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Tug-of-war: LGBTIQ+ rights in the African human rights architecture

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Summary: *Regional organisations can constitute an arena for the negotiation of the human rights of sexual and gender minorities. They facilitate this through institutionalised bodies within their human rights architecture and fora for the involvement of non-state actors. However, the narrative of lesbian, gay, bisexual, transgender, intersex and queer Africans' so-called 'un-Africanness' is often invoked to (mis)appropriate these spaces, using 'anti-imperialist/anti-colonial' rhetoric to exclude LGBTIQ+ persons from human rights protection. In this article we argue that the design choices for regional organisations are both a means of establishing institutionalised human rights frameworks and offer*

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mechanisms for selectively appropriating narratives that justify the exclusion of certain groups from rights protections. This makes regional organisations highly contested spaces where norms, policies and power structures are in continuous negotiation. We conceptualise these contestations as a tug-of-war over which rights and whose identities are recognised within these frameworks. To unpack this struggle over whose human rights are acknowledged and whose are questioned and denied, we examine two key cases in the regional human rights arena of the African Union. These cases are the (de)registration of the Coalition of African Lesbians and the adoption and implementation of Resolution 275 by the African Commission on Human and Peoples' Rights. Within these interrelated regional arenas of the AU, critical questions emerge, namely, how these tug-of-war dynamics are carried out among state actors, and how these conflicts unfold between state and non-state actors within the AU's regional spaces.

Key words: *LGBTIQ+; African Commission on Human and Peoples' Rights; African Union human rights architecture; Coalition of African Lesbians; Resolution 275; 'un-Africanness'*

1 Introduction

Highlighting (only) homo-, inter- and transphobic notions perpetuated by African heads of state and government – and other influential individuals – carries the risk of telling the single story of African homophobia, which renders invisible the multifaceted and complex stories of approval and disapproval for the rights of lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ+)¹ persons across the different local, national and regional spheres on the continent.² Being mindful of this, our aim in this article is to

1 This acronym is largely a Western conceptualisation to denominate sexual orientations and gender identities. See S Tamale 'Researching and theorising sexualities in Africa' in S Tamale (ed) *African sexualities: A reader* (2011) 11. The terms and acronym render invisible non-Western descriptions and designations, such as women loving women, *Kuchu* (a Kiswahili term used in Uganda) and *Matanyola* (a Tswana term used in Botswana). Some of these are a distinctive reclaiming of derogatory names; see M Mbaru, M Tabengwa & K Vance 'Cultural discourse in Africa and the promise of human rights-based on non-normative sexuality and/or gender expression: Exploring the intersections, challenges and opportunities' in N Nicol and others (eds) *Envisioning global LGBT human rights: (Neo)colonialism, neoliberalism, resistance and hope* (2018) 177. Colonial continuities need to be reflected here too, as the reproduction of the 'common' abbreviation and the continuation of making other terms invisible is in itself highly problematic and a continuation of power dynamics. Furthermore, the acronym is an oversimplification of the different identities, lived realities and the intersections of identities of the people it tries to describe.

2 S Ndashe 'The single story of "African homophobia" is dangerous for LGBTI activism' in S Ekin & H Abbas (eds) *Queer African reader* (2013) 155-164.

explore the dangers of the single-story framing LGBTIQ+³ identities as 'un-African' in the name of anti-colonialism and anti-imperialism, and to examine its implications for governance at multiple levels. We argue that this narrative is utilised to paint a picture of ahistorical and apolitical LGBTIQ+ identities, the manifestation of which can be traced in national but also regional governance arenas. At its core, this struggle revolves around the interpretation of who is considered African and whose human rights are recognised as legitimate. These questions have extensive and interrelated implications. Primarily, they impact the lives and lived realities of LGBTIQ+ individuals at the national level, but they also affect regional governance arenas within the African human rights framework. At both levels, a central question arises: For whom is the African human rights system designed, and who is excluded from accessing basic human rights?

On the regional level, governance arenas are highly contentious, especially regarding the rights of sexual and gender minorities. We propose that these contestations can be understood as a tug-of-war over definitions of who belongs and whose human rights matter. Our focus is on how the human rights framework of the African Union (AU) has been leveraged in this tug-of-war concerning LGBTIQ+ rights, and on whether the 'un-Africanness' narrative has been employed to appropriate this regional governance space to tell a certain (single) story shaping a selective view of whose rights are prioritised. Two cases are instructive for understanding how the contestations unfold: the (de)registration of the Coalition of African Lesbians (CAL) and the adoption of Resolution 275 by the African Commission on Human and Peoples' Rights (African Commission) in 2014.⁴

Celebrating its tenth anniversary this year, Resolution 275 has become a cornerstone of the African human rights architecture regarding the rights of LGBTIQ+ persons. It condemns the increasing violence and other human rights violations – including murder, rape, assault, arbitrary imprisonment and other forms of persecution –

3 In the article we speak of LGBTIQ+ because we understand activism for the rights of sexual and gender minorities as an intersectional undertaking. Even though not all examples and the two cases we discuss predominantly address the rights of all or even most of the people grouped under the label of LGBTIQ+, for the sake of being coherent and concise and speaking to the intersectional approach we aim for, we use the umbrella term of LGBTIQ+ even when we speak only of LB(T)Q women or LGB(Q) persons. As n 1 points out, this terminology also is an oversimplification and overgeneralisation and needs further reflection.

4 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 ACHPR/Res.275(LV) 2014, <https://achpr.au.int/en/adopted-resolutions/275-resolution-protection-against-violence-and-other-human-rights-violations> (accessed 30 October 2024).

targeted at individuals on the basis of their imputed or real sexual orientation or gender identity. It further condemns systematic attacks by both state and non-state actors against persons on these grounds, calling on African states to prevent, investigate and remedy acts of violence.⁵ Resolution 275 is the outcome of relentless activism and strategically-coordinated efforts between state and non-state actors across various AU human rights platforms.

In what follows, we outline the conceptualisation of regional organisations and aspects of their institutional design, framing them as arenas of a tug-of-war over human rights of LGBTIQ+ individuals. Our analysis explores how the narrative of the 'un-Africanness' of African LGBTIQ+ identities is employed to appropriate the AU's established human rights architecture, counteracting protections for LGBTIQ+ persons and positioning these regional arenas as spaces of intense contestation. This argument is illustrated along two interconnected cases within the African human rights system: the (de)registration of the CAL, and the adoption and implementation of Resolution 275. Additionally, we briefly discuss debates around the inclusion of sexual and gender minority rights in other soft law instruments of the African Commission, further contextualising these issues within the African human rights framework.

2 Regional organisations as arenas for a tug-of-war over the rights of LGBTIQ+ persons

The tug-of-war at the regional level is a manifestation of diverging interests at the national level, revealing a divide between countries getting rid of anti-LGBTIQ+ colonial legacy laws and those where leaders invoke the 'un-Africanness' of LGBTIQ+ identities, disregarding the reality that African sexualities are diverse. However, not all states externalise their internal political stances in this way. Additionally, the role of non-state actors at both national and regional levels is critical in shaping these contested spaces. This raises key questions, namely, what roles these state and non-state actors play within the regional arenas in the ongoing struggle over defining the 'Africanness' of LGBTIQ+ identities; and how these roles correspond to broader dynamics in regional governance. In the following parts we first unpack and challenge the conceptualisations of LGBTIQ+ identities as 'un-African', examining these with regard to their colonial legacies. We then offer a conceptualisation of regional arenas, focusing on the

⁵ Network of African National Human Rights Institutions *A guide for African national human rights institutions for implementing Resolution 275* (2020).

appropriation of human rights narratives in the struggle for LGBTIQ+ recognition.

2.1 Debunking the 'un-Africanness' of LGBTIQ+ Africans and colonial legacies

Today, LGBTIQ+ persons across the African continent are framed as imports from 'the West', their identities and bodies deemed incompatible with African values, and their very existence labelled 'un-African'. This narrative, which frames non-cisgender and non-heterosexual persons as a recent Western import, is reinforced by an alliance of politicians and religious leaders.⁶

In contrast to this narrative, the lived realities and experiences of LGBTIQ+ individuals in diverse African settings are documented in three seminal anthologies, which together challenge and debunk this ahistorical and apolitical view. Morgan and Wieringa⁷ focus on female same-sex relationships and practices in Eastern and Southern African countries, arguing that labelling same-sex relations a Western import is a 'perverse distortion of African history', especially since 'homophobic post-colonial governments perpetuated colonial policies in denouncing same-sex relations'.⁸ In two more recent anthologies – *African sexualities: A reader*, edited by Tamale,⁹ and *Queer African reader*, edited by Ekine and Abbas¹⁰ – bring together scholarly, activist and artistic perspectives from across the continent, offering nuanced insights into the lives of LGBTIQ+ Africans, and further dismantling the 'un-African' label. Another edited volume sheds light on protecting the human rights of sexual minorities in contemporary Africa¹¹ from a legal perspective, and provides insights into nine country contexts with a view to dispelling the myth of 'un-Africanness'. Based on the accounts from Eastern and Southern Africa, Morgan and Wieringa¹² see the point of departure for this narrative in the influence of missionaries and Christianity, noting how these values were internalised over time.¹³ They argue that 'homophobia in many post-colonial African states also results

6 K Mwikya 'Unnatural and un-African: Contesting queer-phobia by Africa's political leadership' (2014) 19 *Feminist Africa* 98; C Ngwenya *What Is Africanness? Contesting nativism in race, culture and sexualities* (2018).

7 R Morgan & S Wieringa *Tommy boys, lesbian men and ancestral wives. Female same-sex practices in Africa* (2005).

8 R Morgan & S Wieringa 'Introduction' in Morgan & Wieringa (n 7) 11-22.

9 Tamale (n 1).

10 Abbas & Ekine (n 2).

11 S Namwase & A Jjuuko (eds) *Protecting the human rights of sexual minorities in contemporary Africa* (2017).

12 Morgan & Wieringa (n 7).

13 See also Mbaru and others (n 1).

in same-sex identified women feeling alienated from the project of nation building in their countries'.¹⁴ Abbas illustrates a similar logic in debates on aid conditionality:¹⁵

In the last decade LGBTI issues have been put squarely in the geopolitical arena. In Africa, the homophobes are using the very notions of citizenship and African identity as rhetoric to exclude and oppress LGBTI persons and communities. This does not come in a vacuum of oppression. Indeed, a democratic regression and looming economic recession has created systematic entrenchment of various forms of oppression. Notably, oppressions that seek to exert power over bodies and sexuality are gaining ground in an increasingly fundamentalist state and religious rhetoric armed with populist power.

In his seminal work *What is Africanness?* Ngwena¹⁶ theorises the underlying logic behind the narrative of LGBTIQ+ identities as 'un-African'. Ngwena links colonial framings that cast racialised *others* as deviant to similar framings of people based on sexual orientation and gender identity. For instance, '[f]or whites who were inclined to become "deviant" or "disoriented" as to become racially "queer" by going astray and crossing the sexual colour bar, the laws were "straightening devices" to assist with aligning white bodies with white spaces in a racial oligarchy'.¹⁷ Ngwena further develops this idea through the concept of *moral panic*, which

is the construction of a 'political moment of sex' galvanising political action to serve sectional political, cultural and religious ends in the maintenance of heterosexual patriarchal dominance. Characteristically, as Gayle Rubin underscores, the moral panic is aimed at vulnerable constituencies who lack political power.¹⁸

These analyses dismantle the notion that non-cisgender and non-heterosexual African identities are merely *Western* influences, exposing the ahistorical foundation of this narrative.¹⁹ They make it clear that colonial legacies are largely responsible for the homophobic and transphobic practices that persist today, among others, through legal frameworks.²⁰ Laws criminalising same-sex (sexual) relations, so-called 'anti-homosexuality laws' or 'anti-sodomy laws', were passed under British colonial rule and remain in

14 Morgan & Wieringa (n 7) 17.

15 H Abbas 'Aid, resistance and queer power' 5 April 2012, <https://sxpolitics.org/we-recommend-136/7385> (accessed 30 October 2024).

16 C Ngwena *What is Africanness? Contesting nativism in race, culture and sexualities* (2018).

17 Ngwena (n 16) 181.

18 Ngwena (n 16) 203.

19 See also CHM Klapeer 'LGBTIQ rights, development aid and queer resistance' in OU Rutazibwa & R Shilliam (eds) *Routledge handbook of postcolonial politics* (2018) 179-194; Mwikya (n 6).

20 A Jjuuko and others (eds) *Queer lawfare in Africa: Legal strategies in contexts of LGBTIQ+ criminalisation and politicisation* (2022).

force in 35 of the Commonwealth's 54 member nations, including 14 African states. These laws commonly use terms such as 'carnal knowledge', 'unnatural offences' and 'indecent practices', which have been interpreted to prohibit sexual acts between persons of the same sex, typically targeting men who have sex with men. These colonial-era laws remain embedded in Penal Codes based on British Commonwealth law.²¹ Tamale and Bennett reflect: 'Ironically, while Africa is holding onto these archaic colonial laws, countries from which they were imported have largely scrapped them from their statute books.'²² The historical entanglements around European interference in the legislation and treatment of LGBTIQ+ individuals in African nations are intricate and to this day remain complex. One manifestation of this complexity is the ongoing debate about the 'un-Africanness' of LGBTIQ+ Africans. The persistence of this narrative over the past decades is evident across national contexts on the continent, although systematic insights into how it plays out in regional governance spaces, such as the AU, are still largely missing from scholarly debates. Increasingly, civil society and scholars are documenting its presence and the implications it carries in regional governance arenas.

Over the past two decades, colonial legacy laws have been challenged through strategic litigation, or what Jjuuko and others have recently termed 'queer lawfare' at the national level.²³ Several of these decriminalisation efforts have been successful in recent years – among them Botswana.²⁴ Activists involved in the Botswana decriminalisation campaign hope that these national victories will open up spaces for discussion and discourse on different regional governance levels in the future. The assumption is that changes in laws and norms at the national level may diffuse not only to other countries but also through regional arenas. This underlines the AU and, specifically, the African Commission, as critical spaces for both activism and the transnational diffusion of norms.²⁵ The African

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- 21 CIVICUS 'LGBTIQ+ rights in the Commonwealth: Time for change. Commonwealth Heads of Government meeting an opportunity to address colonial legacy of discrimination' 21 June 2022, <https://lens.civicus.org/lgbtqi-rights-in-the-commonwealth-time-for-change/> (accessed 1 March 2024); E Han & J O'Mahoney *British colonialism and the criminalisation of homosexuality: Queens, crime and empire* (2018).
- 22 S Tamale & J Bennett 'Editorial: Legal voice: Challenges and prospects in the documentation of African legal feminism' (2011) 15 *Feminist Africa* 5.
- 23 Jjuuko and others (n 20).
- 24 Southern African Litigation Centre 'Botswana Court of Appeals decriminalisation judgment' 2021, <https://www.southernafricalitigationcentre.org/2021/12/06/the-botswana-court-of-appeals-decriminalisation-judgment-explained/> (accessed 3 March 2024).
- 25 M Reiss 'Advocating for human rights of LGBTIQ+ persons in multilevel governance systems' (2024) 20 *Journal of Civil Society* 269-284.

Commission is regarded as essential not only for activism but also for setting human rights standards within and beyond the AU's human rights framework, positioning it as a *norm leader*.²⁶ Sibongile Ndashe, founder and executive director of the Initiative for Strategic Litigation in Africa (ISLA), underscores this point, stating:²⁷

The ACmHPR [African Commission on Human and Peoples' Rights] is the bearer of standards on for the continent on human rights. The African Charter entrusted the promotion and the protection of human rights to the ACmHPR. If there is any space worth investing in, on the regional sphere, it has to be the ACmHPR. Any advocacy with the political bodies on LGBTI rights that ignores or fails to recognise the importance of engaging with the ACmHPR is doomed to fail.

In the following part we take a closer look at the AU's human rights architecture, its different aspects and parts. We introduce the conceptualisation of its arenas as spaces where a tug-of-war is carried out.

2.2 Conceptualising regional organisations as arenas for tugs-of-war and the appropriation of human rights

We are interested in exploring how the human rights architecture of the AU has been used for tugs-of-war over the rights of LGBTIQ+ persons, and whether the narrative of the 'un-Africanness' of LGBTIQ+ individuals is used to appropriate this regional governance space. The homo and transphobic notions underlying the 'un-Africanness' narrative are understood here as a frame used to claim control over the human rights architecture of regional organisations and to promote a certain (single) story of whose human rights are considered valid and whose are not. To unpack this, it is crucial to examine the different governance levels – both national and regional – as they are central to understanding how these contestations unfolds.

The human rights architecture of the AU is an extensive framework comprising various organs, institutions, policies and polities.²⁸ This constitutes the umbrella framework for the continent, including the sub-regional governance levels. African regional organisations at

26 See OC Okafor & GEK Dzah 'The African human rights system as "norm leader": Three case studies' (2021) 21 *African Human Rights Law Journal* 669-698.

27 S Ndashe 'Seeking the protection of LGBTI rights at the African Commission on Human and Peoples' Rights' (2011) 15 *Feminist Africa* 32.

28 Centre for Human Rights *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), <https://www.pulp.up.ac.za/component/edocman/a-guide-to-the-african-human-rights-system-celebrating-40-years-since-the-adoption-of-the-african-charter-on-human-and-peoples-rights-1981-2021>.

the sub-regional level operate within this framework. However, they often have a less robustly-institutionalised human rights structure – if they have any at all. Among the institutional frameworks in place are regional legislative and judiciary bodies, forums for the involvement of non-state actors, and expert committees.²⁹

In the African regional context, regional organisations are largely organised around the principle of intergovernmentalism, where decisions are made by heads of state or government. This process involves a relatively small, homogenous group with consensus-based decision-making procedures. This principle draws from historical experiences and legacies rooted in the struggle for independence and sovereignty, making it a crucial and enduring feature of (Eastern and Southern) African regional organisations.³⁰ The structure of these institutional designs impacts how power is distributed among the various organs. These design choices are the result of extensive negotiation processes between state – but also non-state – actors.³¹

After the institutional design is implemented, it remains subject to changes and developments from both within and outside. Regarding the role of organised non-state actors in the context of women's rights, Tamale³² asserts that 'without the push and pull from national, regional and international women's movements, it is unlikely that the progress in the gender normative framework of the AU would have been realised'. In the broader discussions on anti-feminism, Ahikire emphasises the need to

utilise regional and pan-African spaces and policy instruments to respond to the more deadly manifestations of anti-feminism. The likely spaces may include specific regional blocs such as the East African Community (EAC), Southern African Development Community (SADC), Economic Community of West African States (ECOWAS), possibly the Arab Maghreb Union and the pan-African AU.³³

29 A van Eerdewijk & C Roggeband 'Gender equality norm diffusion and actor constellations: A first exploration' in A van der Vleuten, A van Eerdewijk & C Roggeband (eds) *Gender equality norms in regional governance. Transnational dynamics in Europe, South America and Southern Africa* (2014) 42-64.

30 S Kingah & C Akong 'Is interregional AU-ASEAN diffusion in the south barren?' in U Engel and others (eds) *The new politics of regionalism. Perspectives from Africa, Latin America and Asia Pacific* (2018) 85-100; M Reiss *Constructing the East African Community: Diffusion from African and European regional organisations* (2022).

31 A Acharya & AI Johnston (eds) *Crafting cooperation. Regional international institutions in comparative perspective* (2007); Reiss (n 30); BA Simmons & L Martin 'International organisations and institutions' in W Carlsnaes, T Risse & BA Simmons (eds) *Handbook of international relations* (2002) 192-211.

32 Tamale (n 1).

33 J Ahikire 'African feminism in context: Reflections on the legitimisation battles, victories and reversals' (2014) 19 *Feminist Africa* 20-21.

Ahikire points to the multilevel governance architecture on the continent, including the regional organisations that are part of the AU's overall integration efforts. While we believe that there is much to gain from the insights in these governance spaces, we focus here on the AU and its human rights architecture. Within these arenas, the role of non-state actors is increasingly accredited more relevance – however, rarely with regard to LGBTIQ+ activism.

In reference to these arenas on the regional level, it is instructive for the conceptualisation of this article to understand these as spaces of a back-and-forth between state and non-state actors over the question whose rights are prioritised. Cavanagh explains in the documentary 'The Commission – From silence to resistance' how the African Commission as a regional space is perceived by civil society activists:³⁴

The intention in terms of being involved in those spaces is advancing social justice and human rights. So, for us this was an important space, not necessarily because what happens there is going to be implemented, but it is a space for ideas and, where ideas are being debated, we have to be there.

We propose conceptualising the dynamics of appropriation using the image of a tug-of-war. This approach is guided by two key indicators that inform our analyses: actors and pull dynamics. In a tug-of-war, both teams pull on the rope to gain ground, aiming to draw the opposing team closer or bring them to the ground. The composition of these teams is crucial, as is the specific pull dynamic employed. Therefore, we propose closely examining the 'teams', which consist of various state and non-state actors on either side. This enables us to identify the opposing sides in each regional arena. In the cases discussed, we explicitly account for the power dynamics between the two sides, recognising that the playing field is inherently uneven.

A tug-of-war is typically characterised by a back-and-forth struggle, where one team's gain corresponds to the other team's loss. Aligning with this metaphor, we argue that the dynamics within the regional arenas of the AU reflect a zero-sum game. Human rights cannot be partially implemented: This principle is embedded in the very nature of the international human rights system and international law. Furthermore, article 4 of the African Charter on Human and Peoples' Rights (African Charter) affirms: 'Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity

34 'The Commission – From silence to resistance' Documentary (2017), <https://www.youtube.com/watch?v=pq0Pu7Nq6MQ:12:43-13:03> (accessed 24 January 2024).

of his person.³⁵ Consequently, we apply the framing of a zero-sum game to debates surrounding the rights of LGBTIQ+ persons, conceptualising these discussions within the AU's arenas as a back-and-forth struggle, ultimately resulting in a 'winner'.

We acknowledge that the tug-of-war metaphor may seem overly simplistic for capturing the layered and complex processes at play. However, we are of the view that it effectively illustrates three key points: first, that human rights are indivisible and should be fully safeguarded in their entirety; second, that the struggles in the regional governance arenas are dynamic, engaging a wide range of state and non-state actors on both sides; and, third, that regional organisations are increasingly becoming important governance arenas for the negotiations of the rights of LGBTIQ+ individuals. Following a brief discussion of our own positionality and the database used for this piece, we outline two major contestations over LGBTIQ+ rights within the AU's regional arenas and analyse the dynamics as a tug-of-war.

3 Database and own positionality

The database for the following analysis predominantly consists of primary documents from the AU, non-governmental organisations (NGOs), as well as other non-governmental and governmental actors. Academic literature on the topic and on activism for the rights of LGBTIQ+ persons within multilevel governance systems is relatively scarce. Thus, we also draw on the documentary 'The Commission. From silence to resistance'³⁶ by Ditsie. This film contextualises and documents the process leading up to the adoption of Resolution 275 and the contestations surrounding CAL's observer status. Ditsie accompanies multiple NGOs, such as CAL, ISLA and African Men for Sexual Health and Rights (AMSHer), along with activists on their journey, providing a detailed account of the cases discussed in this piece. Additionally, we rely on background information drawn from expert interviews³⁷ conducted between November 2021 and March 2022 in Pretoria, Johannesburg and Gaborone, during a research stay by one of the authors, Mariel Reiss. Activists, including from CAL and ISLA, and scholars were interviewed based on their in-depth knowledge and experiences advocating LGBTIQ+ rights on the national, regional and international levels. Mariel Reiss is a *white*,

35 Organisation of African Unity African Charter on Human and Peoples' Rights (1981).

36 Documentary (n 34).

37 J Gläser & G Laudel *Experteninterviews und Qualitative Inhaltsanalyse* (2009).

cisgender lesbian in her mid-thirties, trained as a political scientist at universities in Germany and Sweden. She neither can nor claims to fully understand the lived realities of LBQ+ African women, though her allyship and solidarity extends to them as well as to transgender and intersex persons. During this research trip, the authors of this article met and later on decided to write this piece together. Monica Tabengwa is a human rights advocate/activist from Botswana. She is employed as a policy specialist by the United Nations Development Programme (UNDP) based in South Africa. She held various positions within international NGOs working on LGBTI inclusion, and also is co-founder of the leading LGBTI organisation in Botswana, LeGaBiBo. During this time, she was part of the core group of activists attending African Commission sessions since 2009 to lobby for the integration and inclusion of LGBTI issues in the African human rights mechanisms, in particular to be able to fully participate at all the African Commission sessions without discrimination on the basis of sexual orientation or gender identity and expression, and sex characteristics (SOGIESC).³⁸ Many of the examples and accounts discussed in this article draw on her personal experience and participation in the relevant spaces. We thus complement the data on which we rely our analysis with her experiences and accounts.

4 African Union regional arenas: Tug-of-war over LGBTIQ+ rights

The African regional integration landscape is structured through the AU and the implementation of the treaty establishing the African Economic Community (AEC)³⁹ and the eight recognised regional economic communities.⁴⁰ The AU functions as an umbrella body outlining a six-stage process that extends far beyond mere economic integration. The Organisation of African Unity (OAU), the AU's predecessor, had implemented the African Charter in 1986. This Charter 'is a human rights instrument designed to champion the promotion and protection of human rights and basic freedoms in Africa'. In 1987 the African Commission was inaugurated to oversee and interpret the African Charter.⁴¹ The OAU further established the

38 The terms 'LGBTIQ+' and 'SOGIESC' are both used in this article interchangeably.
39 Also called the Abuja Protocol, which entered into force in 1994 under the predecessor of the AU, the OAU.

40 S Karangizi 'The regional economic communities' in A Abdulkawi Yusuf & F Ouguerouz (eds) *The African Union. Legal and institutional framework. A manual on the Pan-African Organisation* (2012) 231-249.

41 The African Commission consists of 11 commissioners who serve in their personal capacity as independent experts from a variety of professional backgrounds. Commissioners can serve for six years and are eligible for re-election, but not consecutively, and are nominated by their own governments. The appointed

African Court on Human and Peoples' Rights (African Court) in 1998. Thus, the African human rights system is layered and has evolved over time, along with the distribution of tasks among the various entities within the system. 'While the African Commission has a wide mandate covering the monitoring, investigation and promotion of human rights, the African Court's mandate is exclusively limited to receiving and adjudicating complaints on violations of human rights.'⁴² Within this African human rights architecture, the rights related to SOGIESC have been the subject of intense contestation. Over the past two decades, however, these rights have come to play a more relevant role.⁴³

In the following sub-parts, the contestations and the tug-of-war over the human rights of LGBTIQ+ persons is illustrated along two significant cases within the regional human rights arenas of the AU. The cases are the (de)registration case of the CAL and the adoption of Resolution 275. The analysis proceeds as follows: First, the context of each case is introduced and, subsequently, for each case, the relevant actors on both sides and their respective pull tactics in the struggle over whose human rights matter and whose do not are outlined.

4.1 The African Commission and the (de)registration of the Coalition of African Lesbians

Before the adoption of the landmark Resolution 275 in 2014, the tug-of-war between the African Commission and NGOs advocating LGBTIQ+ rights centred around the issue of accreditation or observer status. This aspect of civil society involvement has been – and continues to be – highly contested.

Under article 45 of the African Charter, the African Commission recognises the vital role played by human rights NGOs in its protective and promotional mandate. NGOs provide critical resources and information, and act as a direct link to grassroots efforts in each country, thereby supporting the Commission in

commissioner should meet the highest standard of independence, impartiality and be competent in their fields of work (Criteria for the nomination and election of members of the African Commission on Human and Peoples' Rights, AI Index: IOR 63/002/2007).

42 S Dersso 'Forty years of the African Charter and the reform issues facing the discourse and practice of human rights' (2021) 21 *African Human Rights Law Journal* 654.

43 F Viljoen & A Sogunro 'The promotion and protection of sexual and gender minorities under the African regional human rights system' in AR Ziegler, ML Fremuth & B Hernández-Truyol (eds) *The Oxford handbook of LGBTI law* (2024).

holding member states accountable for human rights violations. Consequently, NGO participation is regulated through the process of accreditation or granting observer status, a decision made by the African Commission.⁴⁴ Any NGO working on human rights can apply for observer status with the African Commission, provided they meet specific criteria. These include demonstrating how their objectives and activities reflect the fundamental principles of the African Charter, outlining their work in the field of human rights, and providing documentation such as financial resources, organisational documents, for instance, their statutes, proof of legal existence, a list of members, and the most recent financial audit statement.⁴⁵

However, the registration process for gaining access to this crucial regional arena is far more difficult and contested than the rules might suggest. This is particularly true for NGOs working on LGBTIQ+ issues. In the following discussion, we outline one of the most significant contestations: the process of the application for – and subsequent deregistration of – CAL as an observer, and the broader implications of the interference by the Executive Council of the AU.⁴⁶

4.1.1 *Granting observer status to the Coalition of African Lesbians*

CAL submitted its first application for observer status in 2008, but the African Commission rejected it in 2010, stating that the organisation did not promote or protect any of the rights in the African Charter. In a special issue of *Feminist Africa*, Ndashe offers a comprehensive discussion and recap of the process leading up to this first application and its subsequent rejection.⁴⁷ Here, we focus on the developments surrounding the second rejection in 2014. That same year, when the African Commission adopted Resolution 275, CAL resubmitted its application. After years of advocacy, CAL was ultimately granted observer status by the Commission at its fifty-sixth ordinary session in April 2015, following a five-to-four vote, with one abstention.

44 African Commission on Human and Peoples' Rights Resolution on the Criteria for Granting and Enjoying Observer Status to Non-Governmental Organisations Working in the Field of Human and Peoples' Rights ACHPR/Res.33(XXV)99 (1999) ch II paras 5-6.

45 African Commission on Human and Peoples' Rights Resolution on the Granting of Affiliate Status to National Human Rights Institutions and Specialised Human Rights Institutions in Africa ACHPR/Res.370(LX)2017 (2016), <https://achpr.au.int/en/adopted-resolutions/370-granting-affiliate-status-national-human-rights-institutions-achprres370lx> (accessed 30 October 2024).

46 The African Union Executive Council is made up of the ministers designated by the member states' governments and thus is one of the intergovernmental bodies of the AU.

47 Ndashe (n 27).

This success is partly attributed to an Africa-wide campaign led by human rights NGOs, which called on the African Commission to reconsider its 2010 decision. The pro-LGBTIQ+ side relied on strategic coalitions between NGOs and commissioners supporting their cause. They managed to rally support for CAL's registration from both state and non-state actors. During the heated debates, the five commissioners who voted in favour of granting CAL observer status stood up to defend the organisation's right to exist, alongside a group of pro-LGBTIQ+ NGOs in the regional arena. On the other end of the rope, openly hostile and homophobic and transphobic sentiments were voiced by those commissioners who voted against granting CAL observer status, as well as by other human rights organisations and state delegates attending the session. These arguments were largely framed around the notion of 'African values, identity, and tradition' which according to the opposition, CAL would undermine or deviate from. Specifically, they argued that an NGO called the Coalition of *African Lesbians* could neither be truly 'African' nor aligned with 'African values'.⁴⁸ In this context, the narrative of the 'un-Africanness' of LBQ+ women was invoked.

By granting CAL observer status in 2014, the push for the inclusion and recognition of LGBTIQ+ persons sent a strong signal to other NGOs as well as the diverse LGBTIQ+ communities across the continent. From 2015 until 2018, CAL was able to participate in regional discourses taking place at the African Commission. However, even during this period, CAL's belonging in this space was continuously contested. This is evident from the ways in which members of NGOs in the regional arenas of the African Commission both implicitly and explicitly suggested that CAL's presence tainted the space. Such reactions highlighted CAL's precarious situation and constantly called their status into question.⁴⁹ One of the main reasons for this opposition was the perception that a focus on SOGIESC issues would divert attention from what those NGOs have been working on, such as HIV/AIDS, conflict prevention and poverty – issues considered to be more important and urgent. This hierarchisation of human rights issues is not uncommon, especially when resources, such as access and attention, are limited.

4.1.2 Deregistration of the Coalition of African Lesbians

Following these debates within the African Commission, and an unsuccessful request for an advisory opinion submitted to the African

48 Documentary (n 34).

49 As above.

Court,⁵⁰ in August 2018 the African Commission withdrew CAL's observer status (Decision 1015). The process stretched from 2015 to 2018. In what follows, we outline the tug-of-war that led to a painful loss for CAL and other human rights organisations and actors advocating LGBTIQ+ persons and their human rights.

The first contestation questioning CAL's belonging can be traced back to June 2015, when the Executive Council of the AU requested that the African Commission withdraw CAL's status and align its decisions on granting observer status more generally with 'fundamental African values, identity and good traditions'.⁵¹ However, the African Commission did not act on this request, instead justifying its decision in its 2017 Activity Report to the AU Executive Council by affirming that the decision fell within its mandate and that it had followed the proper procedure and criteria.⁵² The African Commission sought to assert its independence, in line with its mandate to protect and promote fundamental human rights for all. Despite strong contestation of CAL's position, the African Commission stood firm. This indicates an important aspect of alliance building in the tug-of-war. While the African Commission did not explicitly defend CAL and its stance, it aligned itself with the actors on the side of the rope advocating the protection of LGBTIQ+ rights. On the other side of this tug-of-war, we position the Executive Council and the Secretariat of the AU, both part of the political organs of the AU. There are two levels to their practice: first, to further marginalise LGBTIQ+ organisations and keep them out of the relevant regional human rights arenas; and, second, to infringe upon the independence of the African Commission.

The second contestation occurred in 2018, when CAL's observer status was withdrawn directly following a request by the Executive Council of the AU.⁵³ In this request, the Executive Council urged

50 See *Request for Advisory Opinion by the Centre for Human Rights, University of Pretoria and the Coalition of African Lesbians (Advisory Opinion)* (2017) 2 AfCLR 606, asking the Court's view as to whether the Executive Council was acting within its competence under art 59(3) of the African Charter when it directed the Commission to withdraw CAL's observer status. The request was denied on 28 September 2017, on the basis that the Court does not have jurisdiction to consider a request for an Advisory Opinion by the two NGOs because they were not 'recognised by the African Union', as required by art 4(1) of the Protocol Establishing an African Court on Human and Peoples' Rights. See also 43rd Activity Report of the African Commission on Human and Peoples' Rights (2017) para 50, <https://achpr.au.int/en/documents/2017-06-01/43rd-activity-report> (accessed 15 November 2024) (African Commission's 43rd Activity Report).

51 African Union Executive Council 'Decision on the 38th Activity Report of the African Commission on Human and Peoples' Rights' Doc.EX.CL/921(XXVII) (2015).

52 African Commission's 43rd Activity Report (n 50) para 51.

53 African Union Executive Council, Decision on the 38th Activity Report of the African Commission on Human and Peoples' Rights EX.CL/Dec.887(XXVII) para

the African Commission to consider 'African values' when reviewing applications for the observer status.⁵⁴ Viljoen and Sogunro frame this decision within the increasing pressure exerted on the Commission by various (intergovernmental) organs of the AU,⁵⁵ such as the Executive Council and the Permanent Representatives' Committee (PRC).⁵⁶ Some members of the PRC and the Commission attended a retreat in 2018, after which Decision 1015 was adopted. The authors argue that the language adopted by the Commission around the notion of 'African values' was a direct influence from the above-mentioned intergovernmental bodies. Ultimately, on 8 August 2018, the African Commission withdrew CAL's observer status following decisions by the Executive Council of the AU that called on the African Commission to consider 'African values' when reviewing applications for observer status.⁵⁷ In both instances, the intergovernmental organs and their representatives formed the 'anti-LGBTIQ+ team' on one side of the rope, wielding much more power and leverage. On the other side were CAL, individual commissioners and non-governmental allies, who had significantly fewer resources, power and leverage. The former side won this tug-of-war, further marginalising LGBTIQ+ organisations and keeping them out of the relevant regional human rights arenas. Moreover, they infringed upon the independence of the African Commission. This tug-of-war dynamic took on its own momentum as the Executive Council of the AU persisted. A further directive was issued, informing the African Commission that the AU's political organs hold a more powerful position in relation to the African Commission, which only possesses functional powers. Following from this, the relationship between the Executive Council of the AU and the African Commission became increasingly hostile. With mounting pressure on the African Commission's members, a meeting was called in January 2018 to address the non-compliance with the directive to withdraw CAL's observer status and 'to resolve various concerns expressed about the relationship between the African Commission and the policy organs and member states'.⁵⁸ In June 2018 the Executive Council of the AU once again firmly requested that the African Commission 'withdraw

7 in Executive Council Decisions, EX.CL/Dec.873-897(XXVII).

54 Centre for Human Rights (n 28).

55 Viljoen & Sogunro (n 43).

56 The PRC is made up of the AU member states' ambassadors to the AU headquarters in Addis Ababa, Ethiopia.

57 African Union Executive Council EX.CL/Dec.995(XXXII) Decision on the African Commission on Human and Peoples' Rights Doc EX.CL/1058(XXXII).

58 African Union Executive Council 'Decision on the Report 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) I (2018); EX.CL/Dec.1015(XXXIII) paras 1 & 2 in Executive Council Decisions, EX.CL/Dec.1008-1030(XXXIII).

the accreditation of the Coalition for African Lesbians (CAL) latest by 31st December 2018, in accordance with previous decisions of AU Policy Organs'.⁵⁹ Finally, the African Commission relented and withdrew CAL's observer status in 2018.⁶⁰

4.1.3 *The deregistration of Coalition of African Lesbians and its implications for the human rights architecture of the African Union*

NGOs, activists and their allies advocating the rights of LGBTIQ+ persons widely condemned the decision to revoke CAL's observer status, interpreting it as a threat to the independence of the African Commission. This concern was amplified by the broader implications of the Executive Council's actions, which extended beyond targeting CAL. The Council also urged state parties to reassess the African Commission's jurisdiction to receive and adjudicate complaints of human rights violations. Such measures underscore a troubling development, as the African Commission supposedly is an independent entity within the AU's (human rights) framework.⁶¹ The fall-out from this decision strained relationships within the African Commission itself, as well as between its members and the Executive Council of the AU. Furthermore, it eroded the trust of NGOs working on LGBTIQ+ issues, casting doubt on the Commission's impartiality and ability to safeguard human rights for all.⁶² These developments sparked broader debates on the extent of political interference in the Commission's work and its independence.⁶³ The dispute further escalated when the Executive Council of the AU pointed to a potential conflict concerning the mandate of the African Court and called on states to 'conduct an analytical review of the interpretative mandate of the ACHPR'.⁶⁴ Additionally, the Council requested the African Commission to submit its criteria for granting observer status to state parties for review and approval.⁶⁵ This can be seen as a way to systematically undermine the independence of the African Commission, effectively closing the door to dissent and criticism from civil society. The unyielding stance of the Executive Council of the AU

59 African Union Executive Council para 8(vii).

60 LM Mute 'Sexual minorities and African human rights mechanisms: Reflections on contexts and considerations for addressing discrimination' (2023) 7 *African Human Rights Yearbook* 204.

61 Network of African National Human Rights Institutions (n 5).

62 Viljoen & Sogunro (n 43).

63 Reiss (n 25).

64 African Union Executive Council 'Decision on the Report on the Joint Retreat of the Permanent Representatives' Committee (PRC) and the African Commission on Human and Peoples' Rights (ACHPR) para 7(iii).

65 African Union Executive Council para 8(iv).

may also have been influenced by the composition and positions of individual commissioners within the African Commission.

As this discussion highlights, the implications of the decision for NGOs attempting to access and operate within the regional space of the African Commission are profound and contentious, particularly regarding LGBTIQ+ rights. The narrative of the 'un-Africanness' of LGBTIQ+ persons prevails, further marginalising groups such as LGBTIQ+ women. It took an extensive transnational alliance of state and non-state actors to initially secure observer status for CAL. However, the interference by the Executive Council of the AU in what is the designated regional human rights arena undermined not only CAL but also other NGOs working on LGBTIQ+ rights. This interference further eroded trust in the African Commission and its impartiality. This tug-of-war was fought on two levels and ultimately failed to protect the human rights of LGBTIQ+ persons and, instead, exposed vulnerabilities both within the Commission as a regional arena and the broader human rights architecture of the AU. The narrative of the 'un-Africanness' of L(G)BTIQ+ individuals was weaponised to appropriate the human rights arena for a homophobic and transphobic agenda. This tug-of-war resulted not only in a loss for CAL, but has a long-lasting impact on NGOs and state actors working towards the advancement of human rights for LGBTIQ+ individuals on the national, regional and international levels.

4.2 The African Commission and the adoption and implementation of Resolution 275

Article 2 of the African Charter provides that '[e]very individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status'. The Charter further states that every individual shall be entitled to equal protection under the law, thus paving the way for the equal treatment (also) of LGBTIQ+ persons within the human rights mandate. However, the continued high levels of violence, discrimination and other human rights violations perpetrated due to a person's sexual orientation, gender identity or expression and sex characteristics persist.⁶⁶ In the following, we outline the roles of the

⁶⁶ Coalition of African Lesbians and African Men for Sexual Health and Rights 'Violence based on perceived or real sexual orientation and gender identity in Africa' (2013), <https://www.pulp.up.ac.za/catalogue/other-publications/violence-based-on-perceived-or-real-sexual-orientation-and-gender-identity-in-africa> (accessed 15 November 2024); Arcus Foundation 'Data collection and

relevant state and non-state actors as well as pull dynamics within the African Commission that were instrumental to the adoption of Resolution 275.

4.2.1 *Building strategic coalitions*

The following part predominantly relies on Ditsie's documentary, 'The Commission: From silence to resistance',⁶⁷ and the accounts of Monica Tabengwa, who has been actively involved in activist spaces (and the documentary) and has been at the forefront of the struggle for LGBTIQ+ rights over the past two decades. In the documentary, Ditsie accompanies activists working in transnational NGOs such as CAL, ISLA and AMSHeR on their journey toward the adoption of Resolution 275.

Strategic alliances among NGOs advocating the rights of LGBTIQ+ persons and those focused more broadly on human rights played a pivotal role in the lead-up to the adoption of the Resolution. At the forefront, on one side of the tug-of-war, were two NGOs: CAL and AMSHeR. They led advocacy efforts at the African Commission in coalition with a broader movement of LGBTIQ+ activists, NGOs and other human rights allies. Initially, their strategy prioritised visibility and active participation in the African Commission as a regional arena for human rights advocacy. This approach involved collaboration across diverse human rights movements, transcending LGBTIQ+ rights to engage with other human rights issues.⁶⁸ To strengthen their position, coalitions were built on the premise of human rights' interdependence – arguing that the denial of one right inevitably undermines others. Consequently, coalitions were built to strengthen the group of actors on the one side of the rope pulling in the direction of advancing LGBTIQ+ rights. As a result of the extended solidarity and the intersectional approach to advancing human rights in general, mainstream and other human rights organisations stood alongside CAL calling out the African Commission for failing to fulfil its mandate.⁶⁹ Many of these organisations used their observer status to issue statements

reporting on violence perpetrated against LGBTQI persons in Botswana, Kenya, Malawi, South Africa and Uganda' (2019), <https://www.arcusfoundation.org/wp-content/uploads/2020/04/Iranti-Violence-Against-LGBTQI-Persons-in-Botswana-Kenya-Malawi-South-Africa-Uganda.pdf> (accessed 30 October 2024).

67 Documentary (n 34).

68 BD Nibogora 'Advancing the rights of sexual and gender minorities under the African Charter on Human and Peoples' Rights. The journey to Resolution 275' in E Durojaye, G Mirugi-Mukundi & C Ngwena (eds) *Advancing sexual and reproductive health and rights in Africa. Constraints and opportunities* (2021) 171-187.

69 Documentary (n 34).

in support of CAL's application for observer status and criticised the African Commission when they denied CAL registration in 2010.⁷⁰ Rather than discouraging advocacy, the rejection of CAL's application galvanised efforts to bring more LGBTIQ+ activists and allies into the African Commission's sessions. These alliances, built on the shared belief in the indivisibility of human rights and an intersectional approach, supported their cause through strategic capacity-building initiatives. Trainings organised by the core group of leading NGOs – CAL, AMSHeR, ISLA, SYNERGIA-Initiatives for Human Rights, Human Rights Watch, Amnesty International and East African Sexual Health and Rights Initiative (UHAI) – helped equip activists with the tools to advance their work effectively. The coalition on this side of the rope made an effort to support their allies from the non-state sector by being intersectional in their work, emphasising the interdependence of human rights, highlighting that the denial of one impacts the realisation of the others and recognising the interconnectedness of socio-economic, civil and political rights. This approach intentionally linked LGBTIQ+ issues with broader human rights concerns, ensuring that these topics were not siloed but integrated into broader human rights discussions. LGBTIQ+ groups championed other human rights issues, and non-LGBTIQ+ organisations reciprocated by backing SOGIESC rights. Ultimately, this approach sought to dismantle the single story narrative around LGBTIQ+ issues by fostering a nuanced understanding of SOGIESC as part of a multifaceted spectrum of human rights concerns.

4.2.2 *Advocating LGBTIQ+ rights through visibility, reporting and lobbying*

For those commissioners open to the inclusion of LGBTIQ+ human rights, targeted measures were implemented to bolster their knowledge and confidence. Information packages were distributed, and panel discussions and workshops were organised.⁷¹ The configuration of the Commission is crucial; as well as the alliances between commissioners, who are open to including the rights of LGBTIQ+ in the human rights architecture of the AU, NGOs and activists.⁷² Together, commissioners and NGOs formed a cohesive team on one side of the tug-of-war. Opposing them were commissioners and NGOs advocating the exclusion of LGBTIQ+ persons from the African human rights framework.

70 Ndashe (n 27).

71 Ndashe (n 27); Documentary (n 34).

72 Mute (n 60).

The increasing presence and visibility of African LGBTIQ+ NGOs in these human rights spaces, coupled with the submission of alternative reports by various NGOs detailing human rights violations based on real or perceived SOGIESC status, invoked the need for urgent action.⁷³ To enable the African Commission to fulfil its mandate to monitor state parties' compliance with human rights standards, article 62 of the African Charter obliges state parties to submit biennial reports. The documentation contains legal and other measures the states have taken to respect, implement and comply with human rights standards. These reports, once submitted, are made public, and NGOs can respond with shadow reports (also called alternative reports) focusing on specific human rights or covering more than one of the human rights under the African Charter. These reports often provide missing or contradictory information and may include recommendations for improving compliance with human rights standards. The African Commission in 2022 adopted guidelines for developing shadow reports,⁷⁴ which have been instrumental in providing the Commission with information to hold its member states accountable for human rights violations. The increased publication and review of shadow reports also amplified awareness of (issues related to) LGBTIQ+ struggles for human rights in the AU's member states within the African Commission.

In 2013 a coalition of activists under the auspices of CAL and AMSHeR published a comprehensive report documenting violence and discrimination against LGBTIQ+ persons across Africa.⁷⁵ This report provided accounts of the lived experiences of LGBTIQ+ individuals describing experiences of violations of their human rights at the hands of both state actors and non-state actors. It became a powerful lobbying tool for engaging regional governance structures, and to counter the sentiment that the rights of LGBTIQ+ persons should not be among the African Commission's concerns. The idea to develop a resolution addressing violence against LGBTIQ+ persons materialised during the sessions of the African Commission – here, NGOs meet according to thematic groups. During the thematic group discussions at the NGO forum held at the African Commission's sessions, the groundwork for Resolution 275 was

73 Viljoen & Sogunro (n 43).

74 Guidelines on Shadow Reports of the African Commission on Human and Peoples' Rights adopted by the African Commission at its 72nd ordinary session held from 19 July to 2 August 2022, <https://achpr.au.int/en/documents/2022-10-28/guidelines-shadow-reports-african-commission-human-and-peoples> (accessed 15 November 2024).

75 Coalition of African Lesbians and African Men for Sexual Health and Rights (n 63); recommending that the Commission adopt 'a resolution that condemns the on-going violence against persons based on their sexual orientation and gender identity' (para 4.1(A)).

laid. These discussions focused on human rights violations and discrimination, aligning with the core mandate of the Commission. Particular attention was given to violations and discrimination targeting LGBTIQ+ persons. The publication of the report and adoption of Resolution 275 are closely linked, highlighting the key actors driving the effort on one side of the tug-of-war. Leading this charge were CAL, AMSHeR, ISLA, SYNERGIA-Initiatives for Human Rights, Human Rights Watch, Amnesty International and UHAI, along with commissioners committed to safeguarding LGBTIQ+ rights.

Increasing and further refining their lobbying efforts, these non-state actors developed a traffic light system to map the stance of each commissioner. Commissioners firmly aligned with the 'team' of the LGBTIQ+ activists were marked in green, representing those who had stood on the side of the rope together with the activists for some time. Commissioners marked in yellow were seen as needing more persuasion. For both these groups, activists provided information packages, organised panel discussions and held workshops to enhance their knowledge and confidence. Commissioners categorised in red were firmly on the opposing side of the rope, with little expectation of being convinced – a position that ultimately proved accurate. This system enabled activists to allocate their resources and efforts more effectively and appears to have yielded favourable results.⁷⁶

During its fifty-fifth ordinary session in Luanda, Angola, in May 2014, the African Commission adopted Resolution 275 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'.⁷⁷ Resolution 275 condemns the increasing incidence of violence and other human rights violations, including murder, rape, assault, arbitrary imprisonment, and other forms of persecution of persons on the basis of their imputed or real sexual orientation or gender identity. It denounces systematic attacks by state and non-state actors against persons on the basis of their imputed or real sexual orientation or gender identity. It calls on African states to prevent, investigate and address such acts of violence by both state and non-state actors.⁷⁸ Resolution 275 marked a pivotal shift, breaking the long-standing refusal to acknowledge and include LGBTIQ+ persons in African human rights discourses.

As demonstrated above, Resolution 275 is the outcome of relentless and long-term activism by pivotal LGBTIQ+ NGOs in collaboration

76 Nibogora (n 68).

77 ACHPR/Res.275(LV)2014.

78 Mute (n 60); Network of African National Human Rights Institutions (n 5).

with other NGOs on the continental level within the African Commission. These strategic collaborations were instrumental in the adoption of this landmark decision. In the context of the tug-of-war dynamic, Resolution 275 represents a ground-breaking victory for the rights of LGBTIQ+ individuals on the continent, achieved through the concerted efforts of a specific constellation of actors and many years of advocacy. This tug-of-war culminated in a milestone achievement for those championing the rights of LGBTIQ+ persons at the national, regional and continental levels.

4.2.3 *Ten years on: Resolution 275 and the African Union human rights architecture*

The described dynamics and the tug-of-war have implications beyond the illustrated cases. A decade after its adoption, the realisation of the Resolution's objectives remains largely unmet, and the multi-layered tug-of-war continues.⁷⁹ Recent events underscore this ongoing struggle. In November 2022 the African Commission denied observer status to several NGOs that include advocacy for LGBTIQ+ rights in their mandate, namely, Alternative Côte d'Ivoire, Human Rights First Rwanda Association, ISLA, and Synergía-Initiatives for Human Rights. The Commission justified its rejection on the grounds that 'sexual orientation is not an expressly recognised right or freedom under the African Charter' and is 'contrary to the virtues of African values'.⁸⁰ This decision reflects the continued use of the narrative that LGBTIQ+ persons do not belong in the national, regional and continental human rights spaces.⁸¹

Furthermore, we wish to point to a development observable within the AU human rights architecture: mentions and inclusion of SOGIESC issues in resolutions of the African Commission, in General Comments, Concluding Observations, guidelines and principles.⁸² We characterise these as aspects of a much broader tug-of-war within the AU human rights architecture. Yet, since these sites of

79 For a comprehensive overview of the application of Resolution 275 between 2014 and 2020, see African Men for Sexual Health and Rights & Synergía – Initiatives for Human Rights 'Application of Resolution 275 by the African Commission on Human and Peoples' Rights: A six-year assessment' (2020).

80 African Commission on Human and Peoples' Rights 'Final Communiqué of Its 73rd ordinary session held in Banjul, The Gambia, from 20 October to 9 November 2022' (2022); F Viljoen 'LGBTQ+ rights: African Union watchdog goes back on its own word' *The Conversation* (2023).

81 The criteria for gaining observer status with the Commission were also amended and now include two more aspects: First, the applicant has to be registered in a state part to the African Charter; and, second, has to have a regional office or presence in an African country.

82 See Mute (n 60) 202-203; Viljoen & Sogunro (n 43) para 3.3.4.

contestation are not at the core of this article's analysis, we cannot provide a comprehensive analysis of these broader dynamics (or tugs-of-war). We do, however, want to outline them briefly, as the tug-of-war within the AU, of course, has continued since the adoption of Resolution 275.⁸³

In 2017 the African Commission adopted Resolution 376 on the Situation of Human Rights Defenders in Africa, which calls for the protection of human rights defenders in Africa and specifically mentions protecting those working on sexual orientation and gender identity.⁸⁴ By specifically including these categories, the Resolution complements and reinforces paragraph 3 of Resolution 275 which requires African states to 'ensure that human rights defenders work in an enabling environment that is free of stigma, reprisals or criminal prosecution as a result of their human rights protection activities, including the rights of sexual minorities'.⁸⁵

In March 2023 the African Commission adopted Resolution 552 on the Protection and Promotion of the Rights of Intersex Persons in Africa. This Resolution calls on states to develop and implement measures on suggested recommendations and normative reforms that are essential for the integration and inclusion of intersex human rights in the human rights development agenda, especially accelerating the achievement of the Sustainable Development Goals Agenda 2030. Resolution 552 notes that states are obligated to recognise the rights and freedoms guaranteed by the African Charter through the enactment of laws and adoption of other policy and administrative measures to guarantee the rights and freedoms of intersex persons in Africa.⁸⁶

83 Mute (n 60); Viljoen (n 80).

84 Resolution on the Situation of Human Rights Defenders in Africa ACHPR/Res.376(LX) 2017, <https://achpr.au.int/en/adopted-resolutions/376-resolution-situation-human-rights-defenders-africa-achpres376> (accessed 30 October 2024).

85 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 (n 3).

General Comment 2 on arts 14(1)(a), (b), (c) and (f) and arts 14(2)(a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights 2014, <https://achpr.au.int/index.php/en/node/854> (accessed 30 October 2024).

General Comment 2 (n 85) 14.

General Comment 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (art) 2017 1, https://policehumanrightsresources.org/content/uploads/2021/07/achpr_general_comment_no._4_english.pdf?x49094 (accessed 30 October 2024).

Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (2015) 23, <https://achpr.au.int/en/node/853> (accessed 30 October 2024).

86 Resolution on the Promotion and Protection of the Rights of Intersex Persons in Africa ACHPR/Res.552 (LXXIV) 2023, <https://achpr.au.int/en/adopted->

SOGIESC issues have also been included in General Comments and Concluding Observations. While General Comment 2 on article 14 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) does not explicitly refer to SOGIESC,⁸⁷ it states that '[s]tate parties must ensure provision of comprehensive information and education on human sexuality'.⁸⁸ Similarly, General Comment 4 ('The right to redress for victims of torture and other cruel, inhuman or degrading punishment or treatment') focuses on torture and notes that anyone, regardless of their gender, may be a victim of sexual and gender-based violence that amounts to torture or ill-treatment.⁸⁹ It notes that LGBTI persons are of equal concern, and states are required to ensure, both in law and practice, that victims of torture and other ill-treatment are able to access and obtain redress irrespective of their SOGIESC.

Several guidelines adopted by the African Commission also address the protection of LGBTIQ+ persons' human rights, for instance, the Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (2015) clause 30(a);⁹⁰ the Guidelines on Freedom of Association and Assembly in Africa (2017) clause 80;⁹¹ and the Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa (2017), Preamble.⁹² Furthermore, the Guidelines on Combating Sexual Violence and its Consequences in Africa (2017)⁹³ were adopted by the African Commission with the intent of guiding and supporting states in the effective implementation of their obligations to combat sexual violence and its consequences. The Guidelines include 'sexual orientation, identity or gender expression' in the list of factors that can increase the vulnerability of individuals

resolutions/resolution-promotion-and-protection-rights-intersex-persons (accessed 30 October 2024).

- 87 General Comment 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 2014, <https://achpr.au.int/index.php/en/node/854>.
- 88 General Comment 2 (n 85) 14.
- 89 General Comment 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (art) 2017 1, https://policehumanrightsresources.org/content/uploads/2021/07/achpr_general_comment_no._4_english.pdf?x49094 (accessed 30 October 2024).
- 90 Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (2015) 23, <https://achpr.au.int/en/node/853> (accessed 30 October 2024).
- 91 Guidelines on Freedom of Association and Assembly in Africa (2017) 26, <https://achpr.au.int/index.php/en/soft-law/guidelines-freedom-association-and-assembly-africa> (accessed 30 October 2024).
- 92 Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa (2017) 6-7, <https://achpr.au.int/en/soft-law/guidelines-policing-assemblies-law-enforcement-officials-africa> (accessed 30 October 2024).
- 93 Guidelines on Combating Sexual Violence and its Consequences in Africa (2017), <https://achpr.au.int/en/node/848> (accessed 30 October 2024).

or groups of individuals to sexual violence.⁹⁴ Furthermore, it spells out that states should

take the necessary measures to prevent all forms of sexual violence and its consequences, particularly by eliminating the root causes of that violence, including sexist and homophobic discrimination, patriarchal preconceptions and stereotypes about women and girls, and/or preconceptions and stereotypes based on gender identity, real or perceived sexual orientation, and/or certain preconceptions of masculinity and virility, irrespective of their source.⁹⁵

The Guidelines also define sexual violence to include 'corrective' rape, which is a crime that is targeted against women on the basis of their real or perceived homosexuality.⁹⁶

Through these various mechanisms, the African Commission has acknowledged the ongoing violence, stigma, prejudice and discrimination faced by LGBTIQ+ persons in society, with particular attention to LGBTI women and intersex persons. These recognitions can be interpreted as victories in the broader context of the tug-of-war metaphor.

5 Conclusion

The tugs-of-war carried out in the regional human rights arenas of the AU are multifaceted, involving not only different governance levels but the complex alliances formed both for and against LGBTIQ+ rights. The two cases illustrate the contested nature of these human rights issues, demonstrating how state and non-state actors negotiate their positions through pull dynamics and the alliances on both ends of the rope. They are directly linked to the broader struggle over interpretations of identity, namely, who is considered African and who is not; whose human rights are recognised, and whose are dismissed. The case of CAL's (de)registration underscores how the human rights framework is appropriated through the narrative of the 'un-Africanness' of LGBTIQ+ persons.

In the case of CAL, the tug-of-war turned into wars carried out by shifting alliances of pro-LGBTIQ+ NGOs and supportive commissioners, who ultimately also stood up to the AU policy organs. This sparked another tug-of-war over the African Commission's responsibilities and powers. Under the header of 'African values' and 'family values', the narrative of LGBTIQ+ Africans' 'un-Africanness'

94 Guidelines on Combating Sexual Violence (n 93) 16-17.

95 Guidelines on Combating Sexual Violence (n 93) 18.

96 Guidelines on Combating Sexual Violence (n 93) 14-15.

was strategically employed. The African Commission's adoption of Resolution 275 marked a pivotal moment and a widely-celebrated milestone in advancing the rights of LGBTIQ+ persons in Africa. It marks the first instance in which the highest regional human rights body acknowledged the need for the protection and promotion of LGBTIQ+ rights. The journey to this milestone was characterised by a tug-of-war, with a coalition of NGOs and supportive commissioners on one side of the rope and commissioners with anti-LGBTIQ+ positions – and AU member states – on the other. Since then, significant developments encompass recognising SOGIESC in resolutions, General Comments, Concluding Observations, guidelines and principles. These, we contend, are also aspects of a much broader tug-of-war within the AU human rights architecture.

The tugs-of-war are not only fought at the regional governance level, but primarily at the national level. Among AU member states a mixed picture has evolved over the past decade. Wins for the LGBTIQ+ communities can be counted in at least six countries – Angola,⁹⁷ Botswana,⁹⁸ Gabon,⁹⁹ Mauritius,¹⁰⁰ Mozambique,¹⁰¹ Namibia¹⁰² and Seychelles¹⁰³ – where laws criminalising consensual same-sex sexual relations between adults were repealed. Chad and Cabo Verde enacted laws providing for aggravated punishment if the victim's sexual orientation was a factor in the crime.¹⁰⁴ Angola enacted a

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- 97 G Reid 'Angola decriminalises same-sex conduct. Discrimination based on sexual orientation banned' 23 January 2019, <https://www.hrw.org/news/2019/01/24/angola-decriminalizes-same-sex-conduct> (accessed 23 June 2024).
- 98 Human Rights Watch 'Botswana: High Court strikes down sodomy laws. New momentum for African LGBT movements' 11 June 2019, <https://www.hrw.org/news/2019/06/11/botswana-high-court-strikes-down-sodomy-laws> (accessed 23 June 2024).
- 99 United Nations Human Rights Office of the High Commissioner 'Gabon: Decriminalisation of same-sex relations a welcome step for equality, says UN expert' 2 July 2020, <https://www.ohchr.org/en/news/2020/07/gabon-decriminalisation-same-sex-relations-welcome-step-equality-says-un-expert/> (accessed 23 June 2024).
- 100 Centre for Human Rights. University of Pretoria 'Op-ED: Mauritius is the latest nation to decriminalise same-sex relations in a divided continent' 13 March 2024, <https://www.chr.up.ac.za/sogiesc-news/3693-op-ed-mauritius-is-the-latest-nation-to-decriminalise-same-sex-relations-in-a-divided-continent> (accessed 23 June 2024).
- 101 Human Dignity Trust 'Reform of discriminatory sexual offences laws in the Commonwealth and other jurisdictions. Case study of Mozambique' 21 December 2023, https://www.humandignitytrust.org/wp-content/uploads/resources/HDT-Mozambique-Report_web.pdf (accessed 23 June 2024).
- 102 Amnesty International 'Namibia: Decision to overturn "sodomy" laws is a victory for human rights' 21 June 2024, <https://www.amnesty.org/en/latest/news/2024/06/namibia-decision-to-overturn-sodomy-laws-is-a-victory-for-human-rights/> (accessed 23 June 2024).
- 103 Human Dignity Trust 'Reform of discriminatory sexual offences laws in the Commonwealth and other jurisdictions. Case study of Seychelles' June 2019, https://www.humandignitytrust.org/wp-content/uploads/2019/06/HDT-Seychelles-Report_web_FINAL.pdf (accessed 23 June 2024).
- 104 ILGA World: LR Mendos and others 'State-sponsored homophobia 2020: Global legislation overview update' 2020 240, <https://ilga.org/wp-content/>

law prohibiting discrimination on the basis of sexual orientation and gender identity.¹⁰⁵ Mauritius has included sexual orientation as a prohibited ground of discrimination in employment.¹⁰⁶ Yet, vulnerability to discrimination and violence amongst LGBTIQ+ persons remains high even in countries with protective laws and policies. Other AU member states have pushed to enact more punitive laws, policies and practices against LGBTIQ+ people, including currently debated, introduced or adopted 'anti-homosexuality bills' in Ghana, Kenya, Namibia, Tanzania and Uganda.¹⁰⁷

Furthermore, these tugs-of-war are taking place in other regional and international governance arenas.¹⁰⁸ Other prominent sites of such contestations are the human rights mechanisms at the UN, where African LGBTIQ+ state and non-state actors are actively involved. Here similar debates and contestations of the rights of LGBTIQ+ persons can be observed. The UN Human Rights Council (UNHRC), which had made some important gains in advancing the focus on the rights of LGBTIQ+ persons, faced opposition from narratives centred around 'traditional values' and the so-called 'protection of the family'. This is evident in two UNHRC resolutions. While states continued to affirm their commitment to the universality of human rights, some concerns were raised when two UNHRC resolutions were adopted on the 'protection of the family'.¹⁰⁹ These contestations at the UNHRC coincided with the adoption of Resolution 275 and the debate over the registration of CAL. We thus see the regional arenas on the African continent as sites of contestation situated within the global assault on the human rights of LGBTIQ+ persons. Through this analysis, we seek to contribute to the ongoing discussions about the wider implications of discrimination against LGBTIQ+ persons across various regional and international governance arenas.

uploads/2023/11/ILGA_World_State_Sponsored_Homophobia_report_global_legislation_overview_update_December_2020.pdf (accessed 14 June 2024).

105 UNDP 'Inclusive governance initiative: Angola baseline report' 2020 3-6, <https://www.undp.org/sites/g/files/zskgke326/files/migration/africa/UNDP-igi-angola-baseline-report-en.pdf> (accessed 14 June 2024).

106 https://eoc.govmu.org/eoc/?page_id=1355 (accessed 23 June 2024).

107 OA Maunganidze 'Anti-gay laws: Africa's human rights regression' 27 September 2023, <https://issafrica.org/iss-today/anti-gay-laws-africas-human-rights-regression> (accessed 23 June 2024).

108 African Commission on Human and Peoples' Rights, Inter-American Commission on Human Rights and United Nations 'Ending violence and other human rights violations based on sexual orientation and gender identity' (2016).

109 United Nations Human Rights Council 26th session 'Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development' adopted in June 2014, https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/26/L.20/Rev.1 (accessed 10 November 2024); United Nations Human Rights Council 29th session 'Promotion and protection of all human rights civil, political, economic, social and cultural rights, including the right to development' adopted in July 2015, https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/29/L.25 (accessed 10 November 2024).

Going forward, we hope to see national and transnational African NGOs, LGBTIQ+ activists, human rights defenders and allies locking arms and together pulling on the rope in order to further entrench Resolution 275 within the AU human rights architecture. To achieve this, continued collaborative advocacy for the adoption of review and monitoring mechanisms, such as reporting guidelines, as well as efforts to ensure the visibility and awareness of all existing mechanisms that protect and promote LGBTIQ+ equality and inclusion are needed. Soft law instruments might play an increasingly important role in the advocacy for the rights of LGBTIQ+ persons by integrating them into the AU human rights architecture. We aim for our work to meaningfully contribute to ongoing discussions about the multifaceted implications of discrimination against LGBTIQ+ individuals within national, regional and international governance arenas. At the same time, we seek to demonstrate that, despite setbacks over the last decade, some of the tugs-of-war can indeed be won.