

Seeking the protection of LGBTI¹ rights at the African Commission on Human and Peoples' Rights

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Introduction

Over the past four years there has been a steadily growing movement of organising for the protection of lesbian, gay, bisexual, transgender and intersex (LGBTI) rights at the African Commission on Human and Peoples' Rights ('ACmHPR').³ The ACmHPR is seen as the ideal venue for the protection of rights of sexual minorities because of its mandate to protect human rights. The organising has focused on identifying activists who are interested in working in the regional human rights mechanism, expanding the circles of activism by reaching out to mainstream human rights organisations and finding ways of getting the ACmHPR to understand and respond to the violations of human rights of LGBTI people.

The 39th and 40th Session of the African Commission on Human and Peoples' Rights: The foundational meetings

Before May 2006 mention of LGBTI rights at the ACmHPR had only been in passing⁴ and not part of an organised civil society strategy.⁵ Co-ordinated work for LGBTI rights at the ACmHPR began in May 2006 when the International Gay and Lesbian Human Rights Commission ('IGLHRC')⁶ in conjunction with the Coalition of African Lesbians ('CAL')⁷, Behind the Mask ('BTM')⁸ and All-Africa Rights Initiative ('AARI')⁹ sought to investigate the opportunities for advancing activism using the regional human rights mechanism for the protection of LGBTI people¹⁰. A conscious decision was initially made not to formally engage with the ACmHPR but to establish whether the space to engage with the ACmHPR existed. The meeting focused on providing information about African regional human rights mechanisms and the opportunities and challenges these presented and on looking at the manner in which international human rights has worked to protect LGBTI and

sexual rights. Participants also discussed their national contexts in so far as they relate to LGBTI people.

The meeting was organised to coincide with the 39th Ordinary Session of the ACmHPR in Banjul, the Gambia. Upon hearing that the Cameroon was due to submit its country report for review, the participants had a committee draft a statement that provided details about the situation of LGBTI people in Cameroon, the contents of which was shared with members of the ACmHPR in order to work as a shadow report. At the conclusion of the meeting the participants attended the public session of the ACmHPR. Sybil Ngo Nyeck, a Cameroonian activist, read out the statement, using the observer status¹¹ of the human rights NGO, Legal Defence and Assistance Project ('LEDAP').¹² During the discussion of the Cameroonian country report three commissioners¹³ asked question on issues addressing the violations of human rights of LGBTI people. In particular, Commissioner Tlakula mentioned discrimination against LGBTI people. She also stated that the penal code's criminalisation of consensual same sex practice was not compatible with Article 2 of the African Charter on Human and Peoples' Rights ('ACHPR') and asked whether it was compatible with the Cameroonian Constitution. Commissioner Malila questioned the Cameroonian delegation on the length of the detention period of the Cameroonian 11¹⁴ and whether this was not inconsistent with Article 7 of the ACHPR. He wanted to know about the availability of compensation, among other things. Commissioner Gansou requested further information on the law criminalising sodomy.

IGLHRC held another meeting at the 40th session of the ACmHPR Banjul, the Gambia, in November 2006. Participants at the meeting included a delegation from the Coalition of African Lesbians ('CAL'), Sexual Minorities of Uganda ('SMUG'),¹⁵ Gays and Lesbians of Kenya ('GALCK')¹⁶ and the International Commission of Jurists ('ICJ').¹⁷ IGLHRC and SMUG submitted a shadow report on Uganda. The report provided information on the situation of LGBTI people in Uganda. In particular, it referred to arbitrary arrests, short term detentions, discriminatory laws and policies, and a lack of access to health care services, particularly HIV prevention, treatment and care services.¹⁸ During the ACmHPR's session Uganda presented its country report. Commissioner Mumba Malila asked questions emanating from the shadow report to the Ugandan representative. Among the questions asked by the Commissioner was the status of the continued existence of the penal code which criminalises consensual same-sex conduct and the nature of the violations of Victor Juliet

Mukasa's human rights by the Ugandan authorities.¹⁹ The case dealt with the human rights violations of two individuals who were identified as lesbians and had been subjected to arbitrary arrest, detention, and physical mistreatment by law enforcement officers. The High Court subsequently found that the police had violated a number of human rights instruments.

Developments at the NGO forum

At the NGO forum of the 40th session, Christian Mukosa from Amnesty International presented a report on central Africa.²⁰ The report included the arrests of the Cameroon 11.²¹ In 2005 Cameroonian authorities raided a bar and arrested 11 men. The men were detained without a trial for a period exceeding a year. Some participants objected to the mention of the Cameroon 11 on the basis that homosexuality was un-African.²²

At the 41st session in Accra, Ghana in May 2007 the NGO forum adopted its first resolution²³ explicitly referencing sexual orientation and gender identity. IGLHRC, the Metropolitan Community Church and ICJ worked on a statement that set out the violations of human rights LGBTI people face in Nigeria. In particular the statement focused on the draft same-sex marriage bill. The resolution on human rights defenders adopted at the NGO forum referenced the anti-same sex marriage bill in Nigeria as having the potential to impede on the work of human rights defenders. The ACmHPR did not adopt the resolution with the proposed language.

The 42nd session was held in Brazzaville, in the Republic of Congo. Few organisations were in attendance. There were no statements made by LGBTI groups. The women's rights special interest group proposed a resolution on the situation of women's rights in the Southern Africa Development Community ('SADC'). The draft resolution made reference to lesbian and bisexual women. This resolution was adopted by the NGO forum. The ACmHPR amended the resolution before adopting it and removed the reference to lesbian and bisexual women.

At the 43rd session in Ezulwini, Swaziland in May 2008, there was a large contingent of LGBTI activists. About a third of civil society who participated at the forum were LGBTI rights activists.²⁴ CAL submitted its application for observer status. A resolution condemning violence against LGBTI people was adopted by the NGO forum. The women's rights special interest group had a draft resolution on impunity on violence against women. The resolution made reference to lesbian and bi-sexual women. The resolution was however

not adopted by the ACmHPR. People Opposing Women Abuse ('POWA')²⁵ launched the Raising Feminist Voices Project with the idea that the LGBTI organisations would be a part of that project. CAL and the Forum for the Empowerment of Women ('FEW') were part of it in preparation for the session. The NGO forum established a caucus group on sexuality, gender and human rights. The thematic caucuses often consist of people who are act as focal points for sub-regions. Joel Nana, who was working for IGLHRC and Fikile Vikalazi from CAL were appointed as focal points for Central and West Africa and East and Southern Africa, respectively.

At the 44th session in Abuja, Nigeria in November 2008, a further draft resolution was proposed at the NGO forum condemning violence and the culture of impunity of violations of human rights of LGBTI people. A representative of Advocates International,²⁶ challenged the resolution on the basis that there was no consensus on the issue. A discussion on whether resolutions of the NGO forum should be adopted by consensus or by majority ensued. There were differing views on this. Members of the steering committee proposed to hold the resolution in abeyance until the next session and undertook to make time available at the next session to discuss LGBTI rights in the African human rights mechanism and its relevance to civil society in order to create consensus. In discussions between the activists present, although there was disappointment that the resolution was not adopted, there was appreciation of the idea that the discussion needed to begin in earnest. After the previous resolution it was felt that it was not enough that civil society adopts the resolution without engaging with the content and more importantly how it relates to other thematic areas that are discussed at the session. The opportunity to provide a panel to discuss the issues at the next session was viewed as a way of broadening the support base on the issue.

At the 45th session in Banjul, the Gambia in May 2009, the NGO forum provided space for two panels to discuss LGBTI rights. The participation of LGBTI rights activists was made possible by funding from the United Nations Development Programme (UNDP) through Shivaji Bhattacharya. The panels were organised by IGLHRC, INTERIGHTS,²⁷ POWA, CAL, Centre for Human Rights – University of Pretoria and Global Rights. Hassan Shire, a member of the steering committee, introduced the panels. In doing so, he provided the context of human rights violations against LGBTI people and the importance of civil society to view the issue as fundamentally being about human rights. The first panel, moderated by Joel Nana, from IGLHRC, provided the

context of the human rights violations faced by LGBTI people throughout the continent. Samuel Matsikure from Gays and Lesbians of Zimbabwe ('GALZ') talked about the impact of human rights violations and the criminalization of consensual same-sex practices on the causation of HIV infection, Charles Gueboguo, an academic from the University of Cameroon, gave an overview of same-sex sexual practices in African cultures. Poulina Kimani from GALCK provided an overview on the specific challenges that are faced by lesbians. The second panel provided information on the various identities of the groups covered under the LGBTI initialism and the manner in which various laws impact on LGBTI people. Ralph Monye, a human rights lawyer from Nigeria, provided information on the adverse impact that representing LGBTI people sometimes has on the personal and professional lives of the lawyers. Wendy Isaack talked about the various identities: L G B T and I. In contextualising violence and the other human rights violations that LGBTI people are subjected to, the expectation was not to get civil society to "repent" but to seek a shift from referring to LGBTI rights as moral issues to viewing them as human rights issues. In an informal briefing after the sessions one activist related a discussion with a participant on the NGO forum who still did not "agree with" homosexuality but agreed that the violence had to stop. That was viewed as a success and a start that was hoped for. POWA also launched a book entitled *State Accountability for Homophobic Violence*. The book has contributions from feminist lawyers and activists and is focused on reports of hate crimes against black lesbians and transgender women in South Africa. It was launched by Commissioner Maiga, the special Rapporteur on women's rights.

At the 46th session in Banjul, the Gambia in November 2009, no formal event was held. The Eastern Horn Human Rights Defenders presented a statement on the proposed anti-homosexuality bill in Uganda. An informal meeting was held at the Kairaba Hotel. The purpose of the meeting was to assess the strategies of engaging with the NGO forum as well as the ACmHPR and to think about ways of getting the ACmHPR to adopt a decision on the CAL application for observer status. There was a concern that if the ACmHPR was pushed to make a decision before an assessment of the consequences of the change to the ACmHPR's composition the movement may get a decision that it did not like. Two commissioners who were receptive to the protection of human rights of LGBTI people had left. Sanji Monageng, who had been the chair of the ACmHPR, had joined the International Criminal Court and Angela Melo,

who had been the deputy chair, had left to join UNESCO. Two commissioners from Tunisia and Egypt had joined the ACmHPR and their position on LGBTI rights was relatively unknown. There was a discussion at the informal meeting about getting more information about the new commissioners but also about ascertaining the position of the old commissioners in order to make an informed decision on what needed to be done. One of the suggestions was to identify the ones we thought were green and continue the conversations, the ones we thought were amber, to see if they could be made to see how this was a human rights issue and to simply ignore the ones who were red and hostile to the idea until such time that a strategy has been devised.

The resolution of the NGO forum adopted on at the 46th session was the most elaborate and expansive on LGBTI rights and called on the ACmHPR to adopt a number of measures. The resolution called on the ACmHPR to do the following:

1. Acknowledge the continuing and increasing incidence of human rights violations, including murder, rape, assault, persecution and imprisonment based on perceived or actual sexual orientation and gender identity on the continent as a problem requiring urgent action;
2. Condemn these acts of human rights violations;
3. Condemn discrimination and exclusion of individuals and communities from the enjoyment of rights and the full realization of their potential because of their sexual orientation and gender identity;
4. Specifically condemn the situation of hatred and systematic attacks by state and non-state actors against lesbian, gay, bisexual, transgender and intersex individuals and, more in general, against any human rights defenders who is operating for the protection of LGBTI human rights in Malawi, Kenya and Uganda, with a particular attention for the draconian legislation under consideration by the Ugandan Parliament;
5. Mandate the Special Rapporteur on Human Rights Defenders, the Special Rapporteur on the Rights of Women and the Special Rapporteur on the Freedom of Expression to coordinate a Special Committee to investigate, document and report on these violations in order to develop appropriate responses and interventions;
6. Create a mechanism to address human rights violations based on sexual orientation and gender identity;

7. Ensure that states put in place mechanisms for access to HIV prevention treatment and care services for everyone regardless of their sexual orientation and gender identity.
8. Strongly urge states to:
 - 8.1 Comply with the African Charter on Human and Peoples' Rights, and other binding international treaties, by repealing laws which criminalise non-heteronormative sexualities and gender identities, such as laws criminalizing sexual conducts between consenting adults of the same sex, or laws banning cross-dressing, and by amending other laws that are implemented with the purpose of persecuting individuals and communities based on their sexual orientation and gender identity, such as laws against indecency, impersonation, and debauchery, among others.
 - 8.2 End impunity for acts of violation and abuse, whether committed by state or non-state actors, by enacting appropriate laws, ensuring proper investigation, arrests and punishment of the perpetrators, and establishing judicial procedures favorable to the victims.
 - 8.3 Protect the right of all people, regardless of their sexual orientation and gender identity, to freedom of association and assembly, freedom of expression, and freedom to participate in civil society and key decision-making organs of government.

The NGO forum also adopted a recommendation which 'strongly urged' the ACmHPR to grant observer status to the CAL.

At the 47th session in Banjul, the Gambia in May 2010, LGBTI rights activists attended the first two days of the NGO forum and then held a two day meeting focusing on LGBTI rights. The purpose of the meeting was two-fold, firstly to assess the work that has been done at the ACmHPR since 2006 and secondly to begin a conversation on decriminalisation, which was taking place in various countries with varying degrees of seriousness. The meeting attracted a total of 52 participants. The participants were drawn from mainstream human rights NGOs, women's rights NGOS and HIV/AIDS NGOs.

On the first day, the meeting focused on decriminalisation by looking look at structural features of decriminalisation challenges to try to analyse elements of success and failure. Allison Jernow from the ICJ provided an overview of

the cases where decriminalisation has been successful and where it had not been. Monica Tabengwa provided an analysis of the Botswana situation where decriminalisation has been attempted before but was unsuccessful and the new efforts to launch a new legal challenge. There were presenters who brought in a comparative perspective from the lessons learnt in India during the Naz Foundation case and the ongoing work in the Caribbean to address the criminal laws that criminalise consensual same sex. Arvind Narrain from India and Maurice Tomlinson from Jamaica addressed provided the contextual analysis of their domestic contexts respectively.

The second day was an assessment of the work that had been done at the ACmHPR and to identify new strategies and activities to continue with the work. Wendy Isaack started out by introducing the ACmHPR and provided an overview of how the system works. Joel Nana, who at the time had moved from IGLHRC to become the director of African Men Sexual Health and Rights ('AMShE^R')²⁸ provided a historical account of the development of LGBTI activism at the ACmHPR. Stefano Fabeni of Global Rights and Maurice Tomlinson provided a comparative perspective on the activism at the Organisation of American States ('OAS'). The work at the OAS involved lobbying member states to take progressive positions on LGBTI, and with more recent success in getting the resolution on sexual orientation passed at the OAS it encouraged the movement to start thinking about finding ways to engage with the African Union ('AU'), the OAS' regional counterpart. There were lessons about organising activists who were active in domestic advocacy programs to make linkages with their work and to get them interested in regional advocacy. One of the objectives for the meeting was to identify activists who had an interest in working in the regional mechanism and to request them to be part of an ongoing core group that works at the ACmHPR and to provide training and ongoing support. In that session Frans Viljoen, Director of the Centre for Human Rights at the University of Pretoria, talked about the development of the discussion document²⁹ which civil society formations had worked on in conjunction with the ACmHPR. Steve Letsike from CAL provided the application for CAL's observer status, which had become an issue that the activists can coalesce around.

Although there were many participants present, it was not possible to have all of them in the room in one time. Funding had not been made available to fund all participants who had wanted to come to the meeting. The organisers worked with other mainstream human rights organisations who were attending

the session to get their participants to attend some of the sessions of the meeting in an attempt to build critical mass and to get many people to understand the work that has been taking place at the ACmHPR. Some activists were in Banjul to attend sessions organised by Human Rights Development Initiative, Amnesty International and The Eastern and Horn Africa Human Rights Defenders. UNDP still made funding available to fund nine participants. Whilst the meeting was able to achieve the critical mass, the absence of participants in order to attend to the other work that they were in Banjul for had a disruptive impact on the meeting. The meeting tried to identify activities that activists could work on at a country level that would be supportive of the work at the ACmHPR. A computer was placed in a central point with a page listing various activities. Participants were required to insert their organisations' names on the page with a view to establishing which services including legal aid, community organising, working with politicians, lawyers, mainstream human rights organisations, were available in various countries.

The discussion papers on sexual orientation in Africa

Informal conversation between some of the activists who were working in the regional human rights mechanisms and some of the commissioners who were sensitive to the violations of human rights based on sexual orientation led to the idea of development of a discussion document.³⁰

A legal officer of the ACmHPR was requested to draft of the discussion document. Various organisations including the Centre for Human Rights, University of Pretoria, IGLHRC, CAL and others contributed towards its development. The discussion document was intended to be an internal paper for information and discussion by the commissioners. The discussion document highlights the relevance of sexual orientation to the ACmHPR, while recognising the controversial nature of the subject, and suggests ways in which the ACmHPR can proceed.

The discussion document addressed five issues. In the first part focusing on the relevance of the issue to the ACmHPR, it provides an overview of the situation of individuals whose rights are violated based on their sexual orientation, the existence of criminal laws criminalising consensual same sex sexual conduct, the vulnerability of human rights defenders working to protect sexual minorities, the failure of mainstream civil society organisations to speak out against abuses of sexual minorities and the vilification of gay and lesbian people by political and religious leaders.

The second part locates the right to equality on the basis of sexual orientation within the ACHPR. It highlights the idea that the universal application of rights provided for under the ACHPR by looking at the various formulations, 'every individual', 'every human being' 'every citizen' and 'no one' may be restricted. It asserts that the prohibited grounds of discrimination listed under Article 2³¹ are not exhaustive and therefore should be expanded to include sexual orientation. In addition it claims that the ground of 'sex' already provided for in the list, should be understood to include sexual orientation.

The third part pre-empts arguments around limitations of rights on the basis of sexual orientation. It identifies factors listed in Article 27³² that requires 'due regard to the rights of others, collective security, morality and common interest' as something that could be invoked as a basis for limiting the rights of gay and lesbian people. It continues to make the argument that a limitation cannot erode such that the right becomes illusory and that the limitation must be proportionate and necessary to the interest that states seek to protect.

The section further identifies three potential arguments that can be used to challenge the argument that Article 27 is inconsistent with the protection of gay and lesbian people. The argument that the rights of lesbian and gay people are inimical to the African value system and African family values is weighed up against tolerance for diversity and minorities. The argument that the morality that member states seek to uphold is consistent with the views of the majority, majority morality, is distinguished from political morality and constitutional morality. In the absence of domestic protection, 'Charter morality' requires the ACmHPR to extend its protective shield to include sexual minorities. The last argument deals with the prevention of HIV and denies the contention that criminalising same-sex conduct creates a buffer against the spread of HIV and it points out that HIV transmission occurs overwhelmingly through heterosexual conduct. It proceeds to discuss how the existence of these criminal laws impedes access to information and health services for men who have sex with men who face an increased biological vulnerability.

The discussion document concludes by pointing out the variety of tools and mechanisms that are available to the ACmHPR. The adoption of resolutions, the establishment of working groups and holding of seminars were some of the activities suggested.

In May 2010 during a discussion between some of the activists and the

staff at the ACmHPR it appeared that there were two discussion documents, the first one being the one that civil society formations had developed and the second one being the one that the secretariat staff had worked on which was exclusively prepared by the ACmHPR. The latter discussion document was not made available to the public and was only intended for the private discussion of the ACmHPR, and its distribution was therefore restricted. The agenda of the private sessions of the ACmHPR had an agenda item 8f, draft paper on sexual orientation. Although this paper was not publicly released, it can be noted that it arrived to the same conclusions as the other discussion document, namely that the ACHPR provides a sufficient basis for the protection of people who face human rights violations on the basis of their sexual orientation, whether perceived or real.

CAL's application for observer status

CAL is one of the organisations that applied for observer status at the ACmHPR at its 44th Ordinary Session held in Ezulwini, Swaziland, May 2008. Although there was no formal correspondence, from the time the application was lodged until the decision was communicated, the CAL application became a rallying point for LGBTI rights activists.

In November 2008 at the 44th Ordinary Session, the ACmHPR deferred the CAL application to the 45th Ordinary Session in May 2009 stating that they needed more information on sexual orientation and gender identity in order to inform their decision and that they must still discuss the matter during the private session. In May 2009, the ACmHPR deferred the application to the 46th Ordinary Session in November 2009.

During the 46th session agenda item dealing with the granting of observer status, Commissioner Pansy Tlakula introduced the CAL application. She stated that she did not see any impediment to the granting of observer status as the application met the criteria for eligibility and therefore recommended that CAL be granted observer status before the ACmHPR. There was a discussion after her recommendation. The Ugandan state delegates rejected the recommendation and threatened to leave the ACmHPR if observer status was ever granted to CAL. One of the Ugandan delegates further undertook to refer South Africa to the African Court for passing laws which were inconsistent with the ACHPR. Other commissioners also opposed the recommendation and argued that sexual orientation and gender identity are not guaranteed rights in the ACHPR. The application was again deferred to a private session in May 2010

at the 47th Ordinary Session.

At the beginning of the 47th session, during one of the breaks, an invitation was extended to the LGBTI lobby attending the ACmHPR to attend a private session with the commissioners in order to have a discussion on LGBTI rights. It was not clear what the purpose of the meeting was. There were two discussion documents which set out the basis of the protection of gay and lesbian people under the ACHPR. Most of the lawyers and activists present were of the view that this would be an appropriate conversation to have. The invitation alluded to the CAL application, which at this stage had been postponed again. The view was that it would be inappropriate to merge the two processes as granting CAL observer status depended on whether they met the criteria for eligibility and was not linked to the discussion document.

The delegation for the private session consisted of the author, Steave Nemande from Alternatives-Cameroun, Joel Nana from AMSHeR and Monica Tabengwa from Lesbians, Gays and Bisexuals of Botswana ('LEGABIBO').³³

In going to the meeting the delegation was unclear about the purpose and format of the discussion. The process was unprecedented and the nature of the information required was also unclear. Commissioner Pansy Tlakula explained the purpose of the meeting as a discussion that will provide information to members of the ACmHPR on issues relating to sexual orientation. The presentation by the delegation started by pointing out that despite how the issue has been framed in the various forums, the ACmHPR were not being asked to confer a new set of rights. However, what was being asked was for the ACmHPR to fulfil its mandate to protect rights guaranteed under the ACHPR. Although the term "LGBTI rights" is often mentioned, it was noted that this was done in order to highlight that the rights of the LGBTI persons are human rights and that members of the LGBTI community are entitled to be protected under the ACHPR in the same way that one talks about women's rights. The ACmHPR has been consistent on its mandate to protect the rights guaranteed under the ACHPR. The ACHPR has out of its own accord sought to protect the rights of LGBTI persons. It was then argued that intellectually, the ACmHPR has recognised and accepts its mandate to protect the rights of LGBTI persons. The presentation provided an overview of how various provisions of the ACHPR are consistent with the idea that LGBTI persons are protected under the ACHPR.

It was put to the ACmHPR that if this matter were to be a discussion, for the delegation to be able to respond to the concerns of the ACmHPR in

so far as the protection of LGBTI people were concerned, the rationale for the conversation needed to be clarified. If there was an acceptance that the ACHPR itself did not impose a blanket prohibition on the protection of the LGBTI people then the ACHPR needed to be able to answer two fundamental questions if there were further doubts about using the ACmHPR to protect LGBTI people: firstly, which rights under the ACHPR should not be applicable to the LGBTI community? For example, does violence inflicted on a lesbian woman cease to be a violation of the ACHPR if the sexual orientation of the victim is revealed? Secondly, if the ACmHPR were to take a view that the rights of LGBTI people needed to be curtailed, what is the rationale for this and the extent of the curtailment of those rights?

The delegation pre-empted what some of the possible concerns for the ACmHPR may be. CAL's application for observer status was highlighted as one of the issues that the ACmHPR seemed to have been struggling to make a decision on. The delegation went on to mention that CAL is an organisation that works to protect the rights of LBT women. It complied with the criteria for eligibility. To the extent that 'homosexuality' was a concern to the ACmHPR, an emphasis was placed on the fact that CAL seeks to advocate for the rights of a group whose existence does not violate any laws of the member states to the ACHPR. Being a lesbian is an identity that is not inconsistent with any law. It was pointed out that during the past session of the ACmHPR there had been statements made on the discrimination suffered by LGBTI people and it is now common knowledge that there are numerous human rights violations that lesbians are subjected to for no other reason other than their being lesbians. These violations include rape, forced marriages and murder. Various special rapporteurs including the special Rapporteur on the rights of women at the recent NGO forum continue to urge civil society formations to submit shadow reports and to let the ACmHPR know of violations when they occur in order to enable the ACmHPR to carry out its protective mandate. CAL has been set up to do, among other things, document the violations that attempt to "disappear" lesbians. It is an organisation that seeks to gain observer status as an effort to bring issues that affect lesbians to the ACmHPR and make statements about the violations.

The concerns that the ACmHPR could have about majority morality were also pre-empted. As a starting point, it was argued that the ACmHPR needed to accept that as African people, morality was as diverse and varied as the continent itself. This did not mean that anything and everything becomes

acceptable but there was a need for the ACmHPR to give content to those values and norms that the continent should aspire to. The morality and our values cannot be determined by what the majority thinks but rather on what the ACHPR espouses as values. Although the views of the majority were not entirely irrelevant, the ACmHPR itself has made it clear that the ACHPR's interpretation cannot be conclusively defined with reference to the views of the majority, even as they are reflected by Parliament, acting on their behalf. In *Legal Resources Foundation v Zambia*, the ACmHPR held that justification of limitations cannot be derived solely from popular will: 'Justification ... cannot be derived solely from popular will, as this cannot be used to limit the responsibilities of states parties in terms of the Charter.'³⁴

Reference was also made to Article 28³⁵ of the ACHPR which imposes a duty on every individual to respect and consider his or her fellow beings without discrimination and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance. That has to mean an obligation to respect difference and promote diversity. The presentation by the delegation was a plea to the ACmHPR to understand that it was not being asked to invent something new but that the protection of LGBTI people falls squarely within the ACmHPR mandate. The delegation concluded and then requested that the ACmHPR share their concerns.

After the presentation the chairperson of the ACmHPR asked members of the ACmHPR to ask questions. There were nine commissioners³⁶ who were present during the discussion. Commissioner Bitaye was the first to comment and he was very clear that the ACHPR did not protect LGB persons. His intervention focused on the social aspects of what he considered to be the adverse impact of same-sex relationships. He questioned the value of same-sex relationships to society, arguing particularly that they did not allow for procreation. In response to his interventions it was pointed out that what the CAL application was asking for was only observer status.

Commissioner Atoki was concerned about the framing of LGBTI rights as she could not find a provision that applied to LGBTI people in the ACHPR. She explained that the concept of LGBTI rights would have the consequence that any other group could come to the ACmHPR and ask that they be protected, including thin people organising to have an organisation of their own. She pointed out that the "founding fathers" of the ACHPR did not envisage protection for "this group". She read from the preamble of the ACHPR "taking into consideration the virtues of their historical tradition and the values of

African civilization which should inspire and characterize their reflection on the concept of human rights". Commissioner Tlakula asked the delegation to explain the identities in the LGBTI initialism. Commissioner Atoki wanted to know whether CAL worked to protect lesbians or to promote homosexuality. Commissioner Malila referred to Article 28 of the Charter and said that there was another possible argument under Article 27(2) which referred to the duty of the individual to have due regard to the rights of others, collective security, morality and common interest. He wanted a comment from the delegation. Commissioner Yeun posed a similar question somewhat differently; he accepted the developments at the United Nations including *Toonen v Australia*³⁷ but wanted to know what the delegation thought about how the African human rights systems needed to give content to this issue given the emphasis on the protection of human and peoples' rights. The discussion took a little over two hours.

The letter communicating the decision to deny CAL's observer status is dated 20 May 2010. The decision was taken four days after the meeting. This letter was faxed to CAL on 25 October 2010. The letter does not provide reasons for the refusal. Reasons were however provided by the ACmHPR in its activity report to the AU where it was noted that CAL does not work to protect rights guaranteed under the ACHPR. Upon receiving the letter CAL sent out a call to action to civil society asking them for support by sending letters of protest to the chair and vice chair of the ACmHPR.

At the 48th Ordinary Session in Banjul, the Gambia in November 2010, CAL and its partners requested other civil society formations that had observer status with the ACmHPR to use their observer status to make statements during the public session denouncing the decision of the ACmHPR. Some organisations made full statements setting out why the decision of the ACmHPR was objectionable. Others included paragraphs on their statements dealing with the CAL observer status. No fewer than eighteen organisations³⁸ denounced the decisions. The statements, letters of support and articles from organisations and individuals were later published in *Pambazuka* as a special issue.³⁹

Conclusion

For some, the relevance of the ACmHPR work remains unclear. There are questions of the utility of the mechanism: who takes them seriously? There are questions on the relevance of the work for the activists who are involved

in activism at country level. I would argue however that the importance of the ACmHPR to the development of this area of work the continent can never be overemphasised. The ACmHPR 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. The ACmHPR can provide advisory opinions and make recommendations to governments⁴⁰. The ACmHPR will have to make decisions that are unpopular with member states. Their obligation is to set the standards and then proceed to hold the states accountable. If the AU seeks an opinion on the justiciability of LGBTI rights under the African Human Rights systems, they will have to go to the ACmHPR. The ACmHPR provided an advisory opinion on indigenous peoples' rights to the AU⁴¹. This opinion was made necessary because of the adoption of the UN declaration on indigenous peoples' rights. In the same way, the discussion that are taking place at the UN have implications for the work of the ACmHPR, Resolutions and guidelines adopted by the ACmHPR, on other issues, have also been used by civil society groups for advocacy purposes at domestic level.

The doubts on the usefulness of the ACmHPR have been partly responsible for the lack of funding for the ACmHPR. This has had an impact on the progress of the work. Many participants get to the ACmHPR not to attend the LGBTI session but through other programmes. At present there is no organisation that has assumed co-ordination of the work or ensuring that there is work done inter-session. The co-ordination largely depends on the organisation that is leading a particular session or is able to provide funding for hiring the room and paying for some external participants.. Travel grants have been made available by UNDP for the past three sessions. The absence of a co-ordinator has meant that some of the strategies and activities that have been identified have not been pursued because none of the partners have capacity to add this extra work on their existing programmes.

Most of the activists get to the session to work on other thematic areas that they are funded for, largely the human rights defenders networks and the women's rights work. Whilst this is largely a positive development in terms of mainstreaming the work, activists who specifically funded to attend other parallel meetings are sometimes not available to meet and spend most of their

time doing the work that they have been funded to do.

With the support of mainstream human rights organisations growing, it is hoped that many Africa based NGOs will be strong allies of the movement. In the past, North based NGOs have provided support for the nascent movement. These included a mixture of LGBTI specific and mainstream human rights NGO. An increasing number of both LGBTI specific and mainstream human rights groups based on the continent have embraced the LGBTI rights movement at the ACmHPR and this was evidenced by the number of NGOs that readily supported CAL in denouncing the decision of the ACmHPR not to grant it observer status.

The best successes over the past five years have been in creating visibility and increasing awareness. It is not unheard of for activists to encounter “confessions” from people who have never met a gay person before. Similarly, whilst the presence of transgender activists was initially a subject of intense curiosity the ability and willingness of activists to work on issues other than LGBTI rights has helped to entrench the movement in civil society. This was an objective of the organising, that activism required a “give and take”. It is not only about the activists seeking ways in which other groups could be supportive of LGBTI issues but how activist can support other causes and create allies with groups which are not traditional partners of the LGBTI movement.

The support of the NGO forum and particularly the leadership of the steering committee helped to set the tone for the rest of the forum that LGBTI rights were human rights and therefore not negotiable. At the 47th session one participant suggested that he would charter a boat to take all gay and lesbian people to back Europe where they come from. The NGO forum took this as such a serious issue that they mandated a development of a code of conduct for the participants of the forum.

An LGBTI specific organisation has been granted observer status by the ACmHPR⁴² and there are other mainstream human rights organisations that work on LGBTI issues in ways which are very explicit whose observer status is not threatened by the decision not to grant such a status CAL. Despite the major setback presented by the refusal to grant CAL observer status, the movement for LGBTI rights can only go forward as retreating is no longer an option for the groups working there. The ACmHPR remains one of the few viable spaces for advancing human rights of LGBTI people.

Endnotes

- 1 LGBTI is used as a catch all for the issues and interests that the informal coalition would like to work on. Other organisation use sexual orientation and gender identity and others work only on lgbt issues. The essence of the work has however focused on sexual orientation. There have been discussions on how the collective can bring all the issues impacting on the various groups but there has not been a lot of work done.
- 2 Sibongile Ndashe is a lawyer at Interights. She writes in her personal capacity. Wendy Isaack and Joel Nana provided information and helpful comments. Dennis Wamala from Ice-breakers, Uganda also provided information.
- 3 The African Commission on Human and Peoples' Rights is a body made up of 11 independent human rights experts. It is a body established under Article. 30 of the African Charter on Human and People's Rights. It is tasked with the twin mandate of protection and promotion of human rights in Africa. The Commission sits twice every year for a period of two weeks per session in May and November. The Secretariat of the Commission is in Banjul, Gambia. The sessions of the Commission are preceded by a three day gathering of civil society formations organised as the NGO forum of the African Commission on Human and Peoples' Rights. Other civil society organisations use this opportunity to organise parallel meetings during the sessions in order to draw from the diverse expertise and people who are often in attendance.
- 4 At the 18th session in Praia, Cape Verde in October 1995 an exchange between the then chair, from Gabon, in a discussion about expansion of prohibited grounds for discrimination listed under the African Charter on Human and Peoples' Rights commented that discrimination on the basis of sexual orientation was not protected under the Charter. Chidi Odinkalu, then a legal officer with INTERIGHTS countered that the chair was only expressing a personal opinion.
- 5 In 1994, William Courson instituted proceedings at the ACmHPR against Zimbabwe for criminalising consensual same sex between consenting adults. The communication was withdrawn and the ACmHPR decided not to pursue the matter.
- 6 The International Gay and Lesbian Human Rights Commission (IGLHRC) is a leading international organization dedicated to human rights advocacy on behalf of people who experience discrimination or abuse on the basis of their actual or perceived sexual orientation, gender identity or expression. See <<http://www.iglhrc.org>>.
- 7 The Coalition of African Lesbians is a network of organisations committed to African lesbian equality and visibility. See <<http://www.cal.org>>.
- 8 *Behind the Mask* is a communication initiative around LGBTI rights and affairs in Africa. It publishes a website magazine that gives voice to African LGBTI communities and provides a platform for exchange and debate for LGBTI groups, activists, individuals and allies. See <http://www.mask.org.za>.
- 9 All-Africa Rights Initiative is a network of LGBTI organisations across the continent.

- 10 IGLHRC 2006 Annual Report <<http://www.iglhrc.org/binary-data/ATTACHMENT/file/000/000/25-1.pdf>>.
- 11 The ACmHPR allow non-governmental organisation who have been granted observer status by the ACmHPR to make statements on a host of human rights issues during the public sessions.
- 12 The Legal Defence and Assistance Project (LEDAP) is a non-governmental organization of lawyers and Law professional, engaged in the promotion and protection of human rights, the rule of law and good governance in Nigeria. See <<http://www.ledapnigeria.org/>>.
- 13 Mumba Malila, Special Rapporteur on Prisons and Conditions of detention in Africa, Reine Alapini Gansou, Special Rapporteur on Human Rights Defenders and Pansy Tlakula, Special Rapporteur on Freedom of Information in Africa.
- 14 See page 3 and footnote 20.
- 15 SMUG is a network of lesbian, gay, bisexual, transgender and intersex people's organizations based in Uganda. See <<http://www.sexualminoritiesuganda.org/>>.
- 16 GALCK is an umbrella organisation that consists of six member lesbian, gay, bi-sexual, transgender and intersex organizations; Minority Women in Action (MWA), Ishtar MSM, Gay Kenya Trust (GKT), Transgender Education and Advocacy - TEA, Persons Marginalized and Aggrieved (PEMA Kenya in Mombasa) and Artists For Recognition and Acceptance (AFRA-Kenya). See <<http://galck.org/>>.
- 17 The International Commission of Jurists is an organisation that is dedicated to the primacy, coherence and implementation of international law and principles that advance human rights. See <<http://www.icj.org>>.
- 18 *Outspoken*, IGLHRC, Winter/Spring 2007 edition.
- 19 *Mukasa and Oyo v Attorney General in Victor Juliet Mukasa and Yvonne Oyo v Attorney General* (Misc. Cause No.247 of 2006).
- 20 The NGO forum has a session where updates of the human rights situation from the various regions of the continent are presented.
- 21 On 11 October 2006, the United Nations Working Group on Arbitrary Detention declared that the detention of 11 men in Cameroon on the basis of their presumed sexual orientation constituted an arbitrary deprivation of liberty and a violation of the principle of equal protection of the law.
- 22 See <http://cal.org.za/index.php?option=com_content&task=view&id=46&Itemid=76>.
- 23 The resolution of the NGO forum are draft resolutions that are submitted by the civil society for the consideration of the ACmHPR. They then become resolutions of the ACmHPR once adopted.
- 24 'If not, why not?', J Nana, *Pambazuka News 506: Special Issue: African Commission blocks LBGTI human rights*. See <<http://www.pambazuka.org/en/category/features/68956>>.
- 25 POWA is an NGO that works to end violence against women in South Africa. See <<http://www.powa.co.za>>.

- 26 Advocates International is the largest international network of legal professionals networked for the purposes of protecting and promoting religious freedom, family, human rights, the sanctity of life, justice for the poor or governing integrity under the rule of law. See <<http://www.advocatesinternational.org>>.
- 27 INTERIGHTS, the International Centre for the Legal Protection of Human Rights, works to promote respect for human rights through the use of law. Interights works by providing legal expertise to lawyers, judges, human rights defenders and other partners concerning international and comparative human rights law. See <<http://www.interights.org>>.
- 28 The African Men for Sexual Health and Rights (AMSHer) is the regional coalition of MSM/LGBT led organizations and other organizations that work to address the vulnerability of gay and bisexual men, Male-to-female transgender women and other MSM, to HIV. See <<http://www.amsher.net/>>.
- 29 See section. '*The discussion papers on sexual orientation in Africa*' below.
- 30 Discussion document was for internal circulation only
- 31 Article 2 provides: 'Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.'
- 32 Article 27 provides: '1. Every individual shall have duties towards his family and society, the State and other legally recognised communities and the international community. 2. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.'
- 33 LeGaBiBo (Lesbians, Gays and Bisexuals of Botswana) is the first LGBTI organization in Botswana. See <<http://www.legabibo.org.bw/>>.
- 34 (2001) AHRLR 84 (ACHPR 2001).
- 35 Article 28 provides: 'Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.'
- 36 The Chairperson, Reine Alapine Gansou; Vice Chairperson, Mumba Malila; Musa Bitaye, Chairperson of the working group on indigenous populations; Pansy Tlakula; Catherine Atoki, Special Rapporteur on Prisons and Conditions of Detention in Africa; Soyata Maiga, Special Rapporteur on the Rights of Women; Yeung Yeun, Chairperson working group on the rights of older persons in Africa; Mohamed Kalfallah, Special Rapporteur on Human Rights Defenders and Mohamed Fayek, Special Rapporteur on Refugees, Asylum seekers, IDPs and Migrants in Africa.
- 37 The United Nations Human Rights Committee found that laws that criminalise consensual same sex between adults violated the rights to privacy and equality.
- 38 These included the Human Rights Development Initiative, Alternative Cameroon, POWA, INTERIGHTS, Kenya Human Rights Commission, East and Horn of Africa

Human Rights Defenders, Human Rights Institute of Southern Africa, Centro Nacional de Aconselhamento The Coalition for an effective Court on Human and Peoples' Rights, Centre for Human Rights, Amnesty International, Human Rights Monitoring Group, International Human Rights Law Group, International service for Human Rights, Legal Resources Centre, Associação Justiça, Paz e Democracia and Liga Moçambicana dos Direitos Humanos.

- 39 *Pambazuka New 506; Special Issue: African Commission blocks LGBTI human rights*, see <http://www.pambazuka.org/en/issue/506>>.
- 40 Under Article 45(3) of the ACHPR
- 41 *Advisory opinion of the African Commission on Human and Peoples' Rights on the United Nations Declarations on the Rights of Indigenous Peoples* see <http://www.achpr.org/english/Special%20Mechanisms/Indegenous/Advisory%20opinion_eng.pdf>
- 42 Alternative Cameroons are a LGBTI specific organisation and were granted observer status by the ACmHPR in 2009.

