

# **Combating sexual violence in schools in sub-Saharan Africa: Legal strategies under regional and international human rights law**

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## **Summary**

*Although schools are generally regarded as a 'safe haven' for children, the reality for many girls is that schools can be a place of sexual discrimination, harassment and violence, perpetrated by fellow male students and teachers alike. The widespread problem of sexual and gender-based violence, particularly sexual violence, in schools has been well-documented in a range of studies and reports in sub-Saharan Africa. Sexual and gender-based violence in schools not only violates girls' fundamental rights to dignity and equality, and their rights to be free from violence, but it also undermines their rights to education, particularly when, as is often the case, states fail to take measures to protect girls. Although there is a growing body of empirical research documenting the nature and extent of this problem, particularly in various sub-Saharan African countries, how regional and international human rights law applies to protect girls in this situation appears to have received limited consideration. This article attempts to fill this gap in the literature, by providing an analysis of the problem of sexual and gender-based violence in schools within the framework of regional and international human rights law. The article's objective is to identify and discuss rights-based legal strategies to combat this pervasive human rights violation, specifically within the sub-Saharan African context, with an emphasis on regional developments and regional responses.*

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## 1 Introduction

Although schools are generally regarded as a 'safe haven'<sup>1</sup> for children, the reality for many girls is that schools can be a place of discrimination and sexual abuse.<sup>2</sup> The widespread problem in schools of sexual and gender-based violence (SGBV) – particularly sexual violence – has been well-documented in a range of studies and reports, particularly in various countries throughout sub-Saharan Africa.<sup>3</sup> Sexual violence in schools not only violates girls' fundamental rights to dignity and equality, and their rights to be free from violence, but it also undermines their rights to education, particularly when, as is often the case, states fail to take measures to protect girls. Although there is a growing body of research documenting this issue, particularly in sub-Saharan African countries, how regional and international human rights law applies to protect girls in this situation appears to have received limited consideration.<sup>4</sup> This article considers SGBV in schools within the framework of international human rights law, with the objective of identifying rights-based legal strategies to combat this pervasive human rights violation, specifically within the sub-Saharan African context, and with an emphasis on regional developments and regional responses. Part 2 begins with an overview of the nature, extent, causes and consequences of the problem of SGBV in schools in a range of countries across sub-Saharan Africa. In part 3, the article turns to a discussion of the relevant international human rights law framework. Finally, part 4 explores a few relevant legal strategies to enforce state obligations to ensure the equal rights of girls to education free from sexual violence, while part 5 offers some final concluding thoughts on implementing comprehensive rights-based legal approaches to combat this pervasive problem. As the causes of sexual violence in schools are complex, systemic and rooted in social, cultural, economic and institutional dynamics, it is clear that a legal response is only one aspect of an effective strategy. Broad-based preventive measures, institutional strengthening of education systems and staff sensitisation training, public education and awareness raising, and comprehensive victim support services are

1 This phrase is drawn from United Nations Educational, Scientific and Cultural Organisation (UNESCO) Global Monitoring Report: 'Gender and Education for All: The Leap the Equality' (2003) 143.

2 USAID 'Unsafe schools: A literature review of school-related gender-based violence in developing countries' (2003); PS Pinheiro 'UN World Report on Violence against Children' UN Doc A/61/299 (2006).

3 Amnesty International *Safe schools: Every girl's right* (2008); Human Rights Watch *Scared at school: Sexual violence against girls in South African schools* (2001); F Leach *et al* *An investigative study into the abuse of girls in African schools* (2003); C Mitchell & I Mothobi-Tapela *Taking action: Gender-based violence in and around schools in Swaziland and Zimbabwe* (2003).

4 For a detailed discussion of the applicability of international human rights law in these cases, see Human Rights Watch (n 3 above); E George 'Instructions in inequality: Development, human rights, capabilities and sexual violence in schools' (2005) 26 *Michigan Journal of International Law* 1139.

all essential. Ultimately, however, legal measures are a critical first step, laying the groundwork with binding legal protections and enforcement mechanisms and establishing a comprehensive normative framework to better protect girls in schools.

## 2 Sexual and gender-based violence in schools in sub-Saharan Africa

Gender-based violence (GBV) is 'violence that is directed against a woman because she is a woman or that affects women disproportionately'.<sup>5</sup> GBV encompasses a wide range of different types of violence, including psychological, physical, economic and sexual. However, the focus of this article is on sexual violence specifically, as it has been identified as a particularly widespread and harmful problem facing girls in schools throughout the region. The World Health Organisation (WHO) defines sexual violence as 'any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances ... using coercion, threats of harm or physical force, by any person regardless of relationship to the survivor, in any setting'.<sup>6</sup> All children are vulnerable to abuse, and boys, as well as girls, may be subjected to sexual violence. However, the undeniable reality is that 'girls are far more likely to be the victim of certain kinds of gender-based violence, such as sexual harassment and sexual assault'.<sup>7</sup> Thus, although recognising the seriousness of all violence against children, boys or girls, the focus of this article is on sexual violence in schools, experienced overwhelmingly by girls.

### 2.1 Nature and scope of sexual and gender-based violence in schools

SGBV in schools occurs worldwide and in countries across the global north and global south alike,<sup>8</sup> it is certainly not limited to countries of sub-Saharan Africa, which are of course widely diverse. However, this article focuses on this region generally due to the wide range of localised research on this issue,<sup>9</sup> which establishes it as a widespread regional problem, as well as the uniquely relevant legal protections found in the African human rights instruments. A growing body of research from countries across sub-Saharan Africa indicates that

5 CEDAW Committee 'General Recommendation 19: Violence against women' (1992) para 6.

6 Population Council *Sexual and gender-based violence in Africa: Literature review* (2008) 4.

7 Amnesty International (n 3 above) 1.

8 USAID (n 2 above) i; Pinheiro (n 2 above).

9 The concentration of donor and lending programmes in this region helps to explain the comparatively high number of research studies: M Dunne *et al* 'Gender and violence in schools' background paper prepared for the Education for All Global Monitoring Report 2003/4, Gender and education for all: The leap to equality UN Doc 2004/ED/EFA/MRT/PI/19 5.

gender-based sexual violence in schools is both widespread and generally tolerated.<sup>10</sup> This issue was noted as a major area of concern in regional consultations held for the United Nations (UN) World Report on Violence against Children.<sup>11</sup> A number of qualitative studies indicate that girls suffer abuse in schools ranging from verbal harassment, including propositioning for sexual favours, inappropriate touching, and forced sexual activity, including rape. Within the schools, such abuse is perpetrated both by male classmates and teachers or other school staff. It is most likely to occur in 'unsafe' areas such as toilets or dormitories.<sup>12</sup> Encounters or relationships between teachers and students sometimes occur under threat or on the promise of good grades or money.<sup>13</sup> Thus, students living in poverty are particularly vulnerable.<sup>14</sup> In countries where teenage pregnancy is common, teachers are sometimes identified as the father.<sup>15</sup> For example, of girls who dropped out of school due to pregnancy in Namibia during 2011, in at least 31 cases teachers were recorded as the father of the baby.<sup>16</sup> Further, reports indicate that girls who become pregnant due to sexual abuse by a teacher or classmate are often expelled from school.<sup>17</sup>

A 2003 study in Zimbabwe, Ghana and Malawi<sup>18</sup> concluded that sexual aggression from male classmates was common, and generally tolerated within the schools.<sup>19</sup> There was also evidence of teacher sexual harassment: Of 28 school girls interviewed in-depth in Ghana, 27 per cent indicated that they had been propositioned by a teacher.<sup>20</sup> In Malawi, over half of the girls interviewed stated that they knew of girls who had been propositioned by a teacher,<sup>21</sup> and that it was common for girls to become pregnant by their teachers.<sup>22</sup> A 2012 study in Zambia found that 57 per cent of schoolgirls interviewed had personally experienced sexual harassment or violence from a teacher, male student, or a man they encountered while traveling to school.<sup>23</sup> More than half stated they knew of teachers who had sexually harassed or abused female students, while 14 per

10 N Jones *et al* 'Painful lessons: The politics of preventing sexual violence and bullying at school' (Working Paper 295) (Overseas Development Institute 2008) viii 16.

11 Pinheiro (n 2 above).

12 Leach (n 3 above) 44 81.

13 Pinheiro (n 2 above) 120.

14 George (n 4 above) 1150.

15 Leach (n 3 above) 83.

16 D Kisting 'Close to 1 500 pregnant girls drop out in 2010' *The Namibian* 18 January 2011.

17 Pinheiro (n 2 above) 120.

18 Leach (n 3 above).

19 Leach (n 3 above) 44 81.

20 Leach (n 3 above) 45.

21 Leach (n 3 above) 81.

22 Leach (n 3 above) 83.

23 Women and Law in Southern Africa-Zambia *et al* 'They are destroying our futures': *Sexual violence against girls in Zambia's schools* (2012) 18.

cent had personally experienced this.<sup>24</sup> A 2004 study in Zimbabwe and Swaziland by the United Nations Children's Fund (UNICEF) also confirmed the problem of sexual abuse of girls, both by teachers and male classmates.<sup>25</sup> In focus group discussions, 'the girls showed how teachers "touch touch" them, especially in secluded places like a storeroom, teacher's quarters or dark corners and the sports ground',<sup>26</sup> and reported verbal sexual harassment such as propositioning from teachers as a common occurrence.<sup>27</sup> The girls also indicated that they suffered abuse from boys, and that teachers who were aware of this behaviour did nothing to intervene.<sup>28</sup> Small-scale, localised studies from Lesotho<sup>29</sup> and Namibia<sup>30</sup> report similar findings, while a small study in Kenya found that 95 per cent of 20 high school girls interviewed had experienced sexual harassment or violence at school, mostly perpetrated by male students.<sup>31</sup> A 1998 study on the frequency of rape among South African women found that of women who reported being victims of child rape (under the age of 15), 33 per cent had been raped by teachers.<sup>32</sup> A study by Human Rights Watch in 2001 confirmed that 'sexual abuse and harassment of girls by both teachers and students is widespread in South Africa', and highlighted the serious implications for girls trying to exercise their right to education.<sup>33</sup> In a particularly extreme incident of school sexual violence in 1991, male students broke into the girls' dormitory at a boarding school in Kenya and raped over 70 schoolgirls; during the rampage; 19 of the girls were killed.<sup>34</sup>

Overall, the research overwhelmingly points to widespread tolerance of SGBV among school staff and officials; rarely are perpetrators, whether teachers or other school staff or male students, punished. A study conducted between 2003 and 2009 in Kenya revealed that, while 12 660 girls were sexually abused by their teachers, only 633 teachers were ultimately charged with sexual offences.<sup>35</sup> In the South African context it has been noted that '[g]irls who did report abuse felt that school officials responded with

24 WLSA (n 23 above) 18.

25 Mitchell (n 3 above) 51-53.

26 Mitchell (n 3 above) 51.

27 Mitchell (n 3 above) 52.

28 Mitchell (n 3 above).

29 MV Ngakane *et al* 'Experiencing violence in schools: Voices of learners in the Lesotho context' (2012) 14 *Anthropologist* 39-48.

30 S Felton *et al* *Girls' education in Rundu educational region: A report on a field assessment* (2002).

31 BA Abuya *et al* 'A phenomenological study of sexual harassment and violence among girls attending high schools in urban slums, Nairobi, Kenya' (2012) 11 *Journal of School Violence* 331.

32 R Jewkes *et al* 'Rape of girls in South Africa' (2002) *The Lancet* 319.

33 Human Rights Watch (n 3 above) 5-6.

34 F Banda *Women, law and human rights: An African perspective* (2005) 177.

35 Integrated Regional Information Networks (IRIN) 'Analysis: Sex abuse in Kenyan schools' 30 May 2011 [http://www.ecoi.net/local\\_link/161054/264816\\_en.html](http://www.ecoi.net/local_link/161054/264816_en.html) (accessed 20 February 2013).

indifference, willed disbelief, and hostility'.<sup>36</sup> As one report observes, '[s]chools in many countries turn a deaf ear to the female students' complaints and many girls do not even complain because of a fear of reprisals, especially from teachers, but also because they believe that nothing will be done'.<sup>37</sup> Indeed, it is generally assumed that the vast majority of incidents are never reported. One study from Zambia found that although 57 of the 105 schoolgirls interviewed had experienced sexual harassment or abuse, only three had reported the incidents.<sup>38</sup> The prevailing perception that such abuse is commonly viewed as an 'inevitable part of daily school life',<sup>39</sup> contributes to a lack of political will to address the issue and a failure of various levels of government to take responsibility.<sup>40</sup> As George puts it, '[l]eft unchecked, sexual violence serves to offer clear instruction that legitimates violence and reinforces gender inequality'.<sup>41</sup> Such widespread impunity serves to further normalise such behaviour, and undoubtedly perpetuates the cycle of violence. According to one study, '[i]t is not difficult to see that in a context where schools take no action to discipline aggressive behaviour or sexual misconduct, where the majority of cases go unreported and prosecutions are rare, it can easily thrive'.<sup>42</sup>

## 2.2 Causes and consequences of sexual and gender-based violence in schools

The causes of sexual violence in schools are complex and deeply rooted in social, cultural, economic and institutional factors. As one report notes:<sup>43</sup>

School-based violence is not a problem confined to schools but a complex, multifaceted societal issue. Schools are social spaces within which the power relationships, domination and discrimination practices of the community and wider society are reflected.

An in-depth discussion on the myriad causes of sexual violence in schools is beyond the scope of this article, but it is helpful to outline in broad strokes some of the most significant factors. Social and cultural norms that entrench patriarchal gender relations and perpetuate discrimination and inequality of girls are underlying causes of gender-based violence generally, and contribute to the often systemic nature of sexual violence in schools. The imbalance of power between girls and male teachers and staff members in positions of trust and

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36 George (n 4 above) 1155.

37 USAID (n 2 above) iii.

38 WLSA (n 23 above) 35.

39 Leach (n 3 above) 64.

40 UNESCO (n 1 above) 145.

41 George (n 4 above) 1201.

42 Leach (n 3 above) ix.

43 UNICEF, Plan West Africa, Save the Children Sweden West Africa & ActionAid *Too often in silence: A report on school-based violence in West and Central Africa* (2010) 42.

authority is particularly significant. A UNICEF study of West and Central Africa concluded that '[t]he most frequently-cited situations of sexual abuse in the 23 countries are based directly on the position of authority occupied by teachers'.<sup>44</sup> Poverty is also a notable factor. As noted above, studies have found that some girls engage in transactional sex with teachers under economic pressure in order to afford school fees or obtain spending money, or to secure good grades.<sup>45</sup> As outlined above, institutional weaknesses within the education system, such as severely under-resourced schools, underpaid and undertrained teachers, poorly-designed school grounds (with toilets or hostels in isolated areas, for example), poor disciplinary standards and a culture of impunity for sexual misconduct by both students and staff, are major contributing factors.<sup>46</sup> Unfamiliarity with legal remedies and/or fear or mistrust of the police and court system on behalf of victims and their families also contribute to underreporting and impunity, as noted above. One commentator observes that, in some countries, informally settling cases rather than reporting to the police or schools for formal investigation is the most common response.<sup>47</sup> The range of entrenched and systemic causes of sexual violence in schools indicates a need for a wide range of responses in addition to legal measures, focused on prevention and victim services, including public education and awareness raising regarding legal prohibitions and remedies, provision of appropriate police services and victim support services, teacher training and sensitisation, and institutional strengthening of education systems.

For those students who are subjected to it, the consequences of sexual violence in schools are severe. There is obviously a serious emotional and psychological impact for girls who experience abuse.<sup>48</sup> Physical health consequences are a critical concern, particularly with regard to unwanted youth pregnancy and the spread of sexually-transmitted infections, especially HIV.<sup>49</sup> In addition, SGBV severely affects the ability of girls to participate in school and therefore fully access their rights to education. It perpetuates gender discrimination and inequality in the classroom, especially when it goes unnoticed and unpunished, as is often the case. As one report notes:<sup>50</sup>

A number of studies stress that fear or experience of sexual violence in schools is a major reason behind some girls' underperformance in schools and/or dropping out of school, which is reflected in girls' lower enrolment rates at the secondary school level.

44 N Maalla M'jid *Sexual abuse and exploitation of children in West and Central Africa* (2008) 17.

45 UNICEF *et al* (n 43 above) 28.

46 As above.

47 Maalla M'jid (n 44 above) 19.

48 Jones (n 10 above) 11.

49 USAID (n 2 above) iii.

50 Jones (n 10 above) 17.

In some cases, parents choose to keep children out of school for fear of their safety.<sup>51</sup> Although incidents of SGBV are often not reported, or even considered to be gender-based violence as distinct from general school violence, ‘there is no doubt that underachievement and high drop-out rates for some children are linked to gender-based violence’.<sup>52</sup> Moreover, because education is a ‘multiplier right’ which enhances the realisation of other fundamental rights, a denial of education carries life-long consequences.<sup>53</sup>

### 3 International and regional human rights framework

SGBV in schools, especially when it is tolerated with impunity, implicates a number of overlapping and interrelated fundamental human rights protected under international human rights law: the right to dignity; the right to equality and non-discrimination; the right to be free from violence; and the right to education. This discussion focuses on the international and African regional human rights treaties that specifically protect women and children broadly across the African continent: the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);<sup>54</sup> the UN Convention on the Rights of the Child (CRC),<sup>55</sup> the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (African Women’s Protocol),<sup>56</sup> and the African Charter on the Rights and Welfare of the Child (African Children’s Charter).<sup>57</sup> In addition, sub-regional bodies have introduced relevant binding instruments pertaining to women’s rights and sexual violence, such as the South African Development Community’s binding Protocol on Gender and Development (SADC Protocol).<sup>58</sup>

The right to equality and non-discrimination on the basis of sex is a fundamental right protected in all human rights instruments.<sup>59</sup> Article 2 of CEDAW specifically prohibits all forms of discrimination against

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51 Jones (n 10 above) 11.

52 UNESCO (n 1 above) 144.

53 L Mwambene ‘Implementing the girl child’s right to education in selected countries in Africa’ in J Sloth-Nielsen (ed) *Children’s rights in Africa: A legal perspective* (2008) 219.

54 (1979) 1249 UNTS 13. All but three African states are party to CEDAW.

55 1577 UNTS 3 (in force 2 September 1990). All African states except Somalia are party to CRC.

56 (2003) Assembly/AU/Dec 14(II) (in force 2005). Of Africa’s 54 states, 31 are party to the Protocol.

57 (1990) OAU Doc CAB/LEG/TSG/Rev 1. Forty-six African states are party to the African Children’s Charter.

58 SADC Protocol on Gender and Development (2008).

59 Eg, art 2 Universal Declaration of Human Rights, GA Res 217 (III), UN GAOR, 3d sess Supp 13, UN Doc A/810 (1948); arts 2, 3 & 26 International Covenant on Civil and Political Rights (1969) 999 UNTS 171 (in force 1976); art 2 African Charter on Human and Peoples’ Rights (1981) OAU Doc CAB/LEG/67/3 rev. 5, 21 ILM 58 (in force 1982).

women, and imposes duties upon states to implement measures prohibiting discrimination in all spheres, while article 3 obligates states to take measures to ensure women's equality. Similarly, article 2 of the African Women's Protocol imposes an obligation upon all state parties to eliminate discrimination against women. Note that the African Women's Protocol expressly applies to all 'persons of female gender, including girls'.<sup>60</sup> Article 2 of CRC requires that the state guarantee all rights within the treaty without discrimination, and take measures to ensure that children are protected from all forms of discrimination. There is clear international consensus that gender-based violence constitutes discrimination against women.<sup>61</sup> According to the CEDAW Committee, the body tasked with monitoring implementation of the treaty, 'gender-based violence is a form of discrimination' on the basis of sex.<sup>62</sup> Thus, the SGBV that girls experience in schools in sub-Saharan Africa (and elsewhere) is itself regarded as a form of discrimination.

The African Women's Protocol goes further than CEDAW and expressly prohibits all forms of violence against women, including sexual violence. Article 3(4) protects the right to dignity, which includes the state's duty to protect women from 'all forms of violence, particularly sexual and verbal violence'.<sup>63</sup> Article 4 protects the right to integrity and security of the person, which includes a duty upon states 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'.<sup>64</sup> Most importantly, article 12(1) expressly obligates states to take all appropriate measures to 'protect women, especially the girl-child, from all forms of abuse, including sexual harassment in schools and other educational institutions and provide for sanctions against the perpetrators of such practices'.<sup>65</sup> This is the strongest and most explicit articulation of the right of girls to be free from sexual violence in schools in any international instrument.

Article 19 of CRC requires states to take all appropriate measures to protect children from all forms of violence, including sexual abuse, 'while in the care of parents, legal guardians, or any other person who has the care of the child',<sup>66</sup> which includes school personnel.<sup>67</sup> Article 34 further provides that 'states parties undertake to protect the child from all forms of sexual exploitation and sexual abuse'. Article 16(1) of

60 Art 1(k) African Women's Protocol.

61 CEDAW GR 19 (n 7 above) para 1; *Opuz v Turkey* ECtHR, Application 33401/02, judgment of 7 June 2009; *Gonzalez v Mexico* judgment (IACtHR, 16 November 2009).

62 CEDAW GR 19 (n 7 above) para 1.

63 Art 3(4) African Women's Protocol.

64 Art 4(2)(a) African Women's Protocol.

65 Art 12(1)(c) African Women's Protocol.

66 Art 19(1) CRC.

67 CRC General Comment 13: The right of the child of freedom from all forms of violence UN Doc CRC/C/GC/13 (2011) para 33.

the African Children's Charter also requires states to take specific measures to protect the child from mistreatment, including sexual abuse, 'while in the care of a parent, legal guardian or school authority or any other person who has the care of the child', expressly including 'school authority'. In addition, article 27 generally requires states 'to protect the child from all forms of sexual exploitation and sexual abuse'. Specifically, states must take measures to prevent 'the inducement, coercion or encouragement of a child to engage in any sexual activity'.

The right to education is recognised as a fundamental right in a number of international treaties.<sup>68</sup> According to the internationally-recognised '4A' framework, education must be available, accessible, acceptable and adaptable.<sup>69</sup> The requirement of accessibility is particularly relevant to this discussion because it requires the elimination of discrimination in access to and benefit from education, in law and in fact.<sup>70</sup> Consequently, states have a duty to 'take measures to redress any *de facto* discrimination' in schools.<sup>71</sup> The importance of addressing gender discrimination in access to education has been recognised by the international community: The Dakar Framework on Education emphasises that 'gender-based discrimination remains one of the most intractable constraints to realising the right to education'.<sup>72</sup> Consequently, 'achieving gender equality in education by 2015, with a focus on ensuring girls' full and equal access to and achievement in basic education',<sup>73</sup> was reaffirmed as a Millennium Development Goal.<sup>74</sup>

States have a range of obligations to ensure the equal rights of all children to education without discrimination. Article 10 of CEDAW specifically requires 'state parties to take all appropriate measures to eliminate discrimination against women to ensure to them equal rights with men in the field of education'. Article 12(1)(a) of the African Women's Protocol also obligates states to 'eliminate all forms of discrimination against women and guarantee equal opportunity and access in the sphere of education and training', and expressly prohibits sexual violence in schools.<sup>75</sup> The Women's Protocol also provides that states have a duty to 'provide access to counselling and rehabilitation services to women who suffer abuses and sexual harassment'<sup>76</sup> in schools. Similarly, the SADC Protocol expressly

68 See art 13 International Covenant on Economic, Social and Cultural Rights (1966) 993 UNTS 3 (in force 1976); African Charter (n 59 above).

69 ESCR Committee General Comment 13: The right to education UN Doc E/C.12/1999/10 (8 December 1999) para 6.

70 ESCR Committee General Comment 13 (n 69 above) paras 6 & 37.

71 ESCR Committee General Comment 13 (n 69 above) para 37.

72 Dakar Framework for Action *Education for all: Meeting our collective commitments* (2000) 16.

73 Dakar Framework (n 72 above) art 7(v).

74 Millennium Declaration, GA Res 55/22 (2000).

75 Art 12(1)(c) African Women's Protocol.

76 Art 12(1)(d) African Women's Protocol.

requires Southern African states to 'adopt and implement gender-sensitive educational policies and programmes addressing gender stereotypes in education and gender-based violence'.<sup>77</sup> CRC also protects the right to education in article 28. Article 29(1) goes on to specify that the education of the child shall be directed to specific aims, including respect for human rights<sup>78</sup> and gender equality.<sup>79</sup> The Committee on the Rights of the Child (CRC Committee) highlights the consequences of discrimination for a child's dignity and the ability to benefit from the right to education.<sup>80</sup> The Committee has also stated that the failure to prevent violence in schools and to protect students within schools could deny the right to education guaranteed under articles 28 and 29.<sup>81</sup> The African Children's Charter protects the right to education in article 12. In an important expansion of the right to education beyond that guaranteed in CRC, the African Children's Charter provides that states have an obligation to 'take special measures in respect of female ... children, to ensure equal access to education for all sections of the community'.<sup>82</sup>

As Human Rights Watch argues:<sup>83</sup>

Failure to prevent and redress persistent gender-based violence in all its forms – from rape to sexual harassment – operates as a *de facto* discriminatory deprivation of the right to education for girl children in violation of international and national legal obligations.

However, the right to education also necessarily includes the right to equality, and freedom from gender discrimination and violence. The overlapping and interrelated nature of the rights outlined above is obvious. Moreover, the right to education extends beyond simple access to school to include the equal rights of girls to enjoy their rights *within* education, free from gender-based violence.

## 4 Legal strategies to combat gender-based violence in schools

### 4.1 State obligations

The comprehensive international normative framework prohibiting SGBV in schools does not necessarily translate into effective implementation in practice at the domestic level. However, states that are party to any of the human rights treaties discussed above have a

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77 Art 14 SADC Protocol (n 58 above).

78 Art 28(1)(b) CRC.

79 Art 28(1)(d) CRC.

80 CRC General Comment 1: The aims of education UN Doc CRC/GC/2001/1 (2001) para 10.

81 CRC 'Day of General Discussion on Violence against Children within the Family and in Schools' UN Doc CRC/C/111 para 679 (b).

82 Art 11(3)(e) African Children's Charter.

83 Human Rights Watch (n 3 above) 111; George (n 6 above) 1148.

resulting positive duty to take measures to implement their treaty obligations. Article 2 of both CEDAW and the African Women's Protocol requires all states parties to take all appropriate measures, including legislation, to ensure the elimination of all forms of sex discrimination and realisation of all treaty rights. Moreover, the state has a duty to ensure the right to a remedy for any violations of rights guaranteed in the treaties. For example, the African Women's Protocol obligates the state to 'provide for appropriate remedies to any woman whose rights or freedoms ... have been violated'.<sup>84</sup> Article 1 of the African Children's Charter, likewise, obligates states to adopt legislative or other measures to ensure the protection of the treaty rights. The CRC Committee outlines the comprehensive duties to protect children under article 4 in detail, including<sup>85</sup>

due diligence and the obligation to prevent violence or violations of human rights, the obligation to protect child victims and witnesses from human rights violations, the obligation to investigate and to punish those responsible, and the obligation to provide access to redress human rights violations.

When states fail to take appropriate measures, and to exercise due diligence, to prevent, protect and punish violent actions, even if perpetrated by private persons, it can give rise to responsibility under international law.<sup>86</sup> Although non-binding, the UN Declaration on the Elimination of Violence against Women provides that states have a duty to '[e]xercise due diligence to prevent, investigate and ... punish acts of violence against women, whether those acts are perpetrated by the state or by private persons'.<sup>87</sup> These obligations have been applied in leading international jurisprudence to find violations in cases where state authorities failed to take appropriate measures and exercise due diligence to protect women at risk of violence from private actors and punish perpetrators.<sup>88</sup> In *Zimbabwe Human Rights NGO Forum v Zimbabwe*,<sup>89</sup> a case regarding amnesty for perpetrators of political violence, the African Commission on Human and Peoples' Rights (African Commission) adopted and affirmed the 'due diligence' principle explained above, stating that '[h]uman rights law imposes obligations on states to protect citizens or individuals under their jurisdiction from the harmful acts of others'.<sup>90</sup> The decision specifically cited the UN Declaration on the Elimination of Violence against Women as a source for this standard at international law,<sup>91</sup> and

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<sup>84</sup> Art 25 African Women's Protocol.

<sup>85</sup> CRC General Comment 13 (n 67 above) para 5.

<sup>86</sup> C Benninger-Bludel (ed) *Due diligence and its application to protect women from violence* (2008) 13; *Velasquez Rodriguez v Honduras*, judgment (IACtHR, 29 July 1988).

<sup>87</sup> UN Doc A/RES/48/104 (1994) art 4(c).

<sup>88</sup> See *Opuz* (n 61 above); *Gonzalez* (n 61 above).

<sup>89</sup> (2006) AHRLR 128 (ACHPR 2006).

<sup>90</sup> *Zimbabwe Human Rights NGO Forum* (n 89 above) para 143.

<sup>91</sup> *Zimbabwe Human Rights NGO Forum* (n 89 above) fn 153.

concluded that 'a state can be held complicit where it fails systematically to provide protection of violations'.<sup>92</sup>

Consequently, the duty on the state to exercise due diligence to prevent, protect and punish SGBV in schools applies both in respect of teachers who, as public employees, could potentially be considered agents of the state, and other students, as private persons. The responsibility to ensure due diligence extends to all members of the state who are involved: teachers, school staff, principals, school boards, government education and justice officials, and police and law enforcement. Thus, the focus of this section is to outline, briefly and in broad strokes, possible legal strategies to ensure that states fulfil their treaty obligations to combat SGBV in schools. These legal responses fall into two main categories: legislative and policy measures and strategic litigation.

#### 4.2 Legislative and policy measures

Legislative reform and policy measures focused on building a legal and policy framework that broadly criminalises all forms of sexual harassment, abuse and violence, expressly prohibits teacher sexual contact with students, and imposes duties upon teachers and school administration to protect students and respond effectively to reports of abuse, are necessary to ensure compliance with the duty to exercise due diligence to protect girl students. In practice, some countries are taking notable steps in this regard, offering important instructive examples for the region, but approaches remain *ad hoc* and uneven across the region overall. As one report notes, '[o]nly rarely is violence against children in and around schools addressed holistically or systematically in national legal instruments'.<sup>93</sup> In some states, rights commonly protected under national constitutions, such as the right to equality and bodily integrity, could apply to offer legal protection in gender-based violence in schools cases. In addition, many African states expressly recognise the right to education in their constitutions,<sup>94</sup> such as the Constitution of South Africa.<sup>95</sup>

Common criminal or penal code offences of defilement, rape and sexual abuse will often be applicable. For example, Namibia's Combating of Rape Act introduces comprehensive definitions of rape, and provides for aggravated sentences for offences involving minors when perpetrated by a person in a position of trust or authority, which would apply to a teacher.<sup>96</sup> However, criminal laws in some countries do not include expansive and broad definitions of sexual offences, including sexual harassment, and therefore do not offer adequate protection to all victims. Compliance with the general duty

92 Zimbabwe Human Rights NGO Forum (n 89 above) para 160.

93 UNICEF *et al* (n 43 above) 42.

94 Mwambene (n 53 above) 224.

95 Sec 29 Constitution of the Republic of South Africa 1996.

96 Sec 3(a)(iii)(cc) Act 8 of 2000,.

to implement legal measures to ensure the equal rights of girls to access and benefit from education free from discrimination would require, for example, legislation prohibiting and imposing sanctions for sexual harassment and sexual abuse of girls generally, including in school, whether by teachers, other school staff or fellow students. For example, until Zambia enacted legislative reforms, including the Anti-Gender-Based Violence Act in 2011, sexual harassment and sexual assaults other than rape, attempted rape and indecent assault were not offences under the law.<sup>97</sup> It is necessary that the domestic legal and policy framework takes an expansive and broad approach to defining sexual offences, and imposes duties upon teachers to report violations that occur and to refrain from engaging in sexual conduct with students.

Given the scope and scale of the problem of sexual violence in schools, some countries are responding with targeted law and policy measures specifically geared to teachers and schools. A UNICEF study found that 16 countries across West and Central Africa have introduced legal prohibitions on sexual violence in schools.<sup>98</sup> For example, in response to high levels of sexual violence in schools and elsewhere, Benin introduced legislation that prohibits sexual harassment in various places, specifically including schools.<sup>99</sup> In addition to the general provisions of the criminal law or children's acts, these prohibitions on sexual violence in schools are often found in regulations or policy directives under education legislation governing teacher conduct. For example, in Ghana, section 27 of the Code of Professional Conduct for the Ghana Educational Service states that '[n]o teacher should indulge in immoral or sexual relations with a pupil or student in any educational institution', and provides for disciplinary measures. According to one report, sexual offences involving students are deemed 'major misconduct' in Ghana and could result in the suspension or termination of the teacher or school staff member's contract.<sup>100</sup> Similarly, in Namibia, regulations governing teacher conduct under the Education Act expressly state that a teacher 'may not become involved in any form of romance or sexual relations with a learner or sexual harassment or abuse of a learner'.<sup>101</sup> Similar policies have been adopted in Kenya, which impose an obligation on teachers to report any cases of sexual abuse

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97 WLSA (n 23 above) 45.

98 UNICEF *Sexual abuse, exploitation and violence of children at school in West and Central Africa* (2006). The countries listed are Benin, Burkina Faso, Cameroon, Central African Republic, The Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone and Togo.

99 USAID *Women's legal rights Initiative: Final report* (2007) 14.

100 Child Research and Resource Centre *Report on the study of child sexual abuse in schools* (2009) 18.

101 Ministry of Education Amendment of regulations made under the Education Act, 2001 Government Notice 15 (2004) sec 62(2)A(a)(o).

against a student and require disciplinary action against any teacher perpetrating sexual abuse.<sup>102</sup>

Further, some countries have addressed sexual violence in schools in national action plans and related policy instruments. Both Senegal and Burkina Faso address school-based violence in action plans on child sexual abuse.<sup>103</sup> In The Gambia, the government responded to high levels of sexual violence in schools with a targeted sexual harassment policy and specifically highlighted the need for schools to enforce the policy and to develop disciplinary committees to address sexual violence in schools in the national education policy.<sup>104</sup> In Nigeria, the government targeted all forms of violence in primary schools, including sexual violence, with the development of a National Strategic Framework on Violence-Free Basic Education.<sup>105</sup> These are all important approaches, developing normative standards and building awareness of teacher and school obligations in relation to combating sexual violence in schools. However, legal and policy responses remain inconsistent and often incomplete across the region. Given the scope of the problem of SGBV in schools, and the associated impunity in many countries, it is suggested that the international treaty bodies consider developing guidelines at the regional or international level to articulate the nature of states' responsibilities to develop legislative and other measures to protect children from sexual abuse in schools.

### 4.3 Strategic litigation

#### 4.3.1 Domestic courts

The goal and main advantage of strategic litigation is to provide justice and redress to the victim while targeting a systemic problem, with the broader effect of raising public awareness about and enforcing state accountability for sexual violence in schools. For example, successful legal cases involving school sexual abuse and resulting media attention in Uganda drew attention to the issue and prompted the government to pledge to take action.<sup>106</sup> Strategic litigation strategies could draw on either criminal or civil law, such as claims for negligence or breach of duty of care, for matters where no criminal charges were laid. For example, in a 2006 landmark case in Zambia, a 13 year-old student who was raped by her teacher successfully sued the teacher and her school for negligence due to the

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102 Teachers Service Commission, Circular 3/2010 *Protection of pupils from sexual abuse* (2010).

103 UNICEF 2006 (n 98 above).

104 Department of State for Education *Education policy 2004-2015* (2004) 29.

105 UNICEF, Plan West Africa, Save the Children Sweden West Africa & ActionAid *Addressing violence in schools: Selected initiatives from West and Central Africa* (2010) 6.

106 Mwambene (n 53 above) 227.

school's failure to take any action.<sup>107</sup> The headmaster had been advised of the incident, but did not report the teacher to the police. The complainant argued that the case was a 'novel' opportunity for the court to move the government to 'strengthen its school policy on the protection of the girl child against sexual abuse'.<sup>108</sup> Importantly, she cited the African Women's Protocol, noting that Zambia is party to the treaty and has resulting obligations. The court rejected the teacher's argument that it was a consensual relationship and held that by assaulting the complainant, the teacher violated his duty of care.<sup>109</sup> The court further concluded that the failure of the school to protect her and to discipline the perpetrator was a negligent breach of the duty of care owed by the school towards students. The court also criticised the police for failing to take any action when they became aware of the incident. The judgment awarded substantial damages for pain and suffering, and 'implored' the government to introduce regulations to prevent such situations in the future.<sup>110</sup> This is an important ground-breaking decision that clearly demonstrates that schools have a duty to protect students in their care from violence, especially violence perpetrated by teachers. Moreover, it demonstrates that the civil law can be a viable pathway for strategic litigation, and obtaining justice and redress for child victims, particularly if no criminal charges were laid in the matter.

A similarly strong stance was taken by a South African court in a criminal case involving the rape of a nine year-old girl on school grounds by a school employee. The court commented on the special position of trust school employees hold:<sup>111</sup>

What is glaring is that the complainant was raped at her school, a place where she was expected to be safe. The accused, an employee of the school, as a gardener, was in a position of trust in relation to the complainant. He was expected to protect her.

The court went on to strongly criticise the school for failing to take adequate action after the rape complaint was made as 'a serious dereliction of duty on the part of the principal and her school'.<sup>112</sup> In the court's view, 'this state of affairs should be brought to the attention of the appropriate education authorities'.<sup>113</sup> The court concluded that '[s]urely, a school is an institution entrusted to ensure the safety of pupils, and their moral and educational development and can hardly be seen to condone sexual abuse of pupils'.<sup>114</sup>

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<sup>107</sup> *Katakwa v Hakasenke & Others* High Court of Zambia, Case 2006/HP/0327 (2008) (RM case).

<sup>108</sup> *Katakwa* (n 107 above) 6.

<sup>109</sup> *Katakwa* (n 107 above) 10.

<sup>110</sup> *Katakwa* (n 107 above) 12.

<sup>111</sup> *S v Zothile* [2008] ZAGPHC 288 (12 May 2008) para 5.

<sup>112</sup> *Zothile* (n 111 above) para 19.

<sup>113</sup> *Zothile* (n 111 above).

<sup>114</sup> As above.

Both cases indicate the willingness of some domestic courts to react strongly against incidents of sexual violence in schools, particularly when the school authorities failed to take action. These examples demonstrate the potential impact of domestic strategic litigation on this issue.

#### 4.3.2 International and regional treaty bodies

If domestic legal remedies prove unsatisfactory, or are unavailable or ineffective, the international and regional treaty bodies also allow individuals to bring complaints for human rights violations. Recourse to a treaty body is permitted only after admissibility criteria are satisfied, including the requirement that domestic remedies, as the preferable enforcement mechanism, have been exhausted, unless they are unavailable or ineffective.<sup>115</sup> Although the decisions of quasi-judicial treaty bodies are technically non-binding, they are generally regarded as authoritative.<sup>116</sup> They also have the invaluable benefit of raising public awareness and publicly ‘shaming’ a state for failure to respect its human rights obligations. For example, under the Optional Protocol, the CEDAW Committee has the authority to hear individual complaints.<sup>117</sup> Although the Committee has not considered a complaint based on the right to education, it has issued several ground-breaking decisions affirming the duty of the state to protect women from violence in the domestic sphere. In two separate complaints against Austria, the CEDAW Committee agreed that the repeated failure of the police and prosecutors to protect two women who were eventually killed by their abusive husbands amounted to a breach of CEDAW.<sup>118</sup> Similarly, in *AT v Hungary*, the Committee concluded that Hungary’s failure to enact specific legislation to combat domestic violence and protect the complainant, who had repeatedly complained to the police of serious abuse by her husband, constituted a breach of its obligations under article 2.<sup>119</sup> As a result, Hungary introduced a range of new legislative and policy measures to combat domestic violence.<sup>120</sup> It can be argued that the failure of the state to protect girls and punish perpetrators in cases where it is known that they are being routinely subjected to sexual violence in schools, whether by teachers or fellow students, is analogous to the domestic violence cases as a breach of due diligence and would attract the same state responsibility at international law.

Although the CRC Committee currently lacks the power to hear individual complaints, an Optional Protocol introducing this

115 F Viljoen *International human rights law in Africa* (2007) 336.

116 D Moeckli *et al* (eds) *International human rights law* (2010) 413.

117 GA Res 54/4 (1999) (in force 2000).

118 *Gokce v Austria* UN Doc CEDAW/C/39/D/5/2005 (2007); *Yildirim v Austria* UN Doc CEDAW/C/39/D/6/2005 (2007).

119 UN Doc CEDAW/C/32/D/2/2003 (2005) para 9.3.

120 CEDAW ‘Sixth periodic report of Hungary to the CEDAW Committee’ UN Doc CEDAW/C/HUN/6 (2006) 47-52.

mechanism has been approved by the UN General Assembly and is expected to come into force in the near future.<sup>121</sup> The Committee has often criticised states during the state reporting procedure<sup>122</sup> for failure to effectively respond to SGBV in schools. For example, in Concluding Observations to Cameroon in 2001, the CRC Committee expressed its concern at 'the very high prevalence of violence against, and sexual abuse of children in schools'.<sup>123</sup> The Committee called upon the state to take measures 'against teachers who are violent and abusive towards students' and 'to prevent bullying and sexual abuse of students by other students'.<sup>124</sup> Similarly, in recommendations to Malawi, the CRC Committee expressly called upon the state to ensure safe schools by 'taking all necessary steps to prevent abuse and exploitation of children by school personnel', including 'taking effective disciplinary measures against school personnel who have committed those offences and reporting these incidences to the competent authorities'.<sup>125</sup> Similar concerns and recommendations have been expressed also by the Committee in Concluding Observations to Kenya<sup>126</sup> and Zambia.<sup>127</sup> The Committee's recognition of this problem and its criticism of states which fail to take adequate measures to protect children in schools suggest that it would be receptive to individual complaints concerning sexual abuse in schools.

The jurisprudence of the CEDAW and CRC Committees in regards to sexual violence, especially in schools, highlights the potential of the state reporting process to be a very effective mechanism for advocacy and awareness raising. Non-governmental organisations (NGOs) commonly submit parallel shadow reports outlining concerns with compliance in relation to specific issues, which often are incorporated into the concluding observations of the Committee. This approach could be an effective means to draw attention to sexual violence in schools, and 'shame' states into taking measures in response to the Committee's criticisms, as occurred in the examples described above. For example, in 2012 a coalition of civil society organisations in Zimbabwe submitted a shadow report to the CEDAW Committee highlighting the problem of sexual violence in schools as a barrier to

121 Resolution A/RES/66/138 (2011). The Optional Protocol is currently open for signature and will come into force upon ratification by ten states.

122 State parties to CEDAW and CRC have a duty to submit reports every four years to provide updates outlining measures taken to ensure compliance with treaty obligations.

123 CRC 'Concluding observations: Cameroon' UN Doc CRC/C/15/Add.164 (2001) para 54.

124 CRC Cameroon (n 123 above) para 55(d).

125 CRC 'Concluding observations: Malawi' UN Doc CRC/C/15/Add.174 (2002) para 56(i).

126 CRC 'Concluding observations: Kenya' UN Doc CRC/C/15/Add.160 (2001) para 54.

127 CRC 'Concluding observations: Zambia' UN Doc CRC/C/15/Add.206 (2003) para 57(h).

girls' education, during that country's review period.<sup>128</sup> In response, the CEDAW Committee's Concluding Observations specifically recommended that Zimbabwe 'institute measures to protect girls from sexual harassment and violence on their way to and from schools' and 'establish reporting and accountability mechanisms to ensure that perpetrators of sexual abuse and harassment in schools are prosecuted and punished'.<sup>129</sup> This example illustrates effectively the potential strategic impact of making use of the reporting mechanism to draw attention to systemic problems of sexual violence in schools and the need for concrete government action.

Within the African regional system, the implementation of the African Children's Charter is monitored by a Committee of Experts. Although the Committee has been slow to begin its work, in its first decision in 2011, the Committee found a wide range of violations against Kenya for systemic discrimination against children of Nubian descent.<sup>130</sup> The Committee found a violation of the right to education under article 11(3), concluding that 'there is *de facto* inequality in their access to available education services and resources' as compared to children of other communities.<sup>131</sup> Consequently, '[t]heir right to education has not been effectively recognised and adequately provided for'.<sup>132</sup> The Committee thus took a broad and inclusive approach to interpreting the practical requirements necessary for accessing the right to education free of *de facto* discrimination. The situation of girls effectively denied access to education as a result of SGBV that goes unpunished can similarly be argued as *de facto* discrimination in violation of article 11. Both the African Commission and the African Court on Human and Peoples' Rights (African Court) can also receive complaints of human rights violations brought by individuals or organisations, although technically the African Women's Protocol is to be enforced at the African Court, rather than the Commission.<sup>133</sup>

Thus, there are several regional and international treaty bodies that could potentially consider a complaint concerning SGBV in schools. Strategic considerations will determine which is appropriate in a given case. However, as the African Women's Protocol offers the most comprehensive and detailed protections relevant to the specific rights violated by SGBV in schools, and is specifically geared to the African context, it is the preferable instrument upon which to base a

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128 Zimbabwe Women Lawyers Association 'Zimbabwe Civil Society's Shadow Report to the CEDAW Committee' (2012).

129 CEDAW Concluding observations: Zimbabwe' UN Doc CEDAW/C/ZWE/CO/2-5 (2012) art 30.

130 *Institute for Human Rights and Development in Africa v Kenya*, Decision 002/Com/002/2009 (ACERWC 2011).

131 *Institute for Human Rights* (n 130 above) para 65.

132 As above.

133 Art 27 African Women's Protocol.

complaint.<sup>134</sup> Since the African Court came into existence in 2006,<sup>135</sup> it has rendered only two decisions; nonetheless, it is a promising mechanism for future human rights advocacy, particularly as it issues binding judgments. The African Commission's consideration of the right to education has been limited, and it has not heard any cases regarding gender-based violence or sex discrimination. However, as noted, the Commission has already adopted and affirmed the due diligence principle, citing the Declaration on the Elimination of Violence against Women.<sup>136</sup> Therefore, although a complaint about SGBV in schools would be novel, it arguably finds support in the law and jurisprudence of the African system.

## 5 Conclusion

Pervasive sexual violence in schools, particularly when it is tolerated by the authorities, violates international human rights law on a number of grounds. When states fail to meet their fundamental obligations to protect girls in schools, there are severe consequences. The obvious failure to uphold international legal obligations requires a comprehensive legal response. Yet, effectively addressing sexual violence in schools entails more than legal considerations. As discussed, the causes of sexual violence in schools are complex, systemic and multifaceted, and a holistic approach is essential. This requires a range of non-legal strategies, including: public awareness initiatives, gender sensitivity training of teachers and school personnel, school-based preventive efforts to foster gender equality and freedom from violence, effective training of law enforcement officials, access to information regarding protection mechanisms and remedies, and counselling and medical treatment services for victims.<sup>137</sup> Moreover, it is recognised that, for many individuals, particularly child victims of sexual violence in schools, legal strategies such as litigation may be impractical or simply inaccessible; certainly, there are limitations to these approaches. A wide range of measures are critical to help address the fundamental imbalance of power which underlies the vulnerability of girls in schools where sexual violence occurs and is tacitly condoned. With awareness and education regarding the law, rights and remedies and support services comes the empowerment of students, schools and communities and the capacity to demand accountability from government. As this article has demonstrated, international and regional human rights law establishes the critically-

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134 See the detailed analysis in Solidarity for African Women's Rights Coalition *A guide to using the Protocol on the Rights of Women in Africa for legal action* (2011) 42-46.

135 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human Rights (1998) OAU/LEG/AFCHPR/PROT (III).

136 Zimbabwe Human Rights NGO Forum (n 89 above) para 143.

137 Plan International *Learn without fear: The global campaign to end violence in schools* (2008) 29-30.

important normative framework; the minimum basic standards of protection that states are obligated to provide. This robust framework provides the basis upon which obligations upon states to take seriously their duties to protect children in schools, and to implement the myriad measures required to deliver on this duty, can be enforced through the legal strategies outlined above. As states ultimately bear the responsibility for meeting their human rights commitments domestically, ensuring the effective implementation of these international obligations requires political will and commitment from national governments. Indeed, 'leadership at every level is vital to create an education system free of gender bias and sexual violence'.<sup>138</sup> What is at stake are the most fundamental rights of girls to dignity, bodily integrity, equality, freedom from violence and the right to access education, in schools that truly are 'safe havens' for the education of all children.

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138 Human Rights Watch (n 3 above) 3.