

Article 4

The rights to life, integrity and security of the person

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1. Every woman shall be entitled to respect for her life and the integrity and security of her person. All forms of exploitation, cruel, inhuman or degrading punishment and treatment shall be prohibited.
2. States Parties shall take appropriate and effective measures to:
 - (a) enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public;
 - (b) adopt such other legislative, administrative, social and economic measures as may be necessary to ensure the prevention, punishment and eradication of all forms of violence against women;
 - (c) identify the causes and consequences of violence against women and take appropriate measures to prevent and eliminate such violence;
 - (d) 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;
 - (e) punish the perpetrators of violence against women and implement programmes for the rehabilitation of women victims;
 - (f) establish mechanisms and accessible services for effective information, rehabilitation and reparation for victims of violence against women;
 - (g) prevent and condemn trafficking in women, prosecute the perpetrators of such trafficking and protect those women most at risk;
 - (h) prohibit all medical or scientific experiments on women without their informed consent;
 - (i) provide adequate budgetary and other resources for the implementation and monitoring of actions aimed at preventing and eradicating violence against women;
 - (j) ensure that, in those countries where the death penalty still exists, not to carry out death sentences on pregnant or nursing women;
 - (k) ensure that women and men enjoy equal rights in terms of access to refugee status determination procedures and that women refugees are accorded the full protection and benefits guaranteed under international refugee law, including their own identity and other documents.

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1 Introduction

Violence against women (VAW) is a pervasive violation of human rights and a form of gender-based discrimination.¹ Worldwide, 31 per cent of women have experienced physical and/or sexual violence.² Comparative studies show that the prevalence of VAW in Africa is 36 per cent, which is higher than the global average.³ In sub-Saharan Africa, 44 per cent of women, or more than two in five, have been subjected to intimate partner violence.⁴ Further, 38 per cent of all murders of women are committed by intimate partners.⁵ Statistics show that the magnitude of femicide or gender-related killings remains largely consistent, with negligible increases and decreases over the past decade.⁶ Moreover, there is a rise in digital violence which also disproportionately affects women.⁷ In response, several mobilisation campaigns have arisen, showing outrage on the streets and online.⁸

Article 4 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) provides for the rights of African women to live their lives free from all forms of violence. This right is expressed within the ambit of three foundational rights: the rights to life, to integrity and to security of the person, and to be free from all forms of exploitation, cruel, inhuman, and degrading treatment.

Article 4 is an advance in normative standards compared to the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) because it creates binding state obligations to eradicate VAW. Except for article 6 of CEDAW, which requires state parties to suppress all forms

- 1 UN Declaration on the Elimination of Violence Against Women (DEVAW) Preamble, arts 1 and 2. This chapter uses the terminology VAW in line with the language used in art 4 of the Maputo protocol, with the exception that the terms 'gender-based violence' or 'gendered violence' are used where there is a need to emphasise the gendered nature of VAW.
- 2 WHO 'Violence against women: 2018 estimates for intimate partner violence against women and global and regional prevalence estimates for non-partner sexual violence against women' (2021) <https://www.who.int/publications/i/item/9789240022256> (accessed 28 April 2023) 35.
- 3 As above.
- 4 MD Muluneh, V Stulz, L Francis & K Agho 'Gender based violence against women in sub-Saharan Africa: a systematic review and meta-analysis of cross-sectional studies' (2020) 17 *International Journal of Environmental Research and Public Health* 903. See also WHO (n 2) 35.
- 5 WHO (n 2) 1.
- 6 UNODC *Killings of women and girls by their intimate partner or other family members Global estimates* (2020). Reports from Africa confirm this trend. See S Fröhlich 'Violence against women: Africa's shadow pandemic' DW-Africa 2020 <https://www.dw.com/en/africa-pandemic-violence-rape-women/a-55174136> (accessed 26 April 2023); UN Women 'Facts and figures: Ending violence against women' February 2022 <https://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures>; (accessed 28 April 2023) Muluneh et al (n 4).
- 7 African Commission on Human and Peoples' Rights (the African Commission), Resolution on the Protection of Women Against Digital Violence in Africa—ACHPR/Res. 522 (LXXII) 2022 adopted at 72nd Ordinary 2 August 2022; OA Makinde, E Olamijuwon, NK Ichegebo, C Onyemelukwe & MG Ilesanmi 'The nature of technology-facilitated violence and abuse among young adults in sub-Saharan Africa' in J Bailey, A Flynn & N Henry (eds) *The emerald international handbook of technology-facilitated violence and abuse* (2021) 83-101.
- 8 A Okech 'Feminist digital counter publics: Challenging femicide in Kenya and South Africa' (2021) 46 *Signs: Journal of Women in Culture and Society* 1013-1033. Such as the #TotalShutDown protests in South Africa, the #State of Emergency movement in Nigeria, and the #HerLifeMatters and #NoToFemicide movements in Kenya.

of trafficking in women,⁹ there are no specific provisions on VAW in CEDAW. To remedy this, the Committee on the Elimination of all Forms of Discrimination Against Women (CEDAW Committee) has issued several General Recommendations.¹⁰

This chapter provides a commentary on article 4 in light of national, regional, and global normative standards, including comparative perspectives and implementation practices. The chapter is divided into six sections and aims to analyse one of the most comprehensive rights in the Maputo Protocol. Section 2 begins by reviewing the drafting history of article 4. Section 3 then unpacks the foundational rights under article 4(1), drawing linkages with related provisions in other treaties. Section 4 proceeds with an analysis of the nature of state obligations created under article 4(2) and explicates the scope and content of these obligations. Section four further highlights the obligation that rests on all states to invest financial and other resources to eradicate VAW. Section 5 elaborates on state practice through a review of domestic legislation and state reports submitted to the African Commission on Human and Peoples' Rights (African Commission) under article 26(1) of the Maputo Protocol alongside the related Concluding Observations. Section 6 of this chapter concludes by briefly assessing the challenges that arise in implementing article 4, highlighting its conceptual limits and providing entry points for advancing the realisation of women's right to be free from all forms of violence.

2 Drafting history

The Maputo Protocol was drafted out of concern that despite the existence of the African Charter on Human and Peoples' Rights (African Charter), discrimination against women, especially manifested through VAW, persisted on the continent.¹¹ Article 4 was developed to further concretise the international recognition of VAW as a violation of human rights and as a form of gender-based discrimination.¹² Earlier drafts did not strongly articulate state responsibility to eliminate VAW. Instead, the focus was on physical security, specifically prohibiting the death penalty on pregnant women, commercial sexual exploitation, medical and scientific experiments on women without their consent and rape, especially in times of war.¹³ This initial articulation did not include VAW as it affects women in the so-called¹⁴

9 UN Committee on the Elimination of Discrimination Against Women (CEDAW Committee), General Recommendation 38 on trafficking in women and girls in the context of global migration, 20 November 2020, CEDAW/C/GC/38 (CEDAW Committee General Recommendation 38) para 10; the CEDAW Committee has acknowledged that 'trafficking and exploitation of prostitution in women and girls is unequivocally a phenomenon rooted in structural, sex-based discrimination, constituting gender-based violence'.

10 UN Committee on the Elimination of Discrimination Against Women (CEDAW Committee), General Recommendation 12, Violence Against Women, 8th session 1989; UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 19: Violence against women, 1992, A/47/38; 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, CEDAW/C/GC/35; UN Committee on the Elimination of Discrimination Against Women (CEDAW Committee), General Recommendation 30 on women in conflict prevention, conflict and post-conflict situations, 18 October 2013, CEDAW/C/GC/30.

11 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) para 5.

12 Report of the Meeting of Experts (n 11).

13 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); 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).

14 So-called is used here to show the fallacy of the public/private divide that has been used historically to delegitimize state accountability for VAW by non-state actors or occurring in 'private'. This false dichotomy has been dismantled by scholars and the mandate of the Special Rapporteur on VAW its causes and consequences. See eg R Manjoo UN Special Rapporteur on violence against women its causes and consequences, Developments in the United Nations regarding violence against women over approximately 20 years UN Doc A/HRC/26/38/2014; CH Chinkin & S Wright 'Feminist approaches to international law' (1991) 85 *American Journal of International Law* 613; C Romany 'State responsibility goes private: a feminist critique of the public/private distinction in international human rights law' in RJ Cook (ed) *Human rights of women: national and international perspectives* (1994) 85.

‘private sphere’, nor the broad range of manifestations of protection against VAW that already existed in global and regional human rights conventions such as CEDAW.¹⁵

In the Nouakchott and Kigali Drafts, provisions presently under article 4 were spread between articles 4 and 5 and included the prohibition of harmful cultural practices and non-discrimination provisions.¹⁶ Although the Kigali Draft went further to separate provisions on discrimination under article 4 and the right to physical security under article 5, it overlapped the obligation to modify socio-cultural practices and gender stereotypes as part of the provision on non-discrimination.¹⁷ In an attempt to resolve the overlaps, the Final Draft merged some of the provisions scattered across articles 4 and 5 to create the present article 4.¹⁸ The Final Draft also separated some provisions, moving the provisions on non-discrimination to article 2, and some provisions on sexual and verbal violence were retained under article 3 on dignity. The provision on harmful cultural practices was moved to article 5 to be addressed more comprehensively in line with the merger between the draft OAU Convention on Harmful Practices and the Kigali Draft.¹⁹

The drafting process included discussions which emphasised the importance of anchoring the protection of women from violence in international standards and ensuring that article 4 secured and advanced rights rather than regressing from existing standards.²⁰ Such discussions included a meeting convened by Equality Now in January 2003 which resulted in the Comments by the NGO Forum seeking to strengthen and align the Final Draft with international standards.²¹ With regard to article 4, the main advancement sought by this NGO commentary was the recognition of VAW as a form of discrimination. This is demonstrated by the mark-ups by the NGO Forum integrating discrimination under article 4 and incorporating the right to be free from violence into article 2 on non-discrimination.²² These proposals were not included in the Addis Ababa Draft.²³

Article 4 should be read within the context of the global trajectory of legal standards and jurisprudence on VAW at the time the Protocol was drafted. The human rights standards recognising VAW as a form of discrimination emerged as part of the CEDAW Committee’s attempt to address the major normative gap of CEDAW not including binding provisions on VAW. Through its General

15 See also Vienna Declaration and Programme of Action (Vienna Declaration); DEVAW; United Nations, Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women, 27 October 1995; UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998; International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War; Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará).

16 Nouakchott and Kigali Drafts (n 13).

17 Kigali Draft (n 13) arts 4 and 5.

18 Draft Protocol to the African Charter on Human and Peoples’ Rights on the rights of Women in Africa, CAB/LEG/66.6; final version of 13 September 2000 (Final Draft). Reprinted in MS 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* 53-63.

19 OAU Legal Counsel Inter Office memorandum to the Secretary of the African Commission subject: OAU Convention on the Elimination of all Forms of Harmful Practices (HPs) Affecting the Fundamental Rights of Women and Girls, I CAB/LEG/117.141/62/Vol.I 17 May 2000. On file with the author. See also Organisation of African Unity (OAU) Convention on the Elimination of all Forms of Harmful Practices (HPs) Affecting the Fundamental Rights of Women and Girls IAC/OAU/197.00, IAC/OAU/199.000 and CAB/LEG/117.141/62/Vol.I (OAU Convention on Harmful Practices).

20 Equality Now Regional Office, Letter to the Interim Commissioner for Peace, Security and Political Affairs African Union, Ambassador Djinnit Said, 13 January 2003.

21 Comments by the NGO Forum, CAB/LEG/66.6/Rev.1. January 2003.

22 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) arts 2 & 4.

23 Addis Ababa Draft (n 22).

Recommendation 12,²⁴ updated by General Recommendation 19,²⁵ the CEDAW Committee concluded that gender-based violence (GBV) is a form of discrimination within the meaning of article 1 of CEDAW. This standard is reiterated in article 4 of the DEVAW.

The General Recommendations by the CEDAW Committee and DEVAW are soft law and do not create binding obligations. In contrast, article 4 of the Maputo Protocol creates binding state obligations with respect to VAW. Therefore, the non-integration of discrimination in article 4 does not weaken the Protocol's stance on VAW. Nonetheless, the Preamble to the Maputo Protocol, as discussed in chapter 2, recognises this integration in the 'commitments to eliminate all forms of discrimination and gender-based violence against women'.²⁶ It further emphasises the importance of interpreting and applying the Protocol in line with other global and regional standards.²⁷

3 Concepts and definitions

This section provides a conceptual analysis of the different rights protected under article 4. It includes discussions on the right to be free from violence, the right to life, the right to integrity and security of the person, and the prohibition of all forms of cruel, inhuman, and degrading treatment. It also highlights specific contexts within which VAW takes place: that is, as human trafficking, as medical and scientific experiments and in relation to refugee women.

3.1 Violence against women as a form of gender-based discrimination

VAW as a form of discrimination is evident in the disproportionate and systematic way in which women are targeted by gendered violence at individual and structural levels.²⁸ VAW results from gender-based discrimination and perpetuates gender-based discrimination.²⁹ Article 4(1) of the Maputo Protocol, read with article 4(2), recognises that VAW violates women's rights, whether in public or private. Thus, article 4 aligns Africa's regional human rights system with the consensus which exists in the global human rights system and other regional human rights systems.³⁰

3.2 Right to life

The right to life is foundational, without which other human rights cannot be realised. It is recognised as part of customary international law and 'as a *jus cogens* norm, universally binding at all times'.³¹ It is non-derogable and applies to all persons at all times.³² Thus, it is well recognised in regional³³ and

24 General Recommendation 12 (n 10).

25 General Recommendation 12 (n 10). See also CEDAW Committee General Recommendation 35 (n 10).

26 See A Rudman 'Preamble' sec 4.9 in this volume.

27 See A Rudman 'Preamble' secs 3.3, 4.4, 4.5 & 4.6 in this volume.

28 R Manjoo Report of the Special Rapporteur on violence against women, its causes and consequences, Human Rights Council Seventeenth session, 2 May 2011, UN Doc A/HRC/17/26.

29 Manjoo (n 28) 25-27.

30 DEVAW arts 1 & 2; CEDAW Committee General Recommendation 12 (n 10); CEDAW Committee General Recommendation 19 (n 10); CEDAW Committee General Recommendation 35 (n 10); CEDAW Committee General Recommendation 30 (n 10). The Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention); and Convention of Belém do Pará.

31 African Commission on Human and Peoples' Rights, General Comment 3 on the African Charter on Human and Peoples' Rights the Right to Life (art 4), 18 November 2015 (African Commission General Comment 3) para 5.

32 General Comment 3 (n 31) para 1.

33 African Charter art 4, African Charter on the Rights and Welfare of the Child, arts 5 & 30. American Convention on Human Rights (ACHR) art 4. European Convention on Human Rights (ECHR) art 2.

global³⁴ human rights instruments. The African Commission and the United Nations (UN) Human Rights Committee (HRC) have emphasised that the right to life should be interpreted as broadly as possible to secure a dignified life for all.³⁵ Beyond simply preventing death, the right to life involves states securing the conditions for a dignified life and protecting the right to life of individuals or groups who are particularly at risk, including women.³⁶

The normative standards on the right to life usually cover issues such as extrajudicial killings by state agents, abolition of the death penalty, and enforced disappearances.³⁷ It also includes standards regulating the use of force in law enforcement and armed conflict and the prohibition of arbitrary deprivation of life, and protection of rights of persons held in custody.³⁸

While women's right to life is affected in these ways, it is a narrow purview. The greatest threat to a woman's life is GBV, often by an intimate partner or family member.³⁹ Further, women are targeted through specific gender-related killings occurring in communities and perpetrated or condoned by the state.⁴⁰ Manjoo concludes that such killings are not 'isolated incidents that arise suddenly and unexpectedly but are rather the ultimate act of gendered violence which is experienced as a continuum of violence'.⁴¹

Women's right to life is violated through physical, sexual, psychological and economic violence targeted at women simply because they are women. Direct gender-related killings include femicide as a result of domestic or intimate partner violence, honour-related killings, dowry-related femicide, ethnic- and indigenous identity-related killings, targeted killing of women at war, female infanticide, gender-based sex-selective foeticide and the killing of women due to accusations of witchcraft.⁴² There are also indirect gender-related killings of women, for example, through unsafe abortions, maternal mortality, deaths from harmful practices such as female genital mutilation and deaths linked to human trafficking.⁴³ In terms of reproductive rights, the HRC has elaborated that the right to life for women

34 International Covenant on Civil and Political Rights (ICCPR) art 6; Second Optional Protocol to the ICCPR Aiming at the Abolition of the Death Penalty; UN Convention on Protection of the Rights of All Migrant Workers and Members of Their Families (CRMW) art 9. UN Convention on the Rights of the Child (CRC) art 6. Universal Declaration on Human Rights (Universal Declaration) art 3.

35 African Commission General Comment 3 (n 31) paras 6, 11, 41-43. UN Human Rights Committee (HRC), General Comment 36, art 6 (Right to Life), 3 September 2019, CCPR/C/GC/35 (HRC General Comment 36) para 12.

36 African Commission General Comment 3 (n 31) para 11.

37 See eg *Commission Nationale des Droits de l'Homme et des Libertés v Chad* (2000) AHRLR 66 (ACHPR 1995), where the Africa Commission found violations of the right to life against Chad for failing to prevent disappearances. See also *Achuthan (on behalf of Banda) v Malawi* (2000) AHRLR 144 (ACHPR 1995) (*Achuthan v Malawi*) for violations relating to extrajudicial executions where in Malawi the police shot and killed peacefully striking workers. As to the death penalty, see *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998).

38 African Commission General Comment 3 (n 31), HRC General Comment 36 (n 35).

39 WHO (n 2) 22; *Killings of women and girls* (n 6).

40 R Manjoo Report of the Special Rapporteur on violence against women, its causes and consequences on gender related killings of women, Human Rights Council Twentieth Session, 23 May 2012, UN Doc A/HRC/20/16.

41 Manjoo (n 40) para 15.

42 UNODC Global Study on Homicide. Gender-related killing of women and girls, 2018, https://www.unodc.org/documents/data-and-analysis/GSH2018/GSH18_Gender-related_killing_of_women_and_girls.pdf (accessed 28 April 2023); A Kulczycki A & S Windle 'Honor killings in the Middle East and North Africa: a systematic review of the literature' (2011) 17 *Violence against women* at 1442. During war and conflict women, civilian and combatants are systematically targeted through mass rape and murder to annihilate local communities and humiliate opponents. This form of femicide has been termed by UNODC as 'unrecorded gender-killings' and found in conflicts in Darfur, the Democratic Republic of Congo, Iraq, Rwanda Afghanistan, Bosnia and Herzegovina. See C Corradi Femicide, its causes and recent trends: What do we know? European Parliament 2021, [https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/653655/EXPO_BRI\(2021\)653655_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/653655/EXPO_BRI(2021)653655_EN.pdf) (accessed 28 April 2023).

43 Manjoo (n 40) 16.

includes access to reproductive health services, specifically in state regulation of voluntary termination of pregnancy, especially ‘where the life and health of the pregnant woman or girl is at risk’.⁴⁴

Therefore, when interpreting the right to life under the Maputo Protocol, the gendered context of the lived realities of African women must inform the analysis, and that article 4 is read together with the rest of the Protocol, especially articles 2, 3, 5, 8, 10, 11 13 and 14 to holistically understand the nature of the right to life as it affects African women.

Article 4(1), read with 4(2) of the Maputo Protocol, provides a comprehensive normative framework for defending women’s right to life, whether violated in the typical ways that the generic right to life is understood in international law or the specific ways in which the right to life affects women. For instance, article 4(2)(j) includes prohibiting the death penalty on pregnant or nursing women.⁴⁵ This aligns with the African Commission’s soft law calling on states to abolish the death penalty or establish a moratorium in line with the continental and global trend.⁴⁶ The majority of African states have abolished the death penalty in law or in practice.⁴⁷ The right to life is also protected under humanitarian and international criminal law.⁴⁸

Ultimately, applying the recommended broad interpretation of the right to life means that African women have a right to enjoy a dignified life since ‘the right to life and the right to dignity cannot be divorced – they are, in the standard language, interrelated and indivisible’.⁴⁹

3.3 The right to integrity and security of the person

Although the rights to integrity and security are separate, they are discussed together in this section because they are conceptually linked. Moreover, the right to integrity and security overlaps with the right to dignity, as discussed in chapter 3.⁵⁰

Integrity rights are protections which seek to safeguard the control of one’s personhood, free from unconsented intrusion and interference by others. Integrity is a broad right, sometimes considered a group of rights.⁵¹ It has the capacity to cover a multitude of human rights violations, including

44 UN HRC General Comment 36 (n 35) para 8.

45 The exclusion of women from death penalty especially because of pregnancy or nursing roles is a subject of longstanding contentious debate outside the scope of this chapter, including concerns of protectionist patriarchal chivalry discourse, stereotypes on women’s gender roles, and the value placed on the life of the child as opposed to the woman’s life. See AE Pope ‘A feminist look at the death penalty’ (2002) 65 *Law and Contemporary Problems* 257-282; E Rapaport ‘The death penalty and gender discrimination’ (1991) 25 *Law and Society Review* 367-383; S Hynd ‘Deadlier than the male? Women and the death penalty in colonial Kenya and Nyasaland 1920-57’ (2007) *Vienna Journal of African Studies* 13-32; L Black ‘“On the other hand the accused is a woman ...”: women and the death penalty in post-independence Ireland’ (2018) 36 *Law and History Review* (2018) 139-172.

46 African Commission Resolution 136 Calling on State Parties to Observe a Moratorium on the Death Penalty, ACHPR/Res.136 (XXXXIV) 8 adopted at the 44th ordinary session, Abuja, Nigeria, 10-24 November 2008. See also African Commission General Comment 3 (n 31).

47 A majority of African Union Member States have abolished the death penalty (23) or are applying a de facto moratorium on capital punishment (17); fifteen states have retained the death penalty (15). See La Fédération Internationale des ACAT (FIACAT), A continental trend towards abolition, 2021 http://www.fiacat.org/attachments/article/2507/FIACAT_leaflet-UK_2021_PRINT.pdf (accessed 28 April 2023).

48 See Convention on the Prevention and Punishment of the Crime of Genocide and the I to IV Geneva Conventions. See further TM Makunya & JM Mumbala ‘Article 11’ in this volume for further discussion on the protection of women in armed conflicts.

49 C Heyns ‘Autonomous weapons in armed conflict and the right to a dignified life: an African perspective’ (2017) 33 *South African Journal on Human Rights* 17.

50 See C Kreuser ‘Article 3’ in this volume.

51 AM Viens ‘The right to bodily integrity cutting away rhetoric in favour of substance’ in AV Arnauld, KV Decken & M Susi (eds) *The Cambridge handbook of new human rights: recognition, novelty, rhetoric* (2020) 374 & 375.

manifestations of VAW.⁵² When framed as ‘bodily integrity’, this right includes issues such as bodily autonomy, agency, privacy and self-determination rights.⁵³ As a normative principle integrity has also been broadly invoked in health law and ethics.⁵⁴

Integrity rights also go beyond the physical body to protect against non-bodily interferences, including the protection of mental integrity.⁵⁵ More comprehensive conceptions of integrity will therefore be framed as a right to ‘integrity of the person’ denoting rights over the holistic self, beyond the body, what is sometimes referred to as ‘personal rights’.⁵⁶

In international law, the right to integrity is enshrined in different ways. Sometimes integrity is expressed as a component of the right to liberty and security.⁵⁷ For example, the HRC has defined the right to security of persons as ‘freedom from injury to the body and the mind, or bodily and mental integrity’.⁵⁸ In other frameworks, the right to bodily integrity is a free-standing right and a separate consideration from security. For example, the African Charter provides for the right to ‘integrity of the person’ in article 4 alongside the right to life and the right to liberty and security under article 6.

The jurisprudence of the African Commission has expounded on the right to integrity of the person in its decisions in contexts of VAW. In *Equality Now vs Ethiopia*,⁵⁹ the African Commission affirmed that ‘outside of the law, no one’s person or body should be invaded or exposed to the risk of invasion by state or non-state actors’.⁶⁰ In this case, the Commission found that rape constituted a serious violation of dignity, integrity, and personal security as guaranteed under articles 4, 5 and 6 of the African Charter, respectively.

The European Court of Human Rights (European Court) has also developed jurisprudence on integrity rights in this context. For instance, finding violations of physical integrity in cases of forced gynaecological examination of women while in detention.⁶¹ The European Court has also found that secondary victimisation in the criminal justice system through the use of humiliating and offensive language against a rape victim during cross-examination violated the woman’s right to personal integrity.⁶²

52 CEDAW Committee General Recommendation 19 (n 13) paras 11 & 24(b).

53 Viens (n 51) 374.

54 J Herring & J Wall ‘The nature and significance of the right to bodily integrity (2017) 76 *The Cambridge Law Journal* 566-588.

55 JC Publitz ‘The nascent right to psychological integrity and mental self-determination’ in AV Arnauld, KV Decken & M Susi (eds) *The Cambridge handbook of new human rights: recognition, novelty, rhetoric* (2020) 387-403.

56 T Douglas ‘From bodily rights to personal rights’ in AV Arnauld, KV Decken & M Susi (eds) *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric* (2020) 378 383.

57 Article 6 of the African Charter, similar to art 9 of the ICCPR.

58 UN Human Rights Committee (HRC) General Comment 35 on art 9 (Liberty and security of person), 16 December 2014, CCPR/C/GC/35 (HRC General Comment 35) para 3.

59 *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). Ethiopia ratified the Maputo Protocol in 2018, this communication was therefore heard under the provisions of the Africa Charter.

60 *Equality Now v Ethiopia* (n 59) para 116.

61 *Juhnke v Turkey* ECHR 52515/99, 2008; *YF v Turkey* ECHR 24209/94, 2003.

62 *Y v Slovenia* ECHR 41107/10, 2015.

The individual right to ‘security of the person’ is well established in several international⁶³ and regional⁶⁴ human rights instruments. Theorists have provided different conceptions of security. Fredman, for example, considers the right to security as a ‘platform for the exercise of real freedom and agency including the duty to provide for basic needs of individuals’.⁶⁵ Viens regards the right to security as a framework for the ‘protection of one’s physical integrity’.⁶⁶ Thus, the right to security can be applied specifically or generally, depending on the context.

Under international law, the right to security of the person is often paired with the right to liberty. Article 6 of the African Charter, similar to article 9 of the International Covenant on Economic, Social and Cultural Rights (ICCPR) provides that everyone has the right to liberty and security of the person. The HRC has clarified that ‘[s]ecurity of person concerns freedom from injury to the body and the mind, or bodily and mental integrity’, and it applies to all persons whether detained or not.⁶⁷ Moreover, ‘everyone’ should be interpreted holistically to include ‘lesbian, gay, bisexual and transgender persons’.⁶⁸ The right to security also includes protection against systemic violations targeted at marginalised groups, such as ‘violence against women, including domestic violence’.⁶⁹

Therefore, at the core of the right to integrity and security, for the purposes of article 4 of the Maputo Protocol, is the protection of women, in their diverse identities, from intentional infliction of bodily or mental injury. Article 4 can thus be invoked to cover a broad range of violations of a woman’s holistic wellness, including protection against physical, sexual, emotional, and psychological violence.

3.4 The prohibition of all forms of exploitation, cruel, inhuman or degrading punishment and treatment

The right to be free from cruel, inhuman, and degrading treatment (ill-treatment) is often categorised with torture within the umbrella of the rights to security, sometimes collectively referred to as ‘integrity rights’.⁷⁰ Unlike other rights, it is not possible to justify restrictions to these rights, and they cannot be derogated from in times of public emergency.⁷¹

Unlike other human rights treaties, article 4(1) of the Protocol does not include ‘torture’ in the framing of the rights that constitute protection against ill-treatment.⁷² It is not clear from the preparatory work why torture was not included. Nonetheless, it is well established under international law that VAW may amount to torture in certain circumstances, including in cases of rape, domestic violence, or harmful practices.⁷³

63 Universal Declaration art 3; the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) art 5; ICCPR art 9.

64 ECHR art 5; African Charter art 6; ACHR art 7; Charter of Fundamental Rights of the European Union, 2000/C 364/1 art 6; League of Arab States, Revised Arab Charter on Human Rights 2008 art 14.

65 S Fredman ‘The positive right to security’ in L Lazarus & B Goold (eds) *Security and human rights* (2007) 307.

66 Viens (n 51) 364.

67 HRC General Comment 35 (n 58) para 3.

68 As above.

69 HRC General Comment 35 (n 58) para 9.

70 NS Rodley ‘Integrity of the person’ (2018) 3 *International human rights law* 174.

71 *Article 19 v Eritrea* (2007) AHRLR 73 (ACHPR 2007) para 98; 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.

72 UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) art 1.1; African Charter art 5.

73 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, CEDAW/C/GC/35 (CEDAW Committee General Recommendation 35) paras 5 & 16; Human Rights Committee (HRC) General Comment

Unlike torture, ill-treatment is not expressly defined in international law. However, it is often understood based on its distinction from torture. Torture is the intentional infliction of severe pain or suffering involving a public official to extract a confession, obtain information, or as punishment, intimidation, or discrimination.⁷⁴ Acts which fall short of the definition of torture, especially in terms of the intent or such specific purposes, are usually categorised within the concept of ill-treatment.⁷⁵ A distinction can also be drawn based on the severity of pain.⁷⁶ In this regard, the Special Rapporteur on Torture notes that 'only acts which cause severe pain or suffering can qualify as torture'.⁷⁷

The UN Committee Against Torture (CAT Committee) has clarified that VAW may constitute torture or ill-treatment when it is carried out by the instigation of, or with the consent or acquiescence of the state or its agents.⁷⁸ The 'acquiescence of the state' includes instances where the state fails to intervene, is passive, acts with indifference, or enhances the danger of violence even if a private individual inflicts it.⁷⁹

Article 5 of the African Charter guarantees human dignity and prohibits a range of violations, including 'exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment'. The African Commission's jurisprudence has not consistently distinguished between torture and ill-treatment.⁸⁰ This lack of distinction has been argued to undermine attempts to understand the differences among the elements of violations under article 5.⁸¹ However, on the threshold for torture and ill-treatment, the African Commission has aligned with the definition under article 1 of the UN Convention Against Torture (CAT).⁸² The African Commission has also found that article 5 applies both to state and non-state actors, and states can be held responsible for acts of private individuals where there is a lack of due diligence on the part of the state to prevent the violations or respond effectively to provide reparations to victims.⁸³

In General Comment 4, the African Commission further provides a framework for remedying those manifestations of VAW that amount to torture and ill-treatment under article 5 of the African

28 on the equality of rights between men and women (art 3) CCPR/C/21Rev.1/Add.10; Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 5 January 2016 UN Doc A/HRC/31/57; 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 (Art 5), adopted during the 21st extraordinary session of the African Commission, held in Banjul The Gambia, from 22 October to 5 November 2013 (African Commission General Comment 4) para 57.

74 CAT art 1.

75 CAT arts 1 & 16. See also Manfred Nowak Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment on *Civil and political rights, including the questions of torture and detention* E/CN.4/2006/6 23 December 2005 para 35; CAT (n 72) arts 1 & 16.

76 UN Committee Against Torture General Comment 2 Implementation of art 2 by States Parties, 24 January 2008, CAT/C/GC/2 (CAT Committee General Comment 2) para 10; *Huri-Laws v Nigeria* (2000) AHRLR 273 (ACHPR 2000) para 4.

77 Human Rights Council (HRC) Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment, Manfred Nowak, Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention (5 February 2010) UN Doc.A/HRC/13/39/Add.5 (2010) para 32.

78 CAT Committee General Comment 2 paras 7, 17 & 18.

79 Human Rights Council (HRC) Report of the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, (5 January 2016) UN Doc A/HRC/31/57 (2016) (Report of the Special Rapporteur on Torture (2016)) para 51.

80 See eg *Ouko v Kenya* (2000) AHRLR 135 (ACHPR 2000); *Achuthan v Malawi* (n 41) where the Commission found violations of art 5 without specifying which particular element was violated.

81 F Viljoen & C Odinkalu *The prohibition of torture and ill-treatment in the African human rights system: a handbook for victims and their advocates* (2014) 47-51.

82 *Sudan Human Rights Organisation v Sudan* (2009) AHRLR 153 (ACHPR 2009) para 155.

83 *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128 (ACHPR 2006) para 143.

Charter.⁸⁴ Based on the African Charter, the Economic Community of West African States (ECOWAS) Community Court of Justice (ECOWAS Court) has similarly conceptualised torture and ill-treatment. In *Aircraftwoman Beauty Igbobie Uzezi v Nigeria*,⁸⁵ it found that the rape of a woman was a violation of the right to be free from torture. It also observed that rape, being an act of torture, amounts to a violation of the right to dignity.

The challenge of using the framework of torture and ill-treatment to protect women against GBV is that it evolved 'largely in response to practices and situations that disproportionately affected men'.⁸⁶ With a focus on violence inflicted to extract confessions in prison or in armed conflict, torture and ill-treatment frameworks are designed to capture violations that men are more likely to experience at the hands of state agents or armed militia in the 'public sphere'. While women suffer such violence too, they are more likely to suffer violence by private individuals or non-state actors in the 'private sphere'.⁸⁷ Even though the CAT Committee has extended these frameworks to VAW in the private sphere, the focus has been on rape in war or aggravated rape as torture without addressing other forms of VAW in the same way.⁸⁸

The Special Rapporteur on Torture has examined the relevance of this framework in the context of domestic violence.⁸⁹ He concluded that 'domestic violence *may not always* amount to torture, but it amounts to ill-treatment and *very often* to physical or psychological torture'.⁹⁰ However, he also cautioned against the 'tendency to regard violations against women, girls, and lesbian, gay, bisexual and transgender persons as ill-treatment even where they would more appropriately be identified as torture'.⁹¹

In response, the UN Special Rapporteur on VAW has stressed that a different set of normative and practical measures is required to respond to and prevent VAW in a way that factors in the individual, institutional and structural factors that create and sustain inequitable gender norms which are the root causes of VAW.⁹² Therefore, while the integration of VAW within torture and ill-treatment may be useful, this integration has limited transformative potential for women because the definitional threshold between ill-treatment and torture will continue to be hierarchical, with typical manifestations of VAW being classified as less serious.

3.5 Special considerations

Article 4 contains some considerations of women in specific contexts: trafficking in women, medical and scientific experiments on women and the protection of refugee women.

84 African Commission General Comment 4 (n 73).

85 *Aircraftwoman Beauty Igbobie Uzezi v Federal Republic of Nigeria* Judgment No ECW/CCJ/JUD/11/21 (30 April 2021) (*Aircraftwoman*).

86 Report of the Special Rapporteur on Torture (n 79) para 5.

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

88 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) (Report of the Special Rapporteur on violence against women (2014)) para 24. See also the emphasis on sexual violence and traumatic experiences used to qualify the type of GBV that is applicable under the African Commission General Comment 4 (n 73) para 57.

89 United Nations General Assembly (UNGA) Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Nils Melzer, Relevance of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment to the context of domestic violence (12 July 2019) UN Doc A/74/148 (2019) (Interim Report of the Special Rapporteur on Torture).

90 Interim report of the Special Rapporteur on Torture (2019) (n 89) para 10, emphasis added.

91 Report of the Special Rapporteur on Torture (2016) (n 79) para 8.

92 Report of the Special Rapporteur on Violence Against Women (2014) (n 88) para 61.

3.5.1 *Trafficking in women*

Although not defining trafficking, article 4 pays special attention to the trafficking of women. Article 4(2)(g) calls on states to prevent and condemn trafficking in women and protect the women most at risk. Trafficking in women is a form of VAW and gender-based discrimination.⁹³ This provision should be read together with the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (Palermo Protocol),⁹⁴ which was the first international instrument to define human trafficking. However, being a protocol to the Convention on Transnational Organised Crime, the Palermo Protocol fundamentally adopts a criminal justice-centric approach with a limited human rights approach.⁹⁵ In this regard, the Recommended Principles and Guidelines on Human Rights and Human Trafficking are a critical standard that provides an important framework for integrating a human rights-based approach into all anti-trafficking interventions.⁹⁶ The Special Rapporteur on trafficking in persons, especially women and children, has developed normative clarity on the scope of protection of women from human and state responsibility to prevent and effectively respond to trafficking.⁹⁷

3.5.2 *Medical and scientific experiments on women*

Article 4(2)(h) of the Maputo Protocol prohibits all medical and scientific experiments on women without their informed consent. The provision recognises the historic problem that black African women are among the vulnerable population groups subjected to violent scientific experiments as research subjects without consent.⁹⁸ The OAU resolution of bioethics, as well as article 7 of the ICCPR, recognise this right.⁹⁹ The HRC has concluded that this prohibition relates not only to acts that cause physical pain but also to medical and scientific research that causes mental suffering to the victim.¹⁰⁰

3.5.3 *Women refugees*

Article 4 further includes the protection of refugee women, which should be read together with articles 10 and 11 of the Maputo Protocol.¹⁰¹ The CEDAW Committee has noted that VAW is ‘one of the major forms of persecution experienced by women in the context of refugee status and asylum’.¹⁰²

93 CEDAW Committee General Recommendation 38 (n 9).

94 Supplementing the United Nations Convention against Transnational Organized Crime.

95 Human Rights Council (HRC) Report of the Special Rapporteur on trafficking in persons, especially women and children, MG Giammarinaro, Trafficking in persons, especially women and children (6 April 2020) UN Doc A/HRC/44/45 (2020) paras 4, 6, 7, 49 & 50.

96 Office of the United Nations High Commissioner for Human Rights (OHCHR), Recommended Principles and Guidelines on Human Rights and Human Trafficking (20 May 2002) UN Doc E/2002/68/Add.1 (2002).

97 United Nations General Assembly (UNGA) Report of the Special Rapporteur on trafficking in persons, especially women and children, MG Giammarinaro (3 August 2015) UN Doc A/70/260 (2015) para 27; The first decade of the mandate of the Special Rapporteur on trafficking in persons, especially women and children https://www.ohchr.org/sites/default/files/Documents/Issues/Trafficking/FirsDecadeSRon__trafficking.pdf (accessed 2 May 2023).

98 K Dineo, K Holcomb, NK Connors & L Bradley ‘A perspective on James Marion Sims, MD, and Antiracism in obstetrics and gynecology’ (2021) 28 *Journal of Minimally Invasive Gynecology* at 153. H Lacks & B Holland the ‘Father of modern gynecology’ performed shocking experiments on enslaved women, use of black bodies as medical test subjects falls into a history that includes the Tuskegee syphilis experiment (2017) <https://www.history.com/news/the-father-of-modern-gynecology-performed-shocking-experiments-on-slaves> (accessed 20 May 2023).

99 OAU Resolution of Bioethics AHG/Res.254 (XXXII) adopted by the Assembly of Heads of State and Government of the Organization of African Unity meeting in its 32nd ordinary session in Yaounde, Cameroon, from 8 to 10 July.

100 UN Human Rights Committee (HRC), General Comment 20 Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment (art 7), 10 March 1992, UN Doc A/44/40.

101 See A Budoo-Scholtz ‘Article 10’ and TM Makunya & JM Mumbala ‘Article 11’ in this volume.

102 UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, 5 November 2014, CEDAW/C/GC/32 (CEDAW Committee General Recommendation 32) para 15.

In the cycle of regularising their immigration status, refugee women are often exposed to violations such as trafficking, sexual violence, physical violence, discriminatory justice systems, and political violence, which is exacerbated when they are detained as refugees or asylum seekers. Freedom from violence for refugee, asylum-seeking and stateless women should be seen as part of ‘their rights to non-discrimination and substantive equality’.¹⁰³ Article 4 should therefore be applied complementary to international refugee law to ensure that there is a response to GBV against refugee women.

4 Nature and scope of state obligations

Article 4(2) of the Maputo Protocol contains 11 sub-articles, each containing different state obligations. The following sections provide an analysis of these comprehensive obligations.

4.1 State parties ‘shall’ take ‘appropriate’ and ‘effective’ measures

The term ‘shall’ denotes mandatory intent.¹⁰⁴ It is an imperative command, usually indicating that certain actions are obligatory.

The term ‘appropriate’ means that state parties have an obligation to use means or conduct through legal, political, economic, administrative and institutional frameworks in a way that VAW. According to the CEDAW Committee, ‘appropriateness’ means applying the core state obligations to respect, protect, promote and fulfil women’s right to be free from violence.¹⁰⁵ In *Equality Now v Ethiopia*, the African Commission anchors its finding that the state failed to prevent and protect a victim from rape, abduction and forced marriage on the basis of these four duties which are ‘concomitant to all the rights and freedoms under the Charter’.¹⁰⁶ Accordingly, a state ‘incurs international responsibility if it fails to meet the demands of these duties’.¹⁰⁷

The term ‘effective’ means that the state party must take the type of measures that will enable it to fulfil its obligations. Effectiveness goes beyond the mere recognition and existence of a measure. Under article 1 of the African Charter, state parties must not only ‘recognise rights, but they are obligated to undertake measures to give effect to them’. For state measures to be effective, they must be capable of challenging patterns of discrimination and systemic inequalities that produce VAW. In *Maria da Penha Fernandes v Brazil*¹⁰⁸ a woman had suffered years of domestic violence, and her case was delayed in the criminal justice system for 15 years while her husband remained free. Although Brazil had put in place measures such as specialised police units, the Inter-American Commission on Human Rights (Inter-American Commission) found that they were ineffective, as there was a widespread failure to protect women and to investigate and prosecute VAW, creating a pattern of discrimination enabling domestic violence.

103 CEDAW Committee General Recommendation 32 (n 102) para 4.

104 BA Garner & H Campbell *Black’s Law Dictionary* 11th ed (2019).

105 UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 28 on the Core Obligations of States Parties under art 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 16 December 2010, CEDAW/C/GC/28 (CEDAW Committee General Recommendation 28) para 37.

106 *Equality Now v Ethiopia* (n 59) para 114.

107 As above.

108 *Maria da Penha Maia Fernandes v Brazil*, Case 12.051, Report No. 54/01, OEA/Ser.L/V/II.111 Doc. 20 rev. 704 (2000) (*Maria da Penha*).

4.2 Obligation to act with due diligence

Under international law states are traditionally held accountable for its acts or omissions occasioned through its agents or actors over which it has control.¹⁰⁹ A long-standing exception to this is that states may be held accountable for violations by non-state actors if the state fails to act with due diligence in preventing or responding to such violations.¹¹⁰ In *Velásquez Rodríguez v Honduras*, which is considered the contemporary debut of due diligence obligations in human rights law, the Inter-American Court of Human Rights (Inter-American Court) held that the state was responsible for forced disappearance occasioned by non-state actors because it had failed to prevent the violations, to investigate, identify and punish the perpetrators and to provide adequate compensation to the victims.¹¹¹

Article 4(2) of the Maputo Protocol creates obligations on the state to act with due diligence to prevent, protect, prosecute, punish, and provide effective remedies to victims of VAW. The mandate of the UN Special Rapporteur on VAW has been instrumental in developing the scope and meaning of the obligations of states to act with due diligence.¹¹² Further, these obligations have been reiterated in several resolutions of UN bodies¹¹³ and consistently developed in comparative regional human rights mechanisms.¹¹⁴

The CEDAW Committee has also developed elaborate jurisprudence on due diligence. In *AT v Hungary* the CEDAW Committee found that the state had failed to fulfil its due diligence obligation by failing to prioritise domestic violence cases due to entrenched gender stereotypes.¹¹⁵ The CEDAW Committee instructed the state to protect domestic violence victims, promptly investigate domestic violence matters, and enact domestic violence law. The CEDAW Committee has also found that even where laws and other frameworks exist, the state can be held accountable where there is a lack of political will to ensure these measures are sufficient.¹¹⁶ Their jurisprudence has further clarified that state officials should treat VAW seriously even where the violence does not seem life-threatening.¹¹⁷

The Inter-American Court has also contributed to the jurisprudence on due diligence within the context of VAW. In *González et al v Mexico (Cotton Field)*,¹¹⁸ it found that the killings of three women constituted systematic GBV and discrimination against women and that Mexico had failed to exercise

109 Draft Articles on Responsibility of States for Internationally Wrongful Acts, Yearbook of the International Law Commission, 2001, vol. II (Part Two) para 77.

110 Human Rights Council (HRC) Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, (14 May 2013) UN Doc A/HRC/23/49 (2013).

111 IACHR (29 July 1988) Ser C No 4.

112 Commission on Human Rights (CHR) Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk, Integration of human rights of women and gender perspective; Due diligence standard as a Tool for the Elimination of Violence Against Women (20 January 2006) UN Doc E/CN.4/2006/61 (2006) (Report of the Special Rapporteur on Violence Against Women (2006)).

113 Eg, General Assembly Resolutions 64/137 and 65/187, and Human Rights Council Resolution 14/12.

114 Istanbul Convention and Convention of Belém do Pará.

115 *AT v Hungary* Communication 2/2003, CEDAW Committee (26 January 2005) UN Doc CEDAW/C/32/D/2/2003 (2005).

116 *Şahide Goekce v Austria* Communication 5/2005 CEDAW Committee (6 August 2007) UN Doc CEDAW/C/39/D/5/2005 (2007); *Fatma Yildirim v Austria* Communication 6/2005 CEDAW Committee (1 October 2007) CEDAW/C/39/D/6/2005 (2007).

117 *VK v Bulgaria* Communication 20/2008 CEDAW Committee (17 August 2011) UN Doc CEDAW/C/49/D/20/2008 (2011); *IJ v Bulgaria* Communication 32/2011 (28 August 2012) UN Doc CEDAW/C/52/D/32/2011 (2012).

118 Inter-American Court of Human Rights (IACrtHR), Judgment of November 16, 2009, https://www.corteidh.or.cr/docs/casos/articulos/seriec_205_ing.pdf.

due diligence in preventing the violence and investigating and punishing the perpetrators.¹¹⁹ Similarly, in *Bevacqua and S v Bulgaria*, the European Court found that Bulgaria had violated its positive obligations by failing to protect the victim and punish her husband when it chose not to intervene in the private sphere.¹²⁰

The African Commission Guidelines on Combating Sexual Violence and its Consequences in Africa¹²¹ affirm the due diligence principle, indicating that states must ensure that agents acting on their behalf or under their control refrain from committing sexual violence.¹²² In addition, states must adopt the necessary legislative and regulatory measures to act with due diligence to prevent, investigate, prosecute, and punish perpetrators of sexual violence committed by state and non-state actors and provide remedies to victims.¹²³ In addition, the HRC has emphasised that states parties must respond appropriately to patterns of VAW, including domestic violence.¹²⁴

In *Equality Now v Ethiopia*, the African Commission concluded that when applying the due diligence standard, what is decisive is whether the state has allowed the acts of violence to take place without taking measures to prevent it or to punish those responsible.¹²⁵ The ECOWAS Court has also affirmed some aspects of the due diligence obligations in some of its decisions while rejecting it in others. In *Aircraftwoman*, the ECOWAS Court found Nigeria responsible for the rape of a woman employed by the Nigeria Air Force committed by one of its officials.¹²⁶ Although this case involved rape by a state agent, the ECOWAS Court affirmed the due diligence responsibility of states to prevent, investigate and prosecute VAW, even when non-state actors perpetrate it.¹²⁷ Similarly, in *Adama Vandi v Sierra Leone*, the ECOWAS Court found that by failing to investigate, prosecute and punish the rape of a woman, the state had failed to protect her.¹²⁸

4.2.1 *Obligation to enact and enforce laws*

Article 4(2)(a) creates the obligation to ‘enact and enforce laws to prohibit all forms of VAW including unwanted forced sex, whether the violence takes place in public or private spheres’. It importantly recognises that state parties have an obligation to address VAW, including in situations where the violation occurs in the private sphere. The CEDAW Committee has found that these obligations require states to adopt laws and other measures prohibiting VAW as a form of gender-based discrimination.¹²⁹

119 IACHR (16 November 2009) Ser C No 205; see also *Fernández Ortega Et Al v Mexico* IACHR (30 August 2010) Series C No 215.

120 *Bevacqua and S v Bulgaria* ECHR Appl No 71127/01 (12 June 2008) paras 65 and 83; See also *Opuz v Turkey* (2010) 50 EHRR 28 paras 84 & 159.

121 African Commission on Human and Peoples’ Rights 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 (Niamey Guidelines) 7. These guidelines were designed by the Commission through a consultative process ‘as a tool to offer a methodology to African States, and to serve as the foundation for an adequate legal and institutional framework’.

122 Niamey Guidelines (n 121) para 6.

123 Niamey Guidelines (n 121) para 6. See also Southern Africa Development Community (SADC) Protocol on Gender and Development art 20.

124 HRC resolution 14/12 on Accelerating efforts to eliminate all forms of violence against women: ensuring due diligence in prevention, 30 June 2010 A/HRC/RES/14/12.

125 *Equality Now v Ethiopia* (n 59) para 122.

126 *Aircraftwoman* (n 85) paras 75 & 81.

127 *Aircraftwoman* (n 85) para 67.

128 *Adama Vandi v Sierra Leone* Judgment No ECW/CCJ/JUD/32/22 (18 July 2022) paras 143-144.

129 *X & Y v Georgia* Communication 24/2009 CEDAW Committee (25 August 2015) UN Doc CEDAW/C/61/D/24/2009 (2015).

Article 1 of the African Charter requires states to adopt and implement laws and other measures to prevent violations, including by non-state actors, or to provide for redress when the rights and freedoms have been violated.¹³⁰ The Niamey Guidelines elucidate that states must ensure that national laws criminalise all forms of sexual violence consistent with international standards.¹³¹ They also provide that domestic law must guarantee the effectiveness of any investigation and prosecution of VAW, the right to free legal assistance and medical and forensic costs. Further, the law should contain clear and specific provisions on evidence and ensure that sexual offences that are criminalised are not subject to prescription. The Niamey Guidelines also call on states to prohibit any type of mediation between the victim and the perpetrator of sexual violence and requires states to provide penalties commensurate with the violations.¹³²

4.2.2 *Obligation to prevent*

Article 4(2)(b) creates the obligation of states to adopt legislative, administrative, social, and economic measures to prevent VAW. The UN Special Rapporteur on VAW elaborates that states fulfil the obligation to prevent VAW when they take all necessary means to ensure VAW is considered illegal, transform patriarchal structures and values that perpetuate VAW, and ensure there is the punishment of perpetrators and redress for victims.¹³³

In *Equality Now vs Ethiopia*,¹³⁴ the African Commission found that Ethiopia had failed to prevent the relevant violations because it did not take all appropriate actions to ensure the victim was secure in her rights and freedoms as soon as the state authorities became aware of the danger she faced. The duty to prevent violations requires the state to adopt and diligently implement customised measures of protection that would avert the impending violations or curb or eliminate the prevailing violations altogether.¹³⁵

Article 4(2)(c) of the Maputo Protocol recognises the importance of challenging the root causes of VAW. These root causes are structural in nature, stemming from patriarchal dominance, control and social mechanisms that force women into a subordinate position in both the public and private spheres.¹³⁶ Therefore prevention goes beyond the criminalisation of VAW to targeting the underlying gender inequalities, patriarchal attitudes, practices, and stereotypes that justify the subjugation and discrimination of women. In this regard, article 4(2)(d) calls on states to promote peace education and eradicate beliefs, practices and stereotypes which legitimise and exacerbate VAW.¹³⁷ Peace education refers to a means of socialising society for peace and social justice to prevent VAW.¹³⁸

4.2.3 *Obligation to protect*

Article 4(2)(f) sets out the obligation to establish mechanisms and accessible services for victims of VAW, including ensuring effective access to information and rehabilitation. This is also restated under article 4(2)(e). These comprise the obligation to protect, which requires state parties to only to keep women safe from harm, but to ensure there are mechanisms for redressing violations when they occur.

130 *Equality Now v Ethiopia* (n 59).

131 Niamey Guidelines (n 121) para 39.

132 As above.

133 Report of the Special Rapporteur on violence Against Women (2006) (n 121) paras 15, 38.

134 *Equality Now v Ethiopia* (n 59).

135 *Equality Now v Ethiopia* (n 59) para 125.

136 Report of the Special Rapporteur on Violence Against Women (2006) (n 121).

137 See *KT Vertido v the Philippines* Communication No 18/2008 CEDAW Committee (1 September 2010) UN Doc CEDAW/C/46/D/18/2008 (2010).

138 JS Page *Peace education: International Encyclopedia of Education* (2010).

In *Aircraftwoman*, Nigeria was found to have failed in its due diligence obligation because the state did not ‘intervene to stop, sanction and provide remedies’ for the rape of the victim, ‘thereby encouraging impunity’.¹³⁹

The obligation to protect also requires that states act in a way that responds to patterns of VAW that women are likely to suffer because they are women. This principle was established by the Inter-American Court in *Cotton Field*, where Mexico failed to protect women from violence despite being fully aware of a pattern of GBV specifically targeting women and girls.¹⁴⁰

Protection is also a form of secondary prevention because the recurrence of violence can be reduced through rehabilitation and access to adequate and timely support services.¹⁴¹ Such support services include hotlines, safe houses, protection orders, legal services, emergency medical and forensic services, and continued health services. Protection also includes legal protection, guaranteeing, for example, women’s property rights such as housing, especially in instances of domestic violence where women are at times evicted from their homes by the perpetrator.¹⁴²

4.2.4 Obligations to investigate, prosecute and punish

Article 4(2)(e) of the Maputo Protocol creates an obligation on states to punish perpetrators of VAW. Effective punishment for the criminal justice system depends on effective investigation and prosecution. The obligation to investigate effectively involves diligence in establishing the facts related to VAW and collecting evidence to enable prosecution and punishment of the perpetrator.¹⁴³

Effective punishment requires that state parties not only prosecute but also do so effectively, promptly, impartially and without excuses. Punishment, at the core, is about bringing the perpetrator to justice and ensuring negative consequences for committing VAW.¹⁴⁴ This was demonstrated in *In Egyptian Initiative for Personal Rights & INTERIGHTS v Egypt*, where the African Commission found that ‘a failure to investigate effectively towards an outcome that will bring the perpetrators to justice, shows lack of commitment to take appropriate action by the state, especially when this lack of commitment is buttressed by excuses such as lack of sufficient information to carry out a proper investigation’.¹⁴⁵

In *MC v Bulgaria*, the European Court held that the investigation must be independent, thorough, and effective, that access to a judicial remedy must be available, and the state may be obliged to provide compensation.¹⁴⁶ The ECOWAS Court in *EI v Nigeria* similarly found that investigation and prosecution should be prompt, effective and impartial.¹⁴⁷

Investigation and prosecution of VAW should also be free from gender stereotypes such as rape myths about what ‘proper’ victim behaviour is before, during and after rape, which is often used

139 *Aircraftwoman* (n 85) para 73.

140 *Cotton Field* (n 118) paras 18 and 19.

141 CEDAW General Recommendation 19 (n 13); TL Cornelius & N Resseguie ‘Primary and secondary prevention programs for dating violence: a review of the literature’ (2007) 12 *Aggression and Violent Behaviour* at 364; *Equality Now v Ethiopia* (n 59).

142 *Cecilia Kell v Canada* Communication 19/2008 CEDAW Committee (26 April 2012) CEDAW/C/51/D/19/2008 (2012).

143 *Adama Vandi v Sierra Leone* (n 128) paras 83 & 88-91.

144 *Cecilia Kell v Canada* (n 142).

145 *Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt (Interights)* Communication 323/06 African Commission on Human and Peoples’ Rights, Combined 32nd and 33rd Annual Activity Report (2013) para 163.

146 (2005) EHRR 20.

147 *EI v Nigeria* Judgment No ECW/CCJ/JUD/09/22 (25 April 2022) (*EI*).

to assess women's believability.¹⁴⁸ Judicial processes should also not subject victims to secondary victimisation and should take into account victims' particularities, such as age and disability, when providing assistance.¹⁴⁹ In addition, victims' participation in the criminal justice system is important, and they should be supported to participate since the best witness evidence, especially in rape cases, is the victim.¹⁵⁰

4.2.5 *Obligation to provide an adequate remedy*

Article 4(2)(f) requires state parties to establish mechanisms and accessible services for effective information, rehabilitation, and reparation for victims of VAW. To fulfil the obligation to provide an adequate remedy, states should take the:

[N]ecessary legislative and other measures required to guarantee access to appropriate, efficient, accessible, timeous, and long-lasting reparation for injury and loss suffered by victims of sexual violence, as well as access to appropriate information regarding reparation mechanisms.¹⁵¹

Moreover, the obligation to provide an adequate remedy to VAW victims applies at individual and systemic levels of state responsibility.¹⁵² At the individual level remedies seek to redress the harm to the victim directly, while systemic-level remedies should respond to the root causes of VAW, their gendered manifestations and the structural impediments to eliminating VAW.¹⁵³ Systemic remedies acknowledge that the obligation to act with due diligence creates the nexus between individual women's experiences of VAW and the failure of the state to prevent and protect women from VAW. In *EI v Nigeria*, there was a clear need for remedying VAW at the systemic level. However, the ECOWAS Court found that the rape and the subsequent 10-year delay in the criminal justice system only violated the right to a fair trial.¹⁵⁴ In failing to apply the due diligence standard to explore state accountability outside the right of access to justice, the ECOWAS Court concluded that since neither the state itself nor its agents raped the woman, holding the state accountable was not possible. Damages claimed by the victim were not awarded as the court did not make the connection between the harm occasioned by the rape and the failure of the state to prevent, protect and effectively respond to the sexual violence endured by the victim.

Maria da Penha and Maia Fernandes v Brazil is an example of a decision that addressed both individual and systemic-level remedies.¹⁵⁵ The Inter-American Commission recognised the pattern of discrimination that produced VAW as a violation that was tolerated by the state.¹⁵⁶ It recommended that Brazil not only swiftly prosecute the offenders but also exhaustively investigate why the justice system was delayed. It further recommended Brazil to expand law reform processes to end state condonation of VAW as a form of gender-based discrimination. The Inter-American Commission concluded that '[i]neffective judicial action, impunity, and the inability of victims to obtain compensation is

148 See eg *Uganda v Muhwezi Lamuel* [2010] HC, where the court addressed the issue that delayed reporting in rape does not mean that the victim is lying.

149 *RPB v The Philippines Communication 34/2011* CEDAW Committee (12 March 2014) UN Doc CEDAW/C/57/D/34/2011 (2014) 2003.

150 *Diha Matofali v Republic of Tanzania* CA Criminal Appeal 245 of 2015.

151 Niamey Guidelines (n 121) para 53.

152 Manjoo (n 110).

153 R Manjoo 'Introduction: reflections on the concept and implementation of transformative reparations' (2017) 21 *International Journal of Human Rights* 1193.

154 *EI* (n 147) para 92.

155 *Maria da Penha* (n 108).

156 *Maria da Penha* (n 108) para 55.

an example of the lack of commitment to take appropriate action'.¹⁵⁷ Therefore, it is not sufficient that a court grants remedies; they must be capable of being obtained, including recovery of adequate compensation for damages.¹⁵⁸ Remedies should also take into account not only the immediate but long term consequences of VAW on victims, including the impact of cruelty suffered and prolonged trauma that affects victims' quality of life.¹⁵⁹

Through its jurisprudence, the African Commission has interpreted the right to a remedy at the domestic level to include three parameters: availability, effectiveness and sufficiency.¹⁶⁰ A remedy is considered available 'if the petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint'.¹⁶¹ Although the African Charter does contain an explicit right to remedy, this right is implied as reflected in the maxim 'for the violation of every right, there must be a remedy'.¹⁶² The African Commission Principles and Guidelines on the Right to a Fair Trial further clarify that the right to an effective remedy includes access to justice, reparation for the harm suffered and access to the factual information concerning the violation.¹⁶³

4.3 Obligation to finance eradication of violence against women

In addition to the generic provision on the allocation of resources under articles 26(2) and 4(2)(i) calls on states to specifically provide adequate budgetary and other resources for the implementation and monitoring of actions aimed at preventing and eradicating VAW.¹⁶⁴ This is an imperative obligation without which none of the rights and state obligations elaborated under article 4 can be realised. The CEDAW Committee has clarified that the obligation on states to adequately resource implementation of laws and mechanisms to address VAW should be linked to mainstream governmental budgetary processes to ensure they are adequately funded.¹⁶⁵ The Niamey Guidelines also require states parties to prioritise establishing national funds to afford reparations to victims of sexual violence. Such funds need to be appropriately financed by states in partnership with their development partners, private sector stakeholders and, if possible, by perpetrators of VAW.¹⁶⁶

157 *Maria da Penha* (n 108).

158 *V.P.P. v. Bulgaria* Communication 31/2011 (24 November 2012) CEDAW/C/53/D/31/2011 (2012).

159 *Uganda v Tumwesigye Ziraba alias Sigwa* [2013] HC Criminal Session Case 92 of 2011; 3 December 2013; *Rwanda v Uwiringiyimana* [2017] SC Case No. RPA 0099/13/CS of 17 March 2017; *Rwanda v Uwizeye Eustache* Supreme Court Case No. RPA 0225/13/CS of 21 April 2017.

160 *Sir Dawada K Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000).

161 *Dawada* (n 160) para 32.

162 G Musila 'The right to an effective remedy under the African Charter on Human and Peoples' Rights' (2006) 6 *African Human Rights Law Journal* 447. See also S Gumedze 'Bringing communications before the African Commission on Human and Peoples' Rights' (2003) 3 *African Human Rights Law Journal* 118-148.

163 African Commission Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (African Commission Principles and Guidelines on the Right to a Fair Trial), DOC/OS(XXX)247. For a further discussion on remedies see M Lasseko-Phooko 'Article 25' in this volume.

164 See R Murray 'Article 26' in this volume.

165 CEDAW General Recommendation 28 (n 105).

166 Niamey Guidelines (n 121) para 55. As part of transformative remedies, a system of punitive damages can be developed where perpetrators of VAW pay fines that contribute to the national fund.

5 State practice and implementation

This section evaluates jurisprudence and state practice in relation to article 4. The section reviews state practice with respect to the implementation of legislative measures, administrative, prevention and response measures in practice, challenges, and gaps in state reporting.

5.1 Legislative measures

Various African states have attempted to implement article 4 by enacting sexual offences, domestic violence, and counter-trafficking laws.¹⁶⁷ Therefore, states often report on this provision by listing national or legal frameworks.¹⁶⁸ State reports also often focus on constitutional protections on the right to life and criminal laws enacted to protect the rights to life, integrity and security of the person and freedom from ill-treatment.¹⁶⁹ For example, The Gambia reports on implementing article 4 through the enactment of the Women's Act which complements the domestic violence and sexual violence laws to prohibit various manifestations of VAW, including protecting women from torture or inhuman or degrading treatment or punishment.¹⁷⁰ Niger alludes to enacting VAW laws which include the Ordinance on Trafficking, which also punishes domestic and sexual violence.¹⁷¹ Similarly, Namibia reports on its Combating Domestic Violence Act and Combating Rape Act as part of fulfilling the state obligation to legislate on VAW as a protection measure.¹⁷² However, despite many states having laws against VAW, legal gaps remain in some contexts, most notably the failure to criminalise or sanction

167 See eg Concluding Observations and Recommendations on the Initial and Combined Periodic Report of Sierra Leone on the implementation of the African Charter on Human and Peoples' Rights 1983-2013, African Commission on Human and Peoples' Rights adopted at 19th extraordinary session 16-25 February 2016, Banjul, The Gambia; Concluding Observations and Recommendations on the Initial and Combined 2nd Periodic Report of The Gambia on the implementation of the African Charter on Human and Peoples' Rights 1994-2018, and the Initial Report on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2005-2014 adopted at 31st extraordinary session February 19-25 February 2021. Banjul, The Gambia; Concluding Observations and Recommendations on the Combined 1st to 9th Periodic Report of Eswatini on the implementation of the African Charter on Human and Peoples' Rights, and Initial Report on the Protocol to the African Charter on the Rights of Women in Africa 2001-2020 African Commission on Human and Peoples' Rights, adopted at 70th ordinary session 23 February-9 March 2022, Banjul, The Gambia; Concluding Observations and Recommendations on the Initial and Combined Periodic Report of Liberia on the implementation of the African Charter on Human and Peoples' Rights 1982-2012, African Commission on Human and Peoples' Rights adopted the following Concluding Observations and Recommendations at its 17th extraordinary session, held from 19-28 February 2015, Banjul, The Gambia.

168 Arab Republic of Egypt combined 9th to 17th Periodic Reports 2001-2017 on the African Charter on Human and Peoples' Rights, October 2018; Republic of Kenya combined 12th and 13th Periodic Reports 2015-2020 on the African Charter on Human and Peoples' Rights and Initial Report on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, April 2020; Republic of Namibia 7th Periodic Report 2015-2019 on the African Charter on Human and Peoples' Right., February 2021.

169 See eg Republic of Algeria combined 5th and 6th Periodic Reports 2010-2014 on the African Charter on Human and Peoples' Rights, November 2015; The Republic of Botswana combined 2nd and 3rd Periodic Reports 2011-2015 on the African Charter on Human and Peoples' Rights, November 2018; Central African Republic initial and cumulative Report 1988-2006 on the African Charter on Human and Peoples' Rights, 25 May 2006; Republic of Eswatini combined 1st to 9th Periodic Reports 2001-2020 on the African Charter on Human and Peoples' Rights, March 2021.

170 Republic of The Gambia 2nd Periodic Report 1994-2018 on the African Charter on Human and Peoples' Rights, September 2018.

171 Republic of Niger 14th Periodic Report 2014-2016 on the African Charter on Human and Peoples' Rights, November 2017.

172 7th Periodic Report of Namibia (2015-2019) (n 168).

some forms of VAW. For instance, Malawi,¹⁷³ Kenya¹⁷⁴ and Tanzania¹⁷⁵ still do not have laws outlawing marital rape.

Moreover, practice has shown that enacting laws alone is insufficient to eliminate VAW. For example, in its Concluding Observations to Liberia, while the Commission commends enactment of legislation, it raises concern about the persisting magnitude of VAW, especially against young women and girls.¹⁷⁶ The Commission has also noted that in some instances, even where there is legislation, there is a lack of resolve to implement it, which impedes the realisation of the rights under article 4.¹⁷⁷

5.2 Administrative, prevention and response measures in practice

Some states have provided details beyond legal frameworks to administrative and other measures taken to address VAW.¹⁷⁸ For example, Liberia,¹⁷⁹ Zimbabwe,¹⁸⁰ South Africa,¹⁸¹ Côte d'Ivoire,¹⁸² and Eswatini¹⁸³ have developed national action plans, strategies, or multi-sectoral guidelines to implement practical measures for preventing or responding to VAW. Some states have also reported on the use of existing gender equality commissions to, for example, train state officers.¹⁸⁴

In addition, several states have set up mechanisms such as multi-sectoral agencies, inter-ministerial committees and special agencies to coordinate the fight against VAW.¹⁸⁵ In its 2007-2019 combined report, Zimbabwe reports under article 4 by referencing implementation mechanisms such as the Anti-Domestic Violence Council and an inter-ministerial GBV Committee charged with coordinating the implementation of VAW-related laws.¹⁸⁶ This is similar to Mauritius' National Coalition Against

173 Republic of Malawi 2nd-3rd Periodic Report 2015-2019 on the African Charter on Human and Peoples' Rights, February 2020.

174 Combined Report of Kenya (2015-2020) (n 168).

175 Concluding Observations and Recommendations on the Combined 2nd to 10th Periodic Report of Tanzania on the implementation of the African Charter on Human and Peoples' Rights 1992-2006, African Commission on Human and Peoples' Rights, adopted at 43rd ordinary session 7-22 May 2008, Banjul, The Gambia.

176 African Commission Concluding Observations Liberia (2015) (n 167).

177 Concluding Observations and Recommendations on the 2nd Periodic Report of Benin on the Implementation of the African Charter on Human and Peoples' Rights 2000-2008, African Commission on Human and Peoples' Rights, adopted at 45th ordinary session 13 May 27 2009, Banjul, The Gambia.

178 Republic of Togo combined 6th to 8th Periodic Reports 2011-2016 on the African Charter on Human and Peoples' Rights, March 2018; Republic of Zimbabwe combined 11th to 15th Periodic Reports 2007-2019 on the African Charter on Human and Peoples' Rights, August 2019.

179 Africa Commission Concluding Observations Liberia (2015) (n 167).

180 Concluding Observations and Recommendations on the combined 11th to 15th Periodic Reports of Zimbabwe on the Implementation of the African Charter on Human and Peoples' Rights 2007-2019, adopted at 69th ordinary session 15 November-5 December 2021, Banjul, The Gambia.

181 Department of Women, Youth and Persons with Disabilities, South Africa Gender-based Violence and Femicide National Strategic Plan (GBVF-NSP), Interim Steering Committee, 2020 <https://www.justice.gov.za/vg/gbv/nsp-gbvfinal-doc-04-05.pdf> (accessed 6 May 2023).

182 Republic of Côte d'Ivoire Periodic Report 2016-2019 on the African Charter on Human and Peoples' Rights, October 2022.

183 Republic of Eswatini Combined 1st-9th Periodic Reports 2001-2021 on the African Charter on Human and Peoples' Rights, March 2021.

184 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-4 March 2017, Banjul, The Gambia; Africa Commission Concluding Observations Zimbabwe (2021) (n 180).

185 Democratic Republic of Congo combined 11th to 13 Periodic Reports 2005-2015 on the African Charter on Human and Peoples' Rights and 1st-3rd Periodic Reports on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, November 2017.

186 Combined Report of Zimbabwe (2007-2019) (n 178).

Domestic Violence Committee¹⁸⁷ and the Democratic Republic of Congo's (DRC) use of a National Agency to combat VAW.¹⁸⁸ Coordination measures also include Namibia's National GBV Plan of Action, which is aimed at strengthening integration and coordination of GBV programs.¹⁸⁹

On implementing the obligation to protect and rehabilitate survivors of VAW under article 4, a common practice by states is the establishment of one-stop centres for integrating health, legal and psychosocial services such as Thuthuzela Care Centres in South Africa,¹⁹⁰ Gender-Based Violence Recovery Centres in Kenya,¹⁹¹ Victim Friendly System,¹⁹² and national GBV Help Lines in Zimbabwe.¹⁹³ Malawi's report shows that one-stop GBV centres expanded to 18 in the country, which provide victims with emergency safety and protection as well as providing initial care and support to victims before being referred to hospitals or any relevant authority.¹⁹⁴ Other examples of victim support services include Angola's network of legal and free counselling centres¹⁹⁵ and The Gambia's establishment of a shelter for victims of trafficking.¹⁹⁶

Some states also report on having established specialised mechanisms for reporting, investigation, and prosecution of VAW, such as specialised sexual offences courts, police, and prosecutorial units.¹⁹⁷ Other measures commended by the Commission include capacity-strengthening initiatives such as developing GBV training manuals for the police¹⁹⁸ and mandatory training of prosecutors on prevention and response to VAW.¹⁹⁹

State reports also show the use of public awareness and education campaigns, including advocacy and monitoring mechanisms to prevent and strengthen VAW responses. For example, Zimbabwe reports on rolling out national awareness campaigns on ending GBV with a reach of over 8 million people.²⁰⁰ However, in its Concluding Observations to Zimbabwe, the Commission raised concern about the persisting prevalence of GBV despite numerous sensitisation activities conducted.²⁰¹

187 Republic of Mauritius combined 6th to 8th Periodic Reports, 2009-2015 on the African Charter on Human and Peoples' Rights, November 2016.

188 Combined Report of Democratic Republic of Congo (2005-2015) (n 185).

189 Concluding Observations and Recommendations on the 6th Periodic Report of Namibia on the Implementation of the African Charter on Human and Peoples' Rights 2011-2014, African Commission on Human and Peoples' Rights, adopted at 58th ordinary session 6-20 April 2016, The Gambia, Banjul.

190 Concluding Observations and Recommendations on the 2nd Periodic Report of South Africa on the Implementation of the African Charter on Human and Peoples' Rights 2003-2014, African Commission on Human and Peoples' Rights, adopted at 58th ordinary session 6-20 April 2016, The Gambia.

191 Concluding Observations and Recommendations on the Combined 8th-11th Periodic Report of Kenya on the Implementation of the African Charter on Human and Peoples' Rights 2008-2014, African Commission on Human and Peoples' Rights, adopted at 19th extraordinary session 16-25 February 2016, Banjul, The Gambia.

192 Africa Commission Concluding observations Zimbabwe (2021) (n 180).

193 African Commission Concluding Observations Kenya (2016) (n 191).

194 Combined Report of Malawi (2015-2019) (n 173).

195 Republic of Angola 6th Periodic Report 2011-2016 on the African Charter on Human and Peoples' Rights, March 2018.

196 2nd Periodic Report of The Gambia (1994-2018) (n 170).

197 Combined Report of Liberia (1982-2012) (n 168); Republic of Zambia initial Report 1986-2004, on the Implementation of the African Charter on Human and Peoples' Rights, January 2005; African Commission Concluding Observations Kenya (2016) (n 191).

198 African Commission Concluding Observations The Gambia (2021) (n 167).

199 Republic of Ethiopia combined 5th and 6th Periodic Reports 2009-2013 on the African Charter on Human and Peoples' Rights, May 2015.

200 Combined Report of Zimbabwe (2007-2019) (n 178).

201 African Commission Concluding Observations Zimbabwe (2021) (n 180).

Rwanda similarly reports on various efforts targeting grassroots through community policing and anti-GBV committees at village level to provide an opportunity for awareness raising and elevating VAW as an internal state security issue.²⁰² Kenya and Chad reported having launched national campaigns to speak out against and combat VAW.²⁰³ Moreover, Eswatini has set up the National Surveillance System on Violence, which tracks trends in reported GBV cases, showing which forms are most prevalent.²⁰⁴ Burkina Faso reported on investigative research to understand and create awareness of the underlying drivers of VAW and legal gaps on how to strengthen legal instruments.²⁰⁵

5.3 Persisting challenges in practice

Despite these interventions reported by states, several challenges remain. First is the persistent prevalence of VAW among marginalised groups such as sex workers, LGBTIQ+ women, women with disabilities, young women, and indigenous women.²⁰⁶

Further, states still have inadequate financial investment to ensure the effective implementation of laws, functioning response systems and prevention mechanisms.²⁰⁷ For example, Zimbabwe reports that the challenge to implementing article 4 is inadequate resources to support GBV programs.²⁰⁸ In this regard, Senegal also highlights inadequate mobilisation of resources to promote women's rights and the failure to systematically incorporate resourcing of gender into public policies as among their main challenges.²⁰⁹

As a result of the limited resource investment by states, NGOs bear the greater burden of this work, especially in the provision of victim support services and awareness campaigns to challenge regressive attitudes and gender stereotypes.²¹⁰ Yet, these stereotypes, social norms, and deep-rooted cultural practices that condone gender inequality persist as the root causes and drivers of VAW.²¹¹ For example, Lesotho notes that the greatest challenge to ending VAW is the general acceptance of wife battering within society.²¹² Similarly, Kenya reports that the main challenge to ending VAW is

202 Republic of Rwanda combined 11th to 13th Periodic Reports 2009-2016 on the African Charter on Human and Peoples' Rights and Initial Report on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in, May 2017.

203 Republic of Chad combined 2nd to 9th Periodic Reports 1998 to 2015 on the African Charter on Human and Peoples' Rights, April 2018; Combined Report of Kenya (2015-2020) (n 168)

204 Combined Report of Eswatini (2001-2021) (n 183).

205 Republic of Burkina Faso 3rd and 4th Periodic Reports 2011-2013 on the African Charter on Human and Peoples' Rights Initial Report on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, August 2015.

206 Africa Commission Concluding Observations South Africa (2016) (n 190); Combined Report of Democratic Republic of Congo (2005-2015) (n 186); Combined Report of Kenya (2015-2021) (n 168).

207 See eg Concluding Observations and Recommendations on the combined 2nd and 3rd Periodic Reports of Malawi on the Implementation of the African Charter on Human and Peoples' Rights 2015-2019, African Commission on Human and Peoples' Rights, adopted at 70th ordinary session 23 February-23 February 23-9 March 2022; Combined Report of Kenya (2015-2020) (n 169); Concluding Observations and Recommendations on the Combined 2nd, to 5th Periodic Report of Angola on the Implementation of the African Charter on Human and Peoples' Rights 2002-2010, African Commission on Human and Peoples' Rights, adopted at 12th extraordinary session 30 July-August 04, 2012, Algiers, Algeria.

208 Combined Report of Zimbabwe (2007-2019) (n 178).

209 Republic of Senegal combined 8th-11th Periodic Reports 2004-2013 on the African Charter on Human and Peoples' Rights, May 2015.

210 See eg Combined Report of Zambia (1986-2004) (n 198); African Commission Concluding Observations Burkina Faso (2017) (n 184).

211 African Commission Concluding Observations The Gambia (2021) (n 167).

212 Kingdom of Lesotho combined 2nd to 8th Periodic Reports 2001-2017 on the African Charter on Human and Peoples' Rights and Initial Report on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, April 2018.

patriarchal unequal gender power dynamics and social norms expressed through family honour and a culture of silence that perpetuates VAW.²¹³ Eswatini reports that despite the existence of laws, a lot still needs to be done to address the causes of VAW rooted in societal stereotypes of ‘men’s superiority over women in that men still perceive women as subjects to their authority and control’.²¹⁴

Another challenge to implementing article 4 is that VAW remains underreported due to the shame and stigma associated with it, fear of reprisals and distrust in the legal system.²¹⁵ In addition, the criminal justice systems remain ineffective or inconsistent and thus not sufficiently deterrent. For example, the Commission recommends Namibia and the Gambia to strengthen the criminal justice system by institutionalising gender-specific mandatory training for law enforcement officials and health service personnel to ensure their full capacity in responding to all forms of VAW.²¹⁶

Further, despite the existence of specialised GBV interventions, there is a challenge of implementing these victim protection and support services at scale.²¹⁷ For example, Lesotho reports that there is a GBV care centre, but it is the only one within the country which is barely able to service victims from different regions.²¹⁸ In addition, such protection services may exist, but their effectiveness is compromised when there are regulatory environment gaps. For instance, Nigeria reported an increase in shelters and protection services for VAW survivors, such as counselling and medical services.²¹⁹ However, the African Commission noted that despite an increase in such services, implementation is compromised by the failure to enact the VAW Bill, which would ensure there is an enabling legal environment for these interventions.²²⁰

In some contexts, state reports lack clarity on the measures put in place to monitor the implementation of VAW laws and how these laws are invoked before courts.²²¹ In terms of jurisprudence, while some national courts have contributed positively to the development of progressive VAW precedent, clarifying state obligations and protection measures,²²² there are regressions in other contexts, such as

213 Combined Report of Kenya (2015-2020) (n 168).

214 Combined Report of Eswatini (2001-2021) (n 183) para 405.

215 Combined Report of Mauritius (2009-2015) (n 187).

216 2nd Periodic Report of The Gambia (1994-2018) (n 170).

217 African Commission Concluding Observations Zimbabwe (2021) (n 180).

218 Combined Report of Lesotho (2001-2017) (n 212).

219 Federal Republic of Nigeria 5th Periodic Report, 2011-2014 on the African Charter on Human and Peoples’ Rights, May 2015.

220 Concluding Observations and Recommendations on the 5th Periodic Report of Nigeria on the Implementation of the African Charter on Human and Peoples’ Rights 2011-2014 African Commission on Human and Peoples’ Rights, adopted at 57th ordinary session 4-18 November 2015, Banjul Gambia.

221 Concluding Observations and Recommendations on 5th Periodic Report of Uganda on the Implementation of the African Charter on Human and Peoples’ Rights 2010-2012, African Commission on Human and Peoples’ Rights, adopted at 56th ordinary session 4-18 November, 2015, Banjul, The Gambia; Republic of Algeria combined 3rd and 4th Periodic Reports 2001-2006 on the African Charter on Human and Peoples’ Rights, November 2007; Republic of The Gambia NGO shadow report on the combined 4th and 5th state report on the Convention on The Elimination of All Forms Of Discrimination Against Women (CEDAW) CEDAW/C/GMB/4-5, July 2015.

222 See eg *Tshabalala v S; Ntuli v S* 2020 (5) SA 1 (CC), where the South Africa Constitutional court found that rape is not only a penetrative offense and anyone who assists or facilitates rape can be convicted as a co-perpetrator even if they themselves do not engage in penetrative sex; *AK v Minister of Police* 2023 (2) SA 321 (CC), where negligent investigation by police was found to have prolonged the harm to the victim; *CK (a child) through Ripples International as her guardian and next friend v Commissioner of Police/Inspector General of the National Police Service* [2013] eKLR where the Kenyan high court elaborated on due diligence obligations of states to investigate, prosecute and punish sexual violence in Kenya; *Uganda v Yiga Hamidu* [2004] HC Criminal Session Case No. 5 of 2002; 9 February 2004, where the court found that marriage is not a defense to rape in Uganda; *Bizimana Jean Claude v Uganda* [2014] CA where the court found that corroboration is not a requirement to convict for sexual offences where the victim’s testimony can be established as accurate. Other decisions on due diligence jurisprudence in South Africa include *Suzette Irene Nelson v Minister of Safety and Security* (2006) ZANCHS 88, High Court of South Africa; *Carmichele v Minister of Safety and Security* 2001 (1) SA 489 (SCA); *S v Baloyi* 2000 (1) BCLR 86 (CC).

the failure to acknowledge how gender power relations in social contexts results in rape, especially in cases of intimate partner violence.²²³ In addition, in Kenya, there is a clawback on legislative reforms such as the mandatory minimum sentencing standards, which were established as part of fulfilling the obligation to punish VAW in response to judicial disregard for sexual offences.²²⁴

The African Commission has highlighted another important area of concern in relation to most state reports: the lack of gender-disaggregated data and the lack of statistics on the prevalence and patterns of VAW.²²⁵ While some state reports are more detailed than others, overall, the prevalence and the full range of manifestations of VAW remain unclear. For instance, Lesotho's report relies on some estimated statistics from NGOs but maintains that there are no statistics on GBV in the country.²²⁶ Some states, such as Cameroon, report in more detail on VAW statistics covering prevalence, number of cases reported to the police, prosecuted and the forms of violence disaggregated by gender.²²⁷ Others, like Malawi, provide general statistics on GBV reported to the police annually; however, the data is not disaggregated by gender.²²⁸

Other crosscutting challenges in state practice include the public/private dichotomy in responses to VAW, which keeps women's experiences of VAW outside of state accountability.²²⁹ For instance, the ECOWAS Court still struggles to understand state responsibility to act with due diligence and define VAW as gender-based discrimination.²³⁰ For example, in *Mary Sunday v Nigeria*, the ECOWAS Court held that a state cannot be held liable for domestic violence as the state or its organs are not involved in the imputed conduct – the physically violent act against the woman.²³¹ The court found that the strictly private nature of the violent acts against Mary, even the very context of where they were committed – the couples' household – precludes any connection with public authority.²³² This trajectory of jurisprudence is a dangerous regression from international and regional standards discussed in this chapter, which have evolved to disrupt the public/private dichotomy that has historically been used to keep VAW outside of state responsibility.

223 *Coko v S* (CA&R 219/2020) [2021] ZAECGHC 91.

224 *Edwin Wachira v DPP* High Court of Kenya Consolidated petition 97 of 2021; *Philip Maingi v DPP* High Court of Kenya Petition E017 of 2021.

225 Concluding Observations and Recommendations on the combined 4th and 5th Periodic Report of Sudan on the Implementation of the African Charter on Human and Peoples' Rights adopted at 12th extraordinary session 30 July 30-4 August 2012 Algiers, Algeria.

226 Combined Report of Lesotho (2001-2017) (n 212).

227 Republic of Cameroon combined 4th-6th Periodic Reports 2015-2019 on the African Charter on Human and Peoples' Rights and Initial Report on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, January 2020.

228 Combined Report of Malawi (2015-2019) (n 173).

229 Manjoo (n 88) para 63.

230 See examples of decisions where the ECOWAS Court missed opportunities to hold states accountable for gender discrimination; *Hadijatou Mani Koraou v The Republic of Niger* Judgment No ECW/CCJ/JUD/06/08 (27 October 2008); *EI* (n 147); *Adama Vandi v Sierra Leone* (n 128). For analysis see O Ojigbo 'Litigating gender discrimination cases before the ECOWAS Community Court of Justice and the African Court on Human and Peoples' Rights' in JJ Dawuni (ed) *Gender, judging and the courts in Africa: selected studies* 142-158; 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* 424-454.

231 *Mary Sunday v Federal Republic of Nigeria* Judgment No ECW/CCJ /JUD/11/18 (17 May 2018) 5.

232 As above. See also *EI* (n 147) paras 45 & 46, where the court insisted that it could only cite the state for violation of the right to a fair trial for delay in prosecution, but not for the rape itself.

5.4 Gaps in state reporting under article 4

Some state reports address implementation measures for article 4 when reporting under other provisions, including article 18 of the African Charter.²³³ Aspects of article 4 that lack attention are details on how the obligation to prevent VAW is operationalised beyond what seems to be sporadic awareness campaigns. While state reports, like the report submitted by Seychelles, record that prevention is important to the government, it does not articulate what the state does towards fulfilling this obligation.²³⁴ There is also limited reporting on medical and scientific experiments on women without consent. Some states, such as the DRC, mention that such cases have neither been reported nor recorded.²³⁵ In addition, there is limited information on what the obligation to provide an adequate remedy for victims of VAW entails beyond criminal justice consequences for perpetrators.²³⁶ State reports also show a lack of data on the extent of trafficking in women, with some states like Rwanda reporting that this manifestation of VAW is not common.²³⁷

Another gap is that most states report primarily on criminal laws enacted to protect the right to life, integrity and security of the person, torture and ill-treatment in a gender-neutral way without specifics on how women are affected as directed under article 4 of the Protocol.²³⁸ For example, in its most recent state report, Togo explains the legal protections for attacks on the physical integrity and ill-treatment with a focus on criminal sanctions that apply without distinction of sex, much like it is reported under the African Charter.²³⁹ Thus, there is also a lack of reporting on the full range of measures required under state obligations in article 4 beyond criminalisation.²⁴⁰ In addition, state reports on article 4 also focus on detention-related rights, such as in the practice of *habeas corpus* and the abolition of or moratorium on the death penalty, with limited or no information on how women are affected.²⁴¹ For example, Niger reports that part of detention practice is that a medical certificate must be issued for all prisoners indicating that they have not been subjected to torture or ill-treatment whether mental or physical.²⁴²

It is important to note that even in instances where states have not reported on article 4, the African Commission has made recommendations for the implementation of its provisions. For instance, recommending Mozambique to adopt robust measures to combat VAW, including by ensuring prompt

233 Combined Report of Mauritius (2009-2015) (n 187); Republic of Mauritius combined 9th to 10th Periodic Reports 2016-2019 on the African Charter on Human and Peoples', February 2020; Combined Report of Liberia (1982-2012) (n 167).

234 Republic of Seychelles 3rd Periodic Report 2006-2019 on the African Charter on Human and Peoples' Rights and Initial Report on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, April 2021.

235 Combined Report of Democratic Republic of Congo (2005-2015) (n 185).

236 Concluding Observations and Recommendations on the combined 8th-11th Periodic Report of Senegal on the Implementation of the African Charter on Human and Peoples' Rights 2004-2013, African Commission on Human and Peoples' Rights, adopted at the 18th extraordinary session 29 July-7 August 2015, Nairobi, Kenya.

237 Combined Report Rwanda (2009-2016) (n 202).

238 Combined Report of Togo (2011-2016) (n 178).

239 As above.

240 Combined Report of Algeria (2010-2014) (n 169); Combined Report of Botswana (2011-2015) (n 169); Combined Report of Central African Republic (1988-2006) (n 169).

241 Republic of Cameroon 2nd Periodic Report 2003-2005 on the African Charter on Human and Peoples' Rights, May 2010 sec 2; Combined Report of Egypt (2001-2017) (n 168); 7th Periodic Report of Namibia (2015-2019) (n 168); Combined Report of Lesotho (2001-2017) (n 212).

242 Republic of Niger Periodic Report 2014-2016 on the African Charter on Human and Peoples' Rights, November 2017.

investigation and prosecution of such cases and building operational and institutional capacity to combat VAW.²⁴³

6 Conclusion

Article 4 of the Maputo Protocol is progressive and comprehensive in its state obligations to act with due diligence to prevent, protect, investigate, prosecute, and punish perpetrators of VAW and to provide adequate reparations to victims. However, this chapter has shown that the conception of the foundational rights under article 4(1), the right to life, integrity and security of the person, finds limited application in terms of how women experience violence. They are mainly conceptualised on the basis of violence perpetrated by the state in the ‘public sphere’ and largely framed around men’s lived experiences. As the UN Special Rapporteur on VAW has emphasised, to address VAW, a different set of normative and practical measures is required so as not to invisibilise the everyday violence that women experience at the interpersonal level, in the family, in the community, and condoned by the state.²⁴⁴ Article 4 also lacks an explicitly intersectional approach that articulates how GBV affects certain groups, such as LGBTIQ+ persons in Africa.

Article 4(2) moreover provides a robust framework of state obligations to address VAW, which in turn provides an opportunity for domestic and regional judicial bodies to develop jurisprudence in line with human rights standards. In this regard, there is a dire need to specifically challenge the trajectory of the jurisprudence of the ECOWAS Court on VAW, which maintains the fallacious public/private divide and fails to hold states accountable for VAW as a human rights violation and as gender-based discrimination wherever it occurs. The conceptualisation of VAW as gender-based discrimination remains important, and there is opportunity to develop jurisprudence that will continue to clarify state obligations to address VAW as both a cause and consequence of gender-based discrimination. A transformative approach to the analysis of discrimination and VAW is intersectional and situates violence on a continuum that spans interpersonal and structural violence.²⁴⁵

Further, the scope and content of state obligations must be clarified in the areas of the rights of victims in the criminal justice system, the meaning of concepts such as exploitation, cruel, inhuman and degrading treatment to expand protections across the various manifestations of VAW; ensuring that the accused’s fair trial rights do not erode the perspectives and lived experiences of women who experience violence.

State practice shows that there is cross cutting advancement in law reform and administrative measures through national action plans and GBV coordination mechanisms. However, they remain under-resourced. A critical entry point is the need to hold states accountable for funding VAW prevention and response interventions, including through public-private sector funding partnerships. NGOs need to resist the *status quo* of assuming state functions, including providing victim support services, which continue to be implemented piecemeal, with limited potential for sustainability or scale. In conclusion, addressing the normative, interpretative and implementation aspects appropriately and effectively is key to achieving the legal obligations set out in article 4.

243 Concluding Observations and Recommendations on the 2nd and combined Periodic Report of Mozambique on the Implementation of the African Charter on Human and Peoples’ Rights 1999-2010, African Commission on Human and Peoples’ Rights, adopted at 17th extraordinary session February 19 to February 28, 2015, Banjul, The Gambia.

244 R Manjoo ‘The continuum of violence against women and the challenges of effective redress’ (2012) 1 *International Human Rights Law Review* 1.

245 Manjoo (n 244) 1.