# Article 5

## Elimination of harmful practices

*Satang Nabaneh*

States Parties shall prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards. States Parties shall take all necessary legislative and other measures to eliminate such practices, including:

(a) creation of public awareness in all sectors of society regarding harmful practices through information, formal and informal education and outreach programmes;

(b) prohibition, through legislative measures backed by sanctions, of all forms of female genital mutilation, scarification, medicalisation and para-medicalisation of female genital mutilation and all other practices in order to eradicate them;

(c) provision of necessary support to victims of harmful practices through basic services such as health services, legal and judicial support, emotional and psychological counselling as well as vocational training to make them self-supporting;

(d) protection of women who are at risk of being subjected to harmful practices or all other forms of violence, abuse and intolerance.

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## 1 Introduction

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) is a crucial instrument in guaranteeing the extensive rights of African women and girls, including explicit provisions on harmful practices. State parties are obligated to condemn and prohibit all practices that undermine women's human rights and violate internationally recognised standards. The Maputo Protocol is the first human rights treaty to explicitly call for the prohibition of female genital mutilation (FGM).[1] This is a significant step for women in Africa, where FGM is

1 S Nabaneh & A Muula 'Female genital mutilation/cutting: a complex legal and ethical landscape' (2019) 145(2) *International Journal of Gynecology & Obstetrics* 255.

prevalent in 29 countries[2] and affects more than 200 million girls and women worldwide.[3] The World Health Organization (WHO) estimates that 100-140 million girls and women worldwide are affected by FGM, which is typically performed on young girls between infancy and the age of 15.[4] In Africa alone, an estimated 92 million girls aged ten years and above have undergone FGM.[5] The treatment of FGM-related complications costs billions of dollars every year in high-prevalence countries. If no action is taken, this cost is expected to rise to 2.3 billion USD by 2047.[6]

Consequently, extensive efforts have been made to promote the abandonment of the practice and international mobilisation against harmful practices. In the past 30 years, global efforts have been made to combat harmful practices, including the 1994 African Platform for Action and the Dakar Declaration[7] and the 1994 International Conference on Population and Development (ICPD).[8] African feminists played a significant role in calling for the explicit condemnation of FGM in the 1995 Beijing Declaration and Platform for Action, which consequently called for legislation against perpetrators of such practices.[9]

At the global level, while the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) does not reference FGM, it explicitly prohibits traditional practices that discriminate against women (articles 2 and 5). The Convention on the Rights of the Child (CRC) also obligates states under article 24(3) to abolish traditional practices harmful to children. The CEDAW Committee, under General Recommendation 24, specifically recommended that governments devise health policies that consider the needs of girls and adolescents who may be vulnerable to traditional practices such as FGM.[10] Joint General Recommendation/General Comment 31 of the CEDAW Committee and 18 of the Committee on the Rights of the Child highlights various legislative measures to eliminate the practice of FGM.[11]

While the Maputo Protocol strongly condemns FGM, it also applies to other harmful practices affecting women and girls. These practices include child marriage,[12] virginity testing, widowhood practices, witchcraft, extreme dietary restrictions (forced feeding, food taboos- including during

2 The countries with high prevalence of FGM include Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Côte d'Ivoire, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, The Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Somalia, Sudan, Tanzania, Togo, Uganda and Zambia. Knowledge and data gaps still do exist for countries such as Malawi, Mozambique, South Africa, Zambia, which are not usually listed among the countries with a prevalence of FGM.

3 United Nations Children's Fund (UNICEF) 'Female genital mutilation/cutting: a global concern' 2016 https://data.unicef.org/resources/female-genital-mutilationcutting-global-concern/#:~:text=Female%20genital%20mutilation%2Fcutting%20(FGM,efforts%20to%20end%20the%20practice. (accessed 10 May 2021). See D Gollaher *Circumcision: a history of the world's controversial surgery* (2000).

4 WHO 'FGM fact sheet' (2022) https://www.who.int/en/news-room/fact-sheets/detail/female-genital-mutilation (accessed 16 May 2022).

5 UNICEF (n 3); Gollaher (n 3).

6 WHO (n 4).

7 African platform for action: African common position for the advancement of women: adopted at the Fifth African Regional Conference on Women, Dakar, Senegal 16-23 November 1994 E/ECA/ACW/RC.V/CM/3 https://repository.uneca.org/handle/10855/1147 (accessed 5 June 2022) paras 38 & 84.

8 UN 'International Conference on Population and Development Programme of Action' (1994) para 7.

9 Beijing Declaration and Platform for Action Fourth World Conference on Women, 15 September 1995, A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995).

10 UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 14 Female Circumcision, 1990, A/45/38 and Corrigendum (CEDAW Committee General Recommendation 14)

11 Joint General Recommendation/General Comment 31 of the Committee on the Elimination of Discrimination against Women and 18 of the Committee on the Rights of the Child on harmful practices (14 November 2014), CEDAW/C/GC/31/CRC/C/GC/1.

12 C Musembi 'Article 6' in this volume.

pregnancy), binding, breast ironing, beading[13] and son preference and its implications for the status of the girl child.[14] While there has been increased momentum in the generation of evidence on FGM, this is not the same for other harmful practices. Despite the persistence of these practices that violate international human rights law, there is a shortage of information and data.[15]

It is crucial to contextualise the discussion of harmful practices against women and girls within the broader framework of patriarchal control and regulation of women's sexuality. These practices serve to restrict women's autonomy and agency, particularly in relation to their sexual lives, and reinforce traditional gender roles and power dynamics. Against this backdrop, this chapter seeks to provide a comprehensive understanding of article 5 of the Maputo Protocol, which addresses the issue of FGM and other harmful practices affecting women and girls. Through exploring its drafting history, the concepts of 'harmful' and 'FGM,' the obligations imposed on states, implementation measures undertaken by states, and recommendations for both state and non-state actors, this chapter aims to contribute to the growing discourse around the eradication of harmful practices and the promotion of women's human rights.

## 2 Drafting history

During the drafting process of the Maputo Protocol, the initial version, known as the Nouakchott Draft, which was presented at a 1997 meeting organised by the International Commission of Jurists and the African Commission on Human and Peoples' Rights (African Commission), included a provision for protecting 'women and society from the harmful effects of fundamentalism and of cultural and religious practices which oppose this right.' This right referred to the right to a positive cultural environment, which was included in article 18 of the draft.[16] Similarly, the second draft, known as the Kigali Draft, which was presented at a meeting in Kigali in 1999, did not have a provision on harmful practices. [17] Instead, its draft article 19 focused on cultural practices, stating that states should take appropriate measures to 'protect women and society against all forms of intolerance and repugnant cultural and religious practices'.[18]

Part of the reason for the absence of a provision on the elimination of harmful practices was that there was an ongoing parallel process for a specific treaty, the Organization of African Unity (OAU) Convention on the Elimination of All Forms of Harmful Practices (HPs) Affecting the Fundamental Human Rights of Women and Girls (Draft OAU Convention on Harmful Practices).[19] This was led by the Inter-African Committee on Harmful Traditional Practices Affecting the Health of Women and Children (IAC) and the Women's Unit of the OAU (now the African Union (AU)).[20] The Draft OAU Convention on Harmful Practices recognised that:[21]

13 See K McLay 'Beading practice among the Samburu and its impact on girls' sexual and reproductive health: a critical overview of the literature' (2020)1 *Publications and Scholarship* 1-52.

14 CEDAW Committee General Recommendation 14 (n 10) para 8.

15 Majority of national demographic health surveys focus on FGM and child marriage.

16 See generally Expert Meeting on the Preparation of a Draft Protocol to the African Charter on Human and Peoples' Rights Concerning the Rights of Women, Nouakchott, Islamic Republic of Mauritania, 12-14 April 1997 (Nouakchott Draft).

17 Draft Protocol to the African Charter on Women's Rights, 26th ordinary session of the African Commission on Human and Peoples' Rights 1-15 November 1999 Kigali, Rwanda (Kigali Draft).

18 Kigali Draft (n 17) art 19.

19 R Murray *The African Charter on Human and Peoples' Rights: a commentary* (2019) 466.

20 See also M Nsibirwa 'A brief analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women' (2001) 1 *African Human Rights Law Journal* 40-63.

21 Preamble, Draft Harmful Practices Convention.

> the health and basic human rights of women and girls, such as the right to life, health and bodily integrity, continue to be impinged upon by harmful practices, which include widowhood rites, nutritional taboos, female genital mutilation, forced and/or early childhood marriage.

Article 1 of the Draft Convention defined HPs. Article 2 required states to enact legislation to prohibit HPs. Article 3 further required states to conduct public awareness campaigns, working with a broad range of stakeholders. Article 4 dealt with banning the medicalisation and paramedicalisation of FGM and scarification. Furthermore, article 5 obligated states to take necessary measures to rehabilitate victims of HPs by providing social support services. The Draft Convention further called for the establishment of appropriate institutions where they do not exist in order to ensure implementation of the Draft Convention. In addition, the Draft Convention also called for the setting up of a five-person committee to oversee the monitoring of the Convention.

To avoid duplication, there was a proposal about merging the two initiatives.[22] A series of discussions followed, resulting in a merger of the two drafting initiatives.[23] Subsequently, the OAU Legal Unit passed the IAC/Women's Unit Draft Convention on Harmful Practices to the Chairperson of the African Commission, with a suggestion that the IAC Convention be incorporated into the process of drafting the Protocol on the Rights of Women.[24] This was duly done, with article 5 of the Maputo Protocol drawing heavily from the Draft OAU Convention on Harmful Practices. Thus, the first time the definition of HPs was offered was in the 2001 draft (the Addis Ababa Draft) presented during the Meeting of Experts held in Addis Ababa, Ethiopia.[25] The first draft of the article (6 as it then was) provided as follows:

> State Parties shall condemn all forms of harmful practices which affect the fundamental human rights of women and girls and which are contrary to recognised international standards/and therefore commit themselves

to create awareness, prohibit FGM, provide support to victims and protect women and girls at risk of being subjected to HPs and all other forms of violence/abuse and intolerance.

At a meeting of NGOs convened in 2003 in Addis Ababa, by the Equality Now Africa Regional Office, editorial changes were proposed to the Addis Ababa Draft.[26] The participants of the NGO meeting observed that the current draft fell below international standards as contained in the African Charter on the Rights and Welfare of the Child (African Children's Charter), the CRC and the Beijing Platform for Action. It was therefore suggested that the draft should explicitly recognise that all forms of HPs are a form of discrimination. This speaks to the issue of discrimination also arising from social

22 See Nsibirwa (n 20) 42. See letter, ES/WU/IAC/18/6.00 (20 March 2000).

23 Letter from Berhane Ras-work, President IAC to HEC Dr Salim A. Salim (10 May 2000) File No IAC/OAU/197.00. On file with the author.

24 Interoffice Memorandum addressed to the Secretary, ACHPR (17 May 2000) File No CAB/LEG/117.141/62Nol.I. On file with the author.

25 Report of the Meeting of Experts on the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Expt/Prot.Women/Rpt(I), Addis Ababa, Ethiopia, November 2001 (Report of the Meeting of Experts).

26 Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (as adopted by the Meeting of Government Experts in Addis Ababa on 16 November 2001) 6 January 2003 markup from the meeting convened on 4-5 January 2003 in Addis Ababa, by the Africa Regional Office and the Law Project of Equality Now, CAB/LEG/66.6/Rev.1. (Revised Final Draft).

practice and not just law.[27] Emphasis was also placed on clearly articulating an obligation on states to enact legislation with sanctions attached.[28]

With further minor editorial changes, the proposals emanating from the 2003 meeting were accepted and incorporated into the Maputo Protocol's final draft, which was adopted by the Meeting of Ministers on 28 March 2003.[29]

## 3 Exploring key concepts: definitions, interpretations and interlinkages with other human rights treaties

### 3.1 Defining key concepts

Article 5 of the Maputo Protocol deals with conceptual issues that require definition and interpretation, including the concept of HPs, the particular case of FGM, and the vulnerability of women and girls who are at risk of being subjected to such practices.

#### *3.1.1 Harmful practices*

'Harmful practices' is defined in article 1(g) of the Maputo Protocol to mean 'all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity.' This definition is unique as it addresses both 'acts' that negatively impact the rights of women and girls and 'attitudes,' which require changing opinions and ways of thinking. In an attempt to avoid the skewed perception of culture as only harmful- as is dominant in Western feminist discourse – the Maputo Protocol intentionally uses the term 'harmful practices' instead of 'harmful cultural practices.'[30] The Maputo Protocol, it seems, is careful to avoid the presumption that culture and human rights are inevitably in tension with each other.

Arguably, the African Commission on Human and Peoples' Rights (African Commission) has paid more attention to child marriage and FGM than to other aspects of HPs.[31] However, recently the

27 F Banda 'Blazing a trail: The African Protocol on Women's Rights comes into force' (2006) 50 *Journal of African Law 75*. See eg, art 2(2) of the Protocol, which provides that 'States Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.'

28 With the proposed changes, the provision read thus:
*State Parties shall condemn and prohibit all forms of harmful practices which affect the fundamental human rights of women and which as a form of discrimination are contrary to recognized international standards.*
*State Parties shall take all measures necessary to eliminate such practices, including, but not limited to:*
(a) creating public awareness in all sectors of society regarding harmful practices through information, formal and informal education, communication and outreach programmes;
(b) prohibiting through legislation with sanctions, all form of female genital mutilation, including medicalization and paramedicalization. State Parties shall take effective measures to enforce such prohibition.
(c) providing the necessary support to victims of harmful practices through basic services such as professional health and legal services, emotional and psychological counseling, and skills training aimed at making them selfsupporting;
(d) protecting those women and girls who are at risk of being subjected to harmful practices and all other forms of violence, abuse and intolerance.

29 Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, MIN/WOM.RTS/DRAFT.PROT(II)Rev.5, as adopted by the Meeting of Ministers, Addis Ababa, Ethiopia, 28 March 2003 (Addis Ababa Draft).

30 However, art 2(2) of the Protocol uses the term 'harmful cultural and traditional practices.'

31 See eg: 449 Resolution on Human and Peoples' Rights as central pillar of successful response to COVID-19 and recovery from its socio-political impacts – ACHPR/Res. 449 (LXVI) 2020; Press Release on the Promotion Mission of the African

Commission has made pronouncements on HPs targeted at specific categories of persons, including older persons and persons with disabilities. For instance, the Working Group on the Rights of Older Persons and Persons with Disabilities have noted the 'association of Older Persons with witchcraft or other unnatural practices or beliefs [which] often lead to serious abuses and violations of the human rights of Older Persons.'[32] The focus on HPs against older persons is incorporated into the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa (Protocol on the Rights of Older Persons), which was adopted in January 2016.[33] The Protocol on the Rights of Older Persons calls on states to prohibit and criminalise 'harmful traditional practices that target older persons.[34] States commit to taking all the necessary measures to eliminate HPs, including witchcraft accusations which affect the welfare, health, life and dignity of older persons, especially older women.[35]

Harmful practices targeted at persons with disabilities are also further noted in the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities (African Disability Rights Protocol), which was adopted on 30 January 2018.[36] The Protocol addresses HPs, specifically providing under article 11(1):

> States Parties shall take all appropriate measures and offer appropriate support and assistance to victims of harmful practices, including legal sanctions, educational and advocacy, to eliminate harmful practices perpetrated on persons with disabilities, including witchcraft, abandonment, concealment, ritual killings or the association of disability with omens.

While FGM is clearly articulated in the Maputo Protocol, and the phrase 'and all other practices' would indicate a broad interpretation, this may not necessarily be so. In practice, it is argued that certain practices, not explicitly enumerated in the Maputo Protocol are deemed not be prohibited, even if they are harmful to women.[37] This becomes problematic as the Maputo Protocol is silent, for example, on the 'practices of lobola (bride price) or leviratic marriages (the practice of inheriting a wife).'[38] However, through their various mechanisms, the African Commission and the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) have made detailed pronouncements on what may constitute HPs. The Commission has noted the need for states to take measures to 'protect women against all forms of violence, as well as traditional beliefs and practices such as burying wives alive with their dead husbands, FGM, despoilment of widows'.[39] The African

Commission on Human and Peoples' Rights to the Republic of The Gambia (25 April 2017); Joint Statement by UN human rights experts, the Rapporteur on the Rights of Women of the Inter-American Commission on Human Rights and the Special Rapporteurs on the Rights of Women and Human Rights Defenders of the African Commission on Human and Peoples' Rights (28 September 2015).

32 Statement of the Working Group on the Rights of Older Persons and Persons with Disabilities in Africa of the African Commission on Human and Peoples' Rights, at the occasion of the 26th International Day of Older Persons (1 October 2016) https://www.achpr.org/news/viewdetail?id=52 (accessed 15 May 2022).

33 The Protocol is yet to come into force. There are currently 6 ratifications (Benin, Ethiopia, Kenya, Lesotho, Malawi and South Africa) https://au.int/sites/default/files/treaties/36438-sl-PROTOCOL_TO_THE_AFRICAN_CHARTER_ON_HUMAN_AND_PEOPLES_RIGHTS_ON_THE_RIGHTS_OF_OLDER_PERSONS.pdf (accessed 15 May 2022).

34 Protocol on the Rights of Older Persons art 8(1).

35 Protocol on the Rights of Older Persons art 8(2).

36 The Protocol is yet to come into force. There are currently 3 ratifications (Kenya, Malawi & Rwanda) https://au.int/sites/default/files/treaties/36440-sl-PROTOCOL_TO_THE_AFRICAN_CHARTER_ON_HUMAN_AND_PEOPLESaEUtm_RIGHTS_ON_THE_RI._.pdf (accessed 16 May 2022).

37 K Davis 'The Emperor is still naked: Why the Protocol on the Rights of Women in Africa leaves women exposed to more discrimination' (2009) 950(42) *Vanderbilt Journal of Transnational Law* 964.

38 Davis (n 37) 965.

39 Activity Report of Commissioners: Commissioner Julienne Ondziel-Gnelenga (Item 7b), DOC/ OS(XXIX)/ 217/ 5 (7 May 2001) 6.

Commission has also recognised other forms of HPs such as *Ukuthwala*,[40] (falling within the ambit of child marriage), which continues to restrict South African women and girls from fully enjoying their rights as guaranteed both in the African Charter on Human and Peoples' Rights (African Charter) and the Maputo Protocol.[41] This practice – essentially forced marriage – is also common in other countries, known by the respective local terms: *unwendisa* in Swaziland, and *telefa* in Ethiopia. [42]

The African Commission and the African Children's Committee have both recognised other HPs.[43] These include 'abduction and kidnapping for purposes of marriage,' which is the taking of a person against their will to force them into marriage; 'virginity testing,' which is a non-scientific examination of a girl or woman's hymen to determine her virginity; 'breast ironing,' a harmful practice that involves the flattening of a young girl's breasts; 'forced feeding,' which is the forceful feeding of girls or women to make them gain weight; 'forced marriages,' which are arranged without the free and full consent of both parties, and 'tourist marriages', which are contracted to gain citizenship or residency status in another country, all of which can lead to physical, emotional, and psychological harm. The African Commission's ongoing elaboration on HPs allows for the interpretation and application of measures to be flexible and adaptable to emerging trends.

#### *3.1.2 Female genital mutilation*

FGM comprises all procedures that involve partial or total removal of the external female genitalia or other injuries to the female genital organs for non-medical reasons.[44] According to the WHO, there are four types of FGM.[45] Type I (clitoridectomy) is the partial or total removal of the clitoris (a small, sensitive, and erectile part of the female genitals) and, in very rare cases, only the prepuce (the fold of skin surrounding the clitoris). Type II (excision) is the partial or total removal of the clitoris and the labia minora (the inner folds of the vulva), with or without excision of the labia majora (the outer folds of skin of the vulva). Type III (infibulation) is the narrowing of the vaginal opening by creating a covering seal. The seal is formed by cutting and repositioning the labia minora, or labia majora, sometimes through stitching, with or without removal of the clitoris (clitoridectomy). Type IV includes all other harmful procedures to the female genitalia for non-medical purposes, for example, pricking, piercing, incising, scraping, and cauterising the genital area.

In addition, the introduction of harmful substances into the vagina by mostly adult women to strengthen the vagina to enhance their own or their partner's sexual pleasure fall within the ambit of Type IV. For example, the introduction of tobacco in the vagina has been found to be common in

40 'Ukuthwala' is a form of abduction that involves kidnapping a girl or a young woman by a man and his friends or peers with the intention of compelling the girl or young woman's family to endorse marriage negotiations. See South Africa: Combined 2nd Periodic Report under the African Charter on Human and Peoples' Rights and Initial Report under the Protocol to the African Charter on the Rights of Women in Africa (2015)para 364.

41 Concluding Observations and Recommendations on the Combined 2nd Periodic Report of the Republic of South Africa on the implementation of the African Charter on Human and Peoples' Rights and the initial report on the Maputo Protocol, African Commission on Human and Peoples' Rights, adopted at the 58th ordinary session (6-20 April 2016) paras 23 & 33.

42 Similar practices are found among the Himba in Namibia, Umutara in Rwanda, the Nyanza region in Kenya, some Bantu tribes of Uganda and among the Latuka of Sudan. See Joint General Comment of the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child on ending child marriage (2017) available at https://www.acerwc.africa/sites/default/files/2022-09/Joint_General_Comment_ACERWC-ACHPR_Ending_Child_Marriage_March_2018_English.pdf (accessed 6 May 2023) para 19.

43 Joint General Comment on Child Marriage (n 42) para 49. See also Concluding Observations on the 2nd Periodic Report of South Africa, UN Committee on the Rights of the Child (CRC) (27 October 2016) UN Doc CRC/C/ZAF/CO/2 (2016).

44 WHO (n 4).

45 WHO (n 4).

Northern Nigeria,[46] with the trend gaining ground recently in The Gambia with the use of a stimulant commonly called 'tabaa' to enhance sexual pleasure.[47] However, it is important to note that varied contexts of the practices subsumed under Type IV, and as the WHO pointed out 'it is not always clear, however, what harmful genital practices should be defined as Type IV'.[48]

A key issue to raise is whether FGM is distinct from other practices that involve alteration of the female genitalia, which might be medically necessary. An unresolved issue is whether Female Genital Cosmetic Surgeries (FGCS), which are globally prevalent, should be considered FGM. For example, there has been an uptake in clitoral reconstruction 'despite the absence of conclusive evidence regarding its benefits or absence of harm'.[49] As noted by the WHO, while practices, including genital cosmetic surgery and hymen repair, are legal in many countries, these practices fall within the definition of what constitutes FGM even if they are not generally considered to be.[50]

The WHO and its partners have further reiterated the need to maintain a broad definition of FGM to avoid loopholes. While the Maputo Protocol uses the term FGM, it is important to note that this framing is not universal and is contested.[51] African feminists have decried the framing of FGM based on a Western bias premised on colonial and neo-colonial off-hand and totalising condemnation of the practice as morally repugnant, primitive, and barbaric.[52] This critique does not necessarily undermine the significance of the Maputo Protocol's stance against FGM, but rather calls for a nuanced and culturally-sensitive approach that avoids the imposition of Western values on African societies.

### *3.1.3 Women who are 'at risk'*

Women are vulnerable to HPs when they live in societies where such practices are prevalent or belong to social circles that subscribe to patriarchal values and traditional gender norms, which prioritise male control over women's bodies and sexuality. In the case of FGM, 'at risk' denotes women and girls who are more likely to be subjected to the practice, including those living in countries where it is widespread and those residing in diaspora communities where it persists. Identifying and supporting these vulnerable individuals is essential to prevent them from experiencing HPs.

46 African Tobacco Control Alliance (ATCA) 'Vaginal tobacco: a hidden health danger for women' (6 April 2022) https://atca-africa.org/vaginal-tobacco-a-hidden-health-danger-for-women/ (accessed 10 June 2022). See generally T Okeke et al 'An overview of female genital mutilation in Nigeria' (2012) 2(1) *Annals of Medical and Health Sciences Research* 70-73.

47 K Manneh 'Dr Daffeh: "Taba" is not medically or scientifically confirmed to be used on genital part' *The Voice* 4 October 2021 https://www.voicegambia.com/2021/10/04/dr-daffeh-taba-is-not-medically-or-scientifically-confirmed-to-be-used-on-genital-part/ (accessed 4 June 2022).

48 World Health Organization (WHO) 'Eliminating female genital mutilation: an interagency statement - OHCHR, UNAIDS, UNDP, UNECA, UNESCO, UNFPA, UNHCR, UNICEF, UNIFEM, WHO' (2018) 26-28.

49 J Abdulcadir et al 'A systematic review of the evidence on clitoral reconstruction after female genital mutilation/cutting' (2015) 129(2) *International Journal of Gynecology and Obstetrics* 96.

50 WHO (n 48) 28.

51 See H Lewis 'Between Irua and 'Female Genital Mutilation': feminist human rights discourse and the cultural divide' (1995) 8 *Harvard Human Rights Law Journal* 1; IR Gunning 'Arrogant perception, world-travelling and multicultural feminism: the case of female genital surgeries' (1992) 23 *Columbia Human Rights Law Review* 189.

52 See A Thiam *Speak out, black sisters: black women and oppression in black Africa* (trans DS Blair, 1995); O Nnaemeka *Sisterhood, feminism and power: from Africa to the diaspora* (1998); O Nnaemeka 'Theorizing, practicing, and pruning Africa's way' (2004) 29(2) *Signs: Journal of Women in Culture & Society* 357-385. See also S Tamale 'Researching and theorising sexualities in Africa' in S Tamale (ed) *African sexualities: a reader* (2011) 19-20.

## 3.2 Related provisions

### *3.2.1 Interconnected Maputo Protocol provisions*

There are other provisions in the Maputo Protocol relevant to eliminating HPs. For instance, article 5 of the Maputo Protocol must be read together with article 2, which relates to the elimination of all discriminatory practices against women.[53] Article 2(2) of the Protocol provides that:[54]

> States Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the *elimination of harmful cultural and traditional practices* and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.

As noted in the Joint General Comment on Child Marriage, HPs 'perpetuate gender inequality because they violate girls' fundamental rights to life, health, dignity, education and physical integrity'.[55] Article 3 on the right to dignity further calls on states to ensure respect for the dignity and protection of women from all forms of violence. Moreover, the Maputo Protocol in article 4 on the elimination of violence against women mandates respect for the life, integrity, and security of the person of every woman.[56] The African Commission's Guidelines on Combatting Sexual Violence and its Consequences in Africa (Niamey Guidelines) also recognise FGM as a form of sexual violence that can constitute torture or cruel, inhuman and degrading treatment.[57]

Article 8 of the Maputo Protocol, which addresses access to justice and equal protection before the law, is also relevant. Of particular relevance is the state obligation to equip law enforcement organs to interpret and enforce gender equality rights effectively and to reform existing discriminatory laws and practices to promote and protect women's rights. Article 17 of the Protocol also recognises the right of women to live in a positive cultural context and to participate at all levels in the determination of cultural policies. It further obligates states to take 'all appropriate measures to enhance the participation of women in the formulation of cultural policies at all levels'. Article 17 recognises the interlinkages between human rights and culture and the important role that women can play in the determination of culture that advances women's rights. However, this should be 'based on the principles of equality, peace, freedom, dignity, justice, solidarity and democracy'.[58] In essence, article 5 of the Maputo Protocol acknowledges that culture has often been deployed to encroach on women's rights. Although article 17 of the African Charter and article 17 of the Maputo Protocol recognise the right to culture, with article 18 of the Charter making reference to 'traditional' values, this does not absolve states of their responsibility to eliminate harmful traditional practices that violate human rights.[59] In other words, while cultural rights are important, they cannot be used as an excuse to perpetuate HPs that have a negative impact on individuals' well-being and human rights. States have an obligation to eradicate such practices and ensure that they do not continue to harm individuals within their jurisdiction. Article 5, coupled with these provisions, provides a strong normative basis for protection and promotional measures to eliminate HPs.

53 See also art 2 of the African Charter.

54 Emphasis added.

55 Joint General Comment on Child Marriage (n 42) para 49.

56 See R Nekura 'Article 4' in this volume. See also art 4 of the African Charter.

57 African Commission on Human and Peoples' Rights, 'The Guidelines on Combating Sexual Violence and its Consequences in Africa' adopted during its 60th ordinary session held in Niamey, Niger from 8-22 May 2017 15 (Niamey Guidelines).

58 Preamble, Maputo Protocol.

59 Pretoria Declaration on Economic, Social and Cultural Rights in Africa (2004) para 9.

While the Maputo Protocol is the only binding human rights treaty that explicitly prohibits FGM, article 21(1) of the African Children's Charter prohibits harmful social and cultural practices that are prejudicial to the health or life of the child. The Committee has also adopted Agenda 2040, which prohibits FGM by all African states as a goal under Aspiration 7 (Every child is protected against violence, exploitation, neglect, and abuse).[60] The African Commission adopted a resolution in 2007 urging African states to outlaw FGM.[61] Moreover, on 8 February 2018, the African Commission and the African Children's Committee adopted their first Joint General Comment on Child Marriage.[62] The Joint General Comment seeks to clarify and elaborate on the nature of rights set out in article 6(b) of the Maputo Protocol and article 21(2) of the African Children's Charter, respectively. The Commission and Committee addressed human rights violations in the context of child marriage and other harmful cultural practices.[63] Currently, there is an ongoing process for the development of a Joint General Comment of the African Children's Committee and African Commission on FGM. This is in recognition of the fact that national frameworks for addressing FGM in Africa have been insufficient and non-uniformed, despite international and regional norms.[64]

### *3.2.2 Other international treaties*

Harmful practices – which include FGM – are well recognised as a gross violation of the human rights of girls and women in numerous international declarations and treaties.[65] All forms of FGM violate a range of human rights of girls and women, including the right to non-discrimination, to protection from physical and mental violence to the highest attainable standard of health, and in the most extreme cases, to the right to life. For instance, the UN Human Rights Committee has stated that FGM is in breach of article 7 of the International Covenant on Civil and Political Rights (ICCPR)[66] and constitutes torture or other cruel, inhuman, or degrading treatment or punishment. [67] The UN Human Rights Council has also raised concerns regarding its persistence.[68]

Over the past two decades, international human rights norms have evolved significantly to recognise FGM as a fundamental human rights violation against women and girls.[69] For instance, UN treaty monitoring bodies have also addressed the practice of FGM as a human rights violation.[70] Furthermore, the former UN Special Rapporteur on the Right of Everyone to the Enjoyment of the

60 African Children's Committee, 'Africa's Agenda for Children 2040' (2016) https://www.acerwc.africa/wp-content/uploads/2018/06/Agenda_2040_for_Children_Rights_in_Africa_15x24.pdf.

61 Resolution on the Health and Reproductive Rights of Women in Africa ACHPR/Res.110(XXXXI)07.

62 Joint General Comment on Child Marriage (n 42).

63 Joint General Comment on Child Marriage (n 42) para 49.

64 See generally first draft joint general comment on FGM, discussed at the Experts Meeting organised by the African Children's Committee and the African Commission in collaboration with the Social Welfare Unit at the Department of Health, Humanitarian Affairs and Social Development of the African Union Commission, 7-8 June 2022, Pretoria, South Africa. Draft on file with author.

65 See E Durojaye & S Nabaneh 'Addressing female genital cutting/mutilation (FGC/M) in The Gambia: beyond criminalisation' in E Durojaye, G Mirugi-Mukundi & C Ngwena (eds) *Advancing sexual and reproductive health and rights in Africa: constraints and opportunities* (2021) 117.

66 Article 7 of ICCPR; art 37 of Convention on the Rights of the Child; art 3 of Convention Against Torture. See Human Rights Committee, General Comment 28: art 3 (the equality of rights between men and women), CCPR/C/21/Rev.1/Add.10 (29 March 2000).

67 See Committee Against Torture (CAT) General Comment 2: implementation of art 2 by States Parties CAT/C/GC/2 (24 January 2008).

68 See Human Rights Council 'Report of the Special Rapporteur on torture and other cruel, inhuman nor degrading treatment or punishment, Manfred Nowak' A/HRC/7/3 (15 January 2008).

69 Nabaneh & Muula (n 1) 253.

70 See Human Rights Committee General Comment 28: art 3 (The equality of rights between men and women) CCPR/C/21/Rev.1/Add.10 (29 March 2000).

Highest Attainable Standard of Physical and Mental Health said in his report that FGM represents 'serious breaches of sexual and reproductive freedoms, and are fundamentally and inherently inconsistent with the right to health.'[71] The CEDAW Committee under its General Recommendation 24, specifically urged governments to devise health policies that take into account the needs of girls and adolescents who may be vulnerable to traditional practices.[72]

Additionally, on 25 September 2015, the global community agreed to a new set of development goals – the Sustainable Development Goals (SDGs) – which include a target under Goal 5 to eliminate all HPs, such as child, early and forced marriage and FGM, by the year 2030.[73] The UN General Assembly also adopted a resolution that will no doubt intensify the global movement towards eradicating FGM.[74]

## 4 Nature and scope of state obligations

States have various obligations under article 5 of the Maputo Protocol, such as obligations to prevent HPs, provide protection against FGM and provide effective remedies and reparation for victims of HPs. These are explained below relating to specific obligations such as legislative, institutional, or other measures.

### 4.1 Legislative measures

Article 5(b) requires states parties to prohibit and condemn all forms of FGM through legislative and other measures. This complements article 2, which requires states to take legislative action against discrimination, particularly HPs that endanger women's health and well-being. Due to the very prescriptive nature of the article, states are obligated to enact national legislation that prohibits FGM along with prescribed sanctions for those that perpetuate the practice. The Commission has called on states to institute harsher penalties for all persons involved, including parents and family members.[75] In legislating against FGM, states must ensure that victims of FGM are not prosecuted or portrayed as having participated in the commission of the crime. In addition, states are obligated to prevent third parties from coercing women to undergo traditional practices, such as FGM.[76] The continued practice of FGM despite criminalisation can be attributed to a number of reasons, as argued by Nabaneh and Muula, including the 'lack of accountability procedures and of strong national law enforcement mechanisms due to ineffective governmental coordinating bodies, weak human rights institutions, and ineffective judiciaries.'[77] Thus, it is critical to engage a broad range of stakeholders, including the National Human Rights Institutions (NHRIs) in order to ensure robust accountability.[78] The obligation to protect women and girls from HPs, including FGM requires states, their agents and officials to not only take action to prevent violations but also to impose sanctions for violation of their

71 Human Rights Council 'Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Dainius Pūras' A/HRC/29/33 (2 April 2015).

72 CEDAW Committee General Recommendation 14 (n 10).

73 See Resolution adopted by the General Assembly on 25 September 2015 'Transforming our world: the 2030 Agenda for Sustainable Development' A/RES/70/1.

74 General Assembly Resolution. Intensifying global efforts for the elimination of female genital mutilations, A/RES/71/168 (2017).

75 See Concluding Observations and Recommendations on the Combined 3rd and 4th Periodic Report of Burkina Faso on the Implementation of the African Charter on Human and Peoples' Rights 2011-2013, African Commission on Human and Peoples' Rights adopted at 21st extraordinary session 23 February-04 March 2017, Banjul, The Gambia.

76 See Committee on Economic, Social and Cultural Rights (ICESCR) 'General Comment 22 on the right to sexual and reproductive health (art 12 of the International Covenant on Economic, Social and Cultural Rights' E/C.12/GC/22. 2016 (2 May 2016) paras 29, 49(a) & 59.

77 Nabaneh & Muula (n 1) 256.

78 Niamey Guidelines (n 57) 48-49.

rights by private parties, and to exercise due diligence in investigating, prosecuting and punishing such violators.[79]

## 4.2 Institutional measures

The nature of victim support envisaged under article 5(c) of the Maputo Protocol includes 'health services, legal and judicial support, emotional and psychological counselling, and vocational training to make them self-supporting'. Banda aptly captures the holistic approach of this provision, noting as follows:[80]

> The strength of the African Protocol is in its recognition that violence against women, including the elimination of harmful practices, requires [a] holistic approach which goes beyond law and punishment to embrace the totality of the person whose rights have been violated.

To ensure access to justice, states must build the capacity of law enforcement, prosecution, and judicial officers on handling HPs cases, including FGM. The African Commission has recommended that states train judicial officers on human rights, particularly in handling cases of violence against women.[81] Where necessary, it has recommended, victims should be provided with legal aid.

The short- and long-term medical and psychological consequences of FGM are well-researched.[82] In particular, FGM 'may have various immediate and/or long-term health consequences, including severe pain, shock, infections and complications during childbirth, long-term gynaecological problems such as fistula, psychological effects and death.'[83] It is critical that states provide adequate, affordable, and accessible health services at the time of first response, but also later in terms of management of pregnancy, childbirth and the postpartum period for women who have undergone FGM.[84] Access to psychological counselling should be provided for women and girls, within reasonable distances and at no cost. For example, the African Children's Committee recommended Eritrea to provide financial, medical and psychological assistance to victims of FGM.[85] In addition, states must ensure that vocational training programmes are offered to all victims of FGM.

## 4.3 Other measures

In *Equality Now and Ethiopian Women Lawyers Association v Federal Republic of Ethiopia*[86] the African Commission further elaborated on other measures that states may take in addition to legislation on

79 As above 18.

80 F Banda 'Blazing a trail: the African Protocol on Women's Rights comes into force' (2006) 50 *Journal of African Law* 80-81.

81 See eg, *Equality Now and Ethiopian Women Lawyers Association (EWLA) v Federal Republic of Ethiopia (Equality Now)*, Communication 341/07 African Commission on Human and Peoples' Rights 57th Annual Activity Report (2016) para 160(d).

82 See I Sunday-Adeoye & G Serour 'Management of health outcomes of female genital mutilation: systematic reviews and evidence syntheses' (2017) 136 (Suppl. 1) *International Journal of Gynecology and Obstetrics* 1-2.

83 CEDAW Recommendation 19, para 19. See also WHO Study Group on Female Genital Mutilation and Obstetric Outcome 'Female genital mutilation and obstetric outcome: WHO collaborative prospective study in six African countries' (2006) 367(925) *Lancet* 1835-1841.

84 See generally obligations arising from art 14(2)(a) & (b) of the Protocol and the African Commission's General Comments on art 14(1), (d) and (e) and on art 14(2)(a) and (c) of the Maputo Protocol. See also R Khosla et al 'Gender equality and human rights approaches to female genital mutilation: a review of international human rights norms and standards' (2017) 14(59) *Reproductive Health* 1-9.

85 Concluding Recommendations on the initial report of Eritrea, African Committee of Experts on the Rights and Welfare of the Child, adopted at the 28th session (21 October-1 November 2016).

86 *Equality Now v Ethiopia* (n 81).

issues of abduction, rape, and other harmful practice such as forced marriage. The Commission noted that other measures may include:[87]

> immediately launching sensitisation campaigns in the area about the illegality of the practice of forced marriage by abduction and rape and the attendant penal consequences; providing direct security at the residences of girls attending school; conducting random patrols of the areas where the practice was rampant; or indeed requiring the owners of properties accommodating school-attending girls … to adequately secure the premises.

In line with article 5(a) of the Maputo Protocol, states have an obligation to create public awareness of HPs, through information, formal and informal education, and outreach programmes. This is important given the need to change social norms.[88] It has been observed that in countries where the enactment of anti-FGM law is accompanied by culturally-sensitive education and sensitisation, there is evidence to show a decline in both practice and support for it.[89] The African Commission has called on states to not only sensitise, but also closely collaborate with religious, traditional and political leaders in efforts to eliminate HPs.[90] The African Children's Committee has also recommended that the state take necessary measures to create awareness about the adverse effect of FGM among all relevant stakeholders to eliminate the practice.[91]

The Maputo Protocol calls on states parties to take measures to protect women who are at risk of FGM (article 5(d)). Such measures may include the provision of state-funded rescue centres that shelter victims or girls and women at risk. States have a duty to ensure the availability of these shelters with adequate funding. Toll-free helplines can also be a means through which girls and women at risk may access protection. States should also commit themselves to protecting and granting asylum to those women and girls who are at risk of or have been or are being subjected to HPs.

In sum, article 5 of the Maputo Protocol has adopted a three-prong approach to eradicating HPs as noted.[92] The Maputo Protocol obligates states to exercise due diligence, end impunity and adopt a multi-sectoral approach.

## 5 State practice

Article 26 of the Maputo Protocol calls upon states parties to 'ensure the implementation of this Protocol at the national level' indicating in their periodic reports 'legislative and other measures' undertaken.[93] This section gives a brief snapshot of the various steps states parties have undertaken in line with the above-mentioned obligations.

The evolution of strong international and regional human rights standards recognising HPs as a human rights violation has significantly influenced law reform at the national level. Domestic legal framework plays an essential role in protecting the rights of women and girls against such practices.

87 *Equality Now v Ethiopia* (n 81) para 128.

88 UNICEF 'The dynamics of social change: Towards the abandonment of female genital mutilation/cutting in five African countries' (2010) 6.

89 See AU Commission & United Nations Office of the High Commissioner for Human Rights 'Women's rights in Africa' (2017) 37.

90 See eg African Commission General Comment on art 14(1)(d) & (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa paras 23 & 46.

91 Concluding Recommendations on the initial report of Sierra Leone, African Committee of Experts on the Rights and Welfare of the Child, adopted at the 30th ordinary session (6-16 December 2017).

92 Durojaye & Nabaneh (n 65) 119.

93 Article 26(1) of the Protocol.

For instance, section 8(d) of the South African Equality Act stipulates that unfair discrimination on the ground of gender includes 'any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child'.[94] Similarly, the constitutions of countries such as Ghana, Kenya, Namibia, Uganda, and Malawi, provide for the equality or non-discrimination clause to take precedence over custom or culture in the event of a conflict. However, the constitutions of countries such as Botswana, The Gambia, Ghana, Lesotho, Sierra Leone, and Zambia all contain provisions that exempt the general area of 'personal' law from the guarantee of protection against discrimination.[95] This divergence in constitutional provisions on protection against discrimination highlights the challenges that may arise in implementing anti-FGM obligations. While some countries prioritise the equality or non-discrimination clause over cultural practices, others exempt certain areas, including 'personal' law, from these protections. This may make it more difficult to hold perpetrators accountable and to fully eradicate the harmful practice of FGM in those countries.

Article 5(b) of the Maputo Protocol requires states parties to prohibit and condemn all forms of FGM through legislative and other measures. Evidence shows that at least 60 countries have adopted laws that criminalise FGM, 24 of them African.[96] In Africa, using legal sanctions to address FGM is the most common response. Criminalisation often involves the imposition of jail sentences or fines. Countries such as Ghana (1994), Burkina Faso (1996), Ivory Coast (1998), Senegal (1999), Djibouti (1995) and Togo (1998) have criminalised the practice of FGM.[97]

Over the past decade, there has been a growing trend towards criminalising FGM. This trend is reflected in a range of laws, including penal codes, specific anti-FGM legislation, laws on women's rights or equality, and domestic violence legislation. Between 2007 and 2018, countries such as Zimbabwe, Uganda, South Sudan, Kenya, Guinea Bissau, Mozambique, The Gambia and Cameroon all enacted or amended laws so as to punish the practice of FGM. For instance, The Gambia amended its Women's Act 2015. Nigeria adopted the Violence Against Persons (Prohibition) Act in 2015, whose article 6 prohibits FGM, although the statute only has direct application in the Federal Capital Territory, Abuja, and not in all 36 states. In Mauritania, the Children's Code of 2015 prohibits FGM (article 12). Guinea also adopted a similar provision in articles 405-410 in its Children's Code, 2008. Guinea-Bissau is the only country in West Africa with a specific law prohibiting FGM, which has an extraterritorial clause. Article 9 of Law No. 14/2011 explicitly extends the applicability of the law to citizens and foreign residents in Guinea-Bissau who have performed or undergone FGM in a foreign country.[98] In 2020, Sudan passed a law banning FGM.[99]

Burkina Faso is increasingly being recognised as one of the few countries where FGM legislation is effectively and systematically enforced. In 2017, data collected over a six-month period showed that 51 people (perpetrators and accomplices) were prosecuted for performing FGM on 49 girls; a total of 32 people were sentenced to either firm or conditional sentences.[100] The Commission applauded Burkina

94 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

95 See UN Women's Global Gender Equality Constitutional Database https://constitutions.unwomen.org/en (accessed 20 June 2023).

96 See World Bank 'Compendium of international and national legal frameworks on female genital mutilation' (2018).

97 RJ Cook et al 'Female genital cutting (mutilation/circumcision): ethical and legal dimensions' (2002) 79 *International Journal of Gynaecology and Obstetrics* 285.

98 Law 14/2011. See generally, UNFPA Regional Office for West and Central Africa 'Analysis of legal frameworks on female genital mutilation in selected countries in West Africa' (2017).

99 Law 12 of 2020. See 28TooMany 'Sudan: The Law and FGM' (2020) https://www.28toomany.org/media/uploads/Law%20Reports/sudan_law_report_v2_(march_2022).pdf (accessed 20 June 2023).

100 28Too Many 'Burkina Faso: The Law and FGM' (2018) 5 https://www.28toomany.org/media/uploads/Law%20Reports/burkina_faso_law_report_v1_(september_2018).pdf (accessed 20 June 2023).. See also Concluding Observations on the 7th Periodic Report of Burkina Faso, Committee on the Elimination of Discrimination Against Women (27 May 2016), UN Doc CEDAW/C/BFA/7 (2016).

Faso in its 2015 Concluding Observations, noting the government's commitment, including by training paralegals.[101] While there have been numerous reports of the commission of FGM, very few cases have resulted in convictions. In Kenya, following the enactment of the Prohibition of Female Genital Mutilation Act 32 of 2011 (FGM Act), a special unit was created in the Office of the Director of Public Prosecution (ODPP) to handle FGM cases.[102] In its report on the Maputo Protocol, Kenya noted that for the period 2017 to 2018, the ODPP handled 346 cases of FGM. Out of the 346, there were 34 convictions, 10 acquittals, 22 withdrawals and 280 pending trials.[103] In 2019, it was reported that 76 people (59 females and 17 males) were arrested in connection with the cutting of 50 girls while five girls and women were provided with legal aid, counselling and representations.[104] The Commission has also expressed concerns over the snail's pace of prosecution and completion of few reported cases due to insufficient evidence in The Gambia.[105] Since the law was enacted in late 2015, there have been two cases relating to FGM, one of which involved a 5-month-old baby who died as a result of FGM in Sankandi Village, which has not resulted in a successful conviction [106]

Evidently, there are varied penalties at the domestic level for contravening such laws. For example, section 2 of Kenya's FGM Act defines FGM types I, II and III but excludes Type IV. This results in a lacuna, (as further discussed below), that hampers the effective enforcement of the law. In addition, in efforts to evade the national laws prohibiting FGM in the country of residence, women and girls have increasingly been taken across the borders to undergo FGM in neighbouring countries. Despite the evident progress in commitment from stakeholders, including regional initiatives such as the Mombasa Declaration and the Action Plan on Cross Border FGM adopted in 2019,[107] and the Pan African Parliament (PAP) 2016 Action Plan to end FGM that highlighted the need to strengthen actions against cross-border FGM,[108] this has largely not translated into domestic policies and actions.[109] Thus, cross-border movements for the purpose of FGM is mainly unaddressed.[110] This is evident in the East African region except for Kenya and Uganda, which have specific provisions for cross-border practice of FGM.[111] Despite the commendable increase in the number of African countries with specific legislation prohibiting FGM, there are limitations to the laws implemented, as they primarily follow a crime and punishment model with little emphasis on awareness-raising or victim support measures. Kenya is an exception in that its laws on FGM include provisions for raising awareness about the harmful effects of the practice and for supporting victims. However, in general,

101 Concluding Observations and Recommendations on the Combined 3rd and 4th Periodic Report of Burkina Faso 2011-2013, African Commission on Human and Peoples' Rights, adopted at the 21st extraordinary session (23 February-4 March 2017) para 45.

102 12th and 13th Periodic Reports of Kenya on the Implementation of the African Charter on Human and Peoples' Rights and Initial Report to the Protocol to the African Charter on the Rights of Women in Africa, African Commission on Human and Peoples' Rights, adopted at the 71st ordinary session (21 April-13 May 2022) para 246.

103 As above, para 247.

104 UNICEF 'Case Study on the End Female Genital Mutilation (FGM) programme in the Republic of Kenya' (2021) 9.

105 Concluding Observations and Recommendations on the Combined Periodic Report of The Gambia on the Implementation of the African Charter on Human and Peoples' Rights 1994-2018 and Initial Report to the Protocol to the African Charter on the Rights of Women in Africa 2005-2014, African Commission on Human and Peoples' Rights, adopted at the 64th ordinary session (24 April-19 May 2019) (2021) para 45.

106 Durojaye & Nabaneh (n 65) 125.

107 UNFPA 'Ending cross-border female genital mutilation' (4 October 2019) https://kenya.unfpa.org/en/publications/ending-cross-border-fgm (accessed 6 June 2022).

108 'Pan African Parliament Endorses Ban on FGM' ReliefWeb 7 August 2016 https://reliefweb.int/report/uganda/pan-african-parliament-endorses-ban-fgm (accessed 6 June 2022).

109 See UNICEF & UNFPA 'Beyond the crossing: female genital mutilation across borders, Ethiopia, Kenya, Somalia, Tanzania and Uganda' (2019).

110 See IRIN 'West Africa: Cross-border FGM on the rise' (17 October 2008).

111 Art 21 of the Kenya Prohibition of Female Genital Mutilation Act, 2011 and sec. 15 of the Ugandan Prohibition of Female Genital Mutilation Act 2010.

laws against FGM in many countries do not include such measures. In light of the limited approach of criminalisation, the Commission has emphasised the need for a more comprehensive approach to combating FGM. This includes empowering girls with information, skills, and support networks, as well as engaging with communities to raise awareness about the harmful effects of the practice and promote its abandonment.[112]

Merely enacting legislation is not enough to effectively combat HPs, as the persistent prevalence of such practices in African countries demonstrates. The Commission in examining state reports has raised concerns, for example, Cameroon,[113] and Ethiopia,[114] on the persistence of the ongoing HPs, including FGM despite the existence of national laws. The African Children's Committee has also on several occasions, made recommendations to states- such as Sierra Leone- to strengthen laws and institutions addressing FGM and other forms of HPs against girls. [115] Power relations, culture, and religion continue to be the drivers and determinants of the practice, and these impact public discourses that shape policy. Thus, the trend of criminalisation of FGM has been accompanied by a push to ensure that legislation functions as a supportive tool that catalyses social change and fosters an enabling environment for the abandonment of the practice. For example, section 27 of the FGM Act imposes a mandatory duty on the government to provide support services to victims of FGM.

There is emerging constitutional jurisprudence on FGM in the region. For instance, in *Law and Advocacy for Women in Uganda v Attorney General*,[116] on the issue of whether the custom and practice of FGM was unconstitutional, the Ugandan Constitutional Court held that FGM violates the rights of women enshrined in articles 21, 24, 32(2), 33, and 44 of the Constitution, and, to the extent that girls and women are known to die as a direct consequence of FGM, also article 22 of the Constitution. This was a petition filed at the Constitutional Court of Uganda asking the Court to declare that FGM, which is practised by several Ugandan communities, contravenes several women's rights under the Constitution of Uganda. The petitioner asked the Constitutional Court of Uganda to declare FGM unconstitutional in accordance with article 2(2) of the Constitution, alleging that it violated the right to life guaranteed under article 22(1); the right to dignity and protection from inhuman treatment, secured under article 24; the rights of women recognised under article 33; and the right to privacy guaranteed under article 27(2) of the Constitution.

The Court recognised the right to practice one's culture, religion, and tradition as provided under article 37 of the Constitution of Uganda but emphasised that such practices should not subject any person to any form of torture, cruel, inhuman, and degrading treatment. Consequently, the court held that FGM should be prohibited in the jurisdiction as it violates the Constitution and international law. While the court did not specifically mention the Maputo Protocol, it referred generally to treaties ratified by Uganda. This decision marks a significant milestone in the development of progressive jurisprudence on state obligations under international and national law to protect women's rights against the practice of FGM and other HPs.

112 African Commission, Concluding Observations The Gambia (2021) (n 105) para 62.

113 See eg: Concluding Observations and Recommendations on the 2nd Periodic Report of Cameroon, African Commission on Human and Peoples' Rights, adopted at the 47th ordinary session (12-26 May 2010).

114 Concluding Observations and Recommendations on the 5th and 6th Periodic Reports of Ethiopia on the implementation of the African Charter on Human and Peoples' Rights, African Commission on Human and Peoples' Rights, adopted at the 56th session (2015) para 36.

115 See eg: African Children's Committee Concluding Observations on: Sierra Leone (2017) (n 91); Eritrea (2016) (n 85); Initial report of Cameroon, adopted at the 28th ordinary session (21 October-1 November 2016); Initial report of Ghana, adopted at the 28th ordinary session (21 October-1 November 2016); Initial report of Sudan, adopted at the 20th ordinary session (12-16 November 2012); Initial and first period report of Nigeria, adopted at the 12th session (July 2006)

116 *Law and Advocacy for Women in Uganda v The Attorney General* [2010] UGCC 4 Constitutional Petition no 8 of 2007 Uganda, Constitutional Court.

Recently in Kenya, a medical practitioner, Dr Tatu Kamau, challenged the constitutionality of the FGM Act. She argued that sections of the Act contravened the Kenyan Constitution by denying an adult woman the freedom to choose to undergo FGM under a trained and licensed medical practitioner, which constituted a denial of the right to access healthcare.[117] She also argued that the legislation denied adult women the right to practice their culture. Dismissing her petition, the High Court of Kenya reiterated that the practice of FGM violates a woman's right to health, human dignity and, in instances where it results in death, the right to life, adding that the practice also undermines international human rights standards.

Due to COVID-19 disruptions, a one-third reduction in the progress towards ending FGM by 2030 is anticipated, according to the UNFPA.[118] For instance, the President of Kenya in 2020 ordered an investigation into reports of rising violence against women and girls – including rape, domestic violence, FGM and child marriage – attributed to COVID-19 restrictions.[119] The African Commission, in 2020, also adopted a resolution on COVID-19, which raised concerns about the 'unprecedented scale in the deprivation of the rights of women and girls reported in the context of the pandemic across the continent'. In particular, the Commission expressed concern about 'the rise in harmful practices including forced child marriage and female genital mutilation.'[120]

In addition, Agenda 2063 (Aspirations 3, 4 and 6) of the AU also condemns all forms of violence and discrimination against women and girls, including FGM.[121] A continental campaign to end FGM was launched by the AU in 2019.[122] The campaign, also known as the Saleema initiative, was adopted and launched to save more than 50 million girls in Africa under the age of 15 who are at risk of FGM by 2030 if urgent action is not taken. The Initiative calls for regular reporting by member states to AU statutory bodies and requests the African Union Commission (AUC) to develop the AU Accountability Framework on Eliminating Harmful Practices.

## 6 Conclusion

Addressing HPs requires a multi-faceted approach beyond criminalisation and punishment, and article 5 of the Maputo Protocol highlights the need for holistic interventions that focus on victim support, education, and rehabilitation. However, implementing and enforcing laws against FGM and other HPs remain limited, and practising communities have responded with changed tactics, making it crucial to engage with stakeholders and develop comprehensive solutions to protect the rights of vulnerable individuals.

In addition, we must recognise that HPs extend beyond FGM to include child marriage, beading, breast ironing, and son preference. Therefore, efforts to combat HPs should take a comprehensive approach that addresses all forms of such practices. Rather than solely addressing these practices, it is imperative to tackle the root causes of the issue. This includes challenging the entrenched patriarchal power dynamics that seek to control and diminish women's autonomy, particularly as it relates to their

117 *Dr Tatu Kamau v Attorney General* [Constitutional Petition no 244 of 2019] High Court of Kenya.

118 UNFPA-UNICEF 'COVID-19 Disrupting SDG 5.3. Eliminating Female Genital Mutilation. Technical Note' (2020), https://www.unfpa.org/sites/default/files/resource-pdf/COVID 19_Disrupting_SDG.3_Eliminating_Female_Genital_Mutilation.pdf. See also UN Women and UNFPA 'Impact of COVID-19 on gender equality and women's empowerment in East and Southern Africa' (2021).

119 UN Women & UNDP 'COVID-19 Global Gender Response Tracker. Factsheet: Sub-Saharan Africa (2020), https://data.undp.org/gendertracker/ (accessed 20 November 2021).

120 449 Resolution on Human and Peoples' Rights as central pillar of successful response to COVID-19 and recovery from its socio-political impacts – ACHPR/Res. 449 (LXVI) 2020.

121 African Union. Agenda 2063: The Africa we want. 2013. https://au.int/sites/default/files/pages/3657-file-agenda2063_popular_version_en.pdf.

122 AU Assembly Decision 737/2019.

sexual and reproductive rights. By doing so, meaningful steps can be taken towards ending HPs and advancing gender equality.

State actors play a critical role in combating HPs by adopting multi-faceted strategies that go beyond criminalisation, allocate resources towards victim support, and education programs to modify attitudes. Enforcing laws and engaging with stakeholders such as religious and community leaders is also vital. Non-state actors, including NGOs and civil society organisations, can also contribute significantly by supporting community-led initiatives, building partnerships with state actors and other stakeholders, providing support to victims, and undertaking awareness-raising campaigns. To implement article 5(a) of the Maputo Protocol, public awareness of HPs can be raised through formal education, such as revising school curricula, informal education through community outreach programs and engaging community leaders, mass media campaigns, and organising events and campaigns that bring together survivors, activists, and community leaders. Overall, creating public awareness requires a sustained effort that involves various stakeholders and approaches. It is essential to prioritise education and outreach programmes targeting vulnerable communities and focus on changing social norms perpetuating HPs.

Further progress can be made by building on the advancements made at the regional level in terms of human rights instruments and policies through the development of effective national and regional strategies. While ongoing research and data collection on HPs is important, gaining a comprehensive understanding of these practices is equally vital to inform the creation of effective strategies. Investing in interventions that promote education, rehabilitation, and support to victims of HPs while enforcing laws against these practices and engaging with communities to create a positive change in attitude is important. Eliminating HPs requires the involvement of various sectors of society, such as communities where it is practiced, cultural and traditional leaders, religious institutions, healthcare workers, law enforcement, the media, national human rights institution, and the judiciary. Collaboration between state and non-state actors, as well as development partners is crucial to develop comprehensive and sustainable solutions that address HPs and protect the rights of women and girls.