



## LEGAL ANALYSIS & RECOMMENDATIONS FOR AID AGENCIES: SUMMARY PAPER

### Introduction

This brief (a condensed version of our [full legal analysis](#)) is intended to give aid actors working in humanitarian and displacement settings in Kenya a clear understanding of the legal environment related to increasing their engagement with LGBTQIA+ populations. It concludes that **aid organisations have legal obligations to ensure that LGBTQIA+ individuals are able to access their services on an equal basis**, and includes a list of recommendations to assist in meeting these obligations in practice

### Context: LGBTQIA+ refugees and asylum seekers in Kenya

Kenya hosts more than 841,207 registered refugees and asylum seekers.<sup>1</sup> The PRIDE Centre's population estimate methodology estimates that at least 5% of any population are from a SOGIESC minority, meaning that **the number of LGBTQIA+ refugees amongst this group is at least 42,060**.

New arrivals in Kenya who seek asylum on the basis of their sexual orientation, gender identity or expression, or sex characteristics (SOGIESC) are systematically told by the Department of Refugee Services (DRS) that they must live in Kakuma refugee camp. **In Kakuma, violence against the community is relentless and often extreme.**<sup>2</sup>



*In the camp, our daily life was full of discrimination and beatings.*

Trans woman refugee living on the outskirts of Nairobi



*We cannot live in the camps. Every day, you hear that someone has died.*

Trans woman refugee living on the outskirts of Nairobi



For this reason, most openly identifying LGBTQIA+ refugees do not live in the camp, instead staying in urban and peri-urban areas. In these locations, they survive largely without the assistance of aid agencies – leaving the vast majority struggling to get by.

### Kenyan laws relevant to SOGIESC minorities

#### Laws that discriminate on the basis of SOGIESC

Law	Content
The Penal Code (1963)	<ul style="list-style-type: none"> <li>Makes '<b>carnal knowledge against the order of nature</b>', interpreted by the courts to mean <b>penetrative sex between men</b>, punishable by 14 years' imprisonment.</li> <li>Includes the colonial-era criminalisation of being '<b>idle and disorderly</b>', punishable by up to a years' imprisonment. <b>This Article, more than those criminalising same sex intimacy, that has most commonly been relied on by police to target and harass the LGBTQIA+ community.</b></li> </ul>

<sup>1</sup> UNHCR (2026) 'Operational Portal - Data - Kenya' available at <https://data.unhcr.org/en/country/ken>

<sup>2</sup> Quotes below are from: FGD with LGBTQIA+ RLO, 29 September 2025; FGD with trans RLO, 3 November 2025.

Criminal Procedure Code (1930)	Gives police officers the right to conduct arrests, without a warrant, of 'any person whom he finds in a street or public place during the hours of darkness and whom he suspects upon reasonable grounds of being there for an <b>illegal or disorderly purpose</b> , or who is unable to give a satisfactory account of himself.'
Film and Stage Plays Act (1963)	Gives discretion to the Kenya Film Classification Board to determine what films and plays can be shown within Kenya. The Board tried to ban films depicting LGBTQIA+ content in 2014; this was overturned by the Court of Appeal in 2026. <sup>3</sup>

**The provision of services to LGBTQIA+ populations and advocacy for LGBTQIA+ rights are not criminalised in Kenya** – they are legal and constitutionally protected.

## Laws that impose obligations to ensure equal access to rights and services

Law	Content
Constitution (2010)	<ul style="list-style-type: none"> <li>Protects the rights of every person in Kenya (not just citizens) to <b>freedom from discrimination</b> on any grounds. This has been continuously interpreted by the Kenyan courts to include SOGIESC-based discrimination.</li> <li>Imposes an <b>obligation on all state actors to address the needs of vulnerable groups</b> within society – which the courts have interpreted to include both refugees and SOGIESC minorities.</li> <li>Confers concrete <b>legal rights enforceable in court</b>, including the rights to security, privacy, association, expression, health, housing, adequate food, education, and against torture and ill-treatment.</li> </ul>
Health Act (2017)	<b>Criminalises healthcare actors who do not provide emergency care to anyone who needs it.</b>
HIV policy <sup>4</sup> and law <sup>5</sup>	HIV policy recognises Key Populations to include men who have sex with men (MSM) and trans people, and HIV law contains protections against discrimination these groups. The law also establishes the HIV tribunal: the <b>only HIV-specific statutory body in the world with a mandate to adjudicate cases involving HIV-related human rights violations.</b> <sup>6</sup>
Basic Education Act (2013)	Prohibits discrimination by education institutions on 'any grounds whatsoever' - an unusually broad and strong legal protection.
Children Act (2022)	Contains numerous protections of the rights of intersex children, making Kenya a leader in this area across the region.
Computer Misuse and Cybercrimes Act (2018)	<b>Criminalises cyber harassment</b> , defined to include detrimentally affecting or grossly offending a person, or causing them fear of violence.
Refugees Act (2021)	Requires Kenya to provide asylum to individuals <b>persecuted for their 'membership in a particular social group'</b> . UNHCR Guidelines provide that <b>persecution on the basis of SOGIESC should be considered persecution on this basis.</b> <sup>7</sup> Kenyan authorities previously had a practice of recognising asylum claims on this basis. Since 2018 they have stalled decision-making cases.

Kenya has a **strong culture of strategic human rights litigation**, and LGBTQIA+ litigants have successfully defended their constitutional rights in court on many occasions.

<sup>3</sup> A. Potts (2026) 'Kenya overturns blanket ban on LGBTQIA+ content in films' Q News, available at <https://qnews.com.au/kenya-overturns-blanket-ban-on-lgbtqia-content-in-films/>

<sup>4</sup> Kenyan Ministry of Health (2020) 'Kenya AIDS Strategic Framework II: 2020- 2025', available at [https://nsdcc.go.ke/wp-content/uploads/2021/01/KASFII\\_Web22.pdf](https://nsdcc.go.ke/wp-content/uploads/2021/01/KASFII_Web22.pdf), p 26.

<sup>5</sup> HIV and AIDS Prevention and Control Act, No. 14 of 2006 (Laws of Kenya).

<sup>6</sup> Arasa et al (2022) 'Challenging HIV Criminalisation in the East African Community: A Brief for Parliamentarians', available at [https://arasa.info/wp-content/uploads/2022/07/Policy\\_Brief\\_final.pdf](https://arasa.info/wp-content/uploads/2022/07/Policy_Brief_final.pdf), p

<sup>7</sup> UNHCR (2012) 'Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees', available at [www.refworld.org/policy/legalguidance/unhcr/2012/en/89548](http://www.refworld.org/policy/legalguidance/unhcr/2012/en/89548)

Under Article 27 of the Constitution ‘every person’ is considered equal before the law and therefore is deserving of protection and dignified treatment, regardless of sexual orientation or gender identity.

SC v Director of Public Prosecutions [2025]<sup>8</sup>

## Obligations of aid agencies and donors

Aid agencies operating in Kenya bear human rights obligations arising not only from Kenyan law, but also regional and international law, and the laws applicable to donor states.

### Obligations of aid agencies under Kenyan law

Kenyan health, education and refugee laws and policies, together with Supreme Court jurisprudence, make clear that **it is illegal for entities providing social and humanitarian services to discriminate on the basis of SOGIESC**. In health and education settings, discriminating against service users this basis may constitute a criminal act.

### Obligations of aid agencies under regional and international law

The African Commission has held that non-state actors providing social services in Africa are subject to the requirement **‘to exercise human rights due diligence to ensure that all their operations do not interfere with the enjoyment of human rights or facilitate abuse of rights by any third party.’**<sup>9</sup> This requires organisations to do the following:<sup>10</sup>

- Put in place mechanisms to **regularly assess any adverse impacts** their operations, practices, and services may have on human rights.
- **Consult with affected groups** before, during and after the project cycle.
- Transparently and accessibly disclose financial and operational information.
- Refrain from imposing or facilitating policies that would impair State capacity to meet international human rights obligations.

#### *Jus cogens norms*

Overriding and absolute principles of international law, which cannot be altered or limited.

Though UN agencies and their officials are protected by privileges and immunities,<sup>11</sup> **these protections do not extend to violations of jus cogens norms. The right to life and the prohibition against torture are jus cogens norms.**<sup>12</sup> The High Court of Kenya has also recognised the right to non-discrimination as having attained jus cogens status.<sup>14</sup>

### Obligations of aid agencies and donors under their own laws

**Donor entities have legal obligations under the laws of their own countries and regional systems, and often pass these obligations down to grantees through contractual agreement.** This section focuses on laws and policies in place in the EU, Germany, and the US, as three of the largest donors to the humanitarian sector in Kenya.

#### *European Union*

**EU institutions and EU member states are bound by the EU’s constitutive documents** – particularly the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) – as well as regulations that are passed by the European Parliament and the Council of the EU.<sup>15</sup> The EU also regularly enters into treaties with other states. Generally, organisations receiving EU funding are contractually required to **implement their programmes in accordance with the same legal obligations that apply to the EU.**

<sup>8</sup> Above n 2, para 162.

<sup>9</sup> ACHPR (2022) ‘General Comment 7: State Obligations Under the African Charter on Human and People’s Rights in the Context of Private Provision of Social Services’, available at <https://achpr.au.int/en/documents/2022-10-20/general-comment-7-state-obligations-under-african-charter-human>, p 35.

<sup>10</sup> Ibid, p 48.

<sup>11</sup> Article III, Section 4 of the 1947 Convention on the Privileges and Immunities of the Specialized Agencies.

<sup>12</sup> Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte, 2 All ER 97

<sup>13</sup> Teraya Koji, Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-derogable Rights, European Journal of International Law 917, 927 (2001)

<sup>14</sup> International Law Commission, Report of the International Law Commission on the work of its seventy-first session (2019).

<sup>15</sup> Types of EU Law, Eur. Comm’n (2025), [https://commission.europa.eu/law/law-making-process/types-eu-law\\_en](https://commission.europa.eu/law/law-making-process/types-eu-law_en).

Art 21 of the TEU requires all EU actions to abide by principles of equality. The TFEU explicitly states that **this includes protection from discrimination on the basis of sexual orientation**. Regulation 2021/947 (the 'Cooperation Regulation'),<sup>16</sup> which gives effect to Art 21 of the TEU, mandates that all EU funded programmes must follow a human rights-based approach (HRBA). Implementing a HRBA requires organisations to:<sup>17</sup>

- Perform a context analysis before funding a particular project to identify possible sources of discrimination and structural barriers to the realisation of human rights.
- Continuously monitor projects for human rights risks.
- Implement appropriate mitigation measures.
- Establish clear and accessible complaints procedures.

### CASE STUDY:

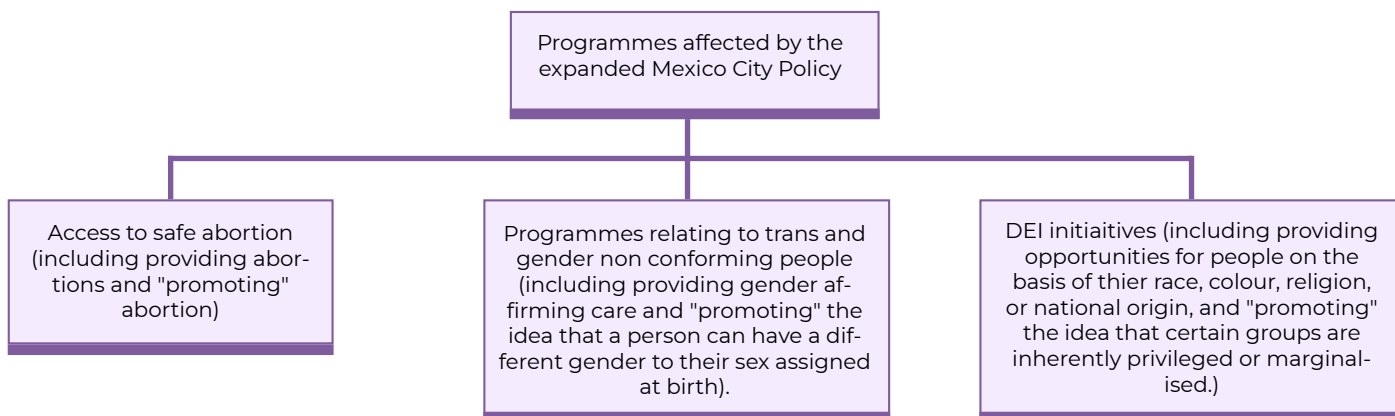
In its 2021 *Working Document on the Human Rights-Based Approach*, the Commission cited a vocational training project in Sudan as an example of successful implementation of the HRBA. In that case, the EU funded a project implemented by an independent organisation. The EU was notified that few disabled individuals were participating in the program. Concluding that this violated the principles of the HRBA, the Commission intervened; convened a working group to address the inaccessibility of the program; and ensured that accommodations were provided so that individuals with disabilities were supported to participate in it.<sup>18</sup>

## Germany

Germany's Federal Ministry for Economic Cooperation and Development (BMZ) imposes certain mandatory requirements of human rights due diligence on all foreign aid spending.<sup>19</sup> Mirroring the European system, the primary vehicle through which to meet these obligations is the implementation of a HRBA – though the requirements set down by German policy documents are more exacting than those set by the EU. For example, if, during the risk human rights risk assessment, it is determined that a project is likely to 'strengthen one human right' but interfere with another, the planners must propose how to navigate this. When adverse human rights effects are identified, BMZ must engage in dialogue with partner states – and if this does not adequately address concerns, **must develop an appropriate response, including the potential suspension or termination** of the cooperation. The policy also requires the implementer to maintain data on human rights outcomes for each project.<sup>20</sup>

## United States

On 26 February 2026, all recipients of USG funding became subject to an expanded version of its 'Mexico City Policy'. The new policy extends existing prohibitions on US foreign assistance to abortion to also encompass programmes that promote what the administration labels **'gender ideology' – which it uses to refer to the idea that a person's gender can be different to their sex assigned at birth**<sup>21</sup> – and/or Diversity, Equity and Inclusion (DEI).<sup>22</sup> The primary relevance of this policy from the perspective of LGBTQIA+ inclusion is that it **prohibits the provision of gender affirming care to transgender and gender non-conforming (TGNC) people**. For organisations based outside the US, it also **prohibits the 'promotion' of the 'ideology' that transgender people exist**.



<sup>16</sup> EU Regulation (2021) 2021/947 of the European Parliament and of the Council of 9 June 2021 establishing the Neighbourhood, Development and International Cooperation Instrument.

<sup>17</sup> European Commission, Commission Staff Working Document: Applying the Human Rights Based Approach to EU International Partnerships, SWD(2021) 179 final, Brussels, 30 June 2021.

<sup>18</sup> Ibid, at 29.

<sup>19</sup> Fed. Ministry for Econ. Coop. and Dev., Human Rights Strategy for German Development Policy (2024) at 4, 16.

<sup>20</sup> Ibid, at 4, 16, 20; BMZ Guidelines for Cooperation (2013), at 2, 12, 18, 19, 22.

<sup>21</sup> US State Department (27 January 2026) 'Combating Gender Ideology in Foreign Assistance', Public Notice: 12931, available at: [www.federalregister.gov/documents/2026/01/27/2026-01516/combating-gender-ideology-in-foreign-assistance](http://www.federalregister.gov/documents/2026/01/27/2026-01516/combating-gender-ideology-in-foreign-assistance)

<sup>22</sup> US State Department (27 January 2026) 'Combating Discriminatory Equity Ideology in Foreign Assistance Rules', Public Notice 12932, available at: [www.federalregister.gov/documents/2026/01/27/2026-01517/combating-discriminatory-equity-ideology-in-foreign-assistance-rules](http://www.federalregister.gov/documents/2026/01/27/2026-01517/combating-discriminatory-equity-ideology-in-foreign-assistance-rules)

For a comprehensive analysis of the expanded Global Gag Rule, and how it will impact LGBTQIA+ communities in humanitarian settings, please read [our analysis](#).

**Removing access to services for TGNC people or any other members of the LGBTQIA+ community would contravene the obligations of US-funded organisations under multiple other legal frameworks.** None of the legal regimes discussed in this briefing carve out exceptions for where donor requirements oblige implementers to contravene established human rights obligations.

## Recommendations for aid agencies

To ensure compliance with these obligations, the PRIDE Centre makes the following recommendations, applicable to UN agencies, NGOs, INGOs, and donors.

- 1. Review programming for compliance** with the legal obligations described in this brief.
- Ensure that LGBTQIA+ individuals are able to access organisational services **without discrimination**. This is a legal obligation; not a policy choice.
- 3. Support refugee-led LGBTQIA+ organisations** and shelters to provide services.
- 4. Undertake human rights due diligence**, including through the implementation of a human rights-based approach (HRBA) and the enforcement of human rights conditionalities.
- 5. Establish human rights complaints mechanisms accessible** to LGBTQIA+ communities.
- Review funding agreements with the US and other donors for **conflicting obligations**.

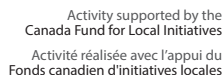
## The International PRIDE Centre

The PRIDE Centre (Protection, Rights, Inclusion in Displacement & Emergencies) provides legal and policy analysis, preparedness, and programming tools for emergency response agencies to ensure inclusive programming for LGBTQIA+ persons in emergency, humanitarian, and development settings. For questions about this briefing or to discuss how the PRIDE Centre may be able to support your operations, please contact [InternationalPrideCentre@pridecentre.org](mailto:InternationalPrideCentre@pridecentre.org).



*The PRIDE Centre is rooted in a foundation of anti-racism and aid decolonisation across all outputs and operations. We embrace SOGIESC communities in all their diversity, inclusive of indigenous understandings of non-CIS sexual identity and gender expression and identity.*

### SUPPORTED BY



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