

Chapter 4

International Law Standards and State Obligations

4.1 Introduction

The East African Commonwealth member countries subscribe to various international and regional human rights instruments that provide for the protection of the rights of women and children particularly the girl child. The instruments contain definitions, set standards and impose obligations on states parties. They include: the UN Charter, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of all forms of Discrimination against Women, the Convention on the Rights of the Child (CRC) and the Convention Against Torture, among others. Since the foundation of all these instruments is the Universal Declaration on Human Rights (UDHR), the Commonwealth member countries are also bound by the universal principles set out in the UDHR.

4.2 The status of international law and norms in the Commonwealth member countries in East Africa

Kenya

By virtue of Article 2(6) of the Constitution of Kenya, any treaty or convention which Kenya has ratified forms part of the law of Kenya. The **Treaty Making and Ratification Act**¹ gives effect to the provisions of Article 2(6) of the constitution and provides the procedure for the making and ratification of treaties and connected purposes. The government is required to enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms (Article 21).

Where a particular law does not give effect to a right or a fundamental freedom, the court is required, in applying a provision of the Bill of Rights, to develop the law to give effect to the provisions of the Bill of Rights.

In so doing, the court is required to adopt the interpretation that most favours the enforcement of the right or fundamental freedom. Since the general rules of international law and treaties and conventions ratified by Kenya form part of the law of Kenya, the international standard of exercising due diligence to prevent, investigate and punish the perpetrators of violence against women is part of Kenyan law.

Rwanda

According to Article 189 of the constitution, the President of the Republic of Rwanda negotiates international treaties and agreements and ratifies them, and thereafter the parliament is notified. However, treaties that commit state finances, modify provisions of laws already adopted by parliament or relate to the status of persons, can only be ratified after authorisation by parliament. Article 190 provides that upon their publication in the official gazette, international treaties and agreements which have been conclusively adopted in accordance with the provisions of law shall be more binding than the domestic/municipal laws (organic laws and ordinary laws), except in the case of non-compliance by one of the parties.

According to Article 192, where an international treaty contains provisions in the event that the Supreme Court, upon request by the organs referred to in Article 145 paragraph 4 of the constitution, rules that an international treaty contains provisions which are inconsistent with the constitution, the authorisation to ratify the treaty or agreement cannot be granted until the constitution is amended.

Tanzania

In Tanzania, treaties and convention are not self-executing. Rather, execution is through an individual chief executive or cabinet decision, followed by a process of ratification through which provisions of international treaty law may be domesticated.

Uganda

The **Constitution of Uganda and the Ratification of Treaties Act, 1998**² constitute the country's municipal law on international conventions. Article 123 of the constitution provides that the president or a person authorised by the president, may make treaties, conventions, agreements or other arrangements between Uganda and any other country. According to Article 287 of the constitution, any treaties which had been signed, affirmed or were in force prior to the promulgation of the constitution, still bind and have the force of law in Uganda. Parliament's ratification jurisdiction is reserved for treaties on armistice, neutrality, peace or the subject of which require amendment of the constitution. Cabinet ratifies all the other treaties. According to the Ratification of Treaties Act, treaties ratified by the cabinet must be laid before parliament.

The Bangalore Principles

Whatever the constitutional provisions regarding the applicability of international law is in each country, judicial officers must be cognisant of the 1988 Bangalore Principles. The Bangalore Principles were released as

a summary of issues discussed at a judicial colloquium on The Domestic Application of International Human Rights Norms, held in Bangalore, India, from 24 to 26 February 1988.³ It was stated that fundamental human rights and freedoms were inherent in all humankind and found expression in constitutions and legal systems throughout the world, and in the international human rights instruments. Furthermore, ten principles hereunder mentioned were agreed upon as important in the work of courts:

1. These international human rights instruments provide important guidance in cases concerning fundamental human rights and freedoms.
2. There is an impressive body of jurisprudence, both international and national, concerning the interpretation of particular human rights and freedoms and their application. This body of jurisprudence is of practical relevance and value to judges and lawyers generally.
3. In most countries whose legal systems are based upon the common law, international conventions are not directly enforceable in national courts unless their provisions have been incorporated by legislation into domestic law. However, there is a growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law – whether constitutional, statute or common law – is uncertain or incomplete.
4. This tendency is entirely welcome because it respects the universality of fundamental human rights and freedoms and the vital role of an independent judiciary in reconciling the competing claims of individuals and groups of persons with the general interests of the community.
5. While it is desirable for the norms contained in the international human rights instruments to be still more widely recognised and applied by national courts, this process must take fully into account local laws, traditions, circumstances and needs.
6. It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes – whether or not they have been incorporated into domestic law – for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.
7. However, where national law is clear and inconsistent with the international obligation of the state concerned, in common law countries, the national court is obliged to give effect to

the national law. In such cases, the court should draw such inconsistency to the attention of the appropriate authorities, since the supremacy of national law in no way mitigates a breach of an international legal obligation which is undertaken by a country.

8. It is essential to redress a situation where, by reason of traditional legal training which has tended to ignore the international dimension, judges and practising lawyers are often unaware of the remarkable and comprehensive developments of statements of international human rights norms. For the practical implementation of these views, it is desirable to make provision for appropriate courses in universities and colleges for lawyers and law enforcement officials; and for meetings for exchanges of relevant information and experience.
9. These views are expressed in recognition of the fact that judges and lawyers have a special contribution to make in the administration of justice in fostering universal respect for fundamental human rights and freedoms.
10. The essence of the Bangalore Principles is that a treaty could give rise to a 'legitimate expectation' (by the citizenry) that the state would adhere to the terms of a treaty that it has ratified. 'This expression seems to encapsulate the modern approach to the use that may be made by judges of International Human Rights principles.'⁴

The equality standard

The **Charter of the United Nations (UN Charter)**, adopted in 1945, is the fundamental and capstone document for subsequent international human rights laws, norms and standards.⁵ The charter introduces equality as an international standard, and proclaims and recognises the inherent dignity of all human beings and their equal and indisputable rights. It further proclaims that fundamental rights and freedoms belong to members of the human race without distinction as to race, sex, language or religion.⁶ It effectively states that those rights are a subject of international concern and are no longer within the state's exclusive domestic jurisdiction.

Subsequent to the UN Charter is the **Universal Declaration of Human Rights (UDHR)**, adopted in 1948.⁷ The UDHR is the basic international statement on the unquestionable rights of all members of the human race and, in all the articles, it echoes the principle of equality of men and women, with the preamble stating that:

the recognition of the inherent dignity and equal and indisputable rights for all members of the human family, is the foundation of freedom, justice and peace in the world.

It recognises that the member states of the United Nations have reaffirmed their faith in human rights and the equal rights of men and women. In Article 1, the declaration provides that all human beings are born free and equal in dignity and in rights, while Article 2 declares that everyone is entitled to all the rights and freedoms set forth in the declaration without distinction of any kind such as race, colour, sex, language, religion or other status. Article 7 echoes the principle of equality and non-discrimination by stating that:

All are equal before the law and are entitled without discrimination, to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Subjecting a person to torture, cruel, inhuman and degrading treatment or punishment is prohibited in Article 5. Women are entitled to enjoy a life that is free of violence, without any discrimination and on a basis of equality with men.

Following the UDHR, equal protection clauses became a standard feature of international and regional conventions and instruments. Such clauses generally proscribe discrimination on the basis of race, sex, religion or national origin or sometimes require simply that all persons be afforded equal protection of the law and equal access to justice. It is the obligation of every state to ensure that all the rights enshrined in the UDHR are enjoyed by all human beings on a basis of equality. It is therefore the obligation of the state to prevent, eradicate, protect, prosecute and punish acts of violence against women and to provide an effective remedy to victims of such violence. These obligations arise from various international and regional human rights treaties which recognise VAW as a form of discrimination and a human rights violation. National constitutions, legislative frameworks, action plans and jurisprudence from national judiciaries and regional human rights institutions supplement these treaties. Under international law, states are accountable for human rights violations and acts of violence perpetrated by the state itself or by its agents, and in some instances by private actors. Such responsibility can arise from state action, omission or failure to take positive measures to protect and promote rights.⁸

Convention on the Elimination of all Forms of Discrimination against Women

The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), also known as the ‘the women’s convention’ and the most comprehensive International Instrument on the rights of women, establishes standards on equality and non-discrimination. In Article 1, it defines ‘discrimination’ as below (Box 4.1).

Box 4.1 Defining discrimination against women

CEDAW Art. 1

For the purposes of the present Convention, the term 'discrimination against women' shall mean, any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Although the convention does not explicitly address or **define 'violence against women'** or lay down specific standards for addressing the problem of VAW, the CEDAW Committee has interpreted the above definition of 'discrimination' to include gender-based violence. In Article 2, the convention condemns discrimination and creates obligations and standards for states parties **'to pursue by all appropriate means and without delay a policy of eliminating discrimination against women.'** To this end, state parties are required to:

- (a) embody the principle of the equality of men and women in their national constitutions and other national legislations in order to ensure the practical realisation of this principle;
- (b) establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions, the effective protection of women against any act of discrimination;
- (c) refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions act in conformity with this obligation;
- (d) take appropriate measures to eliminate discrimination against women by any person, organisation or enterprise; and
- (e) repeal all national penal provisions which constitute discrimination against women and to adopt appropriate legislative and other measures, including sanctions where appropriate, to prohibit all forms of discrimination against women.

Traditional practices that discriminate against women are prohibited in CEDAW Art.2 (f), which creates the obligation on the part of state parties to take all appropriate measures, including the enactment of legislation, to modify or abolish existing laws, customs and practices that constitute discrimination against women. Additionally, Article 5 of the convention creates an obligation for state parties to take all appropriate measures to, among others:

modify the social and cultural patterns of men and women, with a view to achieving the elimination of prejudices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

CEDAW, in Article 11, establishes the obligation of state parties to take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, and in particular the right to work as an indisputable right of all human beings.

Declaration on the Elimination of Violence against Women

The Declaration on the Elimination of Violence against Women (DEVAW) identifies women belonging to minority groups, indigenous women, women refugees, migrant women, women living in rural or remote communities, destitute women, women in institutions or in detention, female children, women with disabilities, elderly women and women in situations of armed conflict as particularly vulnerable to violence and deserving protection by the state through the exercise of due diligence.

Addressing harmful traditional practices, DEVAW in Article 4 creates another obligation for state parties. The state parties are required to **‘condemn violence against women and to refrain from invoking any custom, tradition or religious consideration to avoid their obligation with respect to its elimination’**.

In addition, state parties are required to pursue by all appropriate means and without delay, a policy of eliminating VAW and to *inter alia* take the following steps:

- Refrain from engaging in VAW.
- Exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of VAW, whether those acts are perpetrated by the state or by private persons.
- Develop penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women who are subjected to violence; and provide them with access to the mechanisms of justice and just and effective remedies for the harm suffered as a result of violence.
- Take measures to ensure that law enforcement officers and public officials responsible for implementing policies to prevent, investigate and punish VAW, receive training to sensitise them to the needs of women victims of violence.

- Adopt measures directed towards the elimination of VAW, who are especially vulnerable to such violence.

The CEDAW Committee emphasised that gender-based violence impairs and nullifies women's enjoyment of human rights and fundamental freedoms, including the right to live without violence. The committee has established more obligations on the part of state parties to address VAW and urges them to adopt the following, among others:

- (a) Take appropriate and effective measures to overcome all forms of GBV, whether by a public or private act.
- (b) Ensure that the laws against family violence and abuse, rape, sexual assault and other GBV, give adequate protection to all women and respect their integrity and dignity. Gender-sensitive training for judicial and law enforcement officers for effective implementation of the convention was recommended, as well as the provision of appropriate protective and support services for victims of violence.
- (c) Identify the nature and extent of attitudes, customs and practices that perpetuate VAW and the kinds of violence that result, and report on the measures they have taken to overcome VAW and the effect of those measures.
- (d) Take effective measures to overcome these attitudes and practices. Such measures should include the introduction of education and public information programmes to help eliminate prejudices that hinder women's equality.
- (e) Take all legal and other measures to address family/domestic violence and to provide effective protection of women against GBV, including: penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence, including violence and abuse in the family, sexual assault and sexual harassment in the workplace.
- (f) Establish support services for victims of family violence, rape, sexual assault and other forms of gender-based violence, including refuges, specially trained health workers, rehabilitation and counselling.
- (g) Include in their reports under the convention, information on legal measures that have been taken to overcome VAW and the effectiveness of such measures.⁹
- (h) Take all legal and other measures that are necessary to provide effective protection of women against GBV, including: penal sanctions, civil remedies and compensatory provisions to

protect women against all kinds of violence, including violence in the family, sexual assault and harassment in the workplace.

- (i) Take preventive measures, including public information and education programmes to change attitudes concerning the roles of men and women.
- (j) Take protective measures, including refuges, counselling, rehabilitation and support for women who are victims of violence or who are at risk of such violence.
- (k) Take the following measures with a view to eradicate the traditional practice of female circumcision: the introduction of appropriate educational and training programmes and seminars based on research findings about the problems arising from female circumcision and inclusion in their country reports to the committee, under Article 10 and 12 of the convention, information about measures taken to eliminate female circumcision.

The CEDAW Committee has emphasised that discrimination under the convention is not restricted to actions by or on behalf of the governments (see Articles 2(e), 2(f) and 5 of the convention). Article 2(e), for instance, requires that state parties take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise.

In General Recommendation No. 19, the Committee articulated the due diligence standard and states that:

*under general international law and specific human rights covenants, states may....be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.*¹⁰

Convention on the Rights of the Child

The **Convention on the Rights of the Child (CRC)**¹¹ in Article 2 imposes an obligation on states parties to take appropriate measures and ensure that children are protected from all forms of discrimination. Further, state parties are required to take all effective and appropriate legislative, administrative, social and educational measures to protect children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, exploitation and sexual abuse.¹² In Article 24(3) of the convention, state parties are required to take all effective and appropriate measures to abolish traditional practices prejudicial to the health of children such as child marriages and female genital mutilation (FGM).

The African Charter on the Rights and Welfare of the Child

Article 3 of the African Charter on the Rights of and Welfare of the Child prohibits discrimination as follows:

Every child shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in this Charter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status. (Emphasis added)

Article 16 provides for protection of children against child abuse and torture thus:

1. *State parties to the present Charter shall take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse, while in the care of the child.*
2. *Protective measures under this Article shall include effective procedures for the establishment of special monitoring units to provide necessary support for the child and for those who have the care of the child, as well as other forms of prevention and for identification, reporting referral investigation, treatment and follow-up of instances of child abuse and neglect.*

Article 21: Protection against harmful social and cultural practices:

1. *State parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular:*
 - (a) *those customs and practices prejudicial to the health or life of the child; and*
 - (b) *those customs and practices discriminatory to the child on the grounds of sex or other status.*
2. *Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory.*

International Covenant on Economic, Social and Cultural Rights

According to Article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR),¹³ state parties to the covenant have undertaken to guarantee that the economic, social and cultural rights set out in the covenant will be exercised without discrimination of any kind as

to race, colour, sex, language, religion or other opinion, national or social origin, property, birth or other status. These include the right to enjoy the highest attainable standard of physical and mental health.¹⁴ States parties have an obligation to take steps to achieve the full realisation of this right.

Such steps include those necessary for the healthy development of the child.¹⁵ Child marriages and FGM are a violation of this right, because of their numerous negative and health consequences. The state must therefore act to eliminate FGM and child marriages.

Article 7 of the ICESCR provides the right of everyone to enjoy just and favourable conditions of work. By implication, this requires women to be free from all forms of violence and harassment, including sexual harassment in the workplace. The state has the obligation to legislate against sexual harassment in the workplace.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (commonly known as the Convention against Torture or CAT) bans the use of torture and other cruel, inhuman or degrading treatment or punishment. CAT seeks to effectively support the struggle against the use of torture around the world and requires state parties to: take steps to prevent, investigate and punish those who commit these practices; ensure that any victim (or their dependents in the event of the victim's death) receives adequate compensation, including rehabilitation; and to take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction, including in relation to:

- (a) returning, expelling or extraditing someone where there are substantial grounds to believe s/he will face torture;
- (b) arrest, detention and imprisonment;
- (c) interrogation;
- (d) training law enforcement – civil or military – personnel, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment;
- (e) investigating allegations of torture; and
- (f) ensuring such offences are punished under criminal law, applying appropriate penalties to reflect the gravity of the offence.

The convention establishes the Committee against Torture, which views VAW, including sexual violence and trafficking, as gender-based acts of torture within the scope of the convention.

States that have ratified the convention are required to submit an initial report documenting compliance with the provisions of the treaty within one year of acceding to the convention, and thereafter submit a periodic report every four years.

Council resolution 11(II) of 21 June 1946 establishing the Commission on the Status of Women

The Commission on the Status of Women (CSW) adopted the DEVAW definition of VAW and urged states to strongly condemn all forms of violence against women and girls, and to refrain from invoking any custom, tradition or religious consideration to avoid their obligations with respect to its elimination, as set out in the declaration.

4.2.1 The obligation to submit CEDAW periodic reports

States are required, under Article 18 of CEDAW, to submit periodic reports to the UN Secretary-General for consideration by the CEDAW Committee. Such reports are to be submitted within one year after the entry into force of the convention for the state party concerned, and thereafter every four years – and further whenever the committee calls for such report. A periodic report should contain information about legislative and other measures taken by the state to protect women from all forms of violence, including measures adopted to eradicate such violence. The committee has emphasised that discrimination under the convention is not restricted to actions by or on behalf of governments (see Articles 2(e), 2(f) and 5 of the convention). Article 2(e), for instance, establishes the obligation to take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise. Consequently, the committee – while articulating the due diligence obligation – affirmed that:

*under general international law and specific human rights covenants, States may.....be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.*¹⁶

Kenya

The committee considered the 7th Periodic Reports for Kenya at its 963rd and 964th meetings.¹⁷ In the concluding observations, the committee welcomed the adoption of the current constitution containing a comprehensive Bill of Rights, which enhances protection for women. It noted, among other provisions, Article 27(4) which prohibits direct or indirect discrimination,

among others, on the basis of sex, pregnancy and marital status; Article 27(6) which empowers the state to take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination, in order to give full effect to the realisation of the right not to be discriminated against; and Article 2(4) which provides that any law, including customary law, that is inconsistent with the constitution is void to the extent of the inconsistency.

The committee welcomed the fact that the new constitution requires the repeal of many discriminatory provisions that existed in the former constitution, as well as the application of the constitution's guarantee of non-discrimination with respect to all laws, including those in the areas of marriage, divorce, adoption, burial and succession.

In establishing commissions crucial to the implementation of the new constitution, the committee congratulated the Government of Kenya for implementing the constitutional principle contained in Article 27(8) that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.

However, the committee among other recommendations urged the government to enact, within two years: the Family Protection Bill 2007; the unified Marriage Bill 2007 and Matrimonial Property Bill 2007; the Prohibition of Female Genital Mutilation Bill (2010), which *inter alia* outlaws FGM for all women; and the Equal Opportunity Bill. It further urged the government to harmonise religious and customary law with Article 16 of the convention. Article 16 of the convention requires states parties to take appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations, and to ensure equality of men and women with regard to entering into marriage, during marriage and at the dissolution of marriage. The first four bills have since been enacted into law.

The CEDAW Committee also urged the government to take all appropriate measures to ensure that CEDAW is sufficiently known and applied by all branches of government, including the judiciary, as a framework for all laws, court decisions and policies on gender equality and the advancement of women.

Uganda

In the case of Uganda, the CEDAW Committee considered the combined 4th to 7th Periodic Reports¹⁸ in 2010,¹⁹ and welcomed the enactment of the 2006 Refugee Act, which contains provisions in line with international standards, including the specific provision recognising discriminatory practices based on gender as a ground for seeking asylum. It also welcomed legislative reforms undertaken by the government and the adoption of a

wide range of legislative measures, including: **the Land (Amendment) Act, 2004**; **the Employment Act, 2006**; **the Equal Opportunities Commission Act, 2007**, which provides a legal basis to challenge laws, policies, customs and traditions that discriminate against women, as well as the National Equal Opportunities Policy; the amendments to the **Penal Code**, prohibiting defilement of girls and boys (2007); enactment of the **Domestic Violence Act 3, 2010**, criminalising violence in a domestic setting; enactment of the **Prohibition of Female Genital Mutilation Act 5 (2010)**; enactment of the **Prevention of Trafficking in Persons Act (2010)**; and enactment of the **International Criminal Court Act (2010)**, criminalising sexual exploitation of women during conflict situations.

It observed that despite the enactment of the law prohibiting FGM, the practice of FGM remained prevalent in the country; it called upon the government to ensure the effective implementation of the **Prohibition of Female Genital Mutilation Act (2010)**, as well as prosecution and adequate punishment of perpetrators of this practice.

The committee noted, with satisfaction, that the government had adopted a number of policies, programmes and plans of action to promote gender equality and eliminate discrimination against women, and made specific reference to the National Action Plan on Gender for monitoring the implementation of the convention for the period 2007–2010, as well as the National Gender Policy (2007).

The committee further noted with satisfaction that, in the period since the consideration of the previous report, Uganda had ratified the Convention on the Rights of Persons with Disabilities, as well as the Optional Protocol thereto.

It also took note of a number of important decisions of the Constitutional Court of Uganda. These included the case of *Uganda Women Lawyers Association v Attorney General*,²⁰ which declared parts of existing legislation (the Divorce Act) unconstitutional on the ground of being discriminatory against women. It also noted the case of *Law and Advocacy for Women in Uganda v Attorney General*,²¹ which declared the practice of FGM unconstitutional and thereby outlawed it.

However, the committee expressed concern that legislation and customary practices that discriminated against women and which were inconsistent with the convention remained in force. It called upon the government to speed up the law review process, and to harmonise domestic legislation with the constitutional principles relating to non-discrimination and equality between women and men in line with its obligations. The committee further expressed concern about the delay in the passage of the Marriage and Divorce Bill, the Sexual Offences Bill and the HIV/AIDS Prevention and Control Bill. It

urged the government to expeditiously enact these bills into law and to raise the awareness of legislators about the need to give priority to legal reforms in order to achieve equality for women and comply with the state party's international treaty obligations.

The CEDAW Committee also recommended that the government take all appropriate measures to ensure that CEDAW is sufficiently known and applied by all branches of government, including the judiciary, as a framework for all laws, court decisions and policies on gender equality and the advancement of women. The CEDAW Committee in its concluding observations welcomed legislative reforms that had been undertaken and the enactment of various legislations addressing violence against women.

Box 4.2 Law and Advocacy for Women in Uganda v Attorney General

Facts

The petitions were brought by a women's advocacy association challenging s.154 of the Penal Code and sections 2(n) (i) and (ii), 14, 15, 23, 26, 29, 43 and 44 of the Succession Act. The two petitions were consolidated for purposes of hearing. Section 154 of the Penal Code provided for criminal adultery. It stated as follows:

1. *Any man who has sexual intercourse with any woman not being his wife commits adultery and is liable to imprisonment for a term not exceeding twelve months or a fine not exceeding two hundred thousand shillings; and, in addition, the court shall order any such man on first conviction to pay the aggrieved party compensation of six hundred shillings and on subsequent conviction not exceeding twelve hundred thousand shillings as may be so ordered.*
2. *Any married woman who has sexual intercourse with any man not being her husband commits adultery and is liable on first conviction to a caution by the court and on subsequent conviction to imprisonment for a term not exceeding six months.*

With regards to s.154 of the Penal Code, it was argued by the petitioner that the provision discriminated against women to the extent it penalised married women for having sexual intercourse with any man, whereas married men were exonerated when they had sexual intercourse with unmarried women.

Further, the petitioner argued that such discrimination contravened the constitution to the extent that it treated women with less respect. This, the petitioner submitted, was inconsistent with Article 24 which guaranteed the dignity of every person, Article 31(1) which guaranteed men and women equal rights during marriage and at its dissolution, and Article 33(1) which guaranteed women equal dignity with men.

Regarding the Succession Act, the petitioner argued as follows:

- (a) s.2(n)(i) and (ii) were discriminatory to the extent that the legal heir preferred was to be male;
- (b) s.27 was discriminatory to the extent that it did not make provision for the distribution of property in case of female intestacy;
- (c) s.43 was discriminatory to the extent that mothers could not by will appoint guardians for their minors;
- (d) s.44 did not make provision for female relatives becoming statutory guardians and therefore was discriminatory;
- (e) s.15 and 16 were discriminatory to the extent that a husband could not take the domicile of his wife.

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On s.154 of the Penal Code Act, the respondent conceded to the petitioner's argument that the provision was discriminatory to married women. However, it was the respondent's contention that the Constitutional Court need not strike out the offence of adultery, but could by virtue of Article 274 of the Constitution modify it to bring it in line with provisions of the constitution.

With regards to the provisions of the Succession Act, the respondent conceded to the arguments advanced by the petitioner. The Constitutional Court held *inter alia* that:

1. Section 154 of the Penal Code Act was inconsistent with Article 21, which guaranteed equality before the law for both men and women and prohibited discrimination on grounds of sex. The provision was equally inconsistent with Article 31(1)(b), which accorded married couples equal rights during marriage and at its dissolution.
2. The Constitutional Court only had powers to declare an Act of Parliament or any other law inconsistent with or in contravention of the provisions of the constitution. The court could not modify a law which it found to be inconsistent or in contravention with the provisions of the constitution and certainly could not create a sentence to be imposed on adulterous spouses.
3. The provisions of the Succession Act were inconsistent with the provisions of the constitution and were therefore void (the court did not evaluate this issue in detail).

Ratio decidendi:

Unjustifiable statutory differentiation between men and women solely on the basis of sex contravenes the principle of equality before and in the law.

Contribution to gender jurisprudence/points to note

- The court's holdings clearly communicate the point that laws which provide for criminal conduct or have a civil effect should not unjustly differentiate on grounds of sex.
- The court struck down provisions that existed prior to Uganda's progressive constitution, which recognises equality between men and women.

**Box 4.3 Re MURORUNKWERE Rwanda SUPREME COURT – 2013 SC RS/
Inconst/Pén.0001/08/CS**

Facts

The Petitioner, Murorunkwere Spéciose was prosecuted for adultery per Article 354 of the Rwandan Penal Code. Murorunkwere Spéciose's husband, Sehene JMV, filed a claim with the judicial police accusing his wife of committing adultery with Nisengwe Fred and also filed a civil action for damages amounting to 1,000,000 Rwanda Francs (Frw), 500,000 Frw of reference expenses, and the reimbursement of 1,500,000Frw that Murorunkwere syphoned to Nisengwe Fred.

The Primary court found Murorunkwere Spéciose and Nisengwe Fred guilty of adultery and sentenced them to two months' imprisonment each. The Court also admitted and analyzed the civil action submitted by Sehene JMV and found it with merit. It ordered Murorunkwere Spéciose and Nisengwe Fred to pay Sehene JMV damages amounting to 250,000Frw.

Unsatisfied with the verdict of the Court, Murorunkwere Spéciose and Nisengwe Fred immediately appealed to the Intermediate Court of Nyarugenge and filed a claim in the Supreme Court requesting the repeal of Article 354 of the Decree Law N°21/77 of 18/08/1977 of the Penal Code of Rwanda which provided for different penalties for adultery for men and women.

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Counsel for the petitioner stated that Article 354 of the Rwandan Penal Code is inconsistent with the preamble and Article 16 of Constitution of the Republic of Rwanda which provides that man and woman are equal before the Law. Article 354 of the Rwandan Penal Code imposes different punishments on a man and a woman for the same offence. A female offender is not given the opportunity to pay the fine, an option available to a male offender. According to the petitioner, the judge of the primary court of Kagarama resorted to common sense and sentenced the man and woman to the same penalty. The counsel concluded by requesting the Court to exercise its discretion and repeal Article 354 of the Rwandan Penal Code so as to pave way for parliament to amend the law.

Article 185 of the Constitution of Rwanda established the principle of gender equality and a gender monitoring office which monitors and supervises its compliance. Article 354 of the Rwandan Criminal Code is not in compliance with that principle. Articles 2 and 15 of CEDAW prohibit all forms of discrimination against women. In that convention, it is provided that the ratifying countries shall respect the principle of gender equality, which included Article 190 of the Constitution.

State Counsel stated that the request to repeal the Article had already been addressed in the draft law of the Criminal Code which provides that a man and a woman who commit adultery shall be sanctioned in the same way. He continued to argue that the Court should not repeal the whole provision because it may result in a vacuum in the penal code. The court could proceed on the basis of Article 6 of the law N°18/2004 relating to civil, commercial, social and administrative procedure, which states, "Judges shall decide cases by basing their decisions on the relevant law or, in the absence of such a law, on the rule they would have enacted, had they to do so, guided by judicial precedents, customs and usages, general principles of law and written legal opinions."

OPINION OF THE SUPREME COURT

Article 354 of the Rwandan Penal Code is inconsistent with the Constitution.

Clearly, the penalty for a wife found guilty of the adultery differs from the penalty of a man found guilty of the same crime. The Supreme Court, by law, has been assigned jurisdiction to repeal a law, either in part or in whole, if it finds that it contradicts the Constitution. Nevertheless, during the trial, the Court has to take into account the general interest, the reasons why it should not repeal a provision of the law and then leaves a lacuna, which is likely to incite people to fearlessly indulge in adultery as they are aware that no legal provision shall punish them. To resolve the issue in Article 354 of the Rwandan penal code, the Court resolves to separate the paragraphs of the article. The first paragraph is to be repealed and the second paragraph to be complemented by the insertion of the words "or a woman" after the word "a man". Thus, Article 354 of Rwandan Penal Code is to read as follows: *"a man or woman convicted of adultery shall be liable to a term of imprisonment of one month to six months and a fine of one thousand francs or one of these penalties.* Is the Supreme Court competent to amend this provision in this way? To address this issue, the Court finds that it should refer to the practices of other Courts around the world.

In order to settle issues arising from a provision of law which is inconsistent with the Constitution, different countries, like Canada, the United States of America, and South Africa have resorted to different means including "severance" (separation of the parts of a provision which are inconsistent with the Constitution and are repealed in order to remain with parts which are not inconsistent with the Constitution), "reading down" (Interpretation of a provision in a broader way that makes the law easily understood and consistent with the Constitution), and "reading in" (Insertion of some words in a provision of the law in order to eliminate the inconsistency with the Constitution).⁹

In judgement *RS/Inconst/Pén.0001/07/CS* delivered on 11/1/2008, this Court resorted to the procedure of separating the parts of a provision and repealing the part which is inconsistent with the Constitution. In this case, the Court finds that the procedures which are compatible with this issue include "severance" and "reading in". By repealing the first paragraph of Article 354 and inserting words in the second paragraph, the provision is no longer inconsistent with the Constitution.

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Courts that hear and try petitions in which a repeal of law or a provision is requested for the reason that they are inconsistent with the Constitution, they are recognized the competence to complement the law or to take other measures for preventing the vacuum. In the Constitution of South Africa of 1996, in its article 172, it is provided that in the course of trying the case, the Court may rule that a law or a provision which is in contradiction with the law be repealed. It goes on stating that ".....it may make any order that is just and equitable"

The Supreme Court of Canada has also taken decisions that cater for the problem of unconstitutional laws. It does this in conformity with Article 52 of the Constitution of 1982 which states that "*The Constitution of Canada is the supreme law of Canada and any law that is inconsistent with the provision of the Constitution is, to the extent of the inconsistency, of no force or effect*".^b That Court has explained its jurisdiction in such cases in *Schachter v Canada*.^c In this case, the court ruled that per article 52 of the Constitution of Canada, it can repeal the law, in whole or in part, interpret the law so that it does not conflict with the constitution, or inserting some words in a provision of the law, as a relevant remedy for the issues surrounding an unconstitutional law.

Article 200 of the Constitution of Rwanda is similar to Article 52 of the Constitution of Canada which is mentioned above. Article 200 states, "the Constitution is the supreme law of the State. Any law which is contrary to this Constitution is null and void". Therefore, it is clear that the Supreme Court of Rwanda has the authority to repeal part of a provision of law that is unconstitutional and insert words in the remaining part, in accordance with article 200 of the Constitution and supported by article 93 of the Organic Law N°01/2004 of 29/01/2004 which determines the organization, functioning and competence of the Supreme Court as amended to date. That article provides "Where court finds the petition well founded, it abrogates the whole or part of that law depending on substance of the petition....". This jurisdiction prevents the legal loophole created when part of a provision is repealed for being inconsistent with the Constitution.

In regard to avoidance of a legal lacuna when a provision or its part is repealed for unconstitutionality, the Court finds a good example in the South African case *S v. Manamela*. In this case, the Constitutional Court encountered a problem when it found that there was a provision which was inconsistent with the Constitution. The repeal of the entire provision would result in a legal vacuum because it would take the parliament a long time to sit, during which many consequences could arise. The Court decided to insert some words in the provision of the law to avoid the lacuna. It stated that: "The striking down of the reverse onus in section 37, without more, would leave a vacuum in the present legislative structure designed to deal with "fencing" which is a pervasive evil in our society. Parliament could remedy the situation, but that takes time, and in the interim that gap would remain. To read in the words necessary to establish an evidential presumption is less invasive of the legislative purpose of section 37 than simply striking down the presumption".^d

However, the repeal of a part of a provision and the insertion of words in a provision should be done in a careful manner. The Court should avoid addressing political issues and try to respect the vision and rationale of the legislator during the enactment of disputed law in regard to the aspect of that law after the act of the Court. In the case *National Coalition*, the Constitutional Court of South Africa ruled that the severance of two parts of a provision, one being repealed and the remaining being complemented by the insertion of words, is a decision that the Court takes with care so that even the remaining part of the provision which has been complemented by additional words does not contradict the constitution and respect for fundamental principles of the State. It ruled that: "The severing of words from a statutory provision and reading words into the provision are closely related remedial powers of the court. In deciding whether words should be severed from a provision or whether words should be read alone, a court pays careful attention first, to the need to ensure that the provision which results from severance or reading words into a statute is consistent with the Constitution and its fundamental values and secondly, that the result achieved would interfere with the laws adopted by the legislature as little as possible".^e

Concerning the usurpation of power by the judiciary and the non-interference in the powers of the legislature by reading in of words in a statute; the Court should only focus on what is necessary in order

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for the Constitution to be respected. As held by the Supreme Court of Canada in the case *Mv Hf* "remedial precision requires that the insertion of a handful of words will without more, ensure the validity of the legislation and remedy the constitutional wrong." This means that, in order to avoid usurpation, a few words should be inserted in the statute. This is enough for the statute to be valid and to rectify its contradiction with the Constitution. In this case, the repeal of the first paragraph of article 354 and insertion of the words, "or a woman" shall only ensure the validity of the legislation and invalidate its inconsistency with the Constitution of the Republic of Rwanda.

In this case, the repeal of the first paragraph of Article 354 of the Penal Code of Rwanda, and the insertion of additional words in the remaining second paragraph is likely to keep Article 354 from contradicting the Constitution of the Republic of Rwanda. This Court also finds that the insertion of words in Article 354 of the penal code of Rwanda does not constitute usurpation. Rather, it is an institutional balance which aims at preventing the negative implications likely to result from the non-existence of a provision which penalizes the offence of adultery.

DECISION OF THE SUPREME COURT

The Supreme Court admits the petition submitted by Murorunkwere Spéciose;

- [a] Decides that it has merit.
- [b] Repeals the first paragraph of article 354 of Rwandan Penal code.
- [c] Rules that the second paragraph of article 354 of Rwandan penal code should include the words "or a woman" after the word man.
- [d] Rules that article 354 of the Rwandan penal code is modified as follow: "*a man or woman convicted of adultery shall be liable to a term of imprisonment of one month to six months and a fine of one thousand francs or one of these penalties*".
- [e] Rules in favor of Murorunkwere Spéciose.
- [f] Decides that Court fees amounting to 5,900Frw are to be borne by the public treasury.

Contribution to Jurisprudence

The Court's holdings clearly communicate the point that laws which provide for criminal conduct should not differentiate between men and women solely on the basis of sex.

Point to Note

The Court was mindful of the lacuna it would create by annulling the provisions of the law which punished the offence of adultery. To avoid a vacuum, the Court went on to repeal the provision of the law which hitherto provided a (more punitive) sentence for women and then inserted the word woman into the hitherto (more lenient) provision which was only applicable to men. Court therefore adopted the mechanism of "reading into" the law.

- a These different ways of addressing issues deriving from provisions that are inconsistent with the Constitution are well explained by law scholars, Iain Currie and Johan de Waal, *The new Constitution and Administrative Law*, Vol.I, Cape Town, JUTA, 2001, p 290–293.
- b Meaning that "*The Constitution of Canada is the supreme law of Canada and any law that is inconsistent with the provision of the Constitution is, to the extent of the inconsistency, of no force or effect.*"
- c *Schachter v Canada* (1992) 2 S.C.R 679, P21. <http://CSC.Lexum.Umontreal.ca>.
- d *S v Manamela* 2000 (3) SA1 (CC).
- e *National Coalition of Gay and Lesbian Equality v Minister of Home Affairs* 2000(2) SA 1 (CC) para 75.
- f *MvH* (1999) 2 SCR, para 139

Tanzania

The CEDAW Committee considered the combined 4th, 5th and 6th Periodic Reports of the United Republic of Tanzania in 2008.²² It welcomed the adoption in 2000 of a National Development Vision 2025, aimed at attaining gender equality and the empowerment of women in all socioeconomic and political relations and culture by the year 2025. It also commended the government for adopting the Policy on Women and Gender Development in 2000, and for the establishment in 2001 of the Commission for Human Rights and Good Governance, which is charged with, among others, the mandate to investigate allegations of human rights violations and to disseminate information on human and women's rights. The committee noted with appreciation that a special gender desk dealing with public education and women's rights was established within the commission in 2004. It commended the government for the 14th amendment of the constitution, providing that the number of women in parliament shall not be less than 30 per cent of a combined number of members and that the president is empowered to nominate ten members of parliament, half of whom should be women.

The committee commended the government for the introduction of legal reforms aimed at the eliminating discrimination against women, including the enactment of the **Village Lands Act No. 5**, which gives women the right to acquire, own and use land equally with men; and the **Land Act No. 4 of 1999**, as amended in 2004. The Land Act in section 114 provides that the mortgage of a matrimonial home, including a customary mortgage of a matrimonial home, shall only be valid if the spouse(s) of the mortgagor living in that matrimonial home has/have assented to the mortgage. It provides further that it is the responsibility of a mortgagee to take reasonable steps to ascertain whether the applicant of a mortgage has a spouse or spouses.

The committee also noted that the 13th Constitutional Amendment in 2000 expanded the grounds of discrimination in paragraph 13(5) of the constitution to also include discrimination on the basis of gender, and that Article 12, section 5, of the Constitution of Zanzibar, as amended in 2002, also includes a reference to gender discrimination.

However, the committee was concerned that although the constitution had been amended to include gender as a ground of discrimination, the definition of discrimination was different from that contained in Article 1 of CEDAW, which prohibits direct and indirect discrimination. It called upon the government to consider amending the existing definition of discrimination to encompass both direct and indirect discrimination in accordance with Article 1 of the convention.

The committee also noted with concern that Tanzania had not domesticated CEDAW, and that without such full domestication, the convention was not a part of the national legal framework and its provisions were therefore not enforceable in the courts. While welcoming the effort to achieve

legislative reform, specifically in the context of the work of the Law Reform Commission, the committee expressed concern at the lack of priority given to comprehensive legal reform to eliminate sex-discriminatory provisions and to close legislative gaps in order to bring the country's legal framework fully into compliance with the provisions of the convention. The committee was concerned, in particular, about: the delay in the passage of the proposed amendments to the **Law of Marriage Act of 1971**; inheritance laws; the law on custody of children; as well as other legislation and customary laws still existing in mainland Tanzania and in Zanzibar that discriminated against women and which were incompatible with the convention.

The CEDAW Committee urged the government to prioritise completing the process of full domestication of CEDAW and to speed the law review process. It recommended the need to work with parliament to ensure that all discriminatory legislation was amended or repealed. Finally, the government was urged to raise the awareness of legislators about the need to give priority attention to such reforms in order to achieve equality for women.

Rwanda

The CEDAW Committee considered the combined 4th, 5th and 6th Periodic Reports of Rwanda (CEDAW/C/RWA/6) at its 883rd and 884th meetings, on 4 February 2009.²³ It also received the combined 7th, 8th and 9th Periodic Reports in October 2015,²⁴ in which information was provided on the current implementation of CEDAW, challenges faced and the follow-up to the concluding observations and recommendations made by the committee on the single report equivalent to the 4th, 5th and 6th Periodic Reports on the implementation of the Convention on the Elimination of All forms of Discrimination against Women, submitted by Rwanda in 2007.

Rwanda was commended for: the adoption in 2003 of its constitution, which enshrines the gender non-discrimination norm and principle of gender equality and which triggered extensive legal reforms aimed at removing discriminatory provisions; successful use of quotas in political and public life; the outlawing of polygamy; and accession on 15 December 2008 to the **Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women**. In the same session, the Government of Rwanda was requested to take the necessary steps to implement, systematically and continuously, all the provisions of the convention.

4.2.3 The due diligence obligation

The 'due diligence' standard/obligation in relation to VAW was first articulated in General Recommendation No. 19 (1992) by the CEDAW Committee as a yardstick to assess whether the state has met or failed to meet its obligation to combat violence against women. The committee affirmed that:

*States may also be responsible for private acts if they fail to act with due diligence to prevent, investigate and punish acts of violence and for providing compensation.*²⁵

The Declaration on the Elimination of Violence Against Women (DEVAW), adopted in 1993, requires states to exercise due diligence to prevent, investigate and punish acts of VAW whether these are perpetrated by the state itself or private actors. The legal responsibility of the state for human rights violations, including acts of violence against women perpetrated by the

Box 4.3 CK (A Child) through Ripple International as her Guardian and Next Friend & Others and Ripple International v The Commissioner of Police, Inspector General of The Police Service and 2 Others²⁸

In a Constitutional Petition before the High Court in Kenya, a group of young girls challenged the Kenya government on its inaction regarding sexual abuse of children – defilement. The action was filed in the context of a high prevalence of sexual violence against children in Meru County and, indeed, in the whole country.

The petitioners were on diverse dates between the year 2008 and 2012 victims of defilement and other forms of child abuse. They made reports of the acts of defilement at various police stations within Meru County. However, the police failed to conduct prompt, effective and professional investigations into the complaints. For example, the police did not visit the crime scenes, did not interview the witnesses or collect and preserve evidence, and police officers demanded money before they could intervene in any way. In some instances, the police officers refused to investigate the complaint, claiming that the complaint had been made late; or they interrogated petitioners loudly and in public in the hearing of all present at the police station, thereby subjecting the petitioner to humiliation and inhuman treatment. In some instances, the police refused to arrest or interrogate some perpetrators.

In upholding the rights of the girls, the court held that the respondents were responsible for the physical, emotional and psychological harm caused to the petitioners by reason of their failure to conduct prompt, effective, proper and professional investigations into the petitioners' complaints of defilement.

It was held *inter alia* that once a report or complaint is made, it is the duty of the police to move with speed, promptly commence investigation, and apprehend and interrogate the perpetrators of the offence. The investigation must be conducted effectively, properly and professionally – short thereof amounts to violation of the fundamental rights of the complainant.

The court stated that:

Whereas the perpetrators are directly responsible for the harm to the petitioners, the respondents herein cannot escape blame and responsibility. The respondents' ongoing failure to ensure criminal consequence through proper and effective investigation and prosecution of these crimes, has created a 'climate of impunity' for commission of sexual offences and in particular defilement ... this to me makes the respondents responsible for physical and psychological harm inflicted by perpetrators ... The state duty to protect is heightened in the case of vulnerable groups such as girl children and the State's failure to protect need not be intentional for it to constitute a breach of its obligations.

The court declared that the neglect and/or failure of the police to conduct prompt, effective and professional investigations into the petitioners' complaints of defilement violated their fundamental rights and freedoms, among which is access to justice.

The court made an *Order of Mandamus* directing the police together with its agents to conduct prompt, effective and professional investigations into the petitioners' respective complaints of defilement and other forms of sexual violence.

state itself or its agents, can arise from state actions, omission or failure to take positive measures to protect and promote women's rights.²⁶ Under the due diligence standard, states have an obligation to take positive action to prevent and protect women from violence.

States must investigate, prosecute and punish perpetrators of such violence, and provide victims with effective remedies for acts of violence – whether these are committed by private or state actors.²⁷ In doing so, the state must act with the existing means at its disposal to address both the individual acts of violence and the causes of such violence in order to prevent recurrence.

The due diligence standard was also taken forward in the inter-American human rights system in 1988, with the landmark decision of the Inter-American Court of Human Rights in the case of *Velasquez Rodriguez v Honduras*.²⁹

Three levels of the due diligence obligation and standard

The first (primary) level of this obligation is that of preventing violence from happening. Activities geared towards the fulfilment of the primary level of obligation include: creating awareness, and changing attitudes, mind-sets and stereotypes. This can be achieved through advocacy and campaigns to expose and convey the unacceptability of VAW. The second (secondary) level of the obligation is the state's immediate response after violence has occurred. The response of the state at this level should aim at limiting the consequences of violence, while the third level is the provision of care and support services for survivors of violence.³⁵

Box 4.4 Acting with due diligence to prevent violence

Velasquez Rodrigues v Honduras

The case related to the abduction and disappearance of Velasquez, a graduate student. There was evidence of previous disappearances, which were attributed to government suppression of those it considered dissidents. The court found that the abduction 'was carried out by agents who acted under cover of public authority'³⁰ and that even if that had not been proved, *'the failure of the state apparatus to act, which is clearly proven, is a failure on the part of Honduras to fulfill the duties it assumed'* under the American Convention on Human Rights. These duties created a positive obligation to ensure Velasquez Rodriguez the 'free and full exercise of his human rights'.³¹ Expanding on this analysis, the court found that:

*An illegal act which violates human rights, and which is initially not directly imputable to a state (for example, it is the act of a private person or because the person responsible has not been identified), can lead to international responsibility of the state, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.*³²

The court further held that where rights are granted (by the American Convention on Human Rights), the state is under obligation to exercise due diligence to ensure their fulfilment. As a consequence of this duty, states must act to prevent, investigate and punish any violation of rights.³³ Finally, the court directed the government to take reasonable steps to prevent human rights violations and to use the means at its disposal to investigate violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.³⁴

Checking compliance with the due diligence obligation

The establishment, by the Commission on Human Rights in 1994, through Resolution No. 1994/45, of the mandate of the Special Rapporteur on violence against women, its causes and consequences, was an important development in the application of the due diligence standard. It emphasised:

the duty of governments to refrain from engaging in violence against women and to exercise 'due diligence' to prevent, investigate and in accordance with national legislation, punish acts of violence against women and to take appropriate and effective action concerning acts of violence against women, whether those acts are perpetrated by the state or by private persons and to provide access to just and effective remedies and specialized assistance to victims. (para.2)

In her 2006 report, the Special Rapporteur stated that the due diligence standards to prevent, protect, prosecute and punish gender-based violence, including family violence are connected and, taken together, constitute the obligation to ensure access to justice by all victims of such violence.³⁶

The report contains a framework for model legislation on domestic violence.³⁷ This framework contains a check list (see Box 4.5) to determine state compliance with the due diligence obligation and includes, among others, ratification of human rights instruments; constitutional guarantees of equality of men and women; legislation on VAW and sanctions providing redress for women victims of violence; gender sensitivity of the criminal justice system, including the police; and accessibility and availability of support services. The Special Rapporteur stated in Part II of the report³⁸ that failure to act against crimes of violence against women renders the state as guilty as the perpetrators of such violence. She reiterated the CEDAW Committee recommendation and urged states parties to act with due diligence to ensure enforcement of laws if they wished to avoid such complicity.³⁹

Box 4.5 Check list to determine state compliance with due diligence obligation⁴⁰

- Ratification of international human rights instruments
- Constitutional guarantees of equality of men and women
- The existence of national and/or administrative sanctions providing adequate redress for women victims of violence
- Policies or plans of action that deal with the issue of violence against women
- Gender-sensitivity of the criminal justice system and the police
- Accessibility and availability of support services
- The existence of measures to raise awareness and modify discriminatory policies in the field of education and the media
- The collection of data and statistics concerning violence against women

Judicial officers are in a position to remind the executive arm of government of the value of establishing specialised police and prosecutorial units where necessary or possible. The designation of specialised police and prosecutorial units on violence against women and children is an important intervention that will ensure the discharge, by the state, of the obligation to act with due diligence to investigate and prosecute perpetrators of VAW.

Approaching male police officers can be particularly difficult and sometimes impossible for women and child victims of sexual violence. When these units are staffed with more female than male officers, victims of violence have the option of dealing with women police officers and prosecutors.⁴¹ The establishment of such units can enhance reporting and result in an increase in the number of cases investigated, as such units are more responsive and effective in dealing with VAW.⁴² As part of the state's obligation to address violence, it is important that once such units are established, all officers working in those units receive training in gender and human rights to enable them perform their duties with gender sensitivity and understanding.

The establishment of gender desks or units within police stations, as part of the state's response to VAW, is a good practice intervention aimed at making

Box 4.6 Child and family protection units in police stations

Kenya: In Kenya, although every police station is required to establish a gender desk, some stations have positioned such desks so close to the main report office that the envisaged privacy is lacking. This is due to lack of space within the police station and financial constraints. Other police stations lack gender desks and, where they exist, the facilities are poorly staffed and lack adequately trained personnel.⁴³

Rwanda: A Child and Family Protection Unit was established under the Criminal Investigation Department of the Police in 2001 to provide a victim-referral service.

Tanzania: In Tanzania, the Ministry of Home Affairs together with the Tanzania Police Force developed guidelines that established the gender and children desk.⁴⁴ This facility is designed to address cases of GBV and child abuse in a gender- and child-responsive manner. The desk is situated within the premises of the police station and managed by trained personnel designated by the Officer Commanding the Station (OCS). UNICEF Tanzania supported the police in improving the gender desk and in providing training for officers handling cases of child abuse. The layout and size of the gender desk station includes four rooms: a reception and an interior room with sufficient privacy for interviewing adults, a child-friendly interview room, and a resting room for traumatised survivors of violence.

Uganda: In response to increased reports of VAW and children, the Uganda Police Force established Child and Family Protection Units (CFPU) in police stations, starting with Kampala. These have been replicated in other stations in the country, with a mandate to deal with cases of child abuse and neglect. These units have been instrumental in protecting women and children from violence and abuse, as well as educating the public on laws and legal procedures in such cases.

In 2007, the Committee on the Rights of the Child, considering the report filed by Uganda,⁴⁵ noted that some districts/police stations lacked trained CFPU police officers and recommended training more personnel and deploying them evenly throughout the country to protect children from sexual exploitation, as well as other rights violations.

the police more responsive to gender-based crimes. Such desks should be separate from the main police report office or desk in order to ensure that women survivors of rape and sexual violence can report the offence in a private environment and to officers who are trained to interview survivors and investigate the offence in a sympathetic and gender-sensitive manner.

Commission on the Status of Women (CSW) and the due diligence obligation

The Commission on the Status of Women (CSW) reaffirmed the due diligence standard and urged all states to: exercise due diligence to prevent, investigate, prosecute and punish perpetrators of violence against women and girls and end impunity, and to provide protection and access to appropriate remedies for survivors of such violence.⁴⁶

The Beijing Platform of Action (BPfA) and the due diligence obligation

The BPfA also reiterated the due diligence obligation⁴⁷ and called on governments to discharge this obligation through the following measures:

- enacting and reinforcing penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs done to victims;
- adopting, implementing and reviewing legislation to ensure its effectiveness in eliminating violence against women, emphasising the prevention of violence and the prosecution of offenders; and
- ensuring the protection of women subjected to violence, access to just and effective remedies for such women victims, including compensation, indemnification of victims, as well as the rehabilitation of perpetrators.

The due diligence obligation was further reiterated at the five-year review of the BPfA in 2000,⁴⁸ where states affirmed that VAW and girls – whether it occurs in public or private life – is a human rights issue. They highlighted state responsibility in addressing such violence. Governments were asked to take all appropriate measures to eliminate discrimination and VAW by any person, organisation or enterprise and to treat all forms of violence as criminal offences. The BPfA established three strategic objectives for national governments in addressing VAW namely:

1. taking integrated measures to prevent and eliminate violence against women and girls;
2. studying the causes and consequences of VAW and the effectiveness of preventive measures; and
3. eliminating trafficking in women and assisting victims of violence due to prostitution and trafficking.

Within these objectives, governments are required to take concrete actions, including implementation of international human rights instruments; adoption and periodic review of legislation on VAW; access to justice; provision of effective remedies; adoption of policies and programmes to protect and support women victims of violence; and awareness raising and education.

In deciding whether the state is culpable for failure to act with due diligence to prevent the occurrence of violence, it is important that the court pays special attention to the circumstances in which some women victims of violence may find themselves – particularly, where those circumstances have previously been brought to the attention of the authorities and the authorities have failed to take action, resulting in the victim suffering violence that could have been prevented in the first place.

As was demonstrated in the South African case of *Carmichele v Minister of Safety and Security & Another*,⁴⁹ the obligation of the state to act with due diligence to protect women from violence includes the duty to prevent such violence.

Box 4.7 Acting with due diligence to prevent violence

Carmichele v Minister of Safety and Security & Another

In this case, Carmichele (applicant) sued the respondents after she was sexually assaulted by a man (respondent) who had been released without any security, even though he was awaiting trial for attempting to rape another woman. The police did not bring this fact to the attention of the prosecutor. On two occasions, the accused strayed into her home and on a third occasion he was found trying to open a window. On each occasion, the applicant informed the police and expressed fear that the accused might harm her or someone else. The police took no action to protect her; neither did they bring this information to the prosecutor – who could have applied for cancellation of bail and detention of the accused in custody pending the trial. One day, the accused finally sneaked into the applicant's home, entered the house and sexually assaulted her, inflicting serious injuries. He was charged and convicted.

The applicant sued the respondents for damages. Both the High Court and the Supreme Court of Appeal (SCA) dismissed her case, finding that the police did not owe the applicant a legal duty to take steps to prevent her attacker from causing her harm. She successfully appealed to the Constitutional Court of South Africa and relied on Art. 8 (1&2) of the Interim Constitution (IC), which provided for the equality of all persons before the law and the entitlement to equal protection of the law and which prohibited discrimination of persons for whatever reason.

She also relied on Article 39 of the Constitution of South Africa, which provided that all courts in South Africa should develop the common law in line with the spirit, purport and objects of the Bill of Rights in order to promote the spirit, purport and objectives of the said Bill of Rights.

The Constitutional Court found the respondents liable and held that obligations are now placed on the state to respect, protect, promote and fulfil the rights in the Bill of Rights and, in particular, the rights of women to have their safety and security protected. Therefore, South Africa had a duty under international law to prohibit all gender-based discrimination that has the effect of impairing the enjoyment by women

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of fundamental rights and freedoms and to take appropriate measures to prevent the violation of those rights.

It was further held that the police, who are the primary agencies of the state, had a responsibility to protect the public in general, and women and children in particular, against the invasion of their fundamental rights by perpetrators of violent crime – and they had failed to do so in this case. Although the investigating officer had a duty to bring to the attention of the prosecutor any matters in his knowledge which could have helped the court to exercise its discretion to admit the accused to bail or to cancel bail and prevent violence, the court found that he failed to do so, hence the release of the accused pending trial.

In the case of *Van Eeden v Minister of Safety and Security*,⁵⁰ the applicant was sexually assaulted, raped and robbed by a known serial rapist who had escaped from police custody. Following the decision in the Carmichele case, the Constitutional Court of South Africa held that the police owed her a legal duty to take reasonable steps to prevent the escape of, and attack by, the well-known criminal who was in their custody. They also owed her a legal duty to protect her from violence perpetrated by the serial rapist. Citing Art. 4(d) of DEVAW and CEDAW Art. 2, it was held that it was the obligation of the state to punish and redress the wrongs caused to women victims of violence.

Obligation to enact a comprehensive legislation on VAW

Legislation is a powerful tool to address VAW and the absence of legislation criminalising VAW impedes women victims' access to justice. The state can discharge the due diligence obligation to address violence through the enactment of legislation on VAW. Such legislation must be comprehensive and multidisciplinary, criminalising all forms of VAW and providing adequate punishment for perpetrators. In addition, it must address the various needs and concerns of victims of violence and provide for support services – e.g. alternative shelter for women victims of domestic violence and their children, medical and counselling services for survivors, legal representation and legal aid, among other services required by victims of violence.⁵¹ Consequently, upon the enactment of such legislation, the state is obliged to review, evaluate and update such legislation on an ongoing basis to remove provisions that allow or condone VAW or which increase the vulnerability or victimisation of victims.⁵² Provisions that discriminate against complainants in sexual violence, where the credibility of a complainant is understood to be different from that of a complainant in any other criminal case, ought to be repealed. Where such provisions still exist, it is the duty of the court to strike them out as unconstitutional if the national constitution proscribes discrimination.

Although the police play a crucial role in any co-ordinated response to VAW, survivors of VAW are often reluctant to make reports to the police for fear of secondary victimisation or for fear of not being taken seriously by the police. The callous way in which some police officers handle cases of VAW discourages reporting and subjects victims to secondary victimisation. It is therefore important that any legislation on VAW spells out clearly what is required of police officers, once a report of violence is received at the station. Such

legislation must provide sanctions for non-compliance. This will help the police understand that VAW is not an ordinary crime and that the consequences of such violence are grave. It will also enhance their understanding that complaints of VAW require prioritisation and a swift response. This is important, because failure by the police to act with due diligence to investigate will attract liability in damages and other remedies on the part of the state. Both the **Uganda Domestic Violence Act, 2010**, and the **Kenya Protection against Domestic Violence Act, 2015**, spell out the duties of police officers once a woman victim of violence makes a report of such violence.

Box 4.8 Duties of police under a domestic violence law

Duties of police officers under the Uganda Domestic Violence Act, 2010⁵³

The Uganda Domestic Violence Act provides that a police officer to whom a complaint of domestic violence is made or who investigates the complaint shall assist the victim, including giving assistance or advice in obtaining shelter. If the victim has signs of physical or sexual violence, it is the duty of the police officer to ensure that the victim undergoes medical examination and receives treatment. The officer shall also advise the victim of the right to lodge a criminal complaint and the right to apply for relief under the act.

In addition, the officer is required to offer procedural guidance and any assistance that the victim may require. It is the further duty of a police officer to record a statement from the victim or the victim's representative on the nature of the domestic violence.

However, where a victim or a victim's representative desires, the statement shall be taken by a police officer of the same sex as that of the victim. No doubt this is to create a conducive atmosphere within which the victim can recount her experience. This law makes no sanctions where a police officer fails to comply with these provisions. However, these provisions are good practice because they hold the state, through its agents, accountable if they are breached.

Duties of police officers under the Kenya Protection Against Domestic Violence Act, 2015⁵⁴

The Protection Against Domestic Violence Act, 2015 sets out the duties of police officers in relation to domestic violence. These are the same as set out in the Uganda Domestic Violence law. The only departure is that under the Uganda law, if the victim desires, it is mandatory that the statement on the nature of domestic violence be recorded by a police officer of the same sex as that of the victim.⁵⁵ On the contrary, section 6(2) of the Kenyan law, which deals with the making of a statement, is not worded in mandatory terms. Rather, it provides that if the complainant desires, the person to whom the complainant makes a statement may be a person of the same sex. This leaves room for statements to be recorded by male officers, before whom victims may not feel comfortable to narrate their experiences.

Obligation to provide integrated support services

The provision of criminal law sanctions alone is not sufficient in addressing VAW. In addition to punishing perpetrators, the law must deal with the structural hurdles that inhibit efficient management of the cases. In particular, the law enacted must provide what is known as a '*one-stop-shop*' model of service provision and ensure that it is implemented. This is part of the state's discharge of its due diligence obligation. '*One-stop-shops*' provide

in one place the various resources available to victims of gender-based crimes: the police gender unit; investigators; medical facilities (testing and examination) and medical treatment; the prosecutor; the trauma counselling services; and other relevant facilities. This contributes to a more effective and efficient investigation and prosecution process, by ensuring that proper forms and certificates are filled, tests taken and evidence preserved. It also greatly supports the victim as she navigates the justice system.

Box 4.9 Model of integrated victim support services

The Nairobi Women's Hospital's Gender Violence Recovery Centre⁵⁶

The Gender Violence Recovery Center (GVRC) at the Nairobi Women's Hospital is among the early 'One-Stop Facilities' providing free medical and psychosocial support to survivors of gender-based violence in East and Central Africa. The GVRC has developed a computerised data management system on GBV in Kenya. This data has been used to influence key national initiatives, including the enactment of the Sexual Offences Act, 2006, and the establishment of other recovery centres in the country. The centre collects and preserves evidence and information crucial for bringing to justice those responsible for GBV.

Kenyatta National Hospital Gender-Based Violence Recovery Center

The Gender-Based Violence Recovery Center (GBVRC) at Kenyatta National Hospital (KNH) in Nairobi is a good practice attempt by the Government of Kenya in addressing sexual/gender-based violence. The centre is a public-private partnership between the Ministry of Health and the International Center for Reproductive Health (ICRH), set up in 2007 to complement and strengthen services available at the Coast Provincial General Hospital (CPGH), as it was then known. The centre has developed initiatives to provide comprehensive and continuous quality care for survivors of rape, sexual violence and sexual exploitation, as outlined in the 'National Guidelines on Management of Sexual Violence in Kenya'.

Services provided at the KNH Gender-Based Violence Recovery Center:

Medical: Medical services provided include: management of physical injuries, provision of post-exposure prophylaxis (PEP) to prevent HIV transmission, emergency contraceptive pills (ECP), prevention and treatment of sexually transmitted infections (STIs), forensic collection and management (collection of physical evidence and samples) and filling in of post-rape care (PRC) and P3 (Police Form 3) forms.

Psychosocial care: Services provided under psychosocial care include trauma counselling for the survivor and family/relatives, HIV counselling and testing (HCT) and adherence counselling.

Legal counselling and support: Legal counselling and support includes referral to the police to investigate with a view to prosecution, and preparing survivors to attend court and give evidence. Centre representatives attend court and watch the brief during the hearing.

Referral for specialised services: In the event that a survivor requires specialised medical or psychosocial services, the GBVRC, by making referrals, assists the survivor to access such services, including legal services.

Other one-stop centres established elsewhere in the country include: the Center for Assault and Recovery (CARE) situated at the Moi Teaching and Referral Center in Eldoret; the Coast General Hospital GBV Recovery Center; the Taita Taveta District Hospital GBVRC and Biafra Clinic in Eastleigh, Nairobi; and all county hospitals country wide.

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(continued)

Uganda

Similar centres have also been established at the Jinja District Hospital and Mulago Hospital in Kampala, Uganda.

Rwanda

Rwanda's police-managed ISANGE One Stop Centre: The One Stop Centre for Survivors of Child, Domestic and Gender-Based Violence, established in 2009, is based in the Kacyiru Police Hospital, Kigali. 'ISANGE' (meaning 'feel welcome and free' in Kinyarwanda) was initiated through a partnership between the Rwanda National Police Health Services and the United Nations in Rwanda, with support from UNIFEM (now UN Women), the UN Population Fund (UNFPA) and UNICEF.⁵⁷ The centre offers a range of services, including protection from further violence, crime investigation, medical testing and court referrals, as well as treatment for physical and psychological trauma, in comfortable and confidential facilities.

Supplementary instruments to address VAW

Supplementing international human rights treaties on the use of due diligence are other international instruments which create obligations for state parties to enact legislation addressing violence against women. These include the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and children.

This protocol supplements the UN Convention Against Transnational Organized Crime ('the Palermo Protocol') and the Rome Statute of the International Criminal Court ('the Rome Statute').

Box 4.10 State obligations under the Palermo Protocol

- Adopt necessary legislative and other measures to establish trafficking in persons as a criminal offence when committed intentionally (Article 5)
- Ensure that their domestic legal or administrative system contains measures that provide to victims information on court and administrative proceedings and assistance to enable their views and concerns to be presented and considered during criminal proceedings (Article 6)
- Ensure that their domestic legal systems contain measures that offer victims the possibility of obtaining compensation for damage suffered (Article 6)

4.3 State obligations under regional human rights treaties

States supplementing international human rights treaties and regional human rights systems have adopted treaties that condemn VAW and children and promote gender equality. These establish the same obligations as the international instruments – to prevent VAW and to protect women and children from all forms of violence. At the regional level, the East African states have also ratified, among others: the African Charter on Human and

People's Rights, the Convention against Torture, the African Charter on the Rights and Welfare of the Child, and the African Union (AU) Declaration on Gender Equality in Africa. The states must therefore be taken to be committed to protecting the rights of women and children. The obligations inherent in the instruments include protecting women and girls from discrimination and all forms of violence by taking all measures, including the enactment of legislation, policies and adopting national plans of action to address and protect women from violence.

African Charter on the Rights and Welfare of the Child

The African Charter on the Rights and Welfare of the Child (ACR&WC)⁵⁸ offers children protection against harmful social and cultural practices (Art. 21). It creates an obligation on the part of states parties to the charter to take appropriate measures to abolish harmful social and cultural practices which affect the welfare, dignity, normal growth and development of the child and, in particular, those customs and practices prejudicial to the health or life of the child, including those which discriminate against the child on ground of sex. Child marriage is prohibited and state parties are required to enact legislation to specify the minimum age of marriage to be 18 years.⁵⁹ Further, the charter requires state parties to take measures to prevent and protect children from sexual exploitation and the use of children in: prostitution or other sexual practices, and pornographic activities, performances and materials.⁶⁰

African Charter on Human and People's Rights

The African Charter on Human and People's Rights (the Banjul Charter),⁶¹ ratified by all the Commonwealth member countries in East Africa, recognises, in Article 6, the right to liberty and to the security of the person. It provides that a person can only be deprived of this right for reasons and conditions previously laid down by law. In Article 2, it echoes the principle of equality before the law and equal protection. Article 8 specifically provides for equality of men and women before the law and equal protection and benefit of the law. State parties are required to take all appropriate measures to ensure effective access by women to judicial and legal services, including legal aid. This includes women victims who suffer all forms of violence.

Protocol to the Banjul Charter

The **Protocol to the Banjul Charter**⁶² is specific to women and provides for the entitlement of every woman to respect for her life and the integrity and security of her person. It prohibits all forms of exploitation, cruel, inhuman or degrading punishment and treatment, and creates an obligation for state parties to enact legislation and take other measures to prohibit, prevent, eliminate and punish perpetrators of all forms of violence against women.

Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa

The **Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa** (the Maputo Protocol),⁶³ signed by all the four East African Commonwealth member countries, addresses violence against women in many of its provisions and establishes obligations related to legal reform. It requires state parties to adopt and implement appropriate measures to protect women from all forms of violence, particularly sexual and verbal violence.

The right to life, integrity and security of the person is guaranteed in Article 4, which prohibits all forms of exploitation, cruel, inhuman or degrading treatment or punishment, and requires the state to take appropriate and effective measures to do the following, among others:

- (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 (Article 4(2) (a)).
- (b) Adopt such other legislative, administrative, social and economic measures to ensure the prevention, punishment and eradication of all forms of violence against women (Article 4(2) (b)).
- (c) Identify the causes and consequences of violence against women and take appropriate measures to prevent and eliminate such violence (Article 4(2) (c)).
- (d) Punish perpetrators of violence against women and implement programmes for the rehabilitation of victims of such violence (Article 4(e)).
- (e) Establish mechanisms and accessible services for effective information, rehabilitation and compensation for victims of violence against women (Article 4(f)).
- (f) Prevent and condemn trafficking in women, prosecute the perpetrators of such trafficking and protect those women who are most vulnerable (Article 4(g)).
- (g) Provide adequate budgetary and other resources for the implementation and monitoring of actions aimed at preventing and eradicating violence against women.

In Article 5, the protocol addresses harmful practices and creates an obligation on the part of state parties to prohibit, through legislative and other measures, and to condemn all forms of harmful practices which negatively affect the human rights of women. The protocol explicitly refers to FGM and requires states parties to prohibit, through legislation backed by sanctions, all forms of female genital mutilation, scarification, medicalisation and para-medicalisation of FGM and all other practices in order to eradicate them. Further obligations created by the protocol include protection of women who

are at risk of being subjected to harmful practices or all the other forms of violence, and providing support to women victims of harmful practices.

Such support includes: health services, legal and judicial support for victims, as well as emotional and psychological counselling.⁶⁴ Most importantly, the protocol requires states parties to commit themselves:

*to modify the social and cultural patterns of conduct of women and men, through public education, information, education and communication strategies with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or superiority of either of the sexes, or on stereotyped roles for women and men.*⁶⁵

AU Declaration on Gender Equality in Africa

Another regional instrument creating obligations for governments is the AU *Declaration on Gender Equality in Africa*, adopted by the Heads of State and government of member states of the African Union in Addis Ababa, Ethiopia, in July 2004.

Member states confirmed their commitment to the principle of gender equality and other commitments and principles set out in the various regional and international instruments on human and women's rights. They undertook to, among others, discharge various obligations, including: taking the lead in public campaigns against GBV; creating awareness of legislation relating to VAW and enforcing all laws relating to VAW in all its forms; mounting campaigns against the recruitment of child soldiers and abuse of girl children as wives and sex slaves; and implementing legislation on women's land, property and inheritance rights, including the right to housing.

Human trafficking is a form of violence that is on the increase in the world and CEDAW has established the obligation, on the part of state parties, to take appropriate measures to suppress all forms of traffic in women and exploitation of prostitution.⁶⁶

The Maputo Protocol requires state parties to act appropriately and effectively to prevent and condemn trafficking in women, to prosecute the perpetrators of such trafficking and protect those women who are most at risk.⁶⁷ By virtue of their circumstances, elderly women and women with disabilities are more vulnerable to violence. State parties are required to protect such women from sexual abuse, discrimination and all other forms of violence.⁶⁸

Treaty for Establishment of the East African Community

The Treaty for the Establishment of the East African Community (EAC), as amended on 14th December 2006 and 20th August 2007, established the East African Court of Justice as one of its organs (Article 9).

The court is a judicial body with initial mandate over interpretation and application of the treaty to ensure compliance by EAC partner states, including Kenya, Uganda, Rwanda and Tanzania. Any legal and natural person resident in the partner states may refer to the court for determination, the legality of any act, directive or decision of a partner state. The treaty did not assign the court mandate to determine cases of human rights violations; however, upon extension of mandate, it would have such other original, appellate, human rights and other jurisdiction to be determined by the Council at a suitable subsequent date. To this end, the partner states were required to conclude a protocol to allow for the extended jurisdiction.

Although presently the court lacks jurisdiction to entertain cases on human rights violations, it has not shied away from adjudicating over matters touching on human rights – as was the case in *James Katabazi & others v Secretary General of the EAC & Another*.⁶⁹ Once the court is granted the mandate to determine cases of human rights violations, it will be possible for women victims of violence to seek redress in the court.

4.4 Obligations under international criminal law

The **Rome Statute of the International Criminal Court** (‘the Rome Statute’) classifies GBV as a crime under international criminal law. ‘Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or any other form of sexual violence of comparable gravity’, committed ‘as part of a widespread or systematic attack directed against any civilian population’ are classified as crimes against humanity. Article 8(2)(b)(xxii) of the statute classifies these offences as serious violations of the laws and customs applicable to international armed conflicts and therefore classified as war crimes. Since it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes, it is ‘essential for all States Parties, as well as other states, to amend existing legislation or enact new legislation defining the crimes in accordance with international law’.

Under the statute, individuals may now be held directly accountable under international law, for serious acts of VAW committed in the context of armed conflict. It makes provision for compensation to be paid to victims of such violence.

Other initiatives addressing VAW include intergovernmental conferences and summits that have reaffirmed the commitment to eliminate VAW. The 1994 Cairo International Conference on Population and Development recognised that the elimination of VAW is necessary for the empowerment of women. It called on countries to take full measures to eliminate, among others, all forms of violence against women, adolescents and girls. At the Millennium Summit held in 2000, Heads of State and Government resolved to combat all forms of VAW.

Table 4.1 shows the status of some of the leading regional and international instruments, relevant to VAW, which each of the four East African Commonwealth member countries are party to by way of signature, succession, accession or ratification.

4.5 National legal mechanisms

Over the past two decades, many states have adopted or improved legislation to prevent and respond to VAW, pursuant to the obligation on the state to enact legislation on VAW. Laws increasingly criminalise such violence, ensure the prosecution and punishment of perpetrators, empower and support victims, and strengthen prevention. Victims are also benefiting from civil remedies. National legislative mechanisms responding to or impacting on VAW range from instruments that guarantee protection of the broad range of human rights to statutory law on domestic violence, SGBV, crime, discrimination and marriage, as well as laws on procedural aspects of the rule of law in any given jurisdiction.

4.5.1 National constitutions

The Constitutions of Kenya, Rwanda, Uganda and Tanzania have addressed VAW by embracing the principle of equality of all persons before the law, non-discrimination and equal protection of the law in their respective Bills of Rights. This includes the full and equal enjoyment of all fundamental rights and freedoms on a basis of equality of all persons.⁷⁰ Direct or indirect discrimination by the state⁷¹ or by an individual, or any person on any ground including age or sex is also prohibited.⁷²

The Constitution of Kenya

The Constitution of Kenya 2010 contains crucial provisions that provide evidence that VAW is not tolerable or allowed by the law. Notable among these are:

- (a) Article 159(2), which provides that in exercising judicial authority, the courts and tribunals shall be guided by the following principles: justice shall be done to all, irrespective of status; justice shall not be delayed; alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to a condition that traditional dispute resolution mechanisms shall not be used in a way that is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; justice shall be administered without undue regard to procedural

Table 4.1 Instruments and the status of each of the four states

Instrument	Kenya	Rwanda	Tanzania	Uganda
Abolition of Forced Labour Convention	√	√	√	√
African Charter on Human and People's Rights	√	√	√	√
African Charter on the Rights and Welfare of the Child	√	√	√	√
African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa	–	√	√	√
African Youth Charter	–	√	–	√
Amendment to Article 43(2) of the Convention on the Rights of the Child	√	√	–	√
AU Convention Governing the Specific Aspects of Refugee Problems in Africa	√	√	√	√
Charter of the United Nations	√	√	√	√
Constitutive Act of the African Union	√	√	√	√
Convention Against Discrimination in Education	–	√	√	√
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	√	√	–	√
Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others	–	√	–	–
Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages	–	√	–	–
Convention on Internally Displaced Persons (Kampala Convention), 2009 [Not yet in force]	√	√	√	√
Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)	√	√	√	√
Convention on the Nationality of Married Women	–	√	√	√
Convention on the Political Rights of Women	–	√	√	√
Convention on the Prevention and Punishment of the Crime Of Genocide	–	√	√	√
Convention on the Rights of Persons with Disabilities	√	√	–	√
Convention Relating to the Status of Refugees	√	√	√	√
Covenant on Civil and Political Rights	√	√	√	√
Covenant on the Rights of the Child				
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	√	√	√	√
International Covenant on Civil and Political Rights	√	√	√	√
International Covenant on Economic, Social and Cultural Rights	√	√	√	√

(continued)

**Table 4.1 Instruments and the status of each of the four states
(continued)**

Instrument	Kenya	Rwanda	Tanzania	Uganda
Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment	–	√	–	–
Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, 1999.	–	√	√	–
Optional Protocol to the Convention on the Rights Of Persons With Disabilities, 2006.	√	√	√	√
Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography	√	√	–	√
Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children In Armed Conflict	√	√	–	√
Optional Protocol to the Convention on the Rights of the Child on a communications procedure	–	–	–	–
Protocol of the Court of Justice of the African Union	√	√	√	√
Protocol on Amendments to the Constitutive Act of the African Union	√	√	√	√
Protocol on the Statute of the African Court of Justice and Human Rights	√	√	√	√
Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children	√	√	√	√
Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 2003	√	√	√	√
Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights	√	√	√	√
Rome Statute of the International Criminal Court, 1998	√	√	√	√
Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, 1989	–	√	–	–
United Nations Convention against Transnational Organized Crime	√	√	√	√
Universal Declaration of Human Rights	√	√	√	√

Key to table: √ State party; – Not a state party

technicalities; and the purpose and principles of this constitution shall be protected and promoted.

- (b) The Bill of Rights under chapter four (specifically Articles 19 – Rights and fundamental freedoms; 20 – Application of Bill of Rights; 21 – Implementation of rights and fundamental freedoms; 22 – Enforcement of Bill of Rights; 23 – Authority of courts to uphold and enforce the Bill of Rights; 25 – Fundamental Rights and freedoms that may not be limited; 26 – Right to life; 27 – Equality and freedom from discrimination; 28 – Human dignity; 29 – Freedom and security of the person; 30 – Slavery, servitude and forced labour; 32 – Freedom of conscience, religion, belief and opinion; 33 – Freedom of expression; 37 – Assembly, demonstration, picketing and petition; 39 – Freedom of movement and residence; 40 – Protection of right to property; 41 – Labour relations; 43 – Economic and social rights; 44 – Language and culture; 45 – Family; 47 – Fair administrative action; 48 – Access to justice; 50 – Fair hearing; 159 – Judicial authority.

Under Article 20, courts are required to develop the law to the extent that it does not give effect to a right or fundamental freedom; and adopt the interpretation that most favours the enforcement of a right or fundamental freedom. In interpreting the Bill of Rights, a court, tribunal or other authority shall promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and the spirit, purport and objects of the Bill of Rights. Under Article 23(1), the High Court has jurisdiction in accordance with Article 165 to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

In order to enhance equality and freedom from discrimination, the Government of Kenya is obliged under the constitution, Article 27(8), to take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender. This principle is aimed at having women assume positions in such bodies and take part in the development of the country. The right to freedom and security of the person is also protected by the constitution. This includes the right not to be subjected to: violence from public or private sources, physical or psychological torture, and the right not to be treated or punished in a cruel, inhuman or degrading manner.⁷³

Article 44(3) prohibits a person from compelling another person to perform, observe or undergo any cultural practice or rite. This includes harmful traditional cultural practices like FGM, child marriages and forced marriages. Article 45(2) of the Constitution of Kenya provides for the right of every

person to marry a person of the opposite sex based on the free consent of the parties, while Article 45(3) provides for equal rights at the time of the marriage, during the marriage and at the end of marriage.

It sets the minimum age of marriage at 18 years, thus prohibiting child marriages. Under Article 45(4), parliament is required to enact legislation recognising: marriages concluded under any tradition, or system of religious, personal or family law; and any system of personal and family law under any tradition or adhered to by persons professing a particular religion.

In Article 53, children are protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and harmful or exploitative labour, while the right of every child to free and compulsory basic education is also protected in the same article. The constitution further recognises the vulnerability of certain members of the society, who are entitled to special protection and treatment through affirmative action. These include persons with disabilities, the young, minorities and marginalised groups, and older members of the society.⁷⁴

At least 5 per cent of members of the public in elective and appointive bodies should be persons with disabilities,⁷⁵ while – through affirmative action – the state has undertaken to ensure that minorities and marginalised groups are provided access to employment opportunities (Article 56). Article 57 requires the government to take measures to ensure that elder members of the society live free from abuse and receive reasonable assistance from their family and the state.

Regarding land ownership and access thereto, the Constitution of Kenya recognises inequalities in land ownership and access. In Article 60, it provides that while land in Kenya shall be held, used and managed in a manner that is equitable, efficient and productive, this will be in accordance with, among other principles, the principle of elimination of gender discrimination in law, customs and practices related to land and property in land. This provision promises women equal protection of the law in matters of land ownership, land inheritance and access to land.

Constitution of the Republic of Rwanda

The Constitution of Rwanda guarantees: the equality of men and women (Art. 10); provides that discrimination of whatever kind in any form is prohibited and punishable by law (Art. 11); the right to physical and mental integrity, and protection from torture, physical abuse or cruel, inhuman or degrading treatment (Art. 15); and equality before the law, which means, without any discrimination, equal protection of the law (Art. 16). This constitution also offers provisions on familial issues, such as marriage and children (Art. 26–28). Moreover, the constitution provides for the

establishment of the Gender Monitoring Office, an independent public institution on matters relating to gender equality (Art. 185).

The Constitution of the Republic of Tanzania

The Constitution of the United Republic of Tanzania contains equality and non-discrimination clauses, which offer protection from violence and discrimination (Articles 12 and 13). Article 24 guarantees the right to ownership of property by both men and women, while the right to life is protected by Article 14.

In the concluding observations of the CEDAW Committee regarding the combined 4th–7th periodic reports by Tanzania, the committee noted that it had much earlier recommended that VAW in all its forms be criminalised and that shelters for women who have been subjected to violence be established. Consequently, Tanzania had taken legislative measures to combat VAW.

The Constitution of Uganda

The Constitution of Uganda, Article 33(1) provides that ‘women shall be accorded full and equal dignity of the person with men.’ Article 33(2) further provides that the state shall provide the facilities and opportunities necessary to enhance the welfare of women to enable them to realise their full potential and advancement. All laws, cultures, customs or traditions which are against the dignity, welfare or interest of women, or which undermine their status, are prohibited by Article 33(6) of the Constitution of Uganda (Article 24, 31, 33). Article 21(1) provides for equality and freedom from discrimination of all persons.

The Constitution of Uganda also provides for equality of all persons before and under the law in all spheres of political, economic, social and cultural life, and all persons are entitled to enjoy equal protection of the law. Discrimination on the ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion or disability is prohibited, while Article 22 protects the right to life. Subjecting a person to any form of torture, cruel, inhuman or degrading treatment or punishment is prohibited by Article 24.

4.5.2 Statutory law on VAW in East Africa

It is noteworthy that none of the Commonwealth member countries in East Africa have enacted single pieces of legislation to address the entire spectrum of VAW. However, laws that address domestic violence or GBV have been enacted. Additionally, existing criminal and civil law provides varying forms of protection. For ease of reference, the applicable statutory provisions on VAW have been reduced into tabular form (see Table 4.2).

Table 4.2 Statutory law applicable to VAW in Commonwealth member countries in East Africa

Commonwealth state	Legislative instrument and provision	Measures	Sanctions	Case law
Core Incident Type: Rape/Defilement				
Kenya	Sexual Offences Act (SOA) sec. 3 Rape sec. 8 Defilement sec. 10 Gang rape	Minimum sentences imposed to limit judicial discretion to be exercised in favour of lenient sentences	<p>Rape - Imprisonment for a minimum term of 10 years, which may be enhanced to imprisonment for life.</p> <p>Defilement of a child aged 11 years or less shall upon conviction be sentenced to imprisonment for life.</p> <p>Defilement of a child aged 12–15 years or less shall upon conviction be sentenced to imprisonment for a minimum term of 20 years.</p> <p>Defilement of a child aged 16–18 years or less shall upon conviction be sentenced to imprisonment for a minimum term of 15 years.</p> <p>Gang rape – Imprisonment for a minimum term of which may be enhanced to imprisonment for life (sec. 10).</p> <p>*Where accused is a minor, the court may upon conviction, sentence the minor in accordance with provisions of the Borstal Institutions Act and the Children's Act.</p>	<p><i>Esther Nangwanaa Nandi v Jones</i></p> <p><i>Chewe Bobo [2006] e KLR</i></p>
(continued)				

Table 4.2 Statutory law applicable to VAW in Commonwealth member countries in East Africa (continued)

Commonwealth state	Legislative instrument and provision	Measures	Sanctions	Case law
Rwanda	Organic Law N° 01/2012/OL of 02/05/2012 Instituting the Penal Code (OLPC) Art. 196: Rape Art. 198: Marital rape Art. 200: Marital rape Art. 190: Child defilement Art. 192: Child defilement by a person having authority over the child Article 193: Child defilement resulting in death or an incurable illness Art. 201: Penalty for rape with intention to infect another person with an infection	Art. 38 GBV Law – right of the victim of GBV to claim damages	Art. 197: Rape – General penalty, imprisonment of more than 5–7 years. – If victim is elderly person, a person with disability or a sick person – imprisonment of 7–10 years and a fine of 500,000–1,000,000 Rwandan franc (RWF). – If rape results in an incurable disease for the victim, imprisonment of 10–15 years. – If rape results in the death of the victim, life imprisonment. – Art. 199 <i>marital rape</i> – imprisonment of at least 2 months but less than 6 months and a fine of 100,000–300,000 RWF. If marital rape results in: – an ordinary disease, imprisonment of 6 months to 2 years; – an incurable illness, imprisonment of more than 5–10 years; – the death of the victim – life imprisonment. Art. 191: <i>Child defilement</i> – life imprisonment with special provisions. Art. 192: <i>Child defilement by a person having authority over the child</i> – life imprisonment with special provisions and a fine of 100,000–500,000 RWF. Art. 193: <i>Child defilement has resulted in death or incurable illness</i> – life imprisonment with special provisions and a fine 500,000–1,000,000 RWF. Art. 201: Rape with intention to infect another person with an infection – imprisonment of 20–25 years.	–

Tanzania	sec. 130 Penal Code, amended by Sexual Offences Special Provisions Act (SOSPA) – Rape sec. 131 A Penal Code, amended by SOSPA – Gang rape	Rape – Compensation of amount determined by the court, to the victim (sec. 131 SOSPA)	sec. 131(1) SOSPA – Imprisonment of minimum 30 years, with corporal punishment and a fine and an order to pay compensation of amount determined by the court, to the victim. sec. 131 (2) – Where accused is a minor (less than 18 years), he shall: (a) if a first offender, be sentenced to imprisonment only; (b) if a second time offender, be sentenced to imprisonment for a term of 12 months with corporal punishment; (c) if a third time and recidivist offender, he shall be sentenced to life imprisonment. sec. 131(3) Penal Code, where victim is a girl under 10 years, the offender shall on conviction be sentenced to life imprisonment. sec. 131 A 2) Penal Code amended by SOSPA – Gang rape – imprisonment for life, regardless of the actual role played in the rape.	–
Uganda	sec. 123 Penal Code Act (PCA) – Rape sec. 129 Defilement of girl under 18 years sec. 130 Defilement of idiots or imbeciles Aggravated defilement	–	sec. 124 – Rape - Death penalty sec. 130 – Defilement of imbeciles – 14 years	Uganda v Kusemerwa (Criminal Case No: HCT-01-CR-SC- 0015-2014)4

(continued)

Table 4.2 Statutory law applicable to VAW in Commonwealth member countries in East Africa (continued)

Commonwealth state	Legislative instrument and provision	Measures	Sanctions	Case law
Core Incident Type: Sexual Assault				
Kenya	Sexual assault: SOA	–	SOA – sexual assault – imprisonment for not less than 10 (ten) years and a maximum period of imprisonment for life	–
Rwanda	OLPC Art. 182: Indecent assault OLPC Art. 183: Indecent assault against a child OLPC Art. 184: Indecent assault with violence, trickery or threats against a person aged eighteen (18) or above OLPC Art. 185: Public indecent assault	–	– violence by exercising sexual torture or intending to commit sexual torture – life imprisonment with special provisions [Art. 27. GBV Law]. – sexually indecent acts against someone – imprisonment of between 2 and 5 years and a fine between 100,000–200,000 RWF [Art. 31 GBV Law]. – sexual violence against an elderly person or a handicapped person – imprisonment of 10–15 years and a fine between 500,000–1,000,000 RWF [Art. 32. Art. 33 GBV Law].	–
Tanzania	–	Miscellaneous Rights of Action Law of Marriage Act – sec. 69 Right to damages for breach of promise of marriage – sec. 70 Limitation of actions for breach of promise – sec. 71 Right to return of gifts – sec. 72 Right to damages for adultery – sec. 73 Right to damages for enticement – sec. 74. Assessment of damages for adultery or enticement	–	–

Uganda	sec. 125 Penal Code Act (PCA) – Attempt to commit rape sec. 129(2) PCA – Attempted defilement sec. 128(1) PCA – Indecent assaults	–	–	sec. 125 PCA – <i>Attempted Rape</i> – life imprisonment. sec. 128(1) PCA – <i>Indecent assault</i> – 14 years with or without corporal punishment. sec. 129 (2) – <i>Attempted defilement</i> – 18 years' imprisonment with or without corporal punishment.	–
Core Incident Type: Physical Assault					
Kenya	Assaults, offences endangering life or health	–	–	–	–
Rwanda	OLPC Art. 148: Aggravated assault and battery OLPC Art. 149: Battery or bodily injuries resulting in incapacity OLPC Art. 150: Battery or bodily injuries resulting in incurable illness or permanent incapacity OLPC Art. 152: Battery or causing bodily injuries against a child or a person unable to defend him/herself OLPC Art. 154: Administering a substance to a person which may cause illness or death OLPC Art. 155: Intentional minor violence OLPC Art. 151: Battery or bodily injuries resulting in death OLPC Art. 158: Assault and battery resulting from lack of foresight and precaution OLPC Art. 159: Causing illness to another person	–	–	A judge will have to determine the sentence according to the guilt of the offender, taking into account the motives, previous history, circumstances surrounding the case and the personal background of the offender (OLPC Art. 69). The Code of Criminal Procedure offers general provisions on possible penalties, such as imprisonment (Art. 218–220), fines (Art. 221–224) and public interest works (community service) (Art. 225) and their execution (Art. 226–246). OLPC Arts. 35–96 – General provisions on penalties and their execution, e.g. penalty categorisation, mitigating and aggravating circumstances, and prescription of sentences.	–
Tanzania	sec. 66 Law of Marriage Act No. 5 of 1971 (R.E.2002) prohibits a spouse from inflicting corporal punishment on the other spouse.	–	–	–	–
(continued)					

Table 4.2 Statutory law applicable to VAW in Commonwealth member countries in East Africa (continued)

Commonwealth state	Legislative instrument and provision	Measures	Sanctions	Case law
Uganda	Penal Code Act 1 – Chapter XXIII – Assaults causing grievous bodily harm 2 – sec. 219 PCA – Doing grievous harm	–	–	–
Core Incident Type: Psychological Abuse				
Kenya	–	–	–	–
Rwanda	Art. GBV Law – Distorting the tranquility of one's spouse due to polygamy, adultery, dowry, reproduction and his/her natural physiognomy, or threatening to deprive one's spouse of the right to property and to employment OLPC Art. 203: Sexual harassment OLPC Art. 238: Refusal to provide support to spouse, descendants or ascendants OLPC Art. 239: Denial of freedom to practice family planning OLPC Art. 240: Harassment of spouse OLPC Art. 243: Family desertion Chapter IV: Threats to Harm a Person OLPC Art. 169: Threat to commit an act qualified as terrorism OLPC Art. 170: Verbal threats OLPC Art. 171: Threat by gestures, signs, images or a symbol OLPC Art. 172: Written threats OLPC Art. 173: Blackmail OLPC Art. 174: Penalty for blackmail	–	Distorting the tranquility of one's spouse on grounds of dowry, reproduction and his/her natural physiognomy, or threatening to deprive one's spouse of the right to property and to employment – imprisonment of 6 months to 2 years and a fine between 50,000–200,000 RWF [Art. 26, Law on GBV]. <i>Harassing one's spouse</i> : – imprisonment of 6 to 2 years [Art. 20, Law on GBV]. <i>Adultery for offender and co-offender</i> – for between 6 months and 2 years [Art. 14 Law on GBV].	–
Tanzania	–	–	–	–
Uganda	sec. 128(3) PCA – Indecent assault	–	sec. 128(3) PCA 1 year imprisonment	–

Core Incident Type: Economic Abuse					
Kenya	–	–	–	–	–
Rwanda	Penal Code Art. 241: Disposal of marital property without consent of either spouse Penal Code Art. 330: Appropriating a spouse's personal belongings Penal Code Art. 404: Causing fire on another person's property Penal Code Art. 406: Demolishing or damaging another person's buildings Penal Code: Distorting the tranquility of one's spouse by threatening to deprive one's spouse of the right to property and to employment	–	–	–	–
Tanzania	–	–	–	–	–
Uganda	sec. 199 PCA – Responsibility of person who has charge of another sec. 200 – Duty of head of family sec. 223 PCA – Failure to supply necessities Chapter XXXII PCA - Offences Causing Injury to Property	–	–	–	–
Core Incident Type: Forced Marriage					
Kenya	The Marriage Act – Equality in marriage (section 3(2)) and in section 4 sets 18 years as the minimum age of marriage for all women across religious and cultural divides.	–	–	Violation of the minimum age requirement – imprisonment for a term not exceeding 5 years, or a fine not exceeding Sh1 million or both (sec. 4 Marriage Act).	–

(continued)

Table 4.2 Statutory law applicable to VAW in Commonwealth member countries in East Africa (continued)

Commonwealth state	Legislative instrument and provision	Measures	Sanctions	Case law
Rwanda	OLPC Art. 275: Forcing a person to marry or not to marry a partner of his/her choice OLPC Art. 274: Kidnapping or confinement of a person with intent to live together as wife and husband OLPC Art. 194: Living together with a child as husband or wife OLPC Art. 195: Participating in early or forced marriage of a minor	–	–	–
Tanzania	Law of Marriage Act – sec. 16 provides that marriage can only be contracted on the free will of parties; section 13(1) – 18 years as the age of marriage for boys and 15 years for girls. sec. 13(2) allows child marriages; provides that a party may enter into a marriage, with the consent of the court, if he/she has attained the age of 14.	–	–	–
Uganda	sec. 126(a) PCA – Abduction with intent to marry	–	sec. 126 (a) PCA – 7 years imprisonment	–
Core Incident Type: Female Genital Mutilation/Cutting				
Kenya	Prohibition of Female Genital Mutilation Act – A person, including a person undergoing a course of training while under supervision by a medical practitioner or midwife with a view to becoming a medical practitioner or midwife, who performs female genital mutilation on another person, commits an offence.	–	If in the process of committing the offence of FGM, a person causes the death of another – imprisonment for life.	–
Rwanda	–	–	–	–
Tanzania	sec. 169 A Penal Code – criminalises FGM; protects women below 18 years old, leaving out adult women who are sometimes mutilated forcefully during child birth.	–	–	–

Uganda	<p>Prohibition of Female Genital Mutilation Act, sec. 2 – offence to carry out FGM.</p> <p>sec. 3 – aggravated FGM is committed where death occurs as a result of FGM, the offender is a parent, guardian or a person having authority or control over the victim, the victim suffers a disability, the victim is infected with HIV as a result of FGM or FGM is done by a health worker;</p> <ul style="list-style-type: none"> – carrying out FGM on oneself, attempting to carry out FGM, procuring, aiding abetting FGM and participating in events leading to FGM; – duty to report FGM acts or intent to make a report to the police; – discrimination, stigmatisation of a female who has not undergone FGM or a person who discriminates or stigmatises another person whose wife, daughter or relative has not undergone FGM. 	<p>A Magistrates Court is empowered on application to issue a protection order if the court is satisfied that a girl or woman is likely to undergo FGM (section 14).</p> <p>After convicting a person under this act, the court may in addition to the punishment provided, order the accused to pay compensation to the victim for injuries suffered. Such order shall be deemed to be a decree enforceable under the Civil Procedure Act (sec. 13).</p>	<p>Carrying out FGM – imprisonment for a term not exceeding 10 years.</p> <p>Aggravated FGM – imprisonment for life.</p> <p>Failure to report – a fine not exceeding 12 currency points or imprisonment not exceeding 6 months or both.</p> <p>Discrimination and stigmatisation – by imprisonment for not more than 5 years (sec.12 and 13 FGM Act).</p>	–
Kenya	<p>sec. 6. Employment Act addresses sexual harassment in the work place by an employer, representative of an employer or a co-worker.</p> <p>sec. 88 Employment Act – Sexual harassment at workplace.</p> <p>The Counter Trafficking in Persons Act (CTPA), 2010 – trafficking in persons for purposes of exploitation and that of financing, controlling, aiding or abetting the commission of the offence of trafficking in persons for purposes of exploitation.</p>	–	<p>Sexual harassment – a fine not exceeding Ksh50,000 or imprisonment for a term not exceeding 3 months or to both.</p> <p>Trafficking in persons – imprisonment for a term of not less than 30 years or a fine of not less than Ksh30 million or both. In both cases, a repeat offender is liable to imprisonment for life.</p>	<p>HC Constitutional and Human Rights Division petition No. 331 of 2011 WJ and LN (Minors suing through their guardians, JKM and SCM) V Astariko Henry Amkoah & Others and The Cradle and 3 others</p> <p>(continued)</p>

Table 4.2 Statutory law applicable to VAW in Commonwealth member countries in East Africa (continued)

Commonwealth state	Legislative instrument and provision	Measures	Sanctions	Case law
Rwanda	<p>Law On Prevention and Punishment of Gender-Based Violence, 2008 GBV Law</p> <p>Art. 12 GBV Law – GBV-related cases shall be heard and pronounced at the scene of the crime, if it is convenient for the victim and if it is possible.</p> <p>– intentional transmission of a terminal disease constitutes Art. 29 GBV Law</p> <p>Penal Code:</p> <p>OLPC Article 153: Starving or denying drink to person for whom one is responsible</p> <p>Art. 204: prostitution</p> <p>Art. 206: Encouraging, inciting or manipulating a person for the purpose of prostitution</p> <p>Art. 207: Discouraging efforts to rehabilitate prostitutes</p> <p>Art. 208: Advertisement for facilitation of prostitution</p> <p>Art. 209: Running, managing or investing in a brothel</p> <p>Art. 210: Sharing the proceeds of prostitution</p> <p>Art. 211: Aiding, abetting and protecting prostitution</p> <p>Art. 212: Providing a facility for prostitution</p> <p>Art. 213: Kidnapping and unlawful detention of a person</p> <p>Art. 274: Kidnapping or confinement of a person with intent to live together as wife and husband</p> <p>Art. 250: Definitions of human trafficking terms</p> <p>Art. 251: Participating in trafficking persons out of the country</p> <p>Art. 258: Child kidnapping</p> <p>Art. 231: Abandonment or neglect of a child</p> <p>Art. 232: Neglect or abandonment of a child causing disability, death or disappearance</p> <p>Art. 233: Inciting parents to abandon a child</p> <p>Art. 234: Abandonment or neglect of an unable dependent</p>	<p>GBV is a ground for divorce [Art. 6. Law on GBV]</p>	<p>Art. 71: Factors taken into account by the judge in determining a penalty.</p> <p>Mitigating factors/circumstances – Minority of offender or an accomplice less than eighteen (18) years (Art. 72).</p> <p>Provocation (Arts. 73–78)</p> <p>Recidivism (Arts. 79–82)</p> <p>Concurrence of offences (Art. 84)</p> <p>Suspension of sentence/penalty (Arts. 85–87)</p> <p>Prescription of penalties (Arts. 89–94)</p> <p>Prescription of civil damages (Art. 95)</p> <p>Section 5: Ban on entry into a place and restriction of movement</p> <p>Art. 202: Penalties for the offence of gender-based violence committed by use of medical or narcotic drugs, pictures, signs, speeches and writings.</p> <p>Art. 245: Adultery</p> <p>Art. 252: Penalty for human trafficking</p> <p>Art. 253: Penalty for a person owning a place for human trafficking</p> <p>Art. 246: Penalty for bigamy</p> <p>Art. 248: Penalty for cohabitation</p> <p>Art. 254: Penalty for buying a human being</p> <p>Art. 255: Penalties for a person engaged in trafficking in a human being for the purpose of indecent practices</p> <p>Art. 256: Penalties for trafficking in persons as a profession</p> <p>Art. 259: Penalties for a person who engages in child trafficking for the purpose of prostitution or indecent practices</p>	<p>Art. 7 GBV Law. The parent, trustee or any other person responsible for a child shall protect the latter against any GBV.</p>

<p>Art. 235: Abandonment or neglect of an unable person causing serious illness or death</p> <p>Art. 236: Harassment of an elderly person</p> <p>Art. 403: Arson which results in death of persons</p> <p>Art. 218: Inflicting severe suffering on a child, harassing or imposing severe punishments on him/her</p> <p>Art. 219: Offering alcoholic beverages or tobacco to a child</p> <p>Art. 220: Engaging a child in narcotic drugs and arms trafficking or in the trade of other illegal products</p> <p>Art. 221: Exploiting a child by involving him/her in armed conflicts</p> <p>Art. 223: Refusal to surrender a child</p> <p>Art. 224: Abduction of a child from his/her parents or guardians or where he/she habitually resides</p> <p>Art. 225: Participating in the adoption of a child for the purpose of trafficking</p> <p>Art. 226: Refusal to provide care to a child or unable dependant</p> <p>Art. 227: Child neglect by a parent or guardian without reasonable cause</p> <p>Art. 228: Neglect of a child on the basis of sex</p> <p>Art. 229: Recording and disseminating a child's pornographic picture or voice</p> <p>Art. 230: Advertising of children pornographic pictures</p> <p>Art. 187: Sexual torture</p> <p>Art. 188: Exhibition, sale or distribution of objects of sexual nature</p> <p>Art. 176: Torture</p> <p>Art. 178: Forced labour</p> <p>Art. 161: Throwing at another person anything likely to disturb or dirty him/her</p> <p>Art. 162 Self-induced abortion</p> <p>Art. 163: Causing a woman to abort with or without her consent</p>		<p>Art. 260: Penalties for child trafficking and involving children in indecent practices through different ways</p> <p>Art. 257: Temporary seizure and confiscation of places used for human trafficking</p> <p>Art. 177: Penalties for torture</p> <p>Art. 157: Penalty for involuntary manslaughter</p> <p>Art. 17: GBV Law – <i>Abduction</i> – imprisonment of 5–8 years and a fine between RWF100,000–200,000.</p> <p>Art. 21: GBV Law – <i>Concubinage</i> – imprisonment of 2–4 years and a fine between RWF100,000–200,000.</p> <p>Art. 22: GBV Law – <i>Polygamy</i> – imprisonment of 3–5 years and a fine between RWF300,000–500,000.</p> <p>Art. 22: GBV Law – Any person involved intentionally in polygamy by issuing documents or officiating such marriage – imprisonment of 5–8 years.</p> <p>Art. 23: GBV Law – <i>Sexual slavery</i> – imprisonment of 10–15 years and a fine between RWF500,000–1,000,000.</p> <p>Art. 24: GBV Law – <i>Sexual harassment way of orders, intimidation and terror over a person</i> – imprisonment of 2–5 years and a fine between RWF 100,000–200,000.</p> <p>Art. 34: GBV Law – <i>Defamation on grounds of gender aimed at disparaging his/her personality or his/her work</i> – imprisonment 2–5 years and a fine between RWF100,000 –300,000.</p>		(continued)
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Table 4.2 Statutory law applicable to VAW in Commonwealth member countries in East Africa (continued)

Commonwealth state	Legislative instrument and provision	Measures	Sanctions	Case law
	<p>Art. 164: Abortion resulting in death</p> <p>Art. 156: Definition of involuntary manslaughter and unintentional bodily injuries</p> <p>Art. 137: Manslaughter and intentional bodily injuries</p> <p>Art. 138: Premeditation</p> <p>Art. 139: Ambush</p> <p>Art. 140: Murder</p> <p>Art. 142: Spousal homicide</p> <p>Art. 143: Infanticide</p> <p>Art. 144: Poisoning</p> <p>Art. 145: Homicide committed by degrading acts or preceded by another felony</p> <p>Section 3: Voluntary manslaughter, assault and battery</p> <p>Art. 215: Refusal to report offences of immorality committed against a child</p> <p>Art. 216: Refusal to assist a victim of violence or to testify on violence</p> <p>Art. 244: Adultery</p> <p>Art. 247: Cohabitation</p> <p>Art. 249: Prosecution of adultery and cohabitation</p> <p>Art. 568: False declaration to civil status registrar</p> <p>Art. 8: GBV Law – Failure to cater for child under one's trusteeship just because of whether the child is male or female.</p> <p>Art. 9: GBV Law – Forbidden to fire a woman just because she is pregnant or on maternity leave</p> <p>Art. 10: GBV Law – Pregnancy and delivery shall not constitute causes for depriving a student of her right to education</p> <p>Art. 10: GBV Law – Use of drugs, films, signs, language, and other means with the intention of exercising GBV</p> <p>Art. 10: GBV Law – Obligation to prevent gender-based violence, rescue and call for rescue to assist the victims of this violence.</p> <p>Art. 11: GBV Law – Indecent (acts or behaviour contrary to good morals and politeness, degrading human being) conduct and behaviour</p>		<p>Art. 35: GBV Law – Disturbance of someone resulting in deprivation rights and thus GBV – imprisonment of 6 months and 2 years and a fine between RWF100,000–500,000.</p> <p>Art. 36: GBV Law – Refusal to assist the victim of violence or to testify – imprisonment of 6 months to 2 years and a fine between RWF50,000 – 200,000.</p> <p>Art. 28: Gender-based human trafficking – imprisonment of 15 years to 20 years and a fine between RWF500,000 to RWF2,000,000.</p> <p>Art. 29: GBV Law – intentionally transmitting a terminal disease sexually to someone else – life imprisonment.</p> <p>Art. 30: GBV Law – Using drugs, narcotics, pictures, signs, language or writing to stir up sexual violence – imprisonment of between 5–8 years and a fine between RWF100,000–200,000.</p> <p>Art. 18: GBV Law – Child neglect or harassment (putting someone in unrest condition by persecuting, nagging, scolding or insulting him/her and others) on the basis of sex/gender discrimination or for purposes of spousal harassment – imprisonment of 6 months to 3 years.</p>	

Tanzania	sec. 25 of the Prevention against Combating of Corruption Act, 2007 'sextortion'	–	–	'Sextortion' – a fine of not less than 1–5 million shillings or imprisonment for a term of not less than 3–5 years or both.	–
Uganda	All offences against morality – Chapter XIV PCA [Ss 131–149 PCA] e.g: sec. 131 PCA – Procuration sec. 149 Incest sec. 156 Desertion of children sec. 157 Neglecting to provide food etc. for children sec. 159 Child stealing sec. 187 Manslaughter sec. 188 Murder; sec. 204 Attempt to murder and other offences connected with murder and endangering life or health, criminal recklessness and negligence [Chapters XX, XXI, XXII PCA] sec. 219 PCA – Doing grievous harm Prevention of Trafficking in Persons Act (2010): – trafficking or aggravated trafficking in persons and does not report to police or other relevant authority – trafficking in persons – aggravated trafficking, where the victim of trafficking is a child; adoption, guardianship, fostering and other orders in relation to children is undertaken for the purpose of exploitation; the offence is committed by a public officer; military personnel or law enforcement officer or the victim dies, becomes a person of unsound mind, suffers mutilation or gets infected with HIV/ AIDS or any other life-threatening illness as a result of such trafficking.	–	–	S. 131 PCA: Procuration – 7 years' imprisonment <i>Trafficking or aggravated trafficking in persons and does not report to police or other relevant authority</i> – a fine of five thousand currency points or imprisonment for six months (section 10). Prevention of Trafficking in Persons Act: – <i>trafficking in persons</i> – imprisonment for 15 years – <i>aggravated trafficking</i> – imprisonment for 15 years, but can also be punishable with death if the offence is committed under any of the circumstances set out in section 5 of the Act – <i>war crime</i> imprisonment for life (section 9 ICC Act).	–

(continued)

Table 4.2 Statutory law applicable to VAW in Commonwealth member countries in East Africa (continued)

Commonwealth state	Legislative instrument and provision	Measures	Sanctions	Case law
	<p>International Criminal Court Act [ICC] (2010) provides that any person who commits a war crime (committing rape, sexual slavery enforced prostitution, forced pregnancy, enforced sterilisation, and any other form of sexual violence) in Uganda is liable on conviction to imprisonment for life (section 9). Employment Act, 2006 sec. 7 (1), sexual harassment</p> <ul style="list-style-type: none"> – lodge a complaint with a labour officer who is empowered to make all of the orders he/she could have made if the complaint related to unjustified disciplinary penalty or unjustified dismissal. <p>The Employment (Sexual Harassment Regulations)</p>	–	–	–
Other substantive and procedural legislative provisions of general application to VAW				
Kenya	<p>Children's Act 8/2001</p> <p>The Children Act, Revised Edition 2007 (2001) makes provisions for the safeguard of the rights and welfare for the children; prohibitions and offences.</p> <p>Procedure under the Child Offenders Rules: these rules apply to proceedings with respect to a child who is charged with an offence. It is the duty of the court to ensure that the rules are implemented to enhance access to justice by children in conflict with the law.</p> <p>The Protection against Domestic Violence Act, 2015: prevention, protection and assistance to internally displaced persons and Affected Communities Act No. 56 of 2012.</p> <p>The Matrimonial Property Act, 2013, was enacted to provide for the rights and responsibilities of spouses in relation to matrimonial property.</p> <p>The Evidence Act (Chapter 80) Laws of Kenya (specially Section 124).</p>	<p>Protection/Restraining orders (sec. 8)</p> <ul style="list-style-type: none"> – interim ex parte protection order (sec. 12) to remove the perpetrator from the matrimonial home – protection order granting a victim exclusive occupation of the shared residence or a specified part 	–	–

Rwanda	<p>The Criminal Procedure Code (Chapter 75) Laws of Kenya.</p> <p>The Children Act (Chapter 141) Laws of Kenya (especially Section 13, 14, 15, 18).</p> <p>The Civil Procedure Act (Chapter 21) Laws of Kenya (See Order 32 of the Civil Procedure Rules).</p> <p>The Police Act (Chapter 84) Laws of Kenya.</p> <p>The Law of Succession (Act Chapter (60) Laws of Kenya (See: Section 29, 35, 38, 40).</p> <p>Victim Protection Act No. 17 of 2014: the law provides for the protection of victims of crime and abuse of power, to provide them with better information and support services, reparations and compensation and to provide special protection for vulnerable victims.</p> <p>Witness Protection Act, 2008: many women victims of sexual abuses, domestic violence and other abuses endure suffering without seeking legal redress due to, among other reasons, the fear of retaliation. Act establishes:</p> <ul style="list-style-type: none"> - right to privacy from intrusion by the media, health professionals, and any other person - witness protection programme 	<ul style="list-style-type: none"> - restitution or compensation to the victim for, among others, the costs of any medical or psychological treatment incurred by the victim; the costs of necessary transportation, victim restitution, accommodation and other living expenses relating to the court proceedings leading to the conviction; or any other relief (section 26 & 24). <p>Under section 23, a compensation order made against a convicted offender may be enforced as a judgement in civil proceedings. However, such order is not a bar to civil proceedings. Victim Protection Act No. 17 of 2014.</p>	-	Organic Law N° 01/2012/OI of 02/05/2012 instituting the Penal Code
	<p>2004 Gacaca law – for all formal proceedings in respect to the offences of rape and sexual torture it is mandatory that they are conducted in camera (Art. 38).</p> <p>Hearing in public or in camera (Art. 141). Constitution 2003 states that court proceedings shall be conducted in public, unless the court determines that proceedings should be in camera on the ground that a public hearing might have an adverse effect on general public order or cause moral embarrassment</p>	-	-	Penalties range from: - Community service (Art. 49).
<i>(continued)</i>				

Table 4.2 Statutory law applicable to VAW in Commonwealth member countries in East Africa (continued)

Commonwealth state	Legislative instrument and provision	Measures	Sanctions	Case law
	<p>(Art. 145). The Code of Criminal Procedure also states that hearings are generally conducted in public. According to this law, a court can order for a hearing to be conducted in camera when it finds that a public hearing can be detrimental to public order and good morals. The court should record whether (part of) the hearing was conducted in public or in camera, because this has to be indicated in the judgement (Art. 150).</p> <p>The 2004 Law on Evidence (Art. 121)</p> <p>OLPC</p> <p>Art. 569: Refusal to appear before the judicial police, public prosecution or other authority</p> <p>Art. 570: Concealing an offence or failing to assist a person in danger</p> <p>Art. 571: Destruction of evidence</p> <p>Art. 572: Threats or intimidation with intent to influence a complaint</p> <p>Art. 573: Harboursing or hiding a suspect or an offender</p> <p>Art. 574: Hiding a dead body of a murdered person</p> <p>Art. 575: Denial of justice</p> <p>Art. 576: Refusal to testify</p> <p>Art. 577: Refusal to answer questions from judicial authorities</p> <p>Art. 579: Giving false testimony</p> <p>Art. 580: False testimony due to a gift</p> <p>Art. 581: Influencing witnesses or judges</p> <p>Art. 582: Perjury</p> <p>Art. 583: Suborning of assistants in judicial organs</p> <p>Art. 586: Insulting those in the judicial organs</p> <p>Art. 587: Threats against judicial officers</p> <p>Art. 588: Discrediting a decision of judicial organs</p> <p>Art. 589: Non execution of court decision</p>			<ul style="list-style-type: none"> - Confiscation of property (Art. 51). - Release on parole (Art. 64). - Loss of civic rights (Arts. 66–68)/Article 136: Punishment of the crime of discrimination and sectarian practices Article 590: Penalty for a person who delays to disclose or provide information Article 591: Penalty for refusal to provide information or illegal withholding of information

Tanzania	<p>Law of Marriage Act – Part IV Property, Rights, Liabilities and Status:</p> <p>56. Rights and liabilities of married women; 57. Equality between wives; 58. Separate property of husband and wife; 59. Special provisions relating to matrimonial home; 60. Presumptions as to property acquired during marriage; 61. Gifts between husband and wife; 62. No liability for antecedent debts of spouse; 63. Duty to maintain spouse. 68. Status of widows.</p> <p>National Employment Services Act (1999): The government domesticated the International Labour Standards through the enactment of the National Employment Services Act (1999). This law provides for equal opportunities to women and men in access to employment services.</p> <p>The Employment and Labour Relations Act No. 6 of 2004: This prohibits discrimination in the workplace on the basis of gender, sex, marital status, disability, pregnancy and HIV status, among others (section 7). Although sec. 5 prohibits child labour.</p> <p>The Refugee Act, 1998: This provides for the protection of refugee women from violent acts. The Act also provides a legal framework for assisting refugees and provides for availability of essential services and amenities to the refugee community. Among others, the law requires that every refugee be provided with education in accordance with the Tanzania National Education Act 1978.</p> <p>Land Act No.4 of 1999: sec. 3 of the Land Act – Equal rights of men and women to occupancy and use.</p>	Law of Marriage Act S. 69. – Right to damages for breach of promise of marriage	–	–
(continued)				

Table 4.2 Statutory law applicable to VAW in Commonwealth member countries in East Africa (continued)

Commonwealth state	Legislative instrument and provision	Measures	Sanctions	Case law
	<p>The Village Land Act no. 5/1999: Both men and women have equal rights of ownership and access to land, including a customary right of occupancy.</p> <p>Law of the Child Act No. 21/2009 and Juvenile Court Rules:</p> <p>Part II of the Law of the Child Act provides for the rights and welfare of the child, which are set out in sections 4–13. They include the right to be protected from various forms of violence. Section 7 provides for the right of a child to live with his/her parents or guardian. Section 9 provides for the right of a child to be protected from neglect, discrimination, violence, abuse, exposure to physical and moral hazards and oppression.</p>			
Uganda	<p>The Domestic Violence Act (2010) provides protection and relief to victims of domestic violence, punishment of perpetrators of domestic violence, procedure enforcement of orders made by the court and related matters.</p> <p>The implementation system relies on dual jurisdiction by both the local authorities (Local Council Courts), as these are closer to the people, and the formal courts, which are often far away from populations in rural areas. Under the Act, local councils have powers to act to prevent acts of violence. Both local councils and the formal justice system are required to act swiftly and to hear cases within 48 hours. The formal courts are also empowered to issue orders to protect victims from further violence.</p>	<p>Wide range of remedies to victims, including criminal sanctions, civil remedies and compensatory provisions.</p> <ul style="list-style-type: none"> – Protection Orders – Interim protection orders – Jurisdiction to issue interim protection orders and protection orders is vested in the Magistrates Court, Family and Children Court – Removing perpetrator from matrimonial home 	<p>– A fine not exceeding 48 currency points or imprisonment for a term not exceeding two years or to both and the court may give any other remedy it considers fit.</p>	–

<p>Trial on Indictments (Amendment) Statute, 1990 regulates the grant of bail for serious offences such as rape, defilement.</p> <p>Magistrate's Courts (Amendment) Act, 1990 to abolish the procedure of preliminary proceedings in criminal trials and to render certain serious offences, such as rape, bailable only by the High Court.</p> <ul style="list-style-type: none"> - offence of failure to comply with the terms and conditions of a protection order. - The Refugee Act (2006) – protection for women and child refugees on account of their vulnerability. - equal opportunities and access to procedures relating to refugee status and affirmative action shall be taken to protect women refugees from gender discriminating practices (section 33). - equal enjoyment and protection of all human rights and fundamental freedoms in economic, social, cultural, civil or any other fields, as provided for in the constitution and other relevant laws in force in Uganda and international and regional instruments to which Uganda is a party, and in particular, the Convention on the Elimination of All Forms of Discrimination against Women and the African Charter on Human and People's Rights, 1981. <p>The Equal Opportunities Commission Act (2007). The Equal Opportunities Act establishes the Equal Opportunities Commission. The Act provides a legal basis to challenge laws, policies, customs and traditions that discriminate against women.</p>	<p>(continued)</p>
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Table 4.2 Statutory law applicable to VAW in Commonwealth member countries in East Africa (continued)

Commonwealth state	Legislative instrument and provision	Measures	Sanctions	Case law
Preventive detention and bail provisions				
Kenya	<p>The judiciary – Bail and Bond Policy Guidelines March 2015 (see from pages 16 to 30 and especially under 4.9(f) 4.16 (in defilement cases) and 4.26(f), especially in offences related to VAWG on views of the victim before bail is granted.</p> <ul style="list-style-type: none"> preventive detention – effective for 30 days (after the expiration of that period, it can be continuously renewed for 1 month) maximum period of preventive detention for misdemeanours is 6 months felonies the maximum period of preventive detention is 1 year (Art. 98 – 100) <p>The accused (or his or her defence attorney) can also at any time apply for release on bail to the public prosecutor or to the court depending on the stage of the investigations.</p>	–	–	–
Rwanda		<p>GBV-related conditions for bail (i.e. no contact orders, a prohibition against harassment, stalking and threats to commit abuse, a prohibition of third parties contacting victims on behalf of the accused, confiscation of weapons, liquor abstinence and participation in any available treatment programme or support group). It can also order redetention of the accused, if deemed necessary, because of new and serious circumstances (Art. 101–102).</p>	–	–

Tanzania	-	-	-	-
Uganda	<p>The 1995 Constitution of Uganda: Art. 23(6)(a); right of an accused person to apply to court to be released on bail subject to the legal requirements and conditions which must be fulfilled before court grants bail.</p> <p>Article 23(6)(b): right to be released on bail, if the person has been on remand for 60 days before trial, in respect of an offence that is triable by the High Court or subordinate court (Magistrate's Court) and mandatory bail – where an accused person is remanded in detention before trial starts for a continuous period exceeding 180 days for major offences.</p> <p>Art. 44: Right to a fair hearing</p> <p>sec. 75 (1) Magistrates Court Act, Cap 16 (MCA) A pre-trial detainee may be granted bail</p> <p>Trial on Indictment Act, Cap 23 (TIA) - sec. 15 TIA gives High Court unlimited power to grant or deny accused persons bail upon proof of exceptional circumstances.</p> <p>Police Act Cap. 303 Section 25 – If a person is detained in police custody beyond 48 hours without being charged in court, then he or she can apply to a magistrate within 24 hours, who will then order his or her release.</p>	-	-	<p>Aliphusadi Matovu v Uganda Criminal Miscellaneous Application No. 15 of 2005</p>

Policy instruments/guidelines and action plans to address VAW Kenya

Apart from legislation, the Government of Kenya has adopted other initiatives to address violence against women. These include: policy instruments, guidelines and plans of action, among other initiatives.

The Policy Framework on Sexual Violence in Kenya:

The Policy Framework on Sexual Violence is governed by the *National Guidelines on Medical Management of Sexual Violence/Rape in Kenya 2009* (2004), revised edition.

The guidelines are designed to give general information about the medical management of sexual violence and have set standards for comprehensive care of survivors of sexual violence. To healthcare workers who come in contact with survivors of sexual violence, the guidelines are a practical reference source for service delivery. The guidelines address the medical, psychosocial, legal and humanitarian aspects of sexual violence, to ensure the needs of survivors of sexual violence are addressed as far as possible. Recognising that children form a significant proportion of survivors of sexual violence, the guidelines make special provisions that address the unique aspects of their needs distinct from those of adults. These guidelines are available in health facilities and their implementation is expected to comprehensively address the needs of survivors of sexual violence in Kenya. Kenya has also developed a trainer's manual for rape trauma counsellors (2006) and a trainer's manual on clinical care for survivors of sexual violence. These are interventions addressing VAW.

National Policy on Abandonment of FGM:

Other initiatives addressing VAWG include the National Policy on Abandonment of Female Genital Mutilation, which was approved by Cabinet on 26 June 2010 and the National Plan of Action against sexual exploitation of children in Kenya (2013–2017).

National Action Plan for the Abandonment of FGM (2008–2012):

The National Action Plan for the Abandonment of FGM (2008–2012) was developed by the Ministry of Gender, Children and Social Services in co-operation with the National Committee on Abandonment of Female Genital Mutilation (NACAF). It provides a strategy to create awareness of the harmful effects of the practice of FGM, targeting those who perform FGM and the girl child by making provision for alternative rites of passage. The action plan is implemented under the stewardship of the Anti-FGM Board, which is Government funded.

In approving the National Policy on Abandonment of FGM, and the action plan, the government demonstrated its commitment to the promotion of

gender equality, as envisioned in Vision 2030 whose social pillar focuses on gender, youth and vulnerable groups. It emphasises the importance of reducing vulnerability through the prohibition of retrogressive practices such as female genital mutilation for the empowerment of women and girls.

National Reproductive Health Policy (2007)

This policy identifies priority interventions to include programmes that ensure access to quality treatment and rehabilitative reproductive health services for survivors of sexual gender-based violence.

The policy also identifies promotion of households and community participation programmes as being critical in addressing harmful cultural practices. Other initiatives that address violence against women and girls include: The Plan of Action for Kenya's Adolescent Reproductive Health and Development Policy (2005–2015); National Action Plan on Counter Trafficking in Persons (2011); National Gender Action Plan on accelerated country action on HIV/AIDS for women and girls, the HIV and AIDS Strategic Plan (2009/10–2012/13); National Reproductive Health and HIV and AIDS integration Strategy – August 2009; National Reproductive Health Policy Enhancing Reproductive Health Status for all Kenyans, October 2007; and the 2003 Adolescent Reproductive Health and Development Policy.

National Steering Committee on Counter Trafficking in Persons

In 2012, the government established the National Steering Committee on Counter Trafficking in Persons to monitor the implementation of the Counter Trafficking in Persons Act, while a National Plan of Action (NPA) has been developed as a measure to respond to trafficking in persons. Among the strategies of the action plan is the rescue of women and child victims of trafficking and to provide psychosocial support, rehabilitation, reunification and reintegration services to victims.

The Directorate of Gender

The Gender Directorate is charged with the overall responsibility of promoting and co-ordinating gender equality initiatives. The government has established Gender Units in government ministries and state corporations to spearhead gender mainstreaming, including integration of SGBV initiatives in the various departments.

The National Gender and Equality Commission

The National Gender and Equality Commission is the successor in title to the Kenya National Human Rights and Equality Commission, established by Article 59 of the constitution. Among its functions are: to promote gender equality and freedom from discrimination in accordance with Article 27 of the constitution;

and monitor, facilitate and advise on the integration of the principles of equality and freedom from discrimination in all national and county policies, laws and administrative regulations in all public and private institutions.

In essence, the commission provides oversight over the government in its obligation to provide protection and promotion of the rights of women, children, youth, the elderly, minorities and persons with disabilities, and other vulnerable members of the community.

Rwanda

The Government of Rwanda is highly committed to the cause of gender equality and women's empowerment, as transpired in the June 2003 National Constitution, the National Gender Policy, the ratification of CEDAW, the implementation of the Beijing Platform of Action (BPFA), the Vision 2020 and the Economic Development and Poverty Reduction Strategy (EDPRS), which highlight gender as a cross-cutting issue and work towards the reduction of gender-based inequalities and promotion of gender equality and equity in all areas.⁷⁶

Since 2006, the Ministry of Justice has opened Access to Justice Bureaus (*Maisons d'Accès à la Justice [MAJ]*) in each of the 30 districts staffed by 90 lawyers (three lawyers per district) to provide improved universal access to legal advice and assistance. Specific desks have been established in the MAJ to deal with legal assistance for women, especially related to cases of gender-based violence.⁷⁷

Rwanda has several governmental departments that play a role in combating gender-based violence. Rwanda's Ministry of Gender and Family Promotion oversees, implements, monitors and evaluates the National Policy Against Gender-Based Violence and implements the National Strategic Plan for fighting gender-based violence for the years 2011–2016, which includes objectives and co-operation among a variety of multisectoral stakeholders – including governmental ministries such as the Ministry of Justice, Ministry of Education, Ministry of Health and several others, as well as the Rwanda National Police, local governments, NGOs, the media and the private sector.⁷⁸ The Ministry of Gender and Family Promotion, the Gender Monitoring Office and the National Women Council, respectively: co-ordinate the implementation of national policies and programmes regarding the advancement of women; monitor that implementation of the fundamental principles of gender are respected in all organs at the governmental, private, non-governmental and religious levels and in national policy and programmes intended to ensure the promotion of gender equality; and the mobilisation of women to participate in national development.

Land Policy 2004

The Land Policy adopted in 2004 prohibits all forms of discrimination, such as that based on sex in relation to access to land and the enjoyment of real rights.

Labour Policy

The policy on labour in Rwanda prohibits discrimination on the grounds of gender, marital status or family responsibilities.

The National Gender Policy:

This policy establishes the National Gender Cluster as a co-ordination mechanism that aims at supporting the Government of Rwanda in promoting gender equality and utilising partnership synergies to improve gender interventions in the elimination of discrimination against women.⁷⁹

Other policies include: the Vision 2020 policy, which highlights gender as one of the cross-cutting themes, together with HIV/AIDS, the environment and information and communication technologies (ICTs); the Economic Development and Poverty Reduction Strategy (EDPRS); and the National Gender Policy and the Decentralization Policy.⁸⁰

Tanzania

In addition to the various legislations, Tanzania has adopted other initiatives and established institutions to address VAW. These include: national policy instruments, national plans of action and the Tanzania Commission for Human Rights.

National Plan of Action to Combat VAW

The Government of Tanzania is signatory to the Southern African Development Community (SADC) Declaration on Gender and Development (1997) and its Addendum on the Prevention and Eradication of Violence against Women and Children (1998). The declaration is a commitment by SADC member states, placing gender on the agenda of the SADC programme of action and community building initiatives. Both the SADC declaration and the addendum have been translated into Kiswahili to make them user friendly to the majority of Tanzanians at the grassroots level.

Based on the declaration and addendum, the government initiated the preparation of the National Plan of Action to combat violence against women and children. It was developed in 2001 and disseminated to stakeholders. The plan of action provides strategies and activities to be implemented by various stakeholders. It focuses on legal, socioeconomic, cultural and political services and education, training and awareness raising.

National Plan of Action (NPA) in combating FGM

Based on the NPA in combating violence against women, a National Plan of Action in combating FGM and various programmes were also developed.

The National Plan of Action to combat FGM (2001–2015) was developed to provide guidance on the elimination of female genital mutilation. In implementing the NPA on FGM, various activities were undertaken which include: training of school teachers in order to integrate the knowledge in schools' curricular and sensitisation of communities through campaigns, media programmes, seminars, workshops, drama, books and leaflets on the harmful effects of FGM. Awareness raising on the existing laws against FGM is also provided.

National Development Vision 2025

The National Development Vision 2025, adopted in the year 2000, aims at attaining gender equality and the empowerment of women in all socioeconomic and political relations and culture by the year 2025.

Tanzania Commission for Human Rights

Established in 2001, the Commission for Human Rights and Good Governance has the mandate to investigate allegations involving the violation of human rights and to disseminate information on human rights, including women's rights. The commission also promotes harmonisation of national legislations, and monitors adherence of the constitution to human rights standards enshrined in human rights treaties to which Tanzania is a state party. A special gender desk, dealing with public education and women's rights, was established within the commission in 2004.

Education Sector Development Programme (2000–2015)

The Education Sector Development Programme incorporates the objective of providing education to all women and men by 2015 and other special programmes to promote the education of girls, in collaboration with development partners and NGOs. Such programmes include a training fund for Tanzanian women and community-based education for girls (the building of hostels and boarding schools and setting up of educational trust funds for girls).

Uganda

In addition to legislation, Uganda has adopted other initiatives to address VAW. These include national policy instruments, national plans of action and strategic plans.

The main national policies relating to VAW are: the National Gender Policy (2007); the National Gender Action Plan; the Social Development Plan to monitor the implementation of the Convention for the period 2007–2010;

the National Equal Opportunities Policy and Action Plan; and the National HIV/AIDS Strategic Plan. The goal of all these policies and action plans is to address gender equality and justice, women's empowerment and the elimination of discrimination. The Ministry of Health in Uganda has developed a manual on clinical management of gender-based violence survivors. The manual provides guidelines to all health workers on how to deal with victims of sexual gender-based violence.

Notes

- 1 Act No. 45 of 2012, Laws of Kenya.
- 2 Cap 204, Laws of Uganda.
- 3 Reprinted in Commonwealth Secretariat Developing Human Rights Jurisprudence Vol 3 No 151 and in 1 African Journal of International and Comparative Law/RADIC (1989) 345.
- 4 'The Bangalore Principles and the Internationalization of Australian Law', Glen Cranwell, Senior Lawyer Australian Government Solicitor. Reported in AIAL FORUM NO. 32.
- 5 Charter of the UN (1945), available at: <http://www.un.org/en/charter-united-nations/>
- 6 UN Charter on Human Rights, Adopted in 1945, Article 13, para 1.
- 7 UN General Assembly (1948).
- 8 CEDAW article 2(e); Chirwa, D (2004), 'The Doctrine of state responsibility as a potential means of holding private actors accountable for human rights', *Melbourne Law Journal*, Vol.5, p5.
- 9 CEDAW (1994), note 5, para. 24(v); see also CEDAW (1989), para. 1.
- 10 CEDAW (1994), para. 9.
- 11 Adopted and opened for signature, ratification and accession by GA Resolution 44/25 of 20 November, 1989, entry into force 2 September 1990, in accordance with Article 49.
- 12 Ibid, Article 19.
- 13 GA Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16), at 49, UN Doc. A/6316(1966), 999 UNTS 3.
- 14 See No. 38 above, Article 12(1).
- 15 See No. 38, Article 12(2).
- 16 CEDAW (1994), para. 9.
- 17 CEDAW/C/KEN/CO/7, during the 963rd and 964th meetings on 19 January 2011.
- 18 CEDAW/C/UGA/CO/7.
- 19 47th session held 4–22 October 2010.
- 20 Constitutional Petition No. 2 of 2003.
- 21 Constitutional Petition No. 8 of 2007.
- 22 CEDAW/C/TZA/6 at its 845th and 846th meetings on 11 July 2008.
- 23 CEDAW/C/SR.883 and 884.
- 24 CEDAW/C/RWA/7-9, available at: http://www.minijust.gov.rw/fileadmin/Documents/International_Reports/CEDAW_7th_8th_and_9th_Report_September_2014_Final.pdf
- 25 CEDAW (1994), para 24(a) note 15, para 4(c) note 22, para 13.
- 26 CEDAW, Art. 2(e); Chirwa (2004), page 5.
- 27 CEDAW (1994), para 24(a) note 15, para 4(c) note 22.
- 28 Petition No. 8 of 2012.
- 29 *Velasquez Rodriguez v Honduras*, 1988, Inter-American Court of Human Rights (IACHR) Ser.c, No. 4, 172 (July 29 1988).
- 30 Ibid, 182.
- 31 Ibid, 182.
- 32 Ibid, 182.

- 33 Rodriguez case, *supra*, note 26.
- 34 *Ibid*, at para. 174
- 35 United Nations (2006), para 336.
- 36 Special Rapporteur on Violence against Women (2006); Special Rapporteur on Violence against Women (2013).
- 37 13, United Nations (1996), *Model Legislation on Violence against Women*.
- 38 Coomaraswamy, R (1996), *Report of the Special Rapporteur on violence against women, its causes and consequences*.
- 39 Coomaraswamy, R (1999), *Report of the Special Rapporteur on domestic violence*.
- 40 *Ibid*, paragraph 25.
- 41 UNDESA (2010), page 19.
- 42 *Ibid*.
- 43 *An assessment of Gender Based Violence Responses in Nine Counties of Kenya, My action counts*, page 38.
- 44 Human Rights Watch (2014), *No Way Out, Child Marriage and Human Rights Abuses in Tanzania*, October 2014.
- 45 Committee on the Rights of the Child, Consideration of reports filed by states parties under Article 12(1) of the Optional Protocol to the CRC, CRC/C/OPSC/UGA/1.
- 46 Commission on the Status of Women (2013), *Agreed conclusions on the elimination and prevention of all forms of violence against women and girls*.
- 47 Para 125(b) of the Beijing Platform for Action, 1995.
- 48 See General Assembly Resolution S-23/3 annex, para 69.
- 49 *Carmichele v Minister of Safety and Security, South Africa*, CCT case No. 48/00.
- 50 Supreme Court of Appeal of South Africa, Case No. 176/200.
- 51 UNDESA (2010).
- 52 UN General Assembly (2010), Model Strategies And Practical Measures on the Elimination of Violence Against Women in the Field of Crime Prevention and Criminal Justice ('Model Strategies').
- 53 The Republic of Uganda (2010), The Domestic Violence Act, section 7(2).
- 54 The Republic of Kenya (2015), Protection Against Domestic Violence Act, section 6.
- 55 The Republic of Uganda (2010), The Domestic Violence Act, section 7(4).
- 56 www.cwch.co.ke
- 57 <http://www.endvawnow.org/en/articles/1564-one-stop-centres-osc.html?next=1565>
- 58 OAU Doc. CAB/LEG/24.9/49 (1990).
- 59 OAU Doc. CAB/LEG/24.9/49 (1990), Article 21(2), Section 4 of the Marriage Act, 2014, Kenya sets the minimum age for marriage at 18 years.
- 60 *Ibid*, Article 27.
- 61 Adopted June 27 1981 and ratified by Kenya, Uganda and Tanzania.
- 62 Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5,21, ILM 58(1982), Article 4.
- 63 Adopted by the 2nd Ordinary Session of the Assembly of the Union at Maputo, 11 July 2003; came into force on 25 November 2005.
- 64 Article 5, *Maputo Protocol* (African Union 2003).
- 65 Article 2(2), *Maputo Protocol*.
- 66 CEDAW, Article 6.
- 67 African Union (2003), *Maputo Protocol*, Article 4(2)(g).
- 68 *Ibid*, Articles 22 and 23.
- 69 Reference No. 1 of 2007.
- 70 The Constitution of Kenya 2010, Article 27(1) and (2); Constitution of Rwanda 2015, Article 15; Constitution of Uganda, Article 21(1); Constitution of Tanzania, Article 12.
- 71 Constitution of Kenya 2010, Bill of Rights (Chapter 4), Article 27(4); Constitution of Rwanda 2015, Article 16; Constitution of Uganda, Article 21(2); Constitution of Tanzania, Article 13.
- 72 Constitution of Kenya, Article 27(4) and (5); Constitution of Rwanda 2015, Article 16; Constitution of Uganda, Article 21(2); Constitution of Tanzania, Article 13(4).

- 73 The Constitution of Kenya, 2010, Article 29.
- 74 The Constitution of Kenya, 2010, Articles 54, 55, 56 and 57.
- 75 Ibid, Article 54(2).
- 76 Government of Rwanda (2014), The Combined 7th, 8th and 9th Periodic Report on the Implementation by Rwanda of the Convention on the Elimination of all Forms of Discrimination Against Women.
- 77 Ibid.
- 78 Immigration and Refugee Board (IRB) of Canada (2013), *Rwanda: Domestic violence, including legislation, state protection, services and legal recourse available to victims* (2011–September 2013).
- 79 Ibid.
- 80 United Nations, *Country Assessment on Violence against Women Rwanda*.