T and Rudman A, 'Protecting transgender women within the African human rights system through an inclusive reading of the Maputo Protocol and the proposed Southern African Development Community Gender-Based Violence Model Law' (2022) 33(1) Stellenbosch Law Review 57.

Sogunro A and Surajpal S, 'Resolution 275 and the realisation of LGBTIQ+ rights in Africa' *African Legal Studies* (2022) <https://africanlegalstudies.blog/2022/06/24/resolution-275-and-the-realisation-of-lgbtiq-rights-in-africa/> accessed 31 July 2022.

Spradley J, *Participant Observation* (Waveland Press 2016).

Ssenyonjo M, ‘Economic, Social and Cultural Rights in the African Charter’ in Manisuli Ssenyonjo (ed), *The African regional human rights system: 30 years after the African charter on human and peoples' rights* (Nijhoff 2012).

Ssenyonjo M, ‘Responding to Human Rights Violations in Africa’ (2018) 7(1) International Human Rights Law Review 1.

Stop AIDS in Liberia (SAIL) et al. ‘Human Rights Violations Against Lesbian, Gay, Bisexual, and Transgender (LGBT) People in Liberia A Shadow Report on Liberia’s Compliance with the African Charter on Human and Peoples’ Rights’ (April-May, 2014) <https://www.heartlandalliance.org/gihr/wp-content/uploads/sites/12/2016/07/ACHPR-Liberia-Alternative-Report-2014.pdf> accessed 15 July 2024.

Sturman K and Hayatou A, ‘The Peace and Security Council of the African Union: From Design to Reality’ in Ulf Engel and Joao Porto (eds), *Africa's new peace and security architecture: Promoting norms, institutionalizing solutions* (Routledge 2016).

Sundström K, *National Human Rights Institutions in Africa: Design and Effectiveness* (2022).

Tamale S, *African sexualities: A reader* (Pambazuka Press 2011).

Tamale S, *Decolonization and Afro-feminism* (Daraja Press 2020).

Tamale S and Bennett J, ‘Legal Voice: Challenges and Prospects in the Documentation of African legal feminism’, Feminist Africa 15 Legal Voice: Special.

Tessmann G, ‘Homosexuality among the Negroes of Cameroon and a Pangwe tale: Originally published as “Die Homosexualität bei den Negern Kameruns,” Jahrbuch für sexuelle Zwischenstufen unter besonderer Berücksichtigung der Homosexualität 21 (1921): 121–38.’ in Stephen Murray (ed), *Boy-Wives and Female Husbands: Studies in African Homosexualities* (State University of New York Press 2021).

The Coalition of African Lesbians and African Men for Sexual Health and Rights (eds), *Violence based on perceived or real sexual orientation and gender identity in Africa* (Pretoria University Law Press 2013).

Thomas I, ‘The application of the principle of complementarity in the relationship between the African Court and the African Commission under the Regional African Human Rights System’ (2021).

Tieku T, Gänzle S and Trondal J, ‘People who run African affairs: staffing and recruitment in the African Union Commission’ (2020) 58(3) The Journal of Modern African Studies 461.

Tutu D, *No future without forgiveness* (Doubleday 2000).

Ugirashebuja E and others, *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (2017).

Umozurike O, ‘The African Charter on Human and Peoples’ Rights’ (1983) 77(4) American Journal of International Law 902.

United Nation Human Rights Office of the High Commissioner, ‘High Commissioner’s Strategic Management Plan 2010-2011’ <https://www.ohchr.org/sites/default/files/Documents/Press/SMP2010-2011.pdf> accessed 4 October 2023.

Vetters L, ‘Making sense of noncitizens’ rights claims in asylum appeal hearings: practices and sentiments of procedural justice among German administrative judges’ (2022) 26(7) Citizenship Studies 927.

Viljoen F, ‘Communications under the African Charter: Procedure and Admissibility’ in Malcolm Evans and Rachel Murray (eds), *The African Charter on Human and Peoples' Rights* (Cambridge University Press 2008).

Viljoen F, ‘An Introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa’ (2009) 16 Washington and Lee Journal of Civil Rights and Social Justice 11.

Viljoen F, *International Human Rights Law in Africa* (Oxford University Press 2012).

Viljoen F, ‘From a cat into a lion? An overview of the progress and challenges of the African human right system at the African Commission's 25 year mark’ (2013) 17 Law, Democracy and Development 298.

Viljoen F, ‘Understanding and Overcoming Challenges in Accessing the African Court on Human and People's Rights’ (2018) 67(1) International & Comparative Law Quarterly 63.

Viljoen F, ‘Africa’s rights commission can – and should – do more for sexual minorities’ (2019) <https://www.chr.up.ac.za/sogiesc-news/1511-op-ed-africa-s-rights-commission-can-and-should-do-more-for-sexual-minorities> accessed 15 July 2024.

Viljoen F, ‘LGBTQ+ rights: African Union watchdog goes back on its own word’ *The Conversation* (2023) <https://theconversation.com/lgbtq-rights-african-union-watchdog-goes-back-on-its-own-word-197555> accessed 2 April 2023.

Viljoen F and Sogunro A, ‘The promotion and protection of sexual and gender minorities under the African regional human rights system’ in Andreas Ziegler, Michael Fremuth and Berta Hernández-Truyol (eds), *The Oxford Handbook of LGBTI Law*.

de Vos P, ‘Mind the gap: Imagining new ways of struggling towards the emancipation of sexual minorities in Africa’ (2015) 29(1) Agenda 39.

de Vos P, ‘The Limit(s) of the Law: Human Rights and the Emancipation of Sexual Minorities on the African Continent in Contested Intimacies: Sexuality, Gender, and the Law’, *Contested Intimacies: Sexuality, Gender, and the Law in Africa* (2015).

Wachira G and Ayinla A, ‘Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples' Rights: A possible remedy’ (2006) African Human Rights Law Journal 465.

Wahab A, ‘"Homosexuality/Homophobia Is Un-African"?: Un-Mapping Transnational Discourses in the Context of Uganda's Anti-Homosexuality Bill/Act’ (2016) 63(5) Journal of Homosexuality 685.

Waltz S, ‘Universalizing Human Rights: The Role of Small States in the Construction of the Universal Declaration of Human Rights’ (2001) 23(1) Human Rights Quarterly 44.

Warner M, ‘Fear of a Queer Planet’ (1991) 9(4) Social Text 3.

Watson K, ‘Queer Theory’ (2005) 38(1) Group analysis 67.

Weber M, *Wirtschaft und Gesellschaft: Studienasgabe* (1972).

Weissbrodt D and de la Vega C, *International human rights law: An introduction* (University of Pennsylvania Press 2007).

Wohlgemuth L and Sall E, *Human rights, regionalism and the dilemmas of democracy in Africa* (CODESRIA Books 2006).

Woltersdorff V, 'Queer Theory and Queer Politics' (2003) Utopie kreativ (Rosa-Luxemburg Stiftung) 914 <https://th.rosalux.de/fileadmin/rls_uploads/pdfs/156_woltersdorff.pdf> accessed 15 July 2024.

Yabi G, 'The role of ECOWAS in managing political crisis and conflict' (2010) <https://library.fes.de/pdf-files/bueros/nigeria/07448.pdf> accessed 15 July 2024.

Yusuf A, Ahmad A and Maisara Nuhu, 'ECOWAS Single Currency and the Political Constraints' (2018) 8(9) International Journal of Academic Research in Business and Social Sciences 537.

Yuval-Davis N, 'Situated Intersectionality and Social Inequality' (2015) 58(2) Raisons politiques 91.

Zundel I, A Queer Critique: Intersectionality in the African human rights system (forthcoming).

Zundel I, 'Decolonizing Law and its Practitioner's Minds on the Example of LGBTQI+ Rights' *African Legal Studies* (2021) <https://africanlegalstudies.blog/2021/07/31/decolonizing-law-and-its-practitioners-minds-on-the-example-of-lgbtqi-rights/> accessed 21 January 2022.

Zundel I, 'Breaking through the colonial impositions: Africa, Queerness and the Law' *African Legal Studies* (2022) <https://africanlegalstudies.blog/2022/07/01/breaking-through-the-colonial-impositions-africa-queerness-and-the-law/> accessed 8 July 2023.