

Sexual and Reproductive Health Rights, Sexual Violence and the Protection of Women's Rights in the African Context

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ABSTRACT

Sexual violence is a serious public health and human rights problem with both short and long-term repercussions for women's physical, emotional, sexual and reproductive health. It is an anathema which sadly, permeates the human race. As absurd as it seems, civilization, technology and even laws have not been able to curb this dilemma as there are still reports on sexual violence regularly particularly against women. This however cannot be taken to mean that sexual violence does not operate against boys and men but for the purpose of this paper, attention is tilted towards women. In Africa, sexual violence against women has become so rampant due to distorted orientation which underscores the male superiority and portrays the women as weaker vessels that are used to satisfy the sexual urges of men. The major remedy to this violence which affects the sexual and reproductive health of women are the laws put in place to enforce the rights of women with respect to their reproductive health. This article seeks however to examine the laws that exist in relation to sexual and reproductive health rights of women and recommends that States in Africa subscribe to these laws to protect women from sexual violence.

Introduction

According to The World Health Organization (WHO),^[1] sexual violence is defined as:

“Any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic or otherwise directed against a person's sexuality using coercion, by any person regardless of their relationship to the victim, in any setting, including but not limited to home and work”

It can be inferred from this definition that activities which threaten the sexuality of a person may constitute sexual violence. Sexual violence constitutes a gross violation of Sexual and Reproductive Health (SRH) rights. Over the years, international and regional organisations have adopted various instruments relating to sexual violence and SRH rights. This has been done through passing resolutions and adoption of declarations at various conferences and summits. The treaties and other instruments provide a standard which may be adopted by national legislation for the protection of SRH rights.^[2]

In the international context, health was first recognised as a human right by the Universal Declaration of Human Rights (UDHR);^[3] a more comprehensive expression of this right was given in Article 12 of the Covenant on Economic, Social and Cultural Rights (ICESCR),^[4] and the Convention for the Elimination of All Forms of Discrimination against Women (CEDAW).^[5] The concept evolved as a result of various women's movements and actions of Non-Governmental Organisations (NGOs) advocating for the recognition of the right to sexual and reproductive health.^[6] Respect for the rights of women (especially pertaining to the right to life, human dignity and respect for bodily integrity) was advocated at the 1975 World Conference of the International Women's Year^[7] which was the first women's conference organised by the United Nations.^[8]

According to Cook *et al*, the 1994 UN Conference on Population and Development, held in Cairo, and the 1995 Fourth UN World Conference on Women, held in Beijing, led to the recognition that the protection of sexual and reproductive health is a matter of social justice, and that the realisation of such health could be addressed through the improved application of human rights contained in existing national constitutions and regional and international human rights treaties.^[9] The enjoyment of sexual and reproductive health rights is dependent on the implementation of other rights such as the right to life, right to be free from sexual violence, right to liberty and security, and right to be free from torture, cruel or inhuman treatment, among others.^[10]

This paper will examine some of the key international and regional instruments on SRH rights, paying close attention to the provisions relating to sexual violence against women and girls. The general comments and recommendations provided by the various committees in charge of monitoring the implementation of the instruments will also be discussed.

2.0 International Responses

2.1 Universal Declaration of Human Rights (UDHR) 1948

The UDHR is the starting point for the recognition of human rights in the modern society. It is the foundation for the recognition and codification of human rights among international and national laws. According to Mann *et al*, the UDHR is the cornerstone document for modern human rights.^[11] The UDHR was adopted and proclaimed by the United Nations (UN) General Assembly resolution 217 A (111) of 10 December 1948. It came into existence as a result of the international experience and atrocities committed during the Second World War, and the decision of world leaders to complement the UN Charter with a road map to guarantee the rights of every individual everywhere.^[12] The UDHR incorporates civil and political rights, and social, economic and cultural rights.^[13] From the preamble, the UDHR stressed that recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

Although SRH rights are not specifically mentioned in the UDHR, they can be subsumed under various provisions. Article 5 provides no one shall be subjected to torture or to cruel, inhuman or degrading treatment punishment. One of

the most important tenets of SRH rights is the respect for dignity of the person, which precludes anyone from torture in whatever form, including domestic and sexual violence, and mutilation of body parts. In addition, Article 25 deals with the right to health. Article 25(1) provides that everyone has the right to a standard of living adequate for the health and wellbeing of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his or her control. In effect, the right to health has a number of variables, including food, clothing, housing and medical care and necessary social services. The listed variables have a direct impact on the health of an individual. Article 25(2) further provides that motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection. This provision recognizes the fact that due to the delicate nature of women, especially mothers, and children, they have to be given special care and attention.

While the provisions of Article 25 are laudable, there are no mechanisms for enforcement or effects of default in the UDHR. However, the UDHR is relevant because it has served as a model for provisions on human rights in national constitutions. It has laid a solid foundation for international and regional human rights treaties and conventions, especially with regards to the right to health.

The major limitation of the UDHR is its reliance on other international instruments for enforcement as there is no specific effect of breach. In addition, it is not legally binding, as it is at best persuasive. However, it is reproduced in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), with some additional provisions, to give the provisions of the UDHR the force of law at an international level, culminating in the formation of the International Bill of Rights.

2.2 International Covenant on Economic, Social and Cultural Rights Â Â Â Â Â Â Â Â (ICESCR), 1966

International protection of economic, social and cultural rights became an issue from the moment the UDHR was adopted.^[14] In its preamble, the ICESCR makes reference to the UN Charter and the UDHR, specifically the fact that recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. Thus, the foundation of the ICESCR can be traced to the UN Charter and the UDHR. It reflects the commitments adopted after World War II to promote social progress and better standards of life, reaffirming faith in human rights and employing international machinery to that end.^[15]

Article 12 recognises the right of everyone to “the enjoyment of the highest attainable standard of physical and mental health.” States Parties are therefore required to adopt measures to ensure the full realisation of the right to health, especially through the reduction of infant mortality; improvement of environmental and industrial hygiene; prevention, treatment and control of epidemic, endemic, occupational and other diseases; among others.^[16] According to Vesa, Article 12 could be interpreted to impose a duty on State Parties to protect women’s physical and mental health and provide domestic remedies when their health is in danger, for example, due to sexual violence.^[17] General Comment No. 14 (GC14)^[18] gives a better understanding and interpretation of Article 12 of the ICESCR.Â Paragraph 3 of GC 14 emphasises the fact that the right to health shares a symbiotic relationship with other human rights contained in the International Bill of Rights, including the rights to human dignity, life, non-discrimination, equality, privacy and the prohibition against torture, among others. According to Paragraph 8, the right to health contains both freedoms and entitlements. The right to control one’s health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture; are listed as the freedoms while the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health is listed as the entitlements.

On the issue of discrimination against women, the CESCR suggests that it can be eliminated through the development and implementation of a comprehensive national strategy for promoting women’s right to health throughout their life span.^[19] According to the CESCR, the main purpose of the strategy should be “reducing women’s health risks, particularly lowering rates of maternal mortality and protecting women from domestic violence.” The importance of undertaking “preventive, promotive and remedial action to shield women from the impact of harmful traditional cultural practices and norms that deny them their full reproductive rights” is also stressed.

Under Paragraph 35, States are under the obligation to “ensure that harmful social or traditional practices do not interfere with access to pre- and post-natal care and family planning; to prevent third parties from coercing women to undergo traditional practices, e.g. female genital mutilation; and to take measures to protect all vulnerable or marginalized groups of society, in particular women, children, adolescents and older persons, in the light of gender-based expressions of violence”. Gender-based expressions of violence may include other forms of cultural practices which endanger the life and health of women. The right to health is said to be violated when State Parties fail to take all measures to prevent infringement of the right, including failure to protect women against violence or to prosecute perpetrators and the failure to discourage the continued observance of harmful traditional medical or cultural practices.^[20]

The ICESCR has also set up a mode of monitoring the implementation of the rights set out. Article 16 stipulates that State Parties undertake to submit reports on the measures which they have adopted and the progress made in achieving the observance of the rights. The report goes from the Secretary-General of the UN to the Economic and Social Council (ECOSOC) for consideration. It also provides guidelines on how the report should be compiled and the procedure for analysis of the report.^[21] The ECOSOC established the Committee on Economic, Social and Cultural Rights (CESCR) comprising of 18 independent experts, by [Â Resolution 1985/17](#)Â of 28 May 1985 to carry out the monitoring functionsÂ in Part IV of the ICESCR.^[22]

The Optional Protocol to the ICESCR (OP-ICESCR),^[23] further analyses how the functions of the CESCR are performed; i.e. the procedures for ensuring that the rights enunciated in the ICESCR have international protection and are enforced in member states. For instance, Article 2 of the OP-ICESCR provides that where there is a violation of any of the

economic, social and cultural rights set forth in the ICESCR, victims may forward such complaints, in the form of communications, to the CESCR, provided they are under the jurisdiction of a State Party. In effect, the CESCR will only act on complaints brought by individuals under the jurisdiction of a State Party. In addition, by virtue of Article 3, the complaints will not be considered unless the CESCR has ascertained that all available domestic remedies have been exhausted. After the CESCR has admitted a complaint, the State Party concerned will be notified confidentially and forward a response to the complaint within six months.[\[24\]](#) friendly settlement is thereafter encouraged.[\[25\]](#)

The ICESCR is important because it creates a legally binding international agreement in respect of economic, social and cultural rights, unlike the UDHR. It provides the most comprehensive article on the right to health in international human rights law.

2.3 International Covenant on Civil and Political Rights (ICCPR), 1966[\[26\]](#)

The ICCPR, as the title implies, basically provides for civil and political rights. However, rights relating to sexual violence and sexual and reproductive health rights can be placed under some of its provisions. Vesa stated that human rights, such as the right to life, the right to be free from torture and the right to be free from gender discrimination; are directly related to violence against women.[\[27\]](#) Accordingly, the Preamble to the ICCPR states that the rights contained are derived from the inherent dignity of the human person. One of the tenets of sexual and reproductive health rights is the recognition of the dignity of the human person. By virtue of Article 3, State Parties are to ensure equality of men and women in the enjoyment of the rights set out. Thus, there should be no discrimination whatsoever.

Article 6 recognises the inherent right to life of every human being and requires State Parties to protect the right by taking measures to eliminate acts which threaten the right. In *Kontrova v Slovakia*[\[28\]](#) the applicant had previously lodged criminal complaints against her husband for assault and threats to kill her and their children. The complaint was later withdrawn with the help of the police. The husband later killed himself and the two children. At the European Court of Human Rights, the applicant claimed that the police failed to take adequate steps to protect the lives of her children, bearing in mind the abusive and threatening behaviour of the husband. The Court held that there had been a violation of the right to life as the police (being officers of the State) were obliged to register the applicant's criminal complaint, launch a criminal investigation and criminal proceedings against the applicant's husband; among other necessary steps.

Article 7 prohibits the subjection of a person to torture, cruel, inhuman or degrading treatment or punishment. It has been argued that marital rape is a form of torture against women.[\[29\]](#) In *Eremia and Others v the Republic of Moldova*,[\[30\]](#) the applicant alleged that the State (through the relevant authorities) failed to protect her and her children from the violent and abusive behaviour of her husband, thereby violating their right to be free from inhuman and degrading treatment. The European Court of Human Rights held that there had been a violation of the right to be free from inhuman and degrading treatment. The Court also held that the authorities' attitude amounted to condoning violence and had been discriminatory towards the applicant being a woman.

Article 9 recognises the right of everyone to liberty and security. The right to liberty and security of the person is one of the strongest defences of individual integrity in the reproductive and sexual health care context.[\[31\]](#) Article 28 establishes the Human Rights Committee (HRC) to monitor the implementation of the rights set out in the ICCPR. The HRC also receives complaints from individuals whose rights have been violated. Thus, where there are violations of the rights of women and girls, such acts may be reported to the HRC. It has been argued that despite the fact that the ICCPR guarantees the right to 'effective legal protection, high standards of proof, strict evidentiary requirements and unresponsiveness on the part of police are all obstacles' faced by victims of violence.[\[32\]](#)

2.4 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979.

CEDAW may be regarded as the most applicable international human rights treaty in terms of the rights of women.[\[33\]](#) This is because it integrates the provisions of the UDHR, ICESCR and the ICCPR relating to the rights of women.[\[34\]](#) It is the main document which addresses the rights of women to be free from all forms of discrimination.[\[35\]](#) By virtue of CEDAW, the Committee on the Elimination of Discrimination Against Women (hereafter CEDAW Committee) has also been set up to monitor the implementation of the rights set out in State Parties. In line with this, the Optional Protocol to CEDAW (OP-CEDAW) was adopted by General Assembly resolution A/54/4 of 6th October, 1999, which is similar to the OP-ICESCR in terms of analysis of how the functions of the CEDAW Committee (with respect to monitoring implementation of rights) are carried out. Where a right is violated, a victim may forward complaints to the Committee based on similar conditions in the OP-ICESCR. This has made it possible for victims of violations to come under the umbrella of CEDAW for enforcement of their rights.

In the preamble to CEDAW, it was stressed that discrimination against women constitutes a violation of the principles of 'equality of rights and respect for human dignity', impedes 'participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of the women in the service of their countries and humanity.' Article 1 defines discrimination against women as 'any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.' This definition encompasses enjoyment of all classes of human rights, including the right to sexual and reproductive health, as a subset of the right to health. Article 2 (b)-(c) enjoins State Parties to adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women; to establish legal protection of the rights of women on an equal basis with men; and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination. This emphasises the fact that where there are effective enforcement policies, there will be a high level of protection of the rights of women and discrimination is at best,

relegated.

Article 5(a) provides that State Parties shall take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and woman. Coomaraswamy and Kols argue that without strong state measures, it is doubtful that religious and cultural practices constituting violence against women will be eliminated.[36] In effect, discriminatory cultural practices such as child marriage, female genital mutilation and other forms of domestic violence should be curtailed by State Parties. The right to equal access to health care facilities for all women, including those in confinement, is stated in Article 12. Article 12(1) enjoins State Parties to take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning. In addition, State Parties should ensure appropriate services in connection to pregnancy, confinement and post-natal periods, free services and adequate information during pregnancy and lactation. [37]Article 12 imposes a strong obligation on State Parties to ensure that SRH services are adequately provided to all women, irrespective of status. According to the CEDAW Committee, this implies an obligation to respect, protect and fulfil women's rights to health care. States parties have the responsibility to ensure that legislation and executive action and policy comply with these three obligations. [38] They must also put in place a system which ensures effective judicial action. Failure to do so will constitute a violation of article 12.

Vesa argues that a woman who is a victim of domestic (or sexual) violence, whose health is in danger and who cannot receive adequate medical attention, can seek protection under CEDAW by holding her state of citizenship responsible for not implementing legislation or other measures that would have prevented her partner from physically abusing her, for failing to investigate and punish her partner who has committed domestic violence and for not providing the appropriate avenues to access health care.[39] States are also required to ensure the enactment of and effective enforcement of laws and the formulation of policies, including health care protocols and hospital procedures to address violence against women and abuse of girl children and the provision of appropriate health services because gender-based violence is a critical health issue for women.[40] The CEDAW Committee notes that female genital mutilation and other harmful traditional practices have serious health and other consequences for women.[41] State Parties are enjoined to take appropriate and effective measures with a view to eradicating the practice.[42]

Article 16 puts equal rights in marriage in the proper perspective, highlighting some elements of SRH rights. Article 16(1)(a)-(b) enjoins State Parties to take appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations, and in particular to ensure that marriage is entered on a basis of equal rights of men and women to freely choose a spouse and to enter into marriage only with free and full consent. In its General Recommendations No. 21 of 1991, the CEDAW Committee stated as follows:

“A woman's right to choose a spouse and enter freely into marriage is central to her life and to her dignity and equality as a human being. An examination of States parties' reports discloses that there are countries which, on the basis of custom, religious beliefs or the ethnic origins of particular groups of people, permit forced marriages or remarriages. Other countries allow a woman's marriage to be arranged for payment or preferment and in others women's poverty forces them to marry foreign nationals for financial security. Subject to reasonable restrictions based for example on woman's youth or consanguinity with her partner, a woman's right to choose when, if, and whom she will marry must be protected and enforced at law.”[43]

The right of a couple to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights is expressed in Article 16(1)(e). This provision does not exclude the condition of equality, as the basis of CEDAW is equality of the rights of both men and women. In effect, both the husband and the wife can exercise the right to determine the number and spacing of their children. This is contrary to the belief in African society that the husband is the head of the home and must take decisions on all matters relating to the home. Since pregnancy and motherhood may have physical and mental effects on a woman, she should be party to the decision of the number and spacing of her children.

A very important aspect of Article 16 is the provision on child betrothal and marriage, and the necessity for legislative actions to stop the practice. Article 16(2) provides that the betrothal and the marriage of a child shall have no legal effect; and that all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory. To prevent health hazards such as obstetric fistula, in the form of vesico-vaginal fistula or recto-vaginal fistula, child marriage must be completely phased out. The CEDAW Committee stated that due to the amount of responsibility people assume when they marry, marriage should not be permitted before they have attained full maturity and capacity to act.[44]

The CEDAW Committee recommends that State Parties should ensure that laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to all women, and respect their integrity and dignity.[45] Appropriate protective and support services should be provided for victims. Gender-sensitive training of judicial and law enforcement officers and other public officials is essential for the effective implementation of the Convention. This has been termed the “due diligence obligation” under international law.[46] The United Nations Office on Drugs and Crimes states that “States are required to exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women whether those actions are perpetrated by the State or by private persons.”[47] Thus, when a violation occurs, a State Party may be held responsible for failing to uphold its obligations to eliminate cultural and traditional practices promoting the treatment of women as less than men. In *X and Y v Georgia*,[48] a mother and her daughter (both applicants), alleged that the State failed in its duty to prevent, investigate and punish prolonged physical violence, and sexual and psychological abuse suffered at the hands of their former husband and father. While the marriage between the first applicant and the husband subsisted, the man sexually abused the children and subjected them to other forms of abuse. He was reported to the police a number of times but they never investigated nor prosecuted the man. The CEDAW Committee found that the State breached its obligation under Articles 2 and 5 of CEDAW and the CEDAW Committee's General Recommendation No. 19 on

violence against women. The CEDAW Committee thereafter called on the Georgian government to provide adequate financial compensation to the applicants.

The importance of CEDAW cannot be overemphasised, especially since it has been referenced in most treaties and declarations advocating the protection of women and girls. However, if a State party fails to ratify and domesticate CEDAW, its benefits remain on paper and have no effect whatsoever.

2.5Â Â Â Â Â Â Convention on the Rights of the Child (CRC), 1989[\[49\]](#)

The notion of protection of children has always been necessary and the fact that the general human rights treaties were insufficient to cater for children indicates the importance of the welfare of children. The CRC was adopted by the UN after the need arose for a binding international legal document for the protection of children. A Committee on the Rights of the Child (CRC Committee) was also established to monitor the obligations set out in the CRC.[\[50\]](#)

Article 1 of the CRC defines a child as “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier”. By this definition, where a national law stipulates a lower age for the attainment of majority, e.g. where the age is set at sixteen years, then sixteen years will apply and a child will be defined as any human being below the age of sixteen. Article 2(2) of the CRC enjoins State Parties to take appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of expressed opinions or beliefs of the child’s parents, family members or guardians. Thus traditional beliefs should not undermine the rights of the child.

Article 4 imposes an obligation on State Parties to undertake appropriate legislative, administrative, and other measures for the implementation of the rights of the child. Article 6 recognises that every child has the right to life and State Parties are to ensure that acts which violate or threaten the survival and development of a child are prevented. Article 24 places a duty on State Parties to recognise the right of the child to the enjoyment of the highest attainable standard of health; to endeavour to implement appropriate measures to diminish infant and child mortality; provide medical assistance; and abolish traditional practices prejudicial to the health of children. Child marriage sometimes affects the health of young girls as it may lead to early child birth. Early child birth often leads to higher risks of complications and reproductive health problems for young girls.[\[51\]](#)

According to the CRC Committee, “all policies affecting children’s health should be grounded in a broad approach to gender equality that ensures young women’s enjoyment of all human rights including the recognition of equal rights related to sexual and reproductive health and the elimination of all forms of sexual and gender-based violence”.[\[52\]](#) Children’s right to health contains a set of freedoms and entitlements, including the right to control one’s health and body and sexual and reproductive freedom to make responsible choices.[\[53\]](#) The CRC Committee notes that children require information and education on all aspects of health, including sexual and reproductive health education, which entails self-awareness and knowledge about the body, sexual health and wellbeing, responsible sexual behaviour, sufficient knowledge regarding reproductive health and prevention of gender-based violence. This shows the interrelation of the right to health with other human rights.

In terms of Article 37, States Parties are to ensure that no child is subjected to torture or other cruel, inhuman or degrading treatment or punishment. According to Coomaraswamy and Kols, “incest, female genital mutilation, child marriage, the sale of children by their parents for prostitution or bonded labour, and other harmful traditional practices continue to plague girl-children into their adolescence” and constitute torture and inhuman treatment against children.[\[54\]](#) Thus, action must be taken by State Parties to eliminate such vices.

According to the CEDAW and CRC Committee, State Parties should “establish legal structures to ensure that harmful practices are promptly, impartially and independently investigated, that there is effective law enforcement and that effective remedies are provided to those who have been harmed by such practices”.[\[55\]](#) The CEDAW and CRC Committee however note that the enactment of legislation alone is not enough to combat harmful practices and suggest that legislation must be supplemented with a comprehensive set of measures to facilitate its implementation and enforcement, such as modes of monitoring and evaluation of results achieved through legislations.[\[56\]](#) It is therefore important for State Parties to ensure the implementation of the rights in the CRC, in order to reduce the susceptibility of women and girls to violations.

2.6Â Â Â Â Â Â Convention Against Torture and Other Cruel, Inhuman or Â Â Â Â Â Degrading Treatment (CAT), 1984.[\[57\]](#)

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT), provides a complete bar against any form of torture, or other cruel, inhuman or degrading treatment. Accordingly, Article 1 defines torture as:

“Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

This definition can be said to incorporate various forms of violence, including domestic violence and sexual violence.[\[58\]](#) Copelon stresses that sexual abuse of women by their partners constitutes one of the most dangerous forms of gender-based violence and must be understood as torture.[\[59\]](#)

Article 2(1) imposes an obligation on State Parties to take “effective, administrative, judicial or other measures to prevent acts of torture in any territory” controlled by them. Thus States Parties are expected to abolish acts which may

constitute torture.

The above treaties have provided a good framework for the protection of women and girls from acts of sexual violence, especially child marriage and marital rape. State Parties should therefore take the necessary steps to implement them.

3.0 Regional Instruments Tackling Sexual Violence

3.1 African Charter on Human and Peoples' Rights (ACHPR), 1981^[60]

The adoption of the ACHPR marked the beginning of a new era in terms of recognition, protection and promotion of human rights in Africa.^[61] As the UDHR is to the United Nations Charter, the ACHPR is a follow up to the Charter of the Organisation of African Unity (now African Union) and makes specific provisions relating to human rights.^[62] Accordingly, Article 4 guarantees the right to life and integrity of a person. Article 5 of the ACHPR prohibits all forms of exploitation and degradation of man, especially 'slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment'. It has been established that sexual abuse of women by their partners constitutes one of the most dangerous forms of gender-based violence and must be understood as torture.^[63] Article 16 guarantees the right to the enjoyment of the best attainable state of physical and mental health and requires States to take necessary steps to protect the health of their citizens. Sexual and reproductive health may fall under this provision and victims of violations may seek redress in terms of it. In terms of the rights of women and children, Article 18(3) places an obligation on States to ensure the elimination of every form of discrimination against women and to ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions. Discrimination and gender inequality often encourage violence against women and the ACHPR articulates issues of gender inequalities in various provisions.^[64]

Article 30 establishes the African Commission on Human and Peoples' Rights (ACHPR Commission) to promote the rights set out in the ACHPR and monitor implementation in States. In *Social and Economic Rights Action Centre (SERAC) and another v Nigeria*,^[65] a communication was forwarded to the ACHPR Commission, alleging violations of the right to life and the right to health (among others) through environmental degradation by the Nigerian government. After considering the arguments in the communication, the ACHPR Commission found that Nigeria violated the rights stipulated in the ACHPR.

The ACHPR failed to make adequate provisions for the rights of women. According to Harrington, Article 2^[66] may be criticised on the grounds that 'it fails to give sufficient weight to women's rights because sexual discrimination is placed in the middle of a long list of other grounds on which distinctions are not permitted. Given the extremely serious discrimination that women suffer in Africa, it might be thought that a separate article specifically on women would have been more appropriate to give the rights of women the weight that they need and deserve'.^[67]

In addition, Articles 3-14, which focus on civil and political rights, do not make specific mention of women.^[68] It has also been argued that a major shortcoming of the ACHPR is that it contains various clauses ('claw-back' clauses) which limit the enjoyment of the rights guaranteed and subject them to domestic laws.^[69] Such clauses include 'subject to law and order', 'within the law', except for reasons previously laid down by law', among others. For instance, the right to liberty and security of person is limited by reasons and conditions previously laid down by law.^[70] The ACHPR also lacks adequate provisions protecting women's rights.^[71] The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa was thereafter adopted to provide for the rights of women.

3.2 Protocol to the African Charter on Human and Peoples' Rights on the Rights Women in Africa (Women's Protocol), 2003^[72]

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Women's Protocol) was adopted to elaborate on the ACHPR in respect of the rights of women in Africa. It is important to note that under the Women's Protocol, women are defined to include girls.^[73] According to Durojaye and Murungi,^[74] it 'supplements the ACHPR and complements the CEDAW on matters relating to the protection and recognition of women's rights'.

Article 1 provides definitions to important terms, including discrimination against women, harmful practices and violence against women. Various provisions in the Women's Protocol impose obligations on State Parties to take all necessary measures to combat sexual violence against women. For instance, in Article 2(1), State Parties are required to fight against all forms of discrimination against women through 'appropriate legislative, institutional and other measures', through incorporating principles of equality between men and women in their national constitutions, and implementing legislative and regulatory measures to prohibit harmful practices which jeopardise the general well-being of women, among others. State Parties are also required to 'adopt and implement appropriate measures to ensure the protection of every woman's right to respect for her dignity and protection of every woman from all forms of violence, particularly sexual and verbal violence'.^[75]

Article 4 mandates State Parties to take 'appropriate and effective measures to enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public and to adopt measures to prevent violence'. Causes of violence should also be identified in order to take appropriate steps for eradication, punishment of perpetrators of violence, and the establishment of rehabilitation services for victims of violence.^[76] Coomaraswamy and Kols argue that legislation has essential 'normative value' in its capacity to inform the victims and perpetrators of violence, as well as the general public that violence is a serious offence which will not be condoned.^[77] State Parties are required to ban all forms of harmful practices which have a negative impact on the human rights of women through the creation of awareness programmes and support for victims of harmful practices, including 'legal and judicial support, emotional and psychological counselling as well as vocational training to make them self-supporting'.^[78] Article 5(d) calls on State Parties to take necessary measures to protect women 'who are

at risk of being subjected to harmful practices or all other forms of violence, abuse and intoleranceâ€. The right in Article 5(d) may also be construed to include protection from sexual violence.

With regard to marriage, Article 6 provides that â€œState Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriageâ€. Necessary legislative measures should be put in place to ensure that â€œno marriage shall take place without the free and full consent of both partiesâ€ and â€œthe minimum age of marriage for women shall be 18 yearsâ€.^[79] In the previous chapter, it was stated that child marriage often occurs when a girl is below the age of 18 years and without her consent.^[80] The express wording of Article 6 is to the effect that marriage should be entered into freely and at the attainment of the age of majority.

On the right to health, Article 14 requires State Parties to; â€œensure that the right to health of women, including sexual and reproductive health is respected and promotedâ€, including â€œthe right to control their fertilityâ€ and â€œthe right to decide whether to have children, the number of children and the spacing of childrenâ€. It has been argued that one of the causes of marital rape is the husbandâ€™s drive to exert sexual dominance over his wife and to infringe on her freedom of choice.^[81] Thus, the inability of a woman to decide freely on matters pertaining to her sexuality is an infringement of the right to health guaranteed by the Womenâ€™s Protocol. The General Comment No 2 on the Womenâ€™s Protocol views the provisions of Article 14(a) and (b) in the context of abortion and safe contraception; and how State and non-State actors tend to control the rights of women in respect of reproductive health. The provision cannot be limited to only those issues as it has a wider context and can be spread over a wide range of issues, including sexual violence.

Paragraph 46 of the General Comment provides that; â€œState Parties should provide a legal and social environment that is conducive to the exercise by women of their sexual and reproductive rightsâ€. Laws and policies should be revisited and amended where necessary. Article 14(1) (d) is also to the effect that the right of women to â€œself-protection and to be protected against sexually transmitted infections, including HIV/AIDSâ€ should be guaranteed by State Parties. It has been argued that discriminatory practices against women, harmful practices and violence against women are the reasons for the prevalence of HIV/AIDS in Africa.^[82] While the rights guaranteed in the Womenâ€™s Protocol are praiseworthy, women can only enjoy such rights when there is proper implementation of the rights at national level by State Parties. As of 2014, the Womenâ€™s Protocol had been ratified by about two-thirds of the 54 African Union members, however, it remained undomesticated by all of them.^[83]

3.3.3 African Charter on the Rights and Welfare of the Child (ACRWC), 1990^[84]

The African Charter on the Rights and Welfare of the Child (ACRWC) is similar to the CRC in that it was adopted to specifically protect and promote the rights of children as the ACHPR did not adequately provide for the rights of children.^[85] In its Preamble, the ACRWC reaffirms the principles in the CRC and other international instruments related to the protection of children. It has been argued that the adoption of the ACRWC became necessary because the CRC did not adequately cover the peculiar nature of African children.^[86] Childrenâ€™s rights are not only put in the legal perspective, but also in the cultural perspective.^[87]

Both the CRC and the ACRWC are based on the core values of the best interests of the child,^[88] and non-discrimination of the child. Article 1(1) imposes an obligation on Member States to recognise the rights, duties and freedoms preserved in the ACRWC and to undertake necessary steps in accordance with their constitutional obligations to adopt and give effect to its provisions. Member States are also expected to discourage â€œany custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligationsâ€ set out in the ACRWC. This is a good starting point for the ACRWC as it recognises harmful practices that hinder enjoyment of the rights as laid down. Article 2 defines a child as â€œevery human being below the age of 18 yearsâ€. While the ACRWC provides a clear and strict definition of the age of a child, the CRC places some conditions such as the attainment of the age of majority at an early age.^[89] It has been argued that this condition includes a situation where a person below the age of 18 participates in armed conflict.^[90] The absence of proper birth registration mechanisms often makes it difficult to determine the age of a person.^[91]

Article 5 recognises the right of every child to life and imposes an obligation on Member States to protect this right. Under this provision, nothing should threaten the survival and development of the child. Regarding the right to health, Article 14 recognises the right of the child to â€œenjoy the best attainable state of physical, mental and spiritual healthâ€. Thus activities which have the potential of hampering the enjoyment of this right should be discouraged by Member States.

Article 16 requires State Parties to â€œtake specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatmentâ€. Article 21 lays more emphasis on the protection against harmful social and cultural practices. Article 21(1) requires State Parties to â€œtake all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the childâ€. This should be done by eliminating customs and practices that are injurious to the health or life of the child and discriminatory to the child on grounds of gender or other status. Thus, Article 21(2) requires State Parties to take all measures, including legislative action, to prohibit child marriage and betrothal; and to set the minimum age of marriage at 18 years. This is an express bar against child or forced marriages. However, the requirement of consent is still missing from the provision.

Article 32 establishes the African Committee of Experts on the Rights and Welfare of the Child, which has the responsibility of promoting and protecting the rights and welfare of the African child. By virtue of Article 44, complaints of infringements of any of the rights contained in the ACRWC may be forwarded to the Committee. However, it has been argued that financial constraints may constitute an obstacle to reporting infringements and the institution of proceedings for the enforcement of the rights.^[92]

4.1 Conclusion and Recommendations

There is no doubt that laws exist to combat sexual violence against women which violate their sexual and reproductive health rights. These laws have been in existence for longer than we know but sexual violence is still prevalent in African countries and reports on it are becoming really frequent. Under the various instruments considered, State Parties, are obliged to adopt appropriate legislative and other measures to ensure that discrimination against women is prohibited and to establish legal protection of the rights of women on an equal basis with men. Cultural and customary practices which are based on superiority of men over women; and acts which promote violence against women should be eliminated by State parties.

It is not enough to ratify the instruments discussed above. State parties must put adequate mechanisms in place for the enjoyment of the rights. By this, the citizenry of various countries will feel the impact of the international instruments in their day to day lives. Several states have individually come up with mechanisms to curb sexual violence but the implementation and enforcement is questionable. State parties are however encouraged not only to subscribe to the instruments but also to enforce and implement them so that women are not only made aware of their rights but are also protected by the instrument of laws put in place for that sole purpose.

In addition, it may be necessary to organise awareness and educational programmes for the entire populace on the impropriety of all forms of violence against women.^[93] Also, women should be enlightened on the available laws and mechanisms government has created.

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^[4] Adopted by the UN General Assembly resolution 2200A of 16th December, 1966.

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^[6] E Durojaye & L. N Murungi – The African Women’s Protocol and sexual rights (2014) 18(7-8) *International Journal of Human Rights* 882.

^[7] Report of the World Conference of the International Women’s Year, Mexico City 19th June-2nd July, 1975 available at <http://www.un.org/womenwatch/daw/beijing/otherconferences/Mexico/Mexico%20conference%20report%20optimized.pdf> accessed on 18 February 2020.

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^[10] I Merali – Advancing women’s reproductive and sexual health rights: using the International Human Rights system (2000) 10(5) *Development in Practice* 613.

^[11] JM Mann *et al Health and Human Right* New York: Routledge (1999) 2.

^[12] United Nations – History of the Document available at <http://www.un.org/en/documents/udhr/history.shtml> accessed 19 February, 2020.

^[13] Article 22 of the UDHR provides that everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

^[14] Christian Courtis *Commentary on the Optional Protocol to the ICESCR* Inter-American Institute of Human Rights/ International Commission of Jurists: Geneva (2008) 16.

^[15] International Network for Economic, Social and Cultural Rights – Section 5: Background Information on

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[16] See Article 12, ICESCR.

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[20] Ibid Paragraph 51.

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[22] United Nations Human Rights [~]Committee on Economic, Social and Cultural Rights[™] available at <http://www.ohchr.org/en/hrbodies/cescr/pages/cescrindex.aspx> accessed on 19 February, 2020.

[23] Adopted by General Assembly resolution A/RES/63/117, on 10th December, 2008.

[24] Article 6 OP-ICESCR.

[25] Article 7 OP-ICESCR.

[26] Adopted by General Assembly resolution 2200A (XXI) of 16th December 1966, and entered into force 23rd March, 1976.

[27] Vesa (note 17 above) 320.

[28] Application no. 7510/04 Judgment of 31st May, 2007. See also *Kilic v Turkey* (application no. 63034/11, judgment of 31st September, 2013) and *Civek v Turkey* (application no. 55355/11, judgment of 23rd February, 2016).

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[34] Ibid.

[35] P Goldberg & N Kelly [~]International Human Rights and Violence Against Women[™] (1993) 6 *Harvard Human Rights Journal* 197.

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[39] Vesa (note 17 above) 328.

[40] Note 37.

[41] UN Committee on the Elimination of Discrimination Against Women, General Recommendations No. 14: Female circumcision, ninth session, 1990.

[42] Ibid.

[43] UN Committee on the Elimination of Discrimination Against Women, General Recommendations No. 21: Equality in Marriage and Family Relations, adopted at the thirteenth session, 1994.

[44] Ibid

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[46] United Nations Office on Drugs and Crimes *Handbook on effective prosecution responses to violence against women and girls* Criminal Justice Handbook series, New York: United Nations (2014) 23.

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- [48] Communication no. 24/2009, available at <http://ehrac.org.uk/news/first-ever-international-decision-on-domestic-violence-in-georgia-highlights-serious-shortcomings-in-state-response/> accessed on 19 February, 2020.
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- [51] Merali (note 10 above) 610.
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- [55] UN Committee on the Elimination of Discrimination Against Women and UN Committee on the Rights of the Child: Joint General Recommendation/General Comment No. 31 of the Committee on the Elimination of Discrimination against Women and No.18 of the Committee on the Rights of the Child on harmful practices, CEDAW/C//GC/31-CRC/C/GC/18, 2014, Paragraph 12.
- [56] Ibid, Paragraph 40.
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- [58] Vesa (note 17 above) 333-334.
- [59] R Copelon "Recognizing the Egregious in the Everyday: Domestic Violence as Torture" (1993-1994) 25 *Columbia Human Rights Law Review* 295.
- [60] Adopted by the Organisation of African Unity (OAU) on 27th June, 1981 and entered into force 21st October, 1986.
- [61] Office of the United Nations High Commissioner for Human Rights "The Major Regional Human Rights Instruments and the Mechanisms for their Implementation" available at <http://www.ohchr.org/Documents/Publications/training9chapter3en.pdf> accessed on 15 February, 2020.
- [62] See Preamble to the ACHPR.
- [63] Copelon (note 59 above).
- [64] Vesa (note 17 above) 357.
- [65] (2001) AHRLR 60 (ACHPR 2001).
- [66] Article 2 of the ACHPR provides that "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." This is an umbrella provision and makes no special mention of women and the effect of this is that the protection is not absolute so as to make women feel secure.
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- [68] Ibid.
- [69] SB Keetharuth "Major African legal instruments" available at <http://www.kas.de/upload/auslandshomepages/namibia/Human_Rights_in_Africa/7_Keetharuth.pdf> accessed on 15th February, 2020.
- [70] See Article 6 ACHPR.
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- [73] Article 1(k) Women's Protocol.
- [74] Durojaye & Murungi (note 6 above) 885.
- [75] Article 3(4) Women's Protocol.
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- [78] Article 5(a) & (c) Women's Protocol.

[79] Article 6(a)-(b) Women's Protocol.

[80] See Historical Background of the Concept of Sexual and Reproductive Health Rights and Sexual Violence, Chapter 1 pages 20-21.

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[86] Ibid.

[87] A Lloyd ~A theoretical analysis of the reality of children's rights in Africa: An introduction to the African Charter on the Rights and welfare of the Child™ (2002) 2 *African Human Rights Law Journal* (11-32) 16.

[88] Article 3 of the CRC and Article 2 of the ACRWC are to the effect that the best interest of the child must be considered before taking any action in relation to the child.

[89] See Article 1 of the CRC.

[90] Lloyd (note 87 above) 20.

[91] Ibid.

[92] Ibid 28.

[93] At the Fourth World Conference on Women held in Beijing, it was suggested that States should prioritise educational programmes that emphasise the ~elimination of harmful attitudes and practices, including female genital mutilation, son preference (which results in female infanticide and prenatal sex selection), early marriage, including child marriage, violence against women, sexual exploitation, sexual abuse, which at times is conducive to infection with HIV/AIDS and other sexually transmitted diseases.~ See Paragraph 107(a) of the Beijing Declaration and Platform for Action.