



UNEQUAL JUSTICE

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

REDRESS

Ending torture, seeking justice for survivors

EXECUTIVE SUMMARY

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

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

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

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

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

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

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

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



RECOMMENDATIONS

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

1. Recommendations to States and their institutions

1.1. Legislative reforms

States should:

- a) Conduct a review of the current legal framework and repeal laws and specific provisions that directly or indirectly discriminate against LGBTIQ+ persons, and/or encourage or legitimise violence based on sexual orientation and gender identity. Specifically, States are encouraged to decriminalise same-sex conduct.

- b) Amend national legislation to improve legal protection for LGBTIQ+ persons, including by adopting a comprehensive anti-discrimination law with specific reference to discrimination on grounds of actual



or perceived sexual orientation and gender identity.

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

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

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

i. The criminalisation of torture as a separate offence, as defined under Article 1 of UNCAT, with special attention to the discriminatory purpose.

ii. The absolute prohibition of *refoulement*.

iii. Provision for an independent monitoring body, such as a national preventive mechanism, which shall pay particular attention to the treatment of vulnerable groups in places of detention, including LGBTIQ+ persons.

iv. Provision for an independent mechanism for complaints and investigations into allegations of torture and other human rights violations, including those perpetrated against LGBTIQ+ persons.

v. Provision for a mechanism to ensure victims' access to redress, including rehabilitation and compensation.

1.2. Policy reforms

States should:

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

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

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

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

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

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

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

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

1.3. Educational initiatives

States should:

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

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

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

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

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

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

The ACHPR is encouraged to:

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

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

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

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

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

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

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

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

3. Recommendations to civil society

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

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

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

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

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

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

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

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