4 Rape as manifestation of gender-based discrimination: An exploration of state responsibility for sexual and gender-based violence in the jurisprudence of the ECOWAS Community Court of Justice

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Abstract:

From the vantage point of feminist jurisprudence, this chapter analyses the effects of not classifying rape, a form of sexual and gender-based violence

(SGBV), as gender-based discrimination (GBD). It further analyses states' obligation to prevent rape and, linked thereto, state responsibility for omissions to prevent rape. The discussion traces state responsibility in cases where acts of SGBV have been perpetrated by a non-state actor within an environment where rape is common and normalised. The arguments presented explore the complexities of SGBV litigation before international human rights bodies, such as the ECOWAS Court, which does not possess the jurisdiction to hold individuals criminally responsible for human rights violations.

The objective of this chapter is to show that under certain circumstances, it is possible to attract state responsibility for acts of SGBV perpetrated by non-state actors based on the provisions of the Maputo Protocol, the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts (ILC Draft Articles) and the principle of due diligence. However, it is only possible to establish such responsibility if, first, SGBV is classified as an act of GBD, and second, the obligation of states to 'prevent' SGBV is considered in its totality.

The arguments and findings presented in this chapter have a bearing on how acts of SGBV are evaluated and understood by litigants and courts and how state responsibility is delineated with regard to any and all of the 44 member states to the Maputo Protocol. Ultimately, the arguments and methods crafted are presented to encourage supranational litigation in SGBV cases, which, to date, have not garnered much attention.

1 Introduction

Rape culture is a social environment that allows sexual and gender-based violence (SGBV) to be justified and normalised. It is fuelled by persistent gender inequalities and stereotyped attitudes about gender and sexuality.[1] The patriarchal, cultural, and religious structures that support a culture of rape perpetuating systematic rapes across communities exist in all 55 member states of the African Union (AU) and beyond.[2] In the first half of 2022, the ECOWAS Community Court of Justice (ECOWAS Court) provided the first jurisprudence related to acts of rape under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of

1 UN Women https://www.unwomen.org/en/news/stories/2019/11/compilation-ways-you-can-stand-against-rape-culture (accessed 27 April 2023).

2 This is not a perspective unique to Africa alone but as this research focuses on the regional African human rights system the chapter takes this point of departure.

Women in Africa (Maputo Protocol or Protocol)[3] in *EI* and *Adama Vandi*.[4] However, while the litigants in these cases had their rights to access to justice confirmed, the responsibility of the respective states for the acts of SGBV was not established.

As SGBV is a worldwide crisis, the situations in Nigeria and Sierra Leone, the respondent states in the two cases in the focus of the discussion in this chapter, are not unique.[5] From the vantage point of feminist jurisprudence, this chapter analyses the effects of not classifying rape, a form of SGBV, as gender-based discrimination (GBD). It further analyses states' obligation to prevent rape and, linked thereto, state responsibility for omissions to prevent rape. The discussion traces state responsibility in cases where acts of SGBV, as is often the case, have been perpetrated by a non-state actor within an environment where rape is common and normalised. The arguments presented explore the complexities of SGBV litigation before international human rights bodies, such as the ECOWAS Court, which does not possess the jurisdiction to hold individuals criminally responsible for human rights violations.

In circumstances where individuals are subjected to violations of their rights because they are women, feminist jurisprudence contributes to the recognition of the impact of patriarchy and masculinist norms in the relevant legal structures.[6] Thus, it enables the identification of social environments that enable SGBV and the gendered responses to it by law enforcement agencies and courts, for example. The purpose of feminist jurisprudence is to study the problems that occur at the intersection of gender and law to develop methodologies that correct gender injustice and related restrictions.[7] This theoretical outlook essentially allows a consideration and redress of more traditional legal theory and practice, such as the limited reach of traditional state responsibility within the context of SGBV. It further enables a consideration of less empowered narratives, such as rape narratives. In this regard, feminist jurisprudence assists in analysing courts' approaches to pleadings and related legal

3 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 11 July, entered into force 25 November 2005) CAB/LEG/66.6 (Maputo Protocol).

4 *EI v The Federal Republic of Nigeria* ECW/CCJ/JUD/09/22 (2022); *Adama Vandi v State of Sierra Leone* ECW/CCJ/JUD/32/2022.

5 Amnesty International 'Nigeria: Failure to tackle rape crisis emboldens perpetrators and silences survivors' 17 November 2021 https://www.amnesty.org/en/latest/news/2021/11/nigeria-failure-to-tackle-rape-crisis-emboldens-perpetrators-and-silences-survivors/ (accessed 27 April 2023).

6 H Barnett *Introduction to feminist jurisprudence* (1998) 57-58.

7 Barnett (n 6) 14.

grounds for such pleadings and aids in suggesting alternative practices and outcomes.[8]

Contemporary feminist jurisprudence derives from different scholarly viewpoints, such as international human rights theory, which is the main legal framework of the analysis presented in this chapter. In this regard, the progressive protection against SGBV and the substantive and transformative approach to equality presented in the Maputo Protocol are critical as they entail far-reaching legal obligations on state parties. As further argued throughout this chapter, these obligations necessitate that any court faced with a complaint of SGBV based on the Maputo Protocol must undertake a complex analysis of the matter at hand to establish the appropriate state responsibility under the many and diverse state obligations.

The objective of this chapter is to show that under certain circumstances, it is possible to attract state responsibility for acts of SGBV perpetrated by non-state actors based on the provisions of the Maputo Protocol, the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts (ILC Draft Articles)[9] and the principle of due diligence. However, it is only possible to establish such responsibility if, first, SGBV is classified as an act of GBD, and second, the obligation of states to 'prevent' SGBV is considered in its totality.

The arguments and findings presented in this chapter have a bearing on how acts of SGBV are evaluated and understood by litigants and courts and how state responsibility is delineated with regard to any and all of the 44 member states to the Maputo Protocol.[10] Ultimately, the arguments and methods crafted are presented to encourage supranational litigation in SGBV cases, which, to date, have not garnered much attention.

To explore the arguments posited, this chapter is divided into six sections. Section 2 briefly presents the concept and value of a substantive transformative approach to equality and further argues that the Maputo Protocol supports this approach to equality. Section 3 presents the arguments, analysis, and findings of the ECOWAS Courts in *EI* and *Adama Vandi* pertaining to the claims of GBD made by the victims of

8 Barnett (n 6) 17, 275-280.

9 International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No 10 (A/56/10) ch. IV. E.1.

10 For a full list of states that have ratified the Maputo Protocol, see https://au.int/sites/default/files/treaties/37077-sl-protocol to the african charter on human and people%27s rights on the rights of women in africa.pdf (accessed 23 January 2024).

rape in these cases. This discussion focuses on classifying SGBV as GBD and the importance of the correct legal framing of the act of rape. Section 4 conceptualises rape under international law and further provides context to rape as a grave, systematic and widespread violation of international human rights law. This discussion further contextualises rape as a violation of the Maputo Protocol. Section 5 takes on the task of delineating the scope and meaning of an 'omission to act' under international law, situating this discussion within the context of a 'foreseeable threat' and defining rape as systemic and predictable. Section 5 analyses the obligation to 'prevent' SGBV under the Maputo Protocol in light of the Niamey Guidelines[11] and relevant case law from the Inter-American human rights system. This analysis also conceptualises the meaning of due diligence within the context of endemic rape. The final section, section six, offers some recommendations and conclusions.

2 The substantive and transformative nature of equality under the Maputo Protocol

One of this chapter's main concerns is the ECOWAS Court's failure in *EI* and *Adama Vandi* to classify the SGBV meted out against the victims as GBD. This failure is further addressed in section 3 below. To explore this further, the argument presented in this section suggests that an approach to equality that is both substantive and transformative is required, as reflected by the comprehensive definition of non-discrimination in article 1(f) and the non-discrimination clause in article 2 of the Maputo Protocol. This approach to equality is furthermore supported by the reference to 'effective application', 'effective measures', 'effective information', 'effective access', 'effective representation' and 'effective implementation' throughout the Maputo Protocol.[12] Such an approach to equality further assists in distinguishing between individual reparations and reparations targeted at systematic failures in SGBV cases.[13]

Equality, in its generic form, is a 'treacherously simple concept'.[14] In articles 7 and 8 of the Universal Declaration of Human Rights (Universal

11 Guidelines on Combating Sexual Violence and its Consequences in Africa (Niamey Guidelines), adopted during the 60th ordinary session of the African Commission held in Niamey, Niger from 8 to 22 May 2017.

12 Maputo Protocol (n 3) arts 2, 4, 8, 9 13 & 26.

13 XA Ibanez 'The role of international and national courts: human rights litigation as a strategy to hold states accountable for maternal deaths' in P Hunt & T Gray (eds) *Maternal mortality, human rights and accountability* (2013) 54. See also sec 4.5 below.

14 R Holtmaat 'The concept of discrimination' (2004) *Academy of European Law Conference Paper* http://www.era-comm.eu/oldoku/Adiskri/02_Key_concepts/2004_Holtmaat_EN.pdf (accessed 27 April 2023).

Declaration), equality and the associated concept of non-discrimination, found in Article 2 of the Universal Declaration, form a universal legal principle.[15] However, although often referred to as a progressive principle, formal equality arguably does little to change the experience of women sufferers of SGBV. Therefore, the application of formal equality in the context of SGBV does not uphold the obligations under the Maputo Protocol. Furthermore, a formal approach to equality does not support adequate redress for victims of SGBV. Without recognising rape as GBD and applying a substantive and transformative equality analysis, the harm caused, necessitating reparations, both individually and collectively, is not recognised.[16]

At a glance, the wording of the Preamble and some provisions in the Maputo Protocol, for example, articles 2(2) and 8, may create the impression that the Protocol protects formal, rather than substantive equality as equality between men and women and 'equality before the law' imply an absence of special privileges that favour, in this context, men over women. On the face of it, these provisions draw on the 'sameness and difference' approach used to establish formal equality.[17]

Under Article 3 of the African Charter on Human and Peoples' Rights (African Charter), the African Commission on Human and Peoples' Rights (African Commission) has provided a strictly formalistic interpretation of equality.[18] However, although we might be able to agree on whether 'two individuals are relevantly alike, we may still have doubts as to whether they should always be treated alike'.[19] Reaching an equal

15 UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 33: on women's access to justice (23 July 2015), CEDAW/C/GC/33 (General Recommendation 33) para 6. See also the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) art 5; International Covenant on Civil and Political Rights (ICCPR) arts 2 & 14; International Covenant on Economic, Social and Cultural Rights (CESCR), arts 2(2) & 3; European Convention on Human Rights (ECHR) art 14; Protocol 12 ECHR and American Convention on Human Rights (ACHR) art 24.

16 See Universal Declaration arts 2, 3.3 and 3.4.

17 For a further discussion on the 'sameness and difference' approach, see C MacKinnon 'Difference and dominance: on sex discrimination' in K Weisberg (ed) *Feminist legal theory: foundations* (1993) 276-287. See also C Littleton 'Reconstruction sexual equality' in Weisberg (n 18) 248-263; and J Capps 'Pragmatism, feminism, and the sameness-difference' (1996) 32 *Transactions of the Charles S Peirce Society* at 1, 65-105.

18 *Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development (on behalf of Andrew Barclay Meldrum) v Republic of Zimbabwe*, Communication 294/2004, African Commission on Human and Peoples' Rights, Twenty-sixth Annual Activity Report (2009) paras 96 & 99.

19 S Fredman *Discrimination law* (2011) 2.

outcome in cases of SGBV by applying a formal approach to equality is not possible.[20] With regard to the rights of women, practice implies that equal treatment of men and women may, in reality, especially when it comes to SGBV, preserve existing inequalities.[21] Thus, in contrast, the substantive approach to equality is founded on and demonstrated by the lived inequalities of women.[22] This refers to the prevention of SGBV, the construction of norms (promulgating and reforming the law), their use by judicial institutions and the context within which laws are formulated and applied.[23]

As was highlighted above, the African Charter seemingly focuses on formal equality. However, when considering the many references to 'effective' protection and the 'modification' of harmful practices and stereotypes, the message of the Maputo Protocol is clear: it does away with the formal notion of equality. In this regard, the Maputo Protocol does not approach women as if they are a homogenous group where all are similarly situated. Furthermore, it does not translate present benefits into rights, promoting the imposition of an unequal *status quo ante.*[24] Instead, the Maputo Protocol unambiguously pursues inequalities of gender, hereditary from society's patriarchal past, which, as an example, normalises and justifies SGBV. By disassembling the public and private divide in articles 1(j) and 4, by prescribing economic and welfare rights in article 13, and by applying an intersectional lens throughout, recognising the implication of, for example, refugee status, age and disability, the Maputo Protocol consistently refers to and prescribes a substantive *and* transformative approach to equality, not a formal one.

Departing from its more formalistic stance, as referenced above, the African Commission has, in General Comment 6, developed and defined substantive equality within the context of the Maputo Protocol. The African Commission refers to substantive equality as a form of equality that requires measures that 'go beyond formal equality and seek to redress existing disadvantage; remove socio-economic and sociocultural

20 Fredman (n 19) 1.

21 Fredman (n 19) 2.

22 C MacKinnon 'Substantive equality revisited: A reply to Sandra Fredman' (2016) 14 *International Journal of Constitutional Law* at 739.

23 MLP Loenen 'Towards a common standard of achievement? Developments in international equality law' (2001) *Acta Juridica* at 197.

24 C Albertyn 'Contested substantive equality in the South African Constitution: Beyond social inclusion towards systemic justice' (2018) 34 *South African Journal on Human Rights* at 442.

impediments for equal enjoyment of rights'.[25] The African Commission goes on to say that such measures must 'tackle stigma, prejudice and violence; leading to the promotion of participation and achievement of structural change of social norms, culture and law'.[26] From this characterisation, it is clear that the objective of the Maputo Protocol is to achieve substantive equality alongside transforming women's status in society. This situates transformation at the centre of the endeavour to accomplish substantive equality.

The concept of 'transformative, substantive equality' has been established by Goldblatt and Albertyn. Although developed within the context of the transformation taking place in South Africa after the fall of apartheid, it equally well defines the Maputo Protocol's approach to transform African women's lives. In this context, transformative, substantive equality means a 'complete reconstruction of the state and society, including a redistribution of power and resources along egalitarian lines'.[27] The challenge of realising gender equality (referred to by Goldblatt and Albertyn as the transformation after Apartheid but equally relevant within the context of gender inequalities in a patriarchal context) involves the 'eradication of systemic forms of domination and material disadvantage based on race, gender, class and other grounds of inequality… [i]t also entails the development of opportunities [that] allow [women] to realise their full human potential within positive social relationships'.[28] Therefore, transformative substantive equality necessitates a concern with 'recognition, redistribution and redress, and an eradication of actual, "real-life" inequalities'.[29] As an example relevant to the discussion in this chapter, the obligations to 'identify the causes and consequences of violence against women' and 'take appropriate measures to prevent and eliminate such violence' in article 4(2)(c) of the Maputo Protocol aim to address inequality in a substantive and transformative manner to target systemic forms of discrimination such as SGBV.

25 African Commission General Comment 6 on the Protocol to the African Charter on Human and Peoples Rights on The Rights of Women in Africa (Maputo Protocol): The Right to Property During Separation, Divorce or Annulment of Marriage (Article 7(D)), adopted during the 27th extraordinary session of the African Commission held in Banjul, The Gambia in February 2020 (General Comment 6) para 14.

26 African Commission General Comment 6 (n 25) para 14.

27 C Albertyn & B Goldblatt 'Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 S*outh African Journal on Human Rights* at 249.

28 Albertyn & Goldblatt (n 27) 249.

29 Albertyn (n 24) 442.

However, as is evident in the analysis in section 3 below, the ECOWAS Court's approach to GBD is a strictly formalistic one, applying the most restrictive form of the sameness/difference test.

3 Rape as an act of gender-based discrimination

How an act of rape is framed within the context of the Maputo Protocol is critical. A failure to define SGBV as an act of GBD violates international law and keeps women's experiences of SGBV outside the realm of state accountability.[30] A successful claim of rape as an act of GBD signals that the state must prevent SGBV and actively engage with the enablers of such discrimination to fulfil its obligations under the Maputo Protocol. It also follows that the remedies invoked will differ considerably from a scenario where the matter is viewed as 'only' a private/criminal matter between two parties without any state involvement. The discussion in the following sections highlights the facts of the two cases in focus. It further points to the drastic reduction in state responsibility that occurs when the grounds for a complaint are not correctly contextualised, framed, analysed, and understood.

3.1 The power of pleadings

In *EI*, the applicant alleged that at the age of 17, she was violently raped by an assailant known to her in Lagos State, Nigeria.[31] A medical examination confirmed that she had been raped, and she subsequently reported the rape to the police. After the police investigated the complaint, the alleged perpetrator was charged with the offence of rape and was arraigned before the Lagos State Magistrate's Court in September 2011. Almost seven years had passed since the case was handed over to the domestic court when the applicant approached the ECOWAS Court, and no conclusion had been reached.[32]

Before the ECOWAS Court, the defence of the respondent state, Nigeria, centred on its lack of responsibility because, in its opinion, none of the officials of any of its institutions had prior knowledge of the rape of the applicant before she was admitted to a state hospital in the aftermath of being raped.[33]

30 Human Rights Council (HRC) Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, (28 May 2014) UN Doc A/HRC/26/38 (2014) at 63.

31 *EI* (n 4) paras 4 & 14.

32 *EI* (n 4) para 77.

33 *EI* (n 4) para 22.

In the judgment, the applicant's narrative starts with a detailed account of the rape and then moves through the various attempts made to obtain justice. She rested her case on, among others, articles 2(1), 3, 4 and 25 of the Maputo Protocol with further reference to articles 1, 2, 5, and 7 of the African Charter.[34] Importantly, she sought four *separate* declarations that Nigeria had violated her right to (i) a fair hearing, (ii) a remedy, (iii) her right to be free from GBD, and (iv) her right to dignity and freedom from ill-treatment.[35]

In *Adama Vandi*, the applicant, Ms Vandi, alleged that in January 2019, her village was raided by hundreds of members of the Poro secret society. The raid was led by the Chief of the society and a masked man referred to as the 'Poro devil'.[36] In the judgment, the Poro society is described as a secret society of the Mende culture, composed of men only. The ceremonies of the Poro society are presided over by a masked man known as the 'Poro Devil'.[37] Women are not allowed to see him. It is believed that women who see the masked man will never be able to bear children. Also, it is believed that if the 'Poro Devil' catches a woman, she will disappear.[38]

On the night in question, the Chief and fifteen of his men invaded Ms Vandi's home. She tried to hide, but the Chief managed to find her and grabbed her. When he tried to forcibly remove her clothes, she resisted. However, he threatened her and told her he was going to bring the 'Poro Devil' into the house. Out of fear of what would happen to her if she encountered the 'Poro Devil', Ms Vandi was coerced by the Chief into allowing him to take her clothes off. The Chief then proceeded to rape her. While he was raping her, the other members of the Poro society guarded the house outside.[39] When the Chief finished raping Ms Vandi, he threatened to kill her if she told anyone that he had raped her. Not discouraged by these threats, Ms Vandi filed a report of the rape. However, the police report gave few details about the rape and trivialised the rape while focusing on the attack on the village.[40]

34 *EI* (n 4) paras 20(i) & (ii).

35 *EI* (n 4) paras 21(i), (ii), (iii), & (iv).

36 *Adama Vandi* (n 4) para 10.

37 *Adama Vandi* (n 4) para 11.

38 *Adama Vandi* (n 4) para 13.

39 *Adama Vandi* (n 4) paras 15-17.

40 *Adama Vandi* (n 4) paras 18-20.

The respondent state Sierra Leone, although duly served with notice, neither contested any of the claims made nor participated in the hearings. The judgment was, therefore, rendered in default.[41]

Similar to the applicant's narrative in EI, Ms Vandi's narrative starts with a recount of the rape and moves on through the various attempts she made to obtain justice. Ms Vandi, taking an approach similar to that of the applicant in *EI*, also rested her case on, amongst others, articles 2(1), 3, 4 and 4(2) of the Maputo Protocol with further reference to articles 1, 2, 5, and 7 of the African Charter.[42] She furthermore specifically referred to General Recommendation 19.[43] In addition, Ms Vandi sought the same four separate declarations as the applicant in *EI*.[44]

3.2 The mischaracterisation of the act of gender-based discrimination

In *EI and Adama Vandi*, the claims of GBD and violations of the right to dignity were imputed by the Court to the failure of the state to stage a fair trial, to provide access to justice and an appropriate remedy.[45] In *EI,* the violations were framed in the following way:

> The Applicant contends that by virtue of the failure to conduct a speedy and effective trial against the perpetrator of the sexual violence she suffered, the Respondent is legally responsible for violation of her right to dignity, to a fair hearing, to remedy, freedom from cruel, inhuman or degrading treatment, freedom from discrimination as guaranteed under the relevant human right instruments.[46]

Similarly, in *Adama Vandi*, the plea is described in the following way:

41 *Adama Vandi* (n 4) para 27.

42 *Adama Vandi* (n 4) para 24.

43 *Adama Vandi* (n 4). In para 24 of the case, reference is made to General Recommendation 9 of the CEDAW Committee. But as General Recommendation 9 refers to statistical data concerning the situation of women this reference must be understood to refer to UN Committee on the Elimination of Discrimination Against Women (CEDAW Committee) General Recommendation 19: Violence against women, 1992, UN Doc A/47/38 (General Recommendation 19).

44 *Adama Vandi* (n 4) paras 26(i), (ii) & (iii).

45 In attempting a feminist reading of this jurisprudence, it is, as a point of departure, important to note that the only information available for analysis is the final judgment of the Court. The separate pleadings of the applicants are not accessible through the Court's official website, and thus, the framing of the issues such as they are presented in the respective judgments, was the basis for the analysis.

46 *EI* (n 4) para 5.

> [T]he Applicant contends that, by failing to investigate the facts relating to the sexual assault of which she was a victim, in order to allow the perpetrator to be prosecuted and tried, the Respondent has become liable for the violation of her human rights, namely the right to a remedy and access to justice, not to be discriminated against and not to be offended in her dignity and not to be subjected to cruel and degrading treatment.[47]

However, as discussed above, the scope of the narratives arguably provided an opportunity for the Court to frame these issues differently.[48] Such a reading would have been possible based on the four separate grounds provided for in the applications related to the facts of the cases, which did not only relate to a violation of the applicant's rights to a fair trial and of access to justice. In *Adama Vandi*, the applicant narrates that she,

> [c]ame to plead violation of her human rights, namely the right to a remedy and access to justice, the right not to be subjected to discrimination, the right to dignity and not to be subjected to cruel, inhuman or degrading treatment, alleging that on January 26, 2019, Subu Village of Nongoba-Bulum Chiefdom in Bonthe District was invaded at about 1 am by about five hundred (500) members of the Poro secret society; that the Sovereign Chief who led the invasion, Chief [XX], invaded the home of the Bondo Society together with about fifteen men, where Adama Vandi was staying and the one forcibly raped her and she made an official report of the crime to the police, that however, to date the Paramount Chief has not been prosecuted for raping Adama Vandi.[49]

The applicant in *EI* describes that,

> [s]he was violently raped by one [XX] on 20th August 2011 at Olokonla Area of Lagos State, Nigeria at the age of 17 years…. on that day, she had gone to see [XX] to collect some money for her elder sister. While discussing with him at a roadside, [XX] and eight other accomplices dragged her forcefully to a wooden building where she was forcefully and violently raped by [XX], after tearing her entire clothes. She stated that after the rape, [XX] warned her not to tell anyone else he would send kidnappers to kidnap her.[50]

Ms Vandi describes her rape as part of a pervasive patriarchal cultural practice where 15 men were witnessing her rape without coming to her assistance. At the same time, the applicant in *EI* narrates a scenario where she, in broad daylight, in a densely populated area in Lagos State, is raped.

47 *Adama Vandi* (n 4) para 62.

48 See sec 3.1.

49 *Adama Vandi* (n 4) para 4.

50 *EI* (n 4) para 14.

In comparison, at least eight other men witness the rape equally without coming to her assistance.

These acts took place within a specific context, a context where the respective states had acknowledged the endemic nature of SGBV.[51] With this context in mind, it was arguably possible for the Court, based on the narratives and the additional grounds presented by the applicants, to pinpoint other violations than those of the rights to a fair trial, access to justice and a remedy. In this regard, it is of specific interest to note that in the *EI* and *Adama Vandi* cases, the applicants specifically requested the Court to adjudicate and declare that the SGBV they had been subjected to amounted to GBD, and they provided the legal grounds thereof. They also referred to violations of their rights to dignity and freedom emanating from the cruel, inhumane, and degrading treatment (ill-treatment). Neither of these grounds was arguably necessary to substantiate the argument that the state had not upheld its obligation to provide a fair trial and access to justice. In fact, if strictly arguing for a violation of their fair trial rights and the right of access to justice, these grounds would only have complicated the applicants' pleadings. Thus, it is of interest to analyse the victims' arguments and the Court's reasoning further.

Violations of the rights to a fair trial and of access to justice can arguably be justified merely on the facts of the case, such as a *prima facie* violation brought together with a claim of a prolonged procedure,[52] as in *EI*, or the failure to initiate criminal procedures[53] as in Ms Vandi's case. Such a case can be brought regardless of the gender of the victim and the nature of the act that led a victim to rely on the justice system. The applicants presented clear evidence that the justice system had failed them; however, they never argued that it had failed them because they were women. Had this been the intention of the victims, they would arguably have presented some evidence as to how the discrimination based on their gender took place; they did not.

Although gender stereotypes and biases often negatively influence how victims of SGBV are treated by the justice system, the GBD, the victims in these cases, argued for was related to the act of rape they had been subjected to, not how the justice system perceived or received them.[54]

51 See sec 4.2.

52 As a violation of art 7(1)(a) of the African Charter to have her cause heard.

53 As a violation of arts 1 & 7(1)(a) of the African Charter, art 2(3a) of the CCPR, and art 25 of the Maputo Protocol of the rights to a remedy and access to justice.

54 For a further discussion on judicial stereotyping, see S Cusack 'Eliminating judicial stereotyping: Equal access to justice for women in gender-based violence cases'

This is not to say that these victims were not subjected to GBD in their encounters with the justice system, but rather, as such discrimination is inherently difficult to prove, the victims presented claims that the rapes were acts of GBD in themselves.

Before the approach of the ECOWAS Court to GBD in the *EI* and *Adama Vandi* cases is further explored, the following section presents a brief precursory discussion on how the Court approached claims of GBD in cases involving SGBV prior to its engagements in the aforementioned *cases* so as to further contextualise its methods.

3.3 Sexual and gender-based violence as gender-based violence – a precursory discussion

Before its engagements in the *EI* and *Adama Vandi* cases, the ECOWAS Court had heard two landmark cases where the issue of SGBV as GBD arose. The applicants in *Mani Koraou*[55] and *Mary Sunday*[56] had both requested the Court to classify the abuse they had endured as GBD attributable to the state; the Court declined both requests.

In the *Mani Koraou* case, the applicant, Ms Koraou, was sold at the age of 12 to a 46-year-old tribal Chief to become his fifth wife under a local custom.[57] The applicant spent nine years of her life as a sexual and domestic slave.[58] In the *Mary Sunday* case, Ms Sunday suffered a brutal attack on her life in her home by her fiancé, which left her disabled and with little opportunity to work.[59]

In the *Mani Koraou* case, the ECOWAS Court held that although the applicant was subjected to a misogynistic custom that the state was well aware of, the Court viewed this part of Ms Koraou's claim as a strictly private matter. Notwithstanding the fact that Ms Koraou had spent nine years in sexual servitude, that the state knew of such practices and that Ms Koraou had repeatedly attempted to seek justice without success, the

OHCHR, 9 June 2014, https://www.ohchr.org/Documents/Issues/Women/WRGS/StudyGenderStereotyping.doc (accessed 27 April 2023).

55 *Hadijatou Mani Koraou v The Republic of Niger* ECW/CCJ/JUD/06/08 (2008). There is no official English version available of this case. Therefore, the unofficial translation of the original French text provided by INTERIGHTS was used in this analysis.

56 *Mary Sunday v Nigeria* ECW/CCJ/JUD/11/18 (2018). There is no official English version available of this case. Therefore, the author relied on the original French text and her own translation of the original text in this analysis.

57 *Mani Koraou* (n 55) para 8.

58 *Mani Koraou* (n 55) para 12.

59 *Mary Sunday* (n 56) para II.

Court found that while Ms Koraou was discriminated against, this action was not attributable to the state, but only to the non-state actor and as such no claim of GBD was actionable.[60]

Ten years later, in 2018, the Court took the same approach in the *Mary Sunday* case. On Ms Sunday's claim that she had suffered GBD, the Court held that such an offence must refer to 'one or more acts directed against the female sex, at least against a category of people determined by their affiliation to the female sex'.[61] In other words, the facts must be endowed with a certain generality and a certain systematicity that makes asserting their deliberately discriminatory character possible. Based on this, the Court found that as the facts of the case 'remain[ed] confined to a private, family sphere', those actions 'did not present any "general" or systematic character'.[62] It added that the facts of the case apply 'to a person, not to a "genre", a concept that by definition includes a plurality'.[63] The ECOWAS Court concluded that the 'strictly private nature of the acts criticised, the very framework of their commission – the home of the couple – forbid any connection with the public power'.[64] These conclusions evidently do not consider the common approach in international human rights law that qualifies all acts of SGBV as acts of GBD.[65]

3.4 The power of framing and attribution of legal issues

In returning to the Court's approach to the claims of GBD in the *EI* and *Adama Vandi* cases, two inter-linked issues are noticeable: first that GBD, while not being a self-standing violation, is wrongfully imputed to the claim of a violation of the rights to a fair trial and of access to justice; and while a substantial and transformative equality test should have been applied, as was argued under 2, the Court applies a formal equality test which narrows the test to a question of whether the victims could prove

60 *Mani Koraou* (n 55) para 71.

61 *Mary Sunday* (n 56) para IV 4.

62 *Mary Sunday* (n 56) para IV, pp 4-5.

63 *Mary Sunday* (n 56) para IV, p 5.

64 *Mary Sunday* (n 56) para IV, p 5.

65 General Recommendation 19 (n 43); UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General recommendation 35 on gender-based violence against women, updating General Recommendation 19, 26 July 2017, UN Doc CEDAW/C/GC/35 (General Recommendation 35); Communication 2/2003, *AT v Hungary* CEDAW Committee (26 January 2005); Communication 5/2005, Şahide *Goekce v Austria* CEDAW Committee (6 August 2007) UN Doc CEDAW/C/39/D/5/2005 (2007); and Communication 6/2005, *Fatma Yildirim v Austria* CEDAW Committee (1 October 2007) UN Doc CEDAW/C/39/D/6/2005 (2007).

that the group of 'women' was disadvantaged in the legal systems of the respective states. Notwithstanding the fact that the arguments presented by Ms Vandi were more elaborate in terms of what constituted the act of GBD, the result of the Court's analysis is the same.[66]

In the *EI* case, the Court departs from the idea that the applicant is claiming that the state has failed to 'conduct effective and speedy trial against her perpetrator' and that this 'violates her right of freedom from discrimination'. From this point of origin, the Court then proceeds to set out the legal test for such discrimination, indicating that 'it must be proven that the Applicant has been treated differently in the same analogous situation with another person in similar circumstances or same situation'.[67] In applying this test, the Court concludes that the applicant in *EI* was not able to:

> [S]ubstantiate that the alleged delay in the handling of her case speedily is peculiar to only her compared to other litigants of the same predicament of rape and similar sexual violence cases in the Respondent's courts to justify the allegation of discrimination on any ground.[68]

Therefore, the Court concludes that the claim of GBD 'fails on the basis that it has not been substantiated in view of the available evidence'.[69]

From the submissions made in the *Adama Vandi* case, it is clear that she presented a much broader argument on SGBV. She argued that the SGBV she suffered 'qualifie[d] as gender-based violence and gender-based discrimination' and that although the SGBV she suffered was 'perpetrated by a non-state actor, the state is responsible for the lack of due diligence on its part to prevent the violation'.[70] In her submissions, she invoked that 'rape and sexual violence constitute gender violence, that is, violence against a woman because she is a woman, or that affects women disproportionately'; and that sexual violence, such as the rape she suffered, is directed against women in the vast majority of cases.[71]

Notwithstanding these critical arguments, the Court misses the point that the SGBV experienced substantiates the claim of GBD. Instead, it

66 *EI* (n 4) XII Operative clause para (iv); *Adama Vandi* (n 4) XIV Operative clause para 159 (iv).

67 *EI* (n 4) para 54.

68 *EI* (n 4) para 62.

69 As above.

70 *Adama Vandi* (n 4) paras 92 & 93.

71 *Adama Vandi* (n 4) para 95.

proceeds to investigate the claim of GBD concerning the state's alleged failure to effectively investigate the SGBV to prosecute and punish the abuser. From this point on, the Court applies the same test as in the *Mani Koraou*, *Mary Sunday* and *EI* cases. Relying on its findings in the *Mary Sunday* case, as referred to above, as well as its conclusions in the *Dorothy Njemanze* case[72] that only 'a systematic operation directed against only the female gender furnished evidence of discrimination', the Court notes that Ms Vandi did not 'allege or demonstrate that the Police Department failed to investigate and prosecute the complainant for the alleged rape because the complainant was a woman and that such a position was taken generally and systematically whenever the victim was female'.[73] The Court further noted that Ms Vandi also failed to make any

> comparison of her case with that of another person involved in the same or similar situation of rape or victim of sexual crimes, who has been treated differently by the Respondent, to her disadvantage, so as to justify the allegation of discrimination.[74]

Therefore, the Court finds that the allegation of a violation of a right not to be subjected to GBD is 'unfounded as not proven'.[75]

4 Rape as a violation of the Maputo Protocol

As part of a broader approach by international human rights law, the Maputo Protocol provides a substantial, primary legal basis for state responsibility for acts of SGBV. It carries with it a threefold obligation on behalf of state parties to *prevent* SGBV in the public and private sphere, to *regulate* and *control* state and private actors, and to *investigate* violations, *punish* perpetrators and *provide effective remedies* to victims of SGBV.[76] The following discussion situates the act of rape as a violation of international human rights law generally and as a violation of the Maputo Protocol specifically. It further highlights the obligation to prevent SGBV under the Protocol.

72 *Dorothy Chioma Njemanze & 3 Ors v Federal Republic of Nigeria* (*Dorothy Njemanze*) ECWICCJ/JUD/08/17.

73 *Adama Vandi* (n 4) para 114.

74 *Adama Vandi* (n 4) para 115.

75 *Adama Vandi* (n 4) para 116.

76 DH Chirwa 'The doctrine of state responsibility as a potential means of holding private actors accountable for human rights' (2004) *Melbourne Journal of International Law* 4.

4.1 Rape narratives in international law: 'conflict', 'torturous' and 'everyday' rape

Rape is characterised and treated differently depending on the context in which it is committed. In some contexts, state responsibility is more easily established than in others. With regard to rape as a violation of international law, two main perspectives, or narratives, exist: The occurrence of rape in conflict situations (generally state guided), where for example, the United Nations Department of Political and Peacebuilding Affairs' Women, Peace and Security Policy refers to rape as a 'tactic of war';[77] and the occurrence of rape in 'everyday life' (generally not state guided). This terminology arguably heightens the perceived impact of conflict rapes and thus state responsibility for such rapes, while lessening the same in relation to 'everyday' rape. In between these two characterisations, the development of rape as a form of torture or ill-treatment can be located.[78]

These classifications carry with them a label of gravity: the highest level of gravity is awarded to 'conflict' rape and, in descending order, rape as 'torture' or 'ill-treatment' and 'everyday' rape. With regard to 'conflict' rape, liability is sought through the application of individual criminal liability; while rape as a form of 'torture', 'ill-treatment' and 'everyday' rape as violations of human rights law rely on attaching responsibility for the rape to a state. As acts of rape in the latter contexts are more often than not committed by non-state actors such responsibility is heavily reliant on the due diligence principle.[79]

4.2 Rape as a 'grave, systematic and widespread' violation of human rights

The Special Rapporteur on Violence against Women (Special Rapporteur on VAW) frames rape as a 'grave, systematic and widespread human rights violation, a crime and a manifestation of gender-based violence against women and girls'.[80] She further concludes that rape is the most common and widespread violation of the rights to 'bodily integrity, the rights to autonomy and to sexual autonomy, the right to privacy, the

77 United Nations Department of Political and Peacebuilding Affairs' Women, Peace and Security Policy June 2019, https://dppa.un.org/sites/default/files/190604_dppa_wps_policy_-_final.pdf (accessed 27 April 2023) 2.

78 See sec 4.4.

79 See sec 5.4.

80 Report of the special rapporteur on violence against women (VAW), its causes and consequences, Dubravka Šimonović, *Rape as a grave, systematic and widespread human rights violation, a crime and a manifestation of gender-based violence against women and girls, and its prevention*, A/HRC/47/26 para I 1.

right to the highest attainable standard of physical and mental health, women's right to equality before the law and the rights to be free from violence, discrimination, torture and other cruel or inhuman treatment'.[81] Moreover, the Special Rapporteur on VAW has confirmed that the international human rights framework, together with jurisprudence from different international and regional human rights courts recognises that rape is a human rights violation and that it is a manifestation of SGBV, which can amount to torture.[82] This latter statement is important because it acknowledges that any and *every* rape is an act of GBD. It further indicates that there is a threshold to be met for rape to qualify as 'torture' or 'ill-treatment'.[83]

To briefly contextualise this in relation to the cases under purview, in 2021, Amnesty International reported that '[r]ape continues to be one of the most prevalent human rights violations in Nigeria'.[84] Similarly, with reference to Sierra Leone, it was reported that SGBV against women and girls is pervasive.[85] Emphasising this crisis, both governments declared 'a State of Public Emergency over rape and sexual violence', which affects tens of thousands of women and girls in these countries each year.[86] In 2020 Nigeria's National Human Rights Commission received 11 200 reported cases of rape.[87] While in Sierra Leone, the Rainbo [sic] Initiative

81 Report of the Special Rapporteur on VAW (n 80) para II A 20.

82 Report of the Special Rapporteur on VAW (n 80) para I B 9.

83 See sec 4.4.

84 Amnesty International 'Nigeria: Failure to tackle rape crisis emboldens perpetrators and silences survivors' https://www.amnesty.org/en/latest/news/2021/11/nigeria-failure-to-tackle-rape-crisis-emboldens-perpetrators-and-silences-survivors/ (accessed 27 April 2023).

85 Amnesty International 'Sierra Leone: Rape and murder of child must be catalyst for real change' https://www.amnesty.org/en/latest/news/2020/06/sierra-leone-rape-and-murder-of-child-must-be-catalyst-for-realchange/#:~:text=Sexual%20violence%20against%20women%20and,over%20rape%20and%20sexual%20violence%E2%80%9D (accessed 27 April 2023)

86 Amnesty International Nigeria (n 84); Amnesty International Sierra Leone (n 87). On 19 February 2019, President Bio of Sierra Leone declared a State of Public Emergency over rape and sexual violence. The announcement came amid growing outrage following a series of cases involving minors. On 19 June 2019, the Parliament revoked the measure.

87 National Human Rights Commission, 2020 Annual Report at 53.

reported 3292 cases of SGBV in 2021.[88] However, as is common cause, acts of rape are most often seriously under-reported due to, amongst others, stigma and victim blaming. As a relevant example, the Human Rights Committee (HRC) has expressed concern over the low level of reporting of SGBV in Nigeria. The HRC pointed to factors such as a 'culture of silence perpetuated by persistent societal stereotypes; the lack of prompt and effective investigations of such cases; the low level of prosecution and conviction of perpetrators; and the insufficient level of assistance for victims'.[89] Thus, although the above-cited figures are alarmingly high, they do not reflect the number of rapes that occur daily in these countries and elsewhere.

4.3 Rape as a violation of the Maputo Protocol

As has already been referred to, any analysis of the prohibition of SGBV under international law must commence from an understanding that SGBV is a form of GBD. The Committee on the Elimination of Discrimination Against Women (CEDAW Committee) cemented this understanding more than 30 years ago.[90] General Recommendation 19 confirms that '[g]ender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men'.[91] This definition includes rape.[92] Moreover, the Special Rapporteur on VAW confirmed this, defining rape as 'a manifestation of gender-based violence'.[93]

Discrimination against women is defined in article 1(f) of the Maputo Protocol.[94] When classifying SGBV as a form of GBD, this comprehensive definition, read together with article 2, activates detailed state obligations, including the obligation to 'prevent'. Furthermore, the Maputo Protocol presents a comprehensive set of rights and obligations created to protect women against different forms of SGBV. Article 1(j) defines violence

88 Rainbo Initiative https://rainboinitiative.org/wp-content/uploads/2022/01/Rainbo-Centre-GBV-Data-2021.pdf (accessed 27 April 2023).

89 UN Human Rights Committee (HRC), Concluding observations: Nigeria (29 August 2019), UN Doc CCPR/C/NGA/CO/2 para 20.

90 General Recommendation 19 (n 43) as reconfirmed in General Recommendation 35 (n 65).

91 General Recommendation 19 (n 43) para 1.

92 General Recommendation 19 (n 43) paras 11-12.

93 Report of the Special Rapporteur on VAW (n 80) para 1.

94 GBD is defined as 'any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life'.

against women. This definition importantly does not distinguish between SGBV committed in private or in public. It prohibits all acts of violence, sexual or non-sexual, everywhere, at all times.[95] This approach is carried through articles 3, 4, 5, 11, 20, 22 and 23, which provide substantial protection against violence and, as mentioned under 2, situates violence within the everyday experiences of African women.[96]

Relevant to the cases in focus, article 3 of the Maputo Protocol stipulates that '[e]very woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights'. Article 3(4), as specifically referred to by the victims in the *EI* and *Adama Vandi* cases, furthermore links dignity with freedom from violence by obligating states to 'adopt and implement appropriate measures to ensure the protection of every woman's right to respect for her dignity and protection of women from all forms of violence, particularly sexual and verbal violence'.

Article 4(1) furthermore establishes that every woman is entitled to 'respect for her life and the integrity and security of her person'. Article 4(2)(c) obligates states to 'identify the causes and consequences of violence against women and take appropriate measures to *prevent and eliminate* such violence'.[97] In lieu of the discussion on the remedies below, it is furthermore important to highlight the provision in article 4(2)(d), as reiterated in article 5(a), to 'actively promote peace education through curricula and social communication in order to eradicate elements in traditional and cultural beliefs, practices and stereotypes which legitimise and exacerbate the persistence and tolerance of violence against women'. These key obligations can only be implemented through the provision in article 4(2)(i): to 'provide adequate budgetary … resources for the implementation and monitoring of actions aimed at *preventing and eradicating* violence against women'.[98] The latter provision is intimately linked with article 26(2), which provides that member states must 'provide budgetary and other resources for the full and effective implementation of the rights'. The reference to

95 Violence against women is defined as 'all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peacetime and during situations of armed conflicts or of war'.

96 For a further discussion on the intersectionality approach of the Maputo Protocol see A Rudman 'A feminist reading of the emerging jurisprudence of the African and ECOWAS courts evaluating their responsiveness to victims of sexual and gender-based violence' (2020) 31 *Stellenbosch Law Review* 429.

97 My emphasis.

98 My emphasis.

'full' and 'effective' in article 26(2) also supports the idea of substantial transformative equality as discussed in section 2.

4.4 Rape as torture, cruel, inhuman and degrading treatment

Both the applicant in *EI* and Ms Vandi brought forward a claim that what they had been subjected to amounted to ill-treatment in violation of their human dignity. The applicant in *EI* sought a general declaration from the Court that Nigeria was responsible for these violations under article 5 of the African Charter,[99] while Ms Vandi alleged that Sierra Leone, by virtue of the failure to effectively investigate and prosecute the perpetrators of rape and other acts of violence, inflicted against her, was liable for the violations.[100] However, in addition, Ms Vandi importantly stated that the 'sexual abuse she suffered constitutes torture, cruel, inhuman and degrading treatment since it consisted of so much physical and emotional pain and suffering',[101] directly linking this violation to the act of rape.

The international legal concepts of torture and ill-treatment are made up of two distinct components, a 'substantive' and an 'attributive'. The 'substantive' component describes the conduct that amounts to torture or ill-treatment. The 'attributive' component specifies the degree of state involvement in torture or ill-treatment to incur state responsibility. International human rights law widely recognises that 'ill-treatment at the hands of private perpetrators can trigger a wide range of positive state obligations'.[102] The substantive aspect of torture and ill-treatment is discussed in this section, while the attributive aspect is discussed in section 5.

The right to be free from torture or ill-treatment is often clustered together with the right to dignity, as in article 5 of the African Charter and the right to security, as in article 4 of the Maputo Protocol. These rights are often collectively referred to as 'integrity rights'.[103] Different from other

99 *EI* (n 4) para 40.

100 *Adama Vandi* (n 4) para 117.

101 *Adama Vandi* (n 4) para 118.

102 UNGA Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on '*Relevance of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment to the context of domestic violence*' A/74/148 (12 July 2019), para II-A 6.

103 NS Rodley 'Integrity of the person' (2018) 3 *International Human Rights Law* 174.

rights, these rights can never be restricted, and states cannot derogate from these rights in times of public emergency.[104]

The key features of article 4, for the purpose of an analysis of state responsibility for acts of rape of non-state actors, were set out above. In this section, the focus is on the specific application of article 4 in cases of rape, where rape is defined as an act of torture or ill-treatment.

Article 4(1) stipulates that '[e]very woman shall be entitled to respect for her life and the integrity and security of her person … [a]ll forms of exploitation, cruel, inhuman or degrading punishment and treatment shall be prohibited'. In this regard, it is important to note that unlike other human rights treaties, such as the Universal Declaration,[105] ICCPR,[106] Convention Against Torture (CAT)[107] and the African Charter,[108] article 4(1) of the Maputo Protocol does not reference 'torture' in the framing of the integrity rights. This is an outcome of the fact that torture is primarily understood as violations 'committed by public officials or other person acting in an official capacity', which is generally for the purposes of extracting information. While women experience violence in such circumstances[109], this framing captures violations that men are more likely to experience in the public sphere: as prisoners of war or in police custody. Women, as in the cases discussed in this chapter, are more likely to suffer SGBV, which, if passing the threshold for such acts, is defined as either torture or ill-treatment at the hands of non-state actors.[110]

The Committee Against Torture has, importantly, contributed to expanding the meaning of torture and ill-treatment to better apply to women's lived experiences. In this regard, it has been confirmed that state responsibility ensues where:

> State authorities or others acting in official capacity know or have reasonable ground to believe that acts of torture or ill-treatment are being committed by

104 *Article 19 v State of Eritrea* Communication 275/2003, [2007] ACHPR 79, 30 May 2007; see also *Selmouni v France* (2000) 29 EHRR 403. For further discussion see N Mavronicola 'Is the prohibition against torture and cruel, inhuman and degrading treatment absolute in international human rights law? A reply to Steven Greer' (2017) 17 *Human Rights Law Review* 479-498.

105 African Charter art 5.

106 African Charter art 7.

107 African Charter art 1.

108 African Charter art 5.

109 Women may be tortured via rape or threats of rape. Also, their rape, or threat of rape may be used to obtain information from associated persons.

110 C Benninger-Budel *Due diligence and its application to protect women from violence* (2008) 4.

> non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute, and punish such non-State officials or private actors.[111]

The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (Special Rapporteur on Torture) has provided important input on the relevance of the prohibition of torture and ill-treatment in the context of SGBV. In the view of the Special Rapporteur on Torture, any form of SGBV 'constitutes cruel, inhuman or degrading treatment or punishment, and amounts to torture when it intentionally inflicts severe pain or suffering on a powerless person for purposes such as obtaining information, coercion, punishment or intimidation, or for any reason based on discrimination of any kind, including mere sexual or sadistic gratification or unequal gender power relations'.[112] To this end, the Special Rapporteur on Torture sets out that under articles 2 and 16 of CAT:

> States must take effective legislative, administrative, judicial or other measures to prevent acts of torture or ill-treatment in any territory under their jurisdiction …[f]ailure to exercise due diligence to prevent, investigate, prosecute and redress torture and ill-treatment by private perpetrators, including in the context of domestic violence, amounts to consent or acquiescence in torture or ill-treatment.[113]

Moreover, referring to CAT General Comment 2, the Interim Report of the Special Rapporteur on Torture confirms states' due diligence obligations to 'prevent, investigate, prosecute and punish acts of torture or other cruel, inhuman or degrading treatment by non-State actors, including gender-based violence, such as rape'.[114]

In the two cases under purview, it is clear that the right to be free from torture finds no application. However, both applicants referred to the fact that the rape they had suffered constituted ill-treatment. The analysis in section 5 further traces the Court's findings with regard to the

111 UN Committee Against Torture, General Comment 2: Implementation of article 2 by states parties (CAT General Comment 2), 24 January 2008, UN Doc CAT/C/GC/2 para 18.

112 UNGA Interim report of the Special Rapporteur on torture (n 102) para 31.

113 UNGA Interim report of the Special Rapporteur on torture (n 102) para 22, referring to CAT General Comment 2 (n 111) para 18.

114 UNGA Interim report of the Special Rapporteur on torture (n 102) para 22, referring to CAT General Comment 2 (n 111) paras 18 & 19.

responsibility of the respective states for the ill-treatment of the applicant in *EI* and Ms Vandi.

4.5 Reparations targeted at systematic failures conditioning rape

Classifying rape as a systematic violation of human rights does not only have a bearing on states' obligation to 'prevent', but also on the reparations awarded. Reparation can take many different forms and includes restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[115] When adequate reparations measures are ordered, they can assist victims in coping with the tangible effects of the violation.[116] As suggested by Rubio-Marfn and Sandoval, '[b]ecause some of the effects may be gender-specific, special attention should be given to the need to articulate reparations that do justice to women, avoiding different possible forms of gender bias'.[117]

The African Commission has confirmed that restitutive measures 'aim to put the victim back to the situation they were in before the violation'.[118] However, where the cause of the violation is systematic in nature, such as the rapes discussed in this chapter, this approach may not result in the repair of the harm or injury caused by the violation. In such cases, the African Commission has importantly provided that 'where the violation results from the victims' position of vulnerability and marginalisation which predated the violation, restitutive measures shall be complemented by measures designed to address the structural causes of the vulnerability and marginalisation, including any kind of discrimination'.[119] Thus, a distinction must be drawn between individual reparations and reparations targeted at systematic failures.[120]

115 African Commission General Comment 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5), adopted during the 21st extra-ordinary session of the African Commission, held in Banjul, The Gambia, from 22 October to 5 November 2013. (African Commission General Comment 4) para 10.

116 R Rubio-Marfn & C Sandoval 'Engendering the reparations jurisprudence of the Inter-American Court of Human Rights: The promise of the Cotton Field judgment' (2011) 33 *Human Rights Quarterly* at 1070.

117 Rubio-Marfn & Sandoval (n 116) at 1070.

118 African Commission General Comment 4 (n 115) para 36.

119 As above.

120 Ibanez (n 13) 54.

Reparations targeted at systematic failures aim to guarantee non-repetition of the violation.[121] As substantiated under 2, the Maputo Protocol is transformative in nature.[122] Therefore, reparation for a violation of the Maputo Protocol should not aim to return victims to a position that predated the violation.[123] The facts that result in a violation, as in the *EI* and *Adama Vandi* cases, are often indicators of the root causes of discrimination, such as negative stereotypes or harmful cultural practices.[124] Reparative measures will not serve their purpose if they merely restore the circumstances that perpetuated the initial violation without addressing these root causes.[125] Meeting the requirements of the Maputo Protocol, therefore, requires that restitutive measures address the enablers of discrimination and are thus determined with a gendered lens.

As an example, Ms Vandi sought an order requiring Sierra Leone to adopt the 'necessary legislative, administrative, social and economic resources to ensure the protection, punishment and eradication of all forms of sexual violence against women' and to further 'provide support services to victims of sexual violence against women, including information, legal services, health services, and counselling'.[126] The Court concluded that it found 'the scope of these requests … outside the scope of [the] human rights effectively violated'.[127] Further, the Court found that Sierra Leone did not lack the legislative, administrative, social and economic resources necessary to ensure the protection, punishment and eradication of all forms of sexual violence against women and that it did provide support services to victims of SGBV.[128] This conclusion was based upon the fact that the victim had 'admitted that she received medical care at the Rainbo [sic] Center an entity that provides medical services to victims of sexual or gender-based violence'.[129] The Rainbo Centre is a Non-governmental Organisation supported by the Government of Sierra Leone, local authorities, donors, partner NGOs and supporters.[130]

121 As above.

122 See Chapter 9 for a discussion on the transformative goal of the Maputo Protocol and attaining substantive equality for women in Africa.

123 Rubio-Marfn & Sandoval (116) 1070.

124 As above.

125 As above.

126 *Adama Vandi* (n 4) para 26 (v) & (vi).

127 *Adama Vandi* (n 4) para 151.

128 *Adama Vandi* (n 4) para 152.

129 *Adama Vandi* (n 4) para 153.

130 Rainbo Initiative https://rainboinitiative.org/history/ (accessed 27 April 2023).

The Court's conclusion on this request for remedies is problematic from two perspectives: On the one hand, in only viewing the violations as one isolated act against the victim herself and not classifying these as GBD, the Court failed to see the systemic issues involved in the matter and thus failed to order the appropriate remedies. On the other hand, the fact that the victim was cared for by an NGO and not a state institution should have been an indication in itself that the state lacked the legislative, administrative, social and economic resources needed in support of Ms Vandi's claim to further the protection of other survivors of SGBV.

5 State responsibility for rape as a violation of the rights to dignity and freedom from cruel, inhuman or degrading treatment

The analysis in this pre-final part importantly focuses on the attribution of state responsibility for acts of rape by non-state actors in relation to claims of violations of dignity and freedom from ill-treatment. Without a link between an act or omission and the state attributing the harm caused, victims will have no redress for their sufferings. This discussion is based on the substantive and transformative approach to equality discussed in section 2 and the qualification of rape as a human rights violation, as discussed in sections 3 and 4. This analysis specifically explores the importance of the responsibility to 'prevent' in the context of SGBV, an obligation specifically detailed in section 4.4.

5.1 State responsibility for cases of rape by non-state actors – a precursory discussion

Article 12 of the ILC Draft Articles determines that there is a breach of an international obligation when an act of the state 'is not in conformity with what is required of it by that obligation, regardless of its origin or character'. In the *Gabčíkovo-Nagymaros Project* case, the International Court of Justice (ICJ) confirmed that 'when a State has committed an internationally wrongful act, its international responsibility is likely to be involved whatever the nature of the obligation it has failed to respect'.[131] Similarly, in the *Rainbow Warrior* case, the International Arbitration Tribunal, led by the UN Secretary-General, held that 'any violation by a state of any obligation, of whatever origin, gives rise to state responsibility and consequently, to the duty of reparation'.[132] Thus, it is possible to conclude that any violation of an international obligation, including a violation of the state obligations invested in the Maputo Protocol, will

131 *Gabčikovo-Nagymaros Project case, Hungary v Slovakia* [1997] ICJ Rep 92 para 47.

132 *Case of New Zealand v France, United Nations* (1990) 20 RIAA 217 251 para 75.

give rise to state responsibility if the criteria in the ILC Draft Articles are fulfilled. These criteria are set out and discussed below.[133]

Key to unlocking state responsibility, especially in SGBV cases, as is further argued in this section, is to appropriately understand states' obligations under international treaties such as the Maputo Protocol. The ECOWAS Court in *EI* and *Adama Vandi* wrongfully departed from the idea that the respective states only had obligations to *apprehend*, *investigate* and *prosecute* the alleged offender, rendering a breach of the rights to dignity and freedom from ill-treatment possible only if the state had not *apprehended*, *investigated,* and *prosecuted* the alleged offender. This was the faith of the pleadings of the applicant in *Adama Vandi*. The analysis in this section, however, shows that the state obligation under the relevant provisions in the Maputo Protocol, as discussed in section 4, also includes a broad obligation and, thus, a responsibility to *prevent* acts of SGBV.

When there is an obligation to 'prevent' this has a direct effect on the commission and attribution of an internationally wrongful act as prevention naturally means some level of foreseeability and the acknowledgement of the risk of harm. The analysis in section 5.3 refers to the discussion in section 3.3 and the characterisation of rape as a grave and systematic violation of international human rights law. Where states have openly acknowledged that SGBV persists as a state of emergency, or where such violence is so frequent that it is reasonable to presume that state authorities are or should be aware of it, acts of SGBV, such as rape, cannot be viewed as singular, isolated events but rather as foreseeable outcomes of a pervasive culture of systemic rapes and as acts of GBD. Thus, states have an obligation to protect individuals within their territories against such known, 'foreseeable' threats. To uphold the obligation to protect, that is, shielding itself from responsibility for an omission to protect, a state must take specific measures to try to prevent women from being raped. In this regard, the principle of due diligence discussed below can be applied to establish the threshold for what can be regarded as reasonable preventative measures within a specific context.[134]

5.2 The International Law Commission's Draft Principles on State Responsibility

The ILC Draft Articles codify the basic rules of international law regarding the responsibility of states for their internationally wrongful acts. It is common cause that the ILC Draft Articles establish secondary

133 See sec 5.2.

134 See sec 5.4.

rules of state responsibility. Thus, the ILC Draft Articles do not elaborate on the material content of international obligations that give rise to state responsibility. This is the function of primary rules, such as the Maputo Protocol, in the context of SGBV meted out on African women within the territory of any of the 44 member states to this treaty.

Article 1 of the ILC Draft Articles stipulates the basic principle that '[e]very internationally wrongful act of a State entails the international responsibility of that State'. The determination of whether an internationally wrongful act exists depends on the requirements of the primary obligation and the conditions for such an act, which mainly relates to the principles of attributability in the ILC Draft Articles.[135] It then follows from article 2 that an internationally wrongful act exists when conduct consisting of an action or omission is attributable to the state under international law and constitutes a breach of an international obligation of that state. The legal test for an 'omission to act' is further set out below.[136] The characterisation of an act of a state as internationally wrongful is, as stipulated under article 3, governed by international law, for example, an international treaty, such as the Maputo Protocol. In this regard, it is important to note that such characterisation is not affected by the characterisation of the same act as lawful by internal law.[137]

As the acts of rape in the *EI* and *Adama Vandi* cases were not directly imputable to the state, as was the case in *Aircraftwoman*,[138] the only way to substantiate state responsibility was through the 'omission to act' provision in article 2. The following section sets out the legal requirements for an omission to act and situate this within the facts of the *EI* and *Adama Vandi* cases.

135 As set out in part 1 of the ILC Draft Articles.

136 See sec 5.3.

137 ILC Draft art 3. This principle is furthermore captured in the Vienna Convention on the Law of Treaties (1969) stipulating in art 27 that, '[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. Art 28 of the ILC Draft Articles, moreover, stipulates that 'the international responsibility of a State which is entailed by an internationally wrongful act in accordance with the provisions of part one [of the ILC Draft Articles] involves legal consequences'. In relation to this, art 34 prescribes that full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination.

138 *Aircraft Woman Beauty Igbobie Uzezi v Federal Republic of Nigeria* ECW/CCJ/JUD/11/21 (2021).

5.3 An 'omission' to act

When conduct consisting of an omission to act is attributable to a state under international law and constitutes a breach of an international obligation of the state, there is a wrongful act which renders reparation necessary. The discussion in section 4 about the state obligations related to rape as torture or ill-treatment clearly showed that 'prevention' is a legal obligation. As averred by the ECOWAS Court, to demand the responsibility of a state by its inaction or omission, 'there must be a known and foreseeable threat for which the state failed to take appropriate steps to avert'.[139] This 'foreseeability' is intimately linked with the principle of due diligence as discussed below.[140]

In *Corfu Channel*, the ICJ held that it was a sufficient basis for state responsibility that the state knew, or must have known, of the presence of the mines in its territorial waters and did nothing to warn third states of their presence'.[141] In the *United States Diplomatic and Consular Staff* case, the ICJ similarly concluded that the responsibility of Iran was entailed by the 'inaction' of its authorities, which 'failed to take appropriate steps' in circumstances where such steps were evidently called for.[142] The European Court of Human Rights (European Court) have similarly concluded under Article 2 of the ECHR that a failure to protect against a known and foreseeable threat to life entailed responsibility for the loss of life.[143]

5.4 Responsibility to act with due diligence to prevent rape

To *prevent* something is essentially the act of stopping something negative or bad from happening.[144] In both the *EI* and *Adama Vandi* cases, the ECOWAS Court makes reference to the definition of the obligation to *prevent* as the obligation of the state to 'carry out an effective investigation into acts amounting to human rights violations, intending to prosecute the perpetrators and redress the victims'.[145] None of these measures has as its objective to stop SGBV from happening, and thus, as a first reflection, these are not preventative measures *per se* but measures that are there to, at best, limit the further sufferings of survivors of SGBV.

139 *EI* (n 4) para 49.

140 See sec 5.4.

141 *Corfu Channel Case (United Kingdom v Albania) (merits)* [1949] ICJ Rep 244 paras 22-23.

142 *Case Concerning United States Diplomatic and Consular Staff in Tehran* (*United States of America v Iran*) [1981] ICJ Rep 45 paras 63 & 67. See also *EI* (n 4) para 47.

143 *Case of T v Russia* Application No 2656/07 (2017) EHRR 206, para 611.

144 Oxford English Dictionary.

145 *EI* (n 4) para 67. See also *Adama Vandi* (n 4) para 86.

This section further elaborates on the obligation to *prevent* and shows that the measures involved reach far beyond the fair trial and access to justice-related aspects of prevention in cases of SGBV.

The due diligence standard gives guidance to establish state responsibility when a state has failed to act in relation to acts of SGBV committed by non-state actors. The Niamey Guidelines were adopted by the African Commission on Human and Peoples' Rights in 2017. The goal of the Niamey Guidelines is to guide and support member states of the AU in effectively implementing their obligations to combat sexual violence. Thus, these principles are essential to state parties in their implementation of the African Charter and the Maputo Protocol. The Niamey Guidelines stipulate that to fulfil their due diligence obligation, states must '*prevent* … acts of sexual violence committed by State and non-State actors'.[146] With regard to the due diligence principle, the HRC further explains that:

> [T]he positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights … would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures *or* to exercise due diligence to *prevent*, punish, investigate or redress the harm caused by such acts by private persons or entities.[147]

As referred to above, the CEDAW Committee has established that '[s]tates may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation'.[148] Furthermore, the Declaration on the Elimination of Violence against Women urges states to '[e]xercise due diligence to *prevent*, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons '.[149]

146 My emphasis.

147 UN Human Rights Committee (HRC) General Comment 31(80) The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13 para 8.

148 General Recommendation 19 (n 43) para 9.

149 United Nations, Declaration on the Elimination of Violence against Women. General Assembly resolution 48/104 of 20 December 1993, UN Doc A/RES/48/104, February 23, 1994, Article 4.c. See also the Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women, 27 October 1995 para 124(b) (my emphasis).

The Special Rapporteur on VAW has moreover stated that '[b]ased on practice and the *opinio juris* […] it may be concluded that there is a norm of customary international law that obliges States to *prevent* and respond with due diligence to acts of violence against women'.[150] Furthermore, following the United Nations General Assembly's in-depth study on all forms of violence against women, the UN Secretary-General concluded that:

> It is good practice to make the physical environment safer for women and community safety audits have been used to identify dangerous locations, discuss women's fears and obtain women's recommendations for improving their safety. Prevention of violence against women should be an explicit element in urban and rural planning and in the design of buildings and residential dwellings. Improving the safety of public transport and routes travelled by women, such as to schools and educational institutions or to wells, fields and factories, is part of prevention work.[151]

Furthermore, the Inter-American Commission of Human Rights (Inter-American Commission) and Inter-American Court of Human Rights (Inter-American Court) have provided much important jurisprudence on the due diligence obligation to prevent SGBV. In *Maria Da Penha,* the Inter-American Commission applied the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belém do Pará) for the first time to a case of domestic violence. It held that Brazil had violated its obligation under article 7 to exercise due diligence to prevent, punish and eliminate domestic violence by failing to convict and punish the perpetrator.[152] For the purposes of the analysis in this chapter, the Inter-American Commission, importantly, held that because the violation was part of a 'general pattern of negligence and lack of effectiveness of the State' this was a breach of the obligation to prosecute and convict but also a breach of the obligation to prevent this practice.[153]

150 United Nations, Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk, Integration of the human rights of women and a gender perspective: violence against women, Mission to Mexico, UN Doc E/CN.4/2006/61/Add.4, January 13, 2006 (my emphasis).

151 United Nations General Assembly *In-depth study on all forms of violence against women*. Report of the Secretary-General, sixty-first session, UN Doc A/61/122/Add.1 (July 6, 2006) para 352.

152 *Maria Da Penha Maia Fernandes v Brazil* case 12051, Report No 54/01, OEA/SerL/V/II111 Doc 20 Rev 704 (2000) paras 20 & 60.

153 *Maria Da Penha* (n 152) para 56.

In *González*,[154] the Inter-American Court provided further input in this regard. In this case, the Inter-American Court also based its findings on, amongst others, article 7 of the Convention of Belém do Pará, which stipulates that 'States Parties condemn all forms of violence against women and agree to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence and undertake to … apply due diligence to prevent, investigate and impose penalties for violence against women'. In *Cotton Fields*, the Inter-American Court established that although the obligation to prevent is one of means and not results, Mexico had not demonstrated that the creation of a special Office of the Prosecutor and some additions to its legislative framework were sufficient and effective to prevent the serious manifestations of violence against women displayed in this case.[155]

The jurisprudence from the Inter-American system reveals that states must adopt comprehensive measures to comply with the due diligence principle in SGBV cases. In this regard, the state is obligated to put in place explicit preventative measures in cases where it is evident that specific women or groups of women may be prone to SGBV.[156]

However, it is important to note that the Inter-American Commission and Court both affirm that states cannot be held responsible for all human rights violations committed by private individuals on its territory, and as such, acting with due diligence does not mean unlimited responsibility for any act of private actors. Instead, measures of prevention are qualified on the awareness of the state of a situation of 'real and imminent danger for a specific individual or group of individuals and the reasonable possibility of preventing or avoiding that danger'.[157] This approach is arguably similar to the approach of the ICJ and the European Court, as mentioned above, focusing on the foreseeability of a risk and the measures taken to eliminate harm.[158]

5.5 Specific measures to prevent rape

Rape is preventable, but it requires serious efforts and resources. The prevention of rape begins with tackling cultural values and norms that enable SGBV as a form of GBD. Responsibility for the eradication of

154 *González et al (Cotton Field) v Mexico* preliminary objection, merits, reparations and costs, judgment of 16 November 2009, Series C No. 205.

155 *Cotton Field* (n 154) para 279.

156 *Cotton Field* (n 154) para 258.

157 *Cotton Field* (n 154) para 280.

158 See sec 5.3.

rape rests with the state together with every community. All echelons of government, such as the health, education, justice, and crime prevention sectors, together with NGOs, can contribute; however, the primary responsibility for the prevention of SGBV always rests on the state.

In this regard, the Niamey Guidelines stipulate that states must take the necessary measures to:

> [P]revent all forms of sexual violence and its consequences, particularly by eliminating the root causes of that violence, including sexist and homophobic discrimination, patriarchal preconceptions and stereotypes about women and girls, and/or preconceptions and stereotypes based on gender identity, real or perceived sexual orientation, and/or certain preconceptions of masculinity and virility, irrespective of their source.[159]

Preventative measures can take many forms and have different objectives. Such measures can be implemented to try to prevent rapes altogether, to prevent further consequences when a rape has already occurred, and to prevent rapes from reoccurring or escalating once they have occurred in a specific location in a specific way. Thus, prevention can focus on the eradication of the enablers of GBD, it can entail practical and structural changes to make women safer, and it can focus on preparing women who are specifically vulnerable to rape. It is outside the scope of this chapter to detail the various preventative measures available to states. However, measures such as sensitisation, education, creating institutional frameworks focusing specifically on rape and rape prevention, changing physical environments, engaging in early interventions targeted to individuals and groups who exhibit signs of violent behaviour, providing self-defence and assertiveness training and recognising vulnerable groups are measures that would arguably fall within the legal obligation of states under the Maputo Protocol.

6 Conclusion

EI and *Adama Vandi* presented a renewed opportunity to analyse the public/private dichotomy in relation to SGBV. These cases also presented an occasion to suggest developments of state responsibility related to SGBV in consideration of the principle of due diligence where victims rely on the Maputo Protocol. It is clear from the analysis in this chapter that the ECOWAS Court took a very narrow approach to the harm suffered by the victims of SGBV and that its method neither fulfils the substantial

159 Niamey Guidelines, Part B General Principles and Obligations of States, *7 Obligation to prevent sexual violence and its consequences*.

and transformative equality test as obligated by the Maputo Protocol nor upholds the incurred state obligations to prevent, as prevention is not only about investigation and punishment but also about the implementation of preventative measures to eliminate GBD. For the latter to take place, states and courts must first recognise that all acts of SGBV are acts of GBD.

The main assumptions traced in this chapter were that in cases of SGBV, the traditional attribution of responsibility back to the state for acts of non-state actors is not helpful and that the key to unlocking state responsibility in this regard is an appropriate understanding of the obligation to act with due diligence to prevent (stopping something bad from happening) in cases of SGBV. Prevention of any harmful act is ultimately a state function, and as such, an omission to prevent it is a breach of this obligation.

In the *EI* case, the applicant claimed that she had been ill-treated, and the Court ran through the motion of the methodology of state responsibility. It concluded that the state did not mistreat the applicant as it, through its agents, did not rape her. It further acknowledged that an omission to act could potentially institute state responsibility; however, it did not view this obligation from the vantage point of (full) prevention. If the Court had applied the obligation to 'prevent' as it has been defined by the African Commission, the Special Rapporteurs on VAW and Torture and by the Inter-American Court and Commission, the ill-treatment of the applicant in *EI* could have been imputed to the state by an omission to prevent her rape. This argument is especially powerful within contexts where the state has acknowledged that a rape culture prevails.

Moreover, as established in this chapter, a failure to classify SGBV as GBD alongside the application of a formal equality analysis can also have a serious impact on the remedies ordered by a court. This is evident in the *EI* case, where the applicant received no compensation for the physical and psychological pain, emotional distress, and post-traumatic stress she suffered, as the Court found that her claim with regard to the pain and suffering arose from the alleged rape. As the Court found that the rape did not constitute GBD and as there was only, in its opinion, a breach of her right to a fair trial, on account of a lack of a speedy and effective prosecution of her perpetrator, the only declaration upheld was to direct the state to carry out an effective prosecution. In the same vein, Ms Vandi only received one-tenth of the damages she claimed and none of the systemic reparations that she claimed, such as education, health services and counselling, were granted by the Court.

In conclusion, as the analysis in this chapter has shown, by applying a transformative and substantive equality analysis in rape cases, by classifying rape a grave violation of human rights law, as ill-treatment and as a form of GBD, by contextualising rape within a culture of rape and by focusing on states' responsibility to prevent SGBV, states such as Nigeria and Sierra Leone can be held responsible for acts of rape by non-state actors beyond rights related to access to justice and a fair trial. Applying the Maputo Protocol and the ILC Draft Articles in this manner enables courts to prescribe a wider range of remedies, for example, targeted at the enablers of SGBV, such as gendered stereotypes and cultural beliefs, to appropriately compensate victims of SGBV.

Table of Abbreviations

AU	African Union
CAT	Convention Against Torture
CEDAW	Convention on the Elimination of Discrimination Against Women
ECHR	European Convention on Human Rights
ECOWAS	Economic Community of West African States
GBD	Gender-based discrimination
HRC	Human Rights Committee
ICJ	International Court of Justice
ILC	International Law Commission
SGBV	Sexual and gender-based violence
VAW	Violence against women

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