



TRAINING GUIDE ON THE APPLICATION OF THE MAPUTO PROTOCOL IN JUDICIAL DECISION-MAKING

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SOLIDARITY FOR
AFRICAN WOMEN'S RIGHTS

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DES FEMMES AFRICAINES

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Equality Now
A just world for women and girls.

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About the Training Guide

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) remains one of the most progressive legal instruments providing a comprehensive set of human rights for African women. Unlike many other women's human rights instruments, it details women's wide-ranging and substantive human rights, covering the entire spectrum of civil, political, economic, social, cultural, and environmental rights. It would not be incorrect to name it the African Bill of Women's Human Rights.¹

Although the Training Guide's primary aim is to enhance judicial officers' knowledge on how to use the Protocol as a tool for realising the enjoyment of the rights of women and girls, there is a need to link the Maputo Protocol with other international human rights instruments. Examples of these instruments include the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

How the Maputo Protocol is applied in a particular jurisdiction depends on the legal system in that jurisdiction. A country's treaty obligations automatically form part of its internal legal order in a monist legal system. When a constitution incorporates a procedure for enforcement of international and regional human rights instruments, courts of law become significant actors in bringing human rights into domestic law. But a dualist system treats the international and domestic legal systems as separate and independent. In countries which adopt a dualist approach to international law, such as common law countries, courts have adopted a conservative role in creating jurisprudence based on treaty law. However, treaty bodies, as well as the Bangalore Principles, have clarified that courts have a responsibility to interpret national law in harmony with the treaty obligations of the State.² The link between the application of treaty law as a means of exercising judicial independence is essential, especially considering the importance of judicial independence in ensuring access to justice for women and girls under the rule of law. In both dualist and monist legal regimes, courts are critical in ensuring that universal human rights principles guide the interpretation of domestic legislation.

¹ Women, Gender and Development Directorate (WGDD) of the African Union Commission. (n.d.). *Maputo Protocol on Women's Rights: A Living Document for Women's Human Rights in Africa*. African Union. Retrieved 20 June 2022, from https://au.int/sites/default/files/documents/31520-doc-maputo_protocol_on_womens_rights_a_living_document_for_womens_human_rights_in_africa_submitted_by_the_women_gender_and_development_directorate_wgdd_of_the_african_union_commission.pdf

² United Nations. (2002). *The Bangalore Principles of Judicial Conduct*. https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf

Format of the Judicial Training Facilitator's Guide

This Guide is arranged according to Modules corresponding to thematic areas selected based on the Guidelines for State Reporting under the Maputo Protocol developed jointly by the ACHPR and the Centre for Human Rights at the University of Pretoria.³ These are:

1. Equality and Non-Discrimination
2. Prevention of Violence Against Women
3. Marriage and Divorce Rights
4. Health and Reproductive Rights
5. Economic, Social and Cultural Rights
6. Right to Peace
7. Women's Rights to Peace and Protection during Armed Conflicts, and
8. Rights of Women with Special Needs.

Furthermore, the Modules are divided into sessions, covering specific topics under the eight Modules described above.

³ African Commission on Human and Peoples' Rights. (2016). *Guidelines for state reporting under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*. https://www.achpr.org/public/Document/file/English/Guidelines%20on%20State%20Reporting%20under%20the%20Maputo%20Protocol_2.pdf

Methods of Curriculum Delivery

“Tell me and I forget. Teach me and I remember. Involve me and I will learn.”

(Benjamin Franklin)

Since the curriculum will be delivered to seasoned legal professionals, it is vital that interactive methods of instruction are used and those which empower the participants to take control of their learning. The resource persons should be guided by the principles of brain-based learning, which include: focusing the discussions on specific issues and ensuring that these are presented in a context that judicial officers can relate to, building on the experiences of the participants since the judicial officers have already practised some of the things being examined; and encouraging creativity which will allow the judicial officers to use their own experiences to discover new things, solve new problems and craft effective remedies.⁴

A judicial trainer with the necessary didactical skills will see their role as facilitating practice-oriented exchanges between the participants and promoting learning by transferring experiences. The judicial trainer's method must enable participants to challenge their professional knowledge, behaviour, attitudes, and values. In the quickly-evolving judicial world, nothing can be taken for granted. Thus, the judicial trainer's role is crucial to help the participants “to unlearn and to learn.”

The interactive methods the trainers who rely on this manual can use include:

- i. Case studies
- ii. Roleplaying exercises
- iii. Problem-solving exercises
- iv. Brainstorming
- v. Practice-oriented exchanges
- vi. Peer learning
- vii. The Socratic Method⁵
- viii. Short lectures
- ix. Video Clips
- x. Simulations
- xi. Self-directed reading and study before training sessions
- xii. Break-out group discussions

Note: The methods used in a particular Module or session will depend on the objective of the session and the expected learning outcome.

4 Gülpinar, M. A. (2005). The Principles of Brain-Based Learning and Constructivist Models in Education. *Educational Sciences: Theory & Practice*, 5(2), 302-302

5 Ford, C. M. (2008). The Socratic method in the 21st century. Retrieved from United, 1-2

Choice of Trainers and Facilitators

The curriculum should be delivered by experts in gender and human rights with practical knowledge of the judiciary's role in enforcing women's rights. Depending on the size of the trainee cohort, a single trainer or multiple trainers may be considered. A single trainer must have a multidisciplinary background to be able to deliver different aspects of the training effectively. Multiple trainers could be from a mixed background, including academia, the CSO sector and judges, including retired judges. Including expert trainers with experiences such as the medical, psychological and other effects of violence and discrimination against women, such as in the case of Module 2, should also be considered. Forensic experts, investigators and criminological professionals should also be relied on in training exercises that point to the role of these experts in addressing violence against women.

Module 1: Equality and Non-discrimination

Overview

This Module introduces participants to key concepts enabling an understanding of women's position in society. Women's rights cannot be understood in the abstract and need to be interrogated within the socio-cultural and political context.

This Module will also introduce participants to critical legal concepts related to combating the violation of women's rights – concepts which are the bedrock of equality between men and women.

At the end of the Module, we hope that participants will have realised that widespread perceptions regarding women's roles in society can affect the judicial interpretation of women's rights. Judges, like everyone else, hold preconceived and often firmly held values and beliefs. These perceptions often influence how the judiciary views women's rights.

We hope that at the end of this Module, judicial officers will become aware of the reality and danger of stereotyping and its link with preconceived societal perceptions towards women. We also hope the training participants will recognise gender bias in judicial practice and apply gender mainstreaming to improve women's access to justice.

Session 1: Introduction to Key Concepts

Session Objectives

- To interrogate women's position in society and the impact of societal values on women's rights.
- To distinguish gender and sex.
- To interrogate patriarchy as a value system and its implications for women's rights.
- To interrogate gender stereotyping and its effect on women's rights.
- To explore some of the common stereotypes about women.

Note for Facilitator: Ask the training participants the following questions.

Guiding Questions

- What is gender?
- What is patriarchy?
- What is the relationship between gender and patriarchy?
- What constitutes a stereotype, gender bias and stereotyping?
- What is the link between stereotyping and bias?
- What is discrimination?
- What is the link between gender bias and discrimination?

Exercise: Act like a man/Act like a woman

Note for Facilitator: Split the participants into groups. Each group should constitute either only male or female participants.

- Ask the respective groups to brainstorm a list of words that come to mind when they hear the phrase "Act Like a Man" or "Act like a Woman".
- Explain that this is not a list of things they think are true, but the messages to boys and girls about what they must do 'to act like a boy, 'to act like a girl.'
- Each group must write the words on flipchart paper.
- Tell the groups to indicate against the words enumerated whether the phrase refers to a biological imperative.
- After the exercise, ask the following Guiding Question.

Guiding Question

- What is the thread running through attributes associated with men and women?

Exercise: Sexism in Colours

Note for Facilitator: Ask the training participants the following Guiding Questions. **Guiding Questions**

- What does the colour pink communicate to you?
- What does the colour blue communicate to you?

Assigning colours to babies enforces a role they are supposed to grow and fit into. Assigning only two colours also enforces that there are only two genders

you're allowed to claim. If you're a girl, which means you're girly. If you're a boy, you must have blue, and you cannot like pink, or you aren't manly enough. If you're a girl and like blue, you're a tomboy who doesn't know how to be a proper girl. Gender refers to socially constructed roles, behaviours, and attributes that a society considers appropriate for men or women.

The link between gender and patriarchy

Patriarchy is a system of society or government in which the father or the eldest male is the head of the family, and descent is through the male line. Some patriarchal societies are also **patrilineal**, meaning the male lineage inherits property and title. In addition to being a social system, patriarchy also influences ideas and ideologies that justify the domination of men.

A key feature of patriarchy is the notion of traditional gender roles. For instance, traditional gender roles cast men as strong, decisive, rational and protective, while women are seen as emotional, irrational, weak, nurturing and submissive.

What constitutes a stereotype?

Note to Facilitator: Ask the training participants the following Guiding Questions. **Guiding Questions**

- What is a stereotype?
- What does “stereotyping” someone mean?

Answer: A stereotype is a widely held but fixed and oversimplified image or idea of a particular type of person or thing. If someone **is stereotyped**, they are represented or viewed through a fixed and oversimplified image or ideas.

A gender stereotype is a generalised view, or preconception about attributes or characteristics or the roles that are or ought to be possessed by, or performed by, women and men.⁶ Gender stereotyping refers to the practice of ascribing specific attributes, characteristics, or roles to persons based on their gender.

Note to Facilitator: Ask the training participants the following Guiding Questions.

Guiding Question

- What are some gender stereotypes ascribed to men and women?
- Are these stereotypes good or bad?
- Why should gender stereotypes worry us?

Whether overtly hostile (such as “women are irrational”) or seemingly benign (“women are nurturing”), stereotypes often perpetuate inequalities. For example, the traditional view of women as caregivers means that childcare, care of older person and domestic work responsibilities often fall exclusively on women. Almost all of this work is unpaid and otherwise unrewarded. These culturally enforced expectations limit women's participation in education and paid employment, reinforcing the feminisation of poverty.⁷ This stereotype also affects the perception of women in authority and leadership roles and is a significant barrier to the involvement of women in public life.

Note to Facilitator: Ask the training participants the following Guiding Question.

Guiding Question

- What is the link between the denial of women's rights and gender stereotyping?

From stereotyping to gender bias to gender discrimination

Socially constructed roles that fix men and women in specific areas or positions in society are often a result of gender bias. Gender bias is the tendency to think about people in a particular way based on whether they are male or female. Gender bias is based on stereotypical beliefs rather than an independent evaluation of everyone's abilities and experiences. Bias results in discrimination – bias is mental, and discrimination is action.

What are the effects of gender discrimination?

The effect of gender discrimination is to destroy the recognition of the rights and freedoms of a person. Discrimination can be either direct or indirect.

6 United Nations Office of the High Commissioner for Human Rights. (2014, September). *Gender stereotypes and Stereotyping and women's rights*. Retrieved 30 June 2022, from https://ohchr.org/sites/default/files/Documents/Issues/Women/WRGS/OnePagers/Gender_stereotyping.pdf

7 Christensen, M. A. (2019). Feminization of Poverty: Causes and Implications. *Encyclopedia of the UN Sustainable Development Goals*, 1–10. https://doi.org/10.1007/978-3-319-70060-1_6-1

Session 2: Equal Protection, Access to Justice and Gender-Mainstreaming in Judicial Processes

Session Objectives

1. To familiarise the participants with the principles of non-discrimination and equality before the law.
2. To provide essential guidance on identifying indirect vs direct discrimination.
3. To examine the difference between substantive and formal equality.
4. To expose participants to how societal gender stereotypes and bias seep into judicial decisions.
5. To interrogate the place of affirmative action in the search for equity.
6. To interrogate the utility of gender mainstreaming as a tool for judges to safeguard women's rights.
7. To examine the systemic barriers women face in their attempt to access justice.

Article 1 of the Maputo Protocol

Definitions

For the purpose of the present Protocol:

f) "Discrimination against women" means any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life;

Elimination of Discrimination: Article 2

Article 2 of the Protocol obliges States Parties to combat all forms of discrimination against women through appropriate legislative, institutional and other measures.

Article 2 of the Maputo Protocol

Elimination of Discrimination Against Women

1. States Parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures. In this regard they shall:

- a) include in their national constitutions and other legislative instruments, if not already done, the principle of equality between women and men and ensure its effective application;
- b) enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination particularly those harmful practices which endanger the health and general well-being of women;
- c) integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life;
- d) take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist;
- e) support the local, national, regional and continental initiatives directed at eradicating all forms of discrimination against women.

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

Article 8 of the Protocol states *inter alia* that:

Article 8 of the Maputo Protocol

Access to Justice and Equal Protection before the Law

Women and men are equal before the law and shall have the right to equal protection and benefit of the law. States Parties shall take all appropriate measures to ensure:

- a) effective access by women to judicial and legal services, including legal aid;
- b) support to local, national, regional and continental initiatives directed at providing women access to legal services, including legal aid;
- c) the establishment of adequate educational and other appropriate structures with particular attention to women and to sensitise everyone to the rights of women;
- d) that law enforcement organs at all levels are equipped to effectively interpret and enforce gender equality rights;
- e) that women are represented equally in the judiciary and law enforcement organs;
- f) reform of existing discriminatory laws and practices in order to promote and protect the rights of women.

Article 8 recognises the obligation placed on States to integrate a gender perspective in all areas of governance, considering the systematic way in which gender discrimination pervades society.

The Article recognises the need to integrate a gender perspective in the decisions of institutions.

What constitutes Equality before the Law?

Equality before the law is closely linked to the principle of non-discrimination, and both are fundamental elements of international human rights law. Equality before the law is also referred to as equality under the law and means that every individual is equal in the eyes of the law and is entitled to equal protection.

Guiding Questions:

1. What articles in your country's constitution recognise the principle of equality between women and men?
2. Which national legislation in your country captures the spirit of Article 2 of the Maputo Protocol?
3. How frequently have these constitutional and legislative provisions been invoked since their introduction?
4. Is there jurisprudence around the recognition and implementation of gender equality in your country? If so, provide citations to these cases.
5. How useful is a gender analysis when interpreting a statute, as an adjudicator in a dispute, while sentencing an offender, or when settling property disputes?
6. How can I integrate gender perspectives in specific questions of law, such as in the criminal defence of provocation and self-defence?
7. How can the law mainstream gender in interpreting and applying these defences?
8. What tools and resources do I have when performing a gender analysis or mainstreaming gender in the judicial process? In answering this question, consider the judicial process in civil and criminal proceedings.

When handling matters involving women, judicial officers should always ask themselves, what would the effect of my decision be on men on the one hand and women on the other?

Exercises

Analyse case law from national courts, as well as regional and sub-regional judicial and quasi-judicial bodies which have interrogated the principle of equality between women and men and women's right not to be discriminated against based on sex:

- The Botswana Citizenship case: **Attorney General Unity Dow**⁸
- **Law and Advocacy for Women in Uganda**⁹
- **Sarah Longwe v Intercontinental Hotel** (Zambia)¹⁰
- **Ntambala Fred v Uganda**¹¹ on the use of the corroboration rule in the adjudication of sexual offences
- **S v Katamba** (SA 2/99)¹² on the use of the corroboration rule in the adjudication of sexual offences
- **S v Jackson**¹³ on the use of the corroboration rule in the adjudication of sexual offences
- **Mukungu v R**¹⁴ on the use of the corroboration rule in the adjudication of sexual offences

Use of International and Regional Human Rights Instruments in Judicial Decision Making

In the Unity Dow case, the Botswana Court of Appeal declared a section of the Citizenship Act unconstitutional for discriminating against women. The court did not only analyse the section considering the country's Constitution but, to bolster its interpretation of the constitution, the court also referred to Botswana's international obligations on

non-discrimination. The court noted that Botswana had ratified the African Charter on Human and Peoples' Rights and the Convention on the Elimination of All Forms of Discrimination against Women. The court endorsed the need to consider international instruments in interpreting the Constitution and decided to annul Section 4 of the Citizenship Act.

The case of *Sarah Longwe v. Intercontinental Hotel* is popularly acknowledged as the first women's rights case to come before the Zambian courts. Sarah Longwe filed the case as a test against gender-specific discrimination and violation of freedom of movement as outlined under Articles 11 (fundamental rights and freedoms) and 23 (protection from discrimination on the grounds of race, among others) of the Zambian Constitution. In support, the petitioner cited relevant international instruments and principles that Zambia has ratified or adopted, namely the African Charter on Human and Peoples' Rights, the Convention on the Elimination of All Forms of Discrimination against Women and the Bangalore Principles of 1980.

Although the above cases did not cite the Maputo Protocol, adopted many years later, the reliance on regional and international instruments by the courts that issued these decisions shows that courts in the region would willingly rely on the Protocol.

Exercise

Note to Facilitator: Split participants into groups and instruct them to analyse relevant court decisions from a gender perspective. The case of **Chila v Republic**¹⁵ was the East African *locus classicus* regarding the weight attached to the evidence of a complainant in a sexual assault case. Other Commonwealth jurisdictions are likely to have a similar precedent that may provide opportunities for comparative analysis among these jurisdictions. Is **Chila** good law? Participants should critique the decision from a gender perspective, asking themselves what the

8 Judiciary of Botswana. (1992, June 3). *Attorney-General v. Dow, Appeal Court*, 1994 (6) BCLR 1. Environmental Law Alliance Worldwide. Retrieved 20 June 2022, from <https://elaw.org/content/botswana-attorney-general-v-dow-appeal-court-1994-6-bclr-1-locus-standi>

9 Constitutional Court of Uganda. (2007, April 5). *Law Advocacy for Women in Uganda v Attorney General (Constitutional Petition 13 of 2005)* [2007] UGSC 71 (05 April 2007). Uganda Legal Information Institute. Retrieved 20 June 2022, from <https://ulii.org/ug/judgment/supreme-court-uganda/2007/71>

10 High Court of Zambia. (1992). *Sara H Longwe vs Intercontinental Hotels*, 1992/HP/765

11 Supreme Court of Uganda. (2018, January 18). *Ntambala v Uganda* (CRIMINAL APPEAL NO. 34 OF 2015) [2018] UGSC 1. Uganda Legal Information Institute. Retrieved 20 June 2022, from <https://old.ulii.org/ug/judgment/supreme-court-uganda/2018/1>

12 Supreme Court of Namibia. (1999, December 7). *S v Katamba* (SA 2 of 1999) [1999] NASC 7. Namibia Legal Information Institute (NamibLII). Retrieved 20 June 2022, from <https://namiblii.org/na/judgment/supreme-court/1999/7>

13 Supreme Court of Appeal (South Africa). (1998, March 20). *S v Jackson* (35/97) [1998] ZASCA 13; 1998 (4) BCLR 424 (SCA); [1998] 2 All SA 267 (A). Southern African Legal Information Institute (SAFLII). Retrieved 20 June 2022, from <http://www.saflii.org/za/cases/ZASCA/1998/13.html>

14 Court of Appeal (Kenya). (2003, January 30). *Mukungu v Republic* (2003) AHRILR 175 (KeCA 2003). Office of the High Commissioner for Human Rights. Retrieved 20 June 2022, from https://adatabase.ohchr.org/IssueLibrary/KeCA_Kenya%20v%20Mukungu%20v%20Republic.docx

15 *Chila v Republic* [1967] EA 722. (1967). East Africa Law Reports.

outcome of the case meant for the right of female litigants and survivors of sexual violence, as well as its precedent-setting effect on women's rights in society. Can they identify any direct or implied stereotypes that were apparent in the decision?

Chila v Republic adopted the old English law position that courts were required to warn themselves of “the danger” of acting on the uncorroborated evidence of a complainant in a sexual assault case. If courts gave no such warning, the conviction would typically be set aside unless the appellate court was satisfied that there had been no failure of justice.

Historically, the reason for the corroboration of evidence in a sexual assault prosecution was that women are prone to malice and deception and are particularly adept at concealing it. The origin of the rule lay in the opinion of Sir Mathew Hale in 1671 when he said that rape must be examined with greater caution than any other crime as it is easy to charge and difficult to defend.¹⁶

A similar opinion was expressed by Lord Justice Salmon in **R v Henry & Manning**¹⁷: *“What the judge has to do is to use clear and simple language that will without any doubt convey to the jury that in cases of alleged sexual offences it is really dangerous to convict on the evidence of the woman or girl alone. This is dangerous because human experience has shown that in these courts girls and women do sometimes tell an entirely false story which is very easy to fabricate, but extremely difficult to refute. Such stories are fabricated for all sorts of reasons, which I need not now enumerate, and sometimes for no reason at all. The judge should then go on to tell the jury that, bearing that warning well in mind, they have to look at the particular facts of the particular case and if, having given full weight to the warning, they come to the conclusion that in the particular case the woman or girl without any real doubt is speaking the truth, then the fact there is no corroboration matters not at all; they are entitled to convict.”*

After the groups report their findings in a plenary session, share case authorities that departed from the locus classicus.

- **Ntambala v Uganda**¹⁸ (Uganda, *please read the judgement of Justice Prof Lillian Tibatemwa-Ekirikubinza*)
- **Mukungu v. R**¹⁹ (Kenya)
- **Uganda v Peter Matovu**²⁰ (Uganda)
- **S v Jackson 1998**²¹ (South Africa)
- **S v Katamba**²¹ (Namibia)

Exercise: Analyse the decisions in *Chila v Republic* and *R v Henry and Manning*.

Note to Facilitator: Case law on the requirement for corroboration of the evidence of a complainant in a sexual offence trial brings out the link between stereotyping and discrimination. It is also an example of indirect discrimination. The rule appears gender-neutral on the face of it, but its effect disproportionately affects women far more than it does men.

Affirmative Action

Note to Facilitator: Ask the training participants the following Guiding Questions.

Guiding Questions

- What is affirmative action?
- Is affirmative action acceptable, or does it violate the principle of equality and non-discrimination?
- Can discrimination be lawful?

Guiding Question

Note to Facilitator: Ask the training participants the Guiding Question below and record a summary of their answers in a flip chart for discussion.

- Can discrimination be lawful?

Affirmative action is the strategy or policy of favouring individuals belonging to groups regarded as disadvantaged or subject to discrimination. It is a response to historical trends of discrimination meant to increase opportunities for historically

¹⁶ Hale, M. (1800), *Historia Placitorum Coronæ: The History of the Pleas of the Crown*, by Sir Matthew Hale. Pub. from the Original Manuscripts by Sollom Emlyn. With Additional Notes and References to Modern Cases Concerning the Pleas of the Crown. By George Wilson. A New Ed. And an Abridgment of the Statutes Relating to Felonies Continued to the Present Time, with Notes and References, by Thomas Dogherty, vol. 1, London: Printed by E. Rider, for T. Payne, H. L. Gardner, W. Otridge, E. and R. Brooke and J. Rider [and seven others in London], Retrieved 21 June 2022, from <https://babel.hathitrust.org/cgi/pt?id=uc2.ark:/13960/t19k-4f990&view=1up&seq=7&skin=2021>

¹⁷ *R v Henry and Manning* (1969) 53 CrAppR 150 at page 153

¹⁸ Supreme Court of Uganda. (2018, January 18). *Ntambala v Uganda* (CRIMINAL APPEAL NO. 34 OF 2015) [2018] UGSC 1. Uganda Legal Information Institute. Retrieved 21 June 2022, from <https://ulii.org/ug/judgment/supreme-court-uganda/2018/1>

¹⁹ Court of Appeal (Kenya). (2003, January 30). *Mukungu v Republic* (2003) AHRLR 175 (KeCA 2003).

²⁰ High Court of Uganda. (2002, October 19). *Uganda v Peter Matovu* (Criminal Case 146 of 2001) [2002] UGHC 72. Uganda Legal Information Institute. Retrieved 21 June 2022, from <https://ulii.org/ug/judgment/high-court-uganda/2002/72> ²¹ Supreme Court of Appeal (South Africa). (1998, March 20). *S v Jackson* (35/97) [1998] ZASCA 13; 1998 (4) BCLR 424 (SCA); [1998] 2 All SA 267 (A).

²¹ Supreme Court of Namibia. (1999, December 7). *S v Katamba* (SA 2 of 1999) [1999] NASC 7.

disadvantaged groups. Affirmative action achieves its stated aims through laws and policy prescriptions such as using quotas, prioritising access to public resources to historically marginalised populations, and reparations, among other strategies.

Women are disadvantaged compared to men with respect to the enjoyment of opportunities or benefits due to systematised and historical inequalities. This is why affirmative action is justified in the fight for women's empowerment.

Note to Facilitator: Ask the training participants the Guiding Questions below and record a summary of their answers on a flip chart for discussion.

Guiding Questions

1. Does your country have affirmative action laws, policies and constitutional provisions specifically targeting women? If yes, please summarise these provisions.
2. Apart from affirmative action provisions favouring women, are other groups also included in affirmative action efforts in your country?
3. What are some primary areas where affirmative action is enforced in your country? Some examples would include political participation, representation in government, quotas, affirmative action funds etc.
4. What were these affirmative action efforts established to redress?

Affirmative action obliges States to redress historical patterns of discrimination, in addition to the obligation imposed on States not engaging in discriminatory conduct. Article 2 (d) of the Maputo Protocol obliges state parties to “take corrective and positive action in those areas where there is discrimination against women in law and continues to exist.” As the Commission has stated, ‘in certain cases, positive discrimination or affirmative action helps to redress the imbalance.’²²

Access to Justice

- a. Under Article 8 (a) of the Protocol, States Parties are obliged to take “all appropriate measures to ensure effective access by women to judicial and legal services including legal aid.”

- b. As stipulated by the CEDAW Committee, the right of access to justice for women is a fundamental element of the rule of law, essential to realising women's human rights everywhere.

Guiding Question

- What do the training participants define as access to justice?

In its narrowest sense, access to justice refers to the formal ability to appear in a court of law. However, access to justice interrogates the broader social context of a legal system. Access to justice responds to the systemic barriers different social groups face when interacting with public institutions set up expressly to resolve disputes. Efforts to promote access to justice call for acknowledging that there is a difference between formal equality – which aims to treat all persons equally at all times – and substantive equality – which seeks to address systemic barriers to equality that have built up over a long time. The call for “access to justice” invokes equality, equity, and fairness notions.

Note for Facilitator: Ask the training participants the following questions and write down their responses to explain the basic concepts of access to justice.

Guiding Questions

1. What challenges or barriers (social, cultural, economic) do women face in their attempt to access courts?
2. What systemic challenges do women face as witnesses, survivors of crime, and suspects within the criminal justice system?
3. Does your country have guidelines on how judicial officers can ensure access to justice for court users before them? Do these guidelines address women's access to justice needs?
4. What can a judge do to protect women's rights and experience in the judicial system?

What is Gender Justice?

Gender justice refers to full equality and equity between women and men in all spheres of life, resulting in women jointly and on an equal basis with men, defining and shaping the policies, structures and decisions that affect their lives and society as a whole.²³

²² African Commission on Human and Peoples' Rights. (n.d.). *Communication 276/2003 – Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*. Human Rights Watch. Retrieved 21 June 2022, from https://www.hrw.org/sites/default/files/related_material/2010_africa_commission_ruling_o.pdf

²³ Oxfam International. (2022, May 25). *Gender justice and women's rights*. Retrieved 14 July 2022, from <https://www.oxfam.org/en/what-we-do/issues/gender-justice-and-womens-rights>

²⁵ Council of Europe. (n.d.). *What is gender mainstreaming?* Retrieved 14 July 2022, from <https://www.coe.int/en/web/genderequality/what-is-gender-mainstreaming>

Article 2 of the Maputo Protocol

Elimination of Discrimination Against Women

1. States Parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures. In this regard they shall:

c) integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life;

Gender mainstreaming is a decision-making approach that considers both women's and men's interests and concerns to achieve equality between women and men.²⁵ Gender mainstreaming is assessing the implications for women and men of any planned action, including legislation, policies, processes, or programmes. It integrates gender perspectives into processes so that before decisions are made, an analysis is made of their effects on women and men. This is known as gender analysis, a process which identifies the differences between and among women and men in terms of their relative position in society and the distribution of resources, opportunities, constraints, and power.

Mainstreaming Gender in Judicial Processes

If courts are to address the barriers women face in the judicial system effectively, judicial officers must mainstream gender into court processes. They must acknowledge the differences between men's and women's positioning in society. In their role as adjudicators, judicial officers must always ask themselves the following questions:

1. What would the effect of my decision be on men on the one hand and women on the other?
2. How useful is a gender analysis when interpreting statutes while sentencing an offender, and settling property disputes, for example?
3. How can I integrate gender perspectives in questions of law, such as in the criminal defence of provocation and self-defence?
4. What tools and resources do I have when performing a gender analysis or mainstreaming gender in the judicial process?

Exercise: Analysing Self-Defence by Women Against their Abusers

Note to Facilitator: Split participants into groups and invite them to enumerate the elements of self-defence. Each group should be encouraged to record their discussion on flip charts and present it during the plenary for the facilitator and training participants to contribute to the discussion. In performing this assignment, the participants should be encouraged to answer the following questions:

1. In cases where a woman kills a man who attempts to rape her, how have courts interpreted the concepts of "reasonableness" of the force used by the killer, "equal" force used to ward off an attack?
2. As a follow-up to the question above, what are some of the presumptions behind the concepts of "reasonableness" of force and "equal force?"
3. How might adjudicating that the force used by the female survivor of the attempted rape was unreasonable enforce certain ideas, presumptions and even myths about the severity of sexual violence?
4. How might adjudicating that the force used by the female survivor of the attempted rape was reasonable enforce certain ideas, presumptions and even myths that if the survivor didn't fight back, then the action by the perpetrator is not a crime punishable under the law?

You may use examples of court cases where a woman has been charged with killing a man who attempted to rape her. A few examples of these cases include

- **Uganda v Kazigati**²⁴ (Uganda)
- **Rex v Nana Jabu Lukhele**²⁵ (Eswatini)

²⁴ Unreported but found in Lillian Tibatemwa-Ekirikubinza (1999) *Women's Violent Crime in Uganda: More sinned against than sinning* page 168.

²⁵ Crim. T. 121/93, High Court of Swaziland, held at Mbabane. Judgement delivered on 10 May, 1994. Cited in Lillian Tibatemwa-Ekirikubinza (1999) *Women's Violent Crime in Uganda*

- **State v Little** ²⁶ (United States),
- **State v Wanrow** ²⁷ (United States).

Participants can also be provided with a copy of *Women's Violent Crime in Uganda: More sinned against than sinning*.³⁰ Pages 159 -188 of the book exhaustively discusses the issues.

Article 12 of the Maputo Protocol

Right to Education and Training

1. States Parties shall take all appropriate measures to:

- eliminate all forms of discrimination against women and guarantee equal opportunity and access in the sphere of education and training;
- eliminate all stereotypes in textbooks, syllabuses and the media, that perpetuate such discrimination;
- protect women, especially the girl-child from all forms of abuse, including sexual harassment in schools and other educational institutions and provide for sanctions against the perpetrators of such practices;
- provide access to counselling and rehabilitation services to women who suffer abuses and sexual harassment;
- integrate gender sensitisation and human rights education at all levels of education curricula including teacher training.

2. States Parties shall take specific positive action to:

- promote literacy among women;
- promote education and training for women at all levels and in all disciplines, particularly in the fields of science and technology;
- promote the enrolment and retention of girls in schools and other training institutions and the organisation of programmes for women who leave school prematurely.

²⁶ Court of Appeals of North Carolina. (1975, December 17). *State v. Little* Annotate this Case 219 S.E.2d 494 (1975) 27 N.C. App. 467. Justia. Retrieved 21 June 2022, from <https://law.justia.com/cases/north-carolina/court-of-appeals/1975/752sc465-1.html>

²⁷ Supreme Court of Washington. (1977, January 7). *State v. Wanrow* 88 Wn.2d 221 (1977) 559 P.2d 548. Justia. Retrieved 21 June 2022, from <https://law.justia.com/cases/washington/supreme-court/1977/43949-1.html>

³⁰ Tibatemwa-Ekirikubinza, L. (1998). *Women's Violent Crime in Uganda. More Sinned Against than Sinning*. Fountain Publ. pp 159 - 188

Session 3: The Right to Education and Training

Session Objective

- To interrogate the role of courts and adjudicatory mechanisms in enforcing the right to education. Education has the potential to enhance the status of an individual. The right of access to knowledge and training is necessary for the full development of an individual.²⁸

What is the link between education and equality between men and women?

Education and training can potentially redress the inequality between women and men in all spheres of life. It plays a pivotal transformative and empowering role in promoting human rights values and is recognised as the pathway to gender equality and women's empowerment. Unfortunately, illiteracy continues to be a feminised phenomenon depriving women of a broader range of rights protections contained in national constitutions and statutes and international human rights instruments such as the Maputo Protocol.²⁹

Education is an essential vehicle for the realisation of women's equality, as it enhances women's and girls' economic opportunities, public and political participation, and the development of leadership skills. Lack of training and education prevents girls from achieving higher social and economic statuses and perpetuates cycles of inequalities and discrimination.^{30,31} Several international, regional, and national instruments and court decisions have established that the right to education is justiciable and consequently enforceable in law.

Note to Facilitator: Ask participants the following questions and encourage them to provide a rationale for their answers.

Guiding Questions

1. Does your country's constitution specifically recognise the right to education? If yes, what does the provision in your country's constitution state?
2. Does your country have any other enabling legislation on the right to education? If yes, what are these laws, and what aspects of the right to education do they address?

3. Is the right to education justiciable in your country?
4. What challenges do women and girls face when accessing educational institutions at the primary, secondary and tertiary educational institutions in your country?
5. Is there any key jurisprudence on the right to education in your country? If yes, please briefly summarise the decision.
6. Based on the responses to Questions 1 to 5 above, is there a nexus between the right to education and other human rights? What is the relationship between the right to education and other human rights?

The State's Obligation to Enforce the Right to Education

Realisation of the right to education places an obligation on States to make education available and accessible. The right to education is a positive obligation that requires the state to take active steps such as making budget appropriations for education infrastructure and personnel, creating education standards that enforce the right to quality education, and enforcing maximum school attendance (such as through linking school attendance with the provision of healthcare, food and other social goods).

Additionally, the state has an interest in enforcing the right to education as this serves as a strategy to implement other rights protections. For example, monitoring female student absences can identify girls at risk of harmful cultural practices such as child marriage and female genital mutilation (FGM).

To further gain clarity on the state's obligations to enforce the right to education in a way that incorporates the ideas of gender justice and gender mainstreaming, two challenges facing women and girls are provided for discussion.

1. The expulsion of pregnant school-going girls from primary and secondary institutions
2. The sexual violence against female students (both women and girls) within training institutions at the primary, secondary and tertiary levels.

Exercise: Analysing the expulsion of pregnant school-going girls from primary and secondary institutions

28 Coomans, F. (2004). Exploring the Normative Content of the Right to Education as a Human Right: Recent Approaches. *Persona y Derecho*, 50. <https://dun.unav.edu/handle/10171/14404>

29 Christensen, M. A. (2019). Feminization of Poverty: Causes and Implications. *Encyclopedia of the UN Sustainable Development Goals*, 1–10. https://doi.org/10.1007/978-3-319-70060-1_6-1

30 UN Committee on the Elimination of Discrimination against Women. (2017, November). *General recommendation No.*

31 (2017) *on the right of girls and women to education*. United Nations Digital Library. <https://digitallibrary.un.org/record/3843534?ln=en>

Note to Facilitator: Split participants in groups and invite them to answer the following questions:

- Does your country have a *de facto* or *de jure* policy of expelling pregnant school-going girls?
- Regardless of your answer to the above question, is it a practice in your country for parents to voluntarily withdraw their children from school if they are pregnant?
- Once a school-going child's pregnancy has ended, is she allowed to return to school?
- What rationale do governments, school administrators and parents give for expelling pregnant school-going girls?
- What measures have your government taken to address the needs of pregnant school-going girls? For example, are pregnant school-going girls transferred to dedicated educational institutions serving their needs, is their school attendance reduced, and are they allowed to pause their schooling to attend to childbirth and childcare?
- What are the human rights implications of the measures outlined in the previous question above?
- Are cases of pregnant school-going girls reported to the authorities (such as child services or the police) once discovered? If yes, what mechanisms exist to bring the perpetrator to justice and provide for the rights of the pregnant school-going girls in question?

Groups should record the salient points of their discussions in flip charts that will be used in their presentations during the plenary session. Afterwards, the training participants should be invited to analyse a case touching on the expulsion of pregnant school-going girls. Some examples of these cases include:

1. **Head of Department, Department of Education, Free State Province v Welkom High School and Another**³² (South Africa)
2. **Students' Representative Council of Molepolole College of Education v Attorney General**³³ (Botswana)

3. **Women Against Violence and Exploitation in Society (WAVES) & Child Welfare Society, Sierra Leone (On Behalf of Pregnant Adolescent School Girls in Sierra Leone) v. Sierra Leone**³⁴ (ECOWAS Community Court of Justice)

Exercise: Sexual violence against women and girls within training institutions at the primary, secondary and tertiary levels.

Note to Facilitator: Split participants into groups and invite them to answer the following questions:

- What are some examples of sexual abuse within training institutions at the primary, secondary and tertiary levels that you have heard of?
- In the instances of sexual violence you noted in the question above, who are the perpetrators or likely perpetrators of this violence?
- What vulnerabilities do female students face regarding sexual violence in education? For instance, what are the power differences between female students and their male counterparts and male school administrators and teaching staff?
- What rights are violated or in jeopardy when a woman or a girl is sexually abused within the educational setting?

Groups should record the salient points of their discussions in flip charts that the facilitator will use in their presentations during the plenary session. Afterwards, the facilitator should invite training participants to analyse a case about sexual violence against female students within primary, secondary and tertiary training institutions. Some examples of these cases include:

1. **RM Katakwe v. Edward Hakasenke and Others**³⁵ (Zambia)
2. **W. & Another v Astarikoh Henry Amkoah & 9 Others**³⁶ (Kenya)

32 Constitutional Court of South Africa. (2013, July 10). *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* (CCT 103/12) [2013] ZACC 25; 2013 (9) BCLR 989 (CC); 2014 (2) SA 228 (CC). Southern African Legal Information Institute. Retrieved 21 June 2022, from <http://www.saflii.org/za/cases/ZACC/2013/25.html>

33 Court of Appeal of Botswana. (1995, January 21). *Students' Representative Council of Molepolole College of Education vs Attorney General*. African LII. Retrieved 21 June 2022, from <https://africanlii.org/content/student-representative-council-molepolole-college-education-v-attorney-general-civil-appeal>

34 ECOWAS Community Court of Justice. (2020, January 13). *ECW/CCJ/JUD/37/19 Women Against Violence and Exploitation in Society (WAVES) & Child Welfare Society, Sierra Leone (CWS SL) (On Behalf of Pregnant Adolescent School Girls in Sierra Leone) v. Sierra Leone*. Institute for Human Rights and Development in Africa. Retrieved 29 July 2022, from <https://ihrda.uwazi.io/en/entity/i17yfu3qrocj>

35 High Court of Zambia. (2008). *Rosaria Mashita Katakwe v. Hakasenke, et al.* 2006/HP/0327. Global Health and Human Rights Database. Retrieved 21 June 2022, from <https://www.globalhealthrights.org/wp-content/uploads/2013/10/Katakwe-Zambia-2008.pdf>

36 High Court of Kenya. (2015, May 19). *W. & another v Astarikoh Henry Amkoah & 9 others* [2015] eKLR. National Council for Law Reporting (Kenya Law). Retrieved 21 June 2022, from <http://kenyalaw.org/caselaw/cases/view/109721/> ³⁹ Bari, F. (2005, November). *Women's Political Participation: Issues and Challenges*. United Nations. <https://www.un.org/womenwatch/daw/egm/enabling-environment2005/docs/EGM-WPD-EE-2005-EP12%20%20draft%20of.pdf>

Session 4: Right to Participation in the Political and Decision-Making Process

Session Objectives

- To interrogate the obligation among States to guarantee the right of women to participate in the political and decision-making process.
- To interrogate the judiciary's role in guaranteeing the right of women to participate in the political and decision-making process.

Women's active political participation is fundamental to gender equality and genuine democracy.³⁹ It facilitates women's direct engagement in public decision-making. The active participation of women, on equal terms with men, at all levels of decision-making and political involvement is essential to achieving equality and the inclusion of their perspectives and experiences into the decision-making processes.

Article 9 of the Maputo Protocol

Right to Participation in the Political and Decision-Making Process

1. States Parties shall take specific positive action to promote participative governance and the equal participation of women in the political life of their countries through affirmative action, enabling national legislation and other measures to ensure that:
 - a) women participate without any discrimination in all elections;
 - b) women are represented equally at all levels with men in all electoral processes;
 - c) women are equal partners with men at all levels of development and implementation of State policies and development programmes.
2. States Parties shall ensure increased and effective representation and participation of women at all levels of decision-making.

Guiding Questions

Note to Facilitator: Split participants in groups and invite them to answer the following questions:

1. Does your country's constitution have provisions guaranteeing women's active participation in politics and public decision-making? If yes, provide a summary of these provisions.
2. Has your country taken any legislative steps to enhance women's active participation in politics and public decision-making? If yes, provide a summary of these legislative provisions?
3. If your country had constitutional and/or legislative provisions guaranteeing women's active participation in politics and public decision-making, what gaps are these provisions meant to address? How well are these provisions, in your view, enforced?
4. Does the country have other enabling policies to ensure women's active participation in politics and public decision-making?
5. What challenges do women face when they exercise their right to active participation in politics and public decision-making in their capacity as voters and as politicians?
6. How can judicial officers play a role in enhancing women's active participation in politics and public decision-making in their capacity as voters and politicians respectively?

Groups should record the salient points of their discussions in flip charts that will be used in their presentations during the plenary session. Afterwards, the training participants should be invited to analyse cases touching on women's right to active participation in politics and public decision-making. Some examples of these cases include:

- **National Gender and Equality Commission & Others v. Independent Electoral and Boundaries Commission and Another** [2013] eKLR³⁷ (Kenya)
- **Centre for Rights Education and Awareness & Another v. Speaker of National Assembly & Others** [2017] eKLR³⁸ (Kenya)
- **National Gender & Equality Commission & Another v. Judicial Service Commission & Others** [2017] eKLR³⁹ (Kenya)

Session 5: Legal Pluralism and Gender Justice

Session Objectives

- To define legal pluralism.
- To identify the sources of law in plural legal systems.
- To define customary law.
- To interrogate the place of customary law and religious law under a legal framework incorporating universal human rights protection.
- To explore the interaction between customary law and religion and women's right to equality with men.

Guiding Question

- **What is Legal Pluralism?**

Note to Facilitator: Ask the training participants the above question and record a summary of their answers in a flip chart for the interactive lecture. Training participants should also be encouraged to give examples of legal pluralism observed in their country and other countries.

Legal pluralism is 'the existence of multiple sources of law (both state and non-state) within the same geographical area.⁴⁰ It is generally defined as a situation where two or more legal systems coexist in the same social field, such as a country.⁴¹ Plural

legal systems may result from interactions between distinct linguistic, cultural and religious groups interacting with each other over a sustained period, necessitating the interaction of different approaches when settling disputes.

Sources of Law

Guiding Questions

1. What are the sources of law in your country?
2. Is there a hierarchy of laws in your country? If so, what is the hierarchy of these laws from the most binding and supreme to the least binding?
3. What do you find positive in customary law?
4. What are the harmful aspects of customary law in women's lives?
5. What is the nature of the interaction between customary law and other sources of law, such as the constitution of your country, statute and common law?

Note to Facilitator: Write down the answers so the training cohort can see them. While noting the answers down, please categorise them per country. Make references to the responses you receive during the session.

Legal Pluralism

The legal system of many African countries is pluralistic and composed of the following sources of law:

1. Constitutions
2. African customary law
3. Religious laws (especially where there is a significant Muslim population)
4. Received law (common law or civil law depending on the colonial history of the country in question)
5. Colonial-era laws (adopted from the colonising state)
6. Post-independence laws.

37 High Court of Kenya. (2015a, April 15). *National Gender and Equality Commission v Independent Electoral and Boundaries Commission & another* [2013] eKLR. National Council for Law Report (Kenya Law). Retrieved 21 June 2022, from <http://kenyalaw.org/caselaw/cases/view/87523>

38 High Court of Kenya. (2017, August 24). *Centre for Rights Education & Awareness (CREAW) & another v Speaker of the National Assembly & 2 others* [2017] eKLR. National Council for Law Reporting (Kenya Law). Retrieved 21 June 2022, from <http://kenyalaw.org/caselaw/cases/view/142135>

39 High Court of Kenya. (2017a, May 12). *National Gender & Equality Commission & another v Judicial Service Commission & 2 others* [2017] eKLR. National Council for Law Reporting (Kenya Law). Retrieved 21 June 2022, from <http://kenyalaw.org/caselaw/cases/view/135563/>

40 Merry, S. E. (1988). Legal Pluralism. *Law & Society Review*, 22(5), 869. Retrieved 21 June 2022, from <https://doi.org/10.2307/3053638>

41 Merry, S. E. (1988). Legal Pluralism. *Law & Society Review*, 22(5), 869.

What is African customary law?

Note to Facilitator: Before discussing customary law and its interaction with women's rights law, please gauge the participants' understanding or definition of the term.

The use of the term "African customary law" does not imply that there is a single uniform set of customs prevailing in Africa or indeed in any single African country. Rather, it is used as a blanket description covering many different legal systems. These systems are largely ethnic in origin, and they usually operate only within the area occupied by a distinct ethnic group and cover disputes in which at least one of the parties to the dispute is a member of the ethnic group. Religious law is also part of the plural legal systems in many African countries. This is more prevalent in societies with a significant Muslim population.

Cultural Relativism?

Note to Facilitator: Start each discussion by asking the Guiding Questions that come before them.

Guiding Questions

- What is culture? Culture refers to the idealism, customs and social behaviour of a particular people or society.

Cultural relativism is a principle established by Franz Boas. Boas states that, "although for every culture some moral judgments are valid, no moral judgement is universally valid. Instead, every moral judgement is culturally relative."⁴²

Cultural relativism is the theory that beliefs, customs, and morality exist in relation to the culture from which they originate and are not absolute. It is the idea that these beliefs, values, and practices should be understood based on that culture, rather than against the criteria of another culture. According to cultural relativist theories, beliefs, values and practices are considered to be subjective due to the uniqueness and diversity of different societies. It rejects the existence of a single and absolute truth. Therefore, you cannot judge a particular cultural custom from the perspective of a different culture.

Cultural relativism is counter to the principle of universality of rights. Cultural relativism espouses the multiplicity of legal norms where a multiplicity of cultures exists. The holding that multiple cultures

lead to multiple legal norms is further emphasised by the principle of multiculturalism and legal pluralism.

The Universality of Human Rights

Note to Facilitator: Start this discussion by asking the Guiding Question.

Guiding Question

- Are human rights universal?

Universalism is the opposite of relativism. Universalism views human rights as a set of standardised and globalised values upon which most nations agree. Under the universalist view, human rights are presumed to be inherent to all human beings, irrespective of nationality, place of residence, gender, national or ethnic origin, colour, or religion, among other grounds. It is for this reason that many key international human rights treaties and declarations adopt a "universal" or global outlook in their provisions.

Universalists view the wide ratification of the main international human rights documents by most countries – such as the nearly universal ratification of the Maputo Protocol by African countries – as proof of human rights as generally accepted norms with universal application irrespective of geographical area or cultural specificities.

Navigating the Tension Between Cultural Relativism and Universal Rights

Cultural relativism and universalism seem at odds, with few opportunities for any meaningful compromise between these two schools of thought. How does one safeguard minority rights under a culturally relativistic system where the majority may have more say in what is considered culturally appropriate? How does one address the needs of distinct groups whose views may contradict what is considered a universal right?

To address these tensions, some important compromises have been made. For instance, only a limited range of rights have universal applications, such as the right to life, the freedom from torture, cruel, inhuman and degrading treatment, and freedom from slavery and servitude. Other approaches have been the promotion of positive cultural aspects, the prohibition of or

42 Tilley, J. J. (1998). Cultural Relativism, Universalism, and the Burden of Proof. *Millennium: Journal of International Studies*, 27(2), 275–297. Retrieved 21 June 2022, from <https://doi.org/10.1177/03058298980270020601>

disincentivization against harmful cultural practices or enabling individuals to privately opt in or opt out of having customary or religious law applied to them.

Women's rights are a key area where the tension between cultural relativism and universal rights clash. Cultural relativists might argue that women's rights should be fashioned according to the cultural context. In contrast, universalists might argue that women's rights *protection* means that certain rights apply in the same way to all women regardless of their cultural context and should be enforced as such. However, it is important to consider the view of women's rights thinkers and practitioners who apply these concepts according to the lived realities of the women in question. For instance, a women's rights perspective might agree that, although women's rights depend on the cultural context in which they exist, women are entitled to the agency and capability to influence their context by participating in decision-making and influencing their culture. This approach recognises women's personhood as human beings and community members. On the other hand, a women's rights perspective might agree that all women have a basic shared set of rights protections that apply regardless of the specific background or circumstances of the woman in question but might assert the right for these rights to be affirmed and enforced in a way that addresses the specific cultural context of the women in question. In this way, a women's rights perspective seeks to apply the principle in a way that has women's rights as the driving force, ensuring that women's rights are protected and promoted regardless of the underlying human rights principle.

Exercise

Note to Facilitator: Please put the questions below to the plenary. Write down the responses you receive so the plenary can see them.

- In your view, is the Maputo Protocol an example of a universalist approach to human rights, a cultural relativist one, or both? What is the reason for your answer?
- Based on the foregoing discussion, are customary norms compatible with human rights norms contained in International and Regional Human Rights Instruments?

Customary Law and Constitutionalism

Guiding Questions

Note to Facilitator: Start this discussion by asking the Guiding Questions below.

- What is the nature of the interplay between customary law on one hand and constitutional law on the other in your country?
- How do courts resolve the conflict between customary law and the concept of equality between men and women?

In many African States, a significant proportion of people conduct their personal affairs in accordance with and subject to customary law. Consequently, customary law has a great impact on the lives of most Africans in personal law matters such as marriage, inheritance, parental rights, and other family-related issues.

Most African constitutions contain and integrate broadly agreed upon human rights norms and protections guaranteeing equality, human dignity, and prohibiting discrimination based on gender, among other grounds. In the same breath, these constitutions also recognize the application of customary law in certain instances. While some constitutions address the place of customary law within a country's legal framework – such as by declaring that customary law is only applicable in cases where it does not go against constitutional provisions – some do not, leaving it to the discretion of the legislature, the judiciary, or traditional dispute resolution mechanisms set up to enforce customary law in the settlement of disputes.

Exercise: Group Discussion

Note to Facilitator: Split the training participants into groups and assign them the cases below for analysis and discussion.

- **Mifumi (U) Ltd & Anor v Attorney General & Anor** (Constitutional Appeal 2 of 2014) (Uganda)⁴³
- **Rono v Rono** (2005) AHRLR 107 (KeCA 2005) (Kenya)⁴⁴
- **Ephraim v Pastory** (2001) AHRLR 236 (TzHC 1990) (Tanzania)⁴⁵
- **Tatu Kamau v Attorney General & 2 others** [2021] eKLR (Kenya)⁴⁷

In analysing the case, the training participants should consider the questions below, writing down the salient points of their deliberation to be presented during a plenary session that will take place afterwards:

1. What are some of the customary law questions that were addressed in the case that has been assigned to you?
2. How did these questions of customary law interact with women's rights principles discussed in the foregoing?
3. Were international human rights treaties such as CEDAW and the Maputo Protocol applied in the case that has been assigned to you? If yes, how were they applied in the case? If not, what specific provisions of the Maputo Protocol would apply in this case?
4. What constitutional and statutory provisions were applied in this case? How did these provisions interact with the customary law questions presented in the case?

⁴³ Supreme Court of Uganda. (2015, August 6). *Mifumi (U) Ltd & Anor v Attorney General & Anor (Constitutional Appeal 2 of 2014)* [2015] UGSC 13. Uganda Legal Information Institute. Retrieved 21 June 2022, from [https://ulii.org/ug/judgment/supreme-court-uganda/2015/13#:~:text=MIFUMI%20\(U\)%20Ltd%20and%202012,the%20petiti%20on%20C%20hence%20this%20appeal](https://ulii.org/ug/judgment/supreme-court-uganda/2015/13#:~:text=MIFUMI%20(U)%20Ltd%20and%202012,the%20petiti%20on%20C%20hence%20this%20appeal).

⁴⁴ Court of Appeal of Kenya. (2005, April 29). *Rono v Rono* (2005) AHRLR 107 (KeCA 2005). Women Link Worldwide. Retrieved 21 June 2022, from <https://www.womenslinkworldwide.org/files/2758/gjo-kenya-rono-v-rono-en-pdf.pdf>

⁴⁵ High Court of Tanzania. (1990, February 22). *Tanzania: Ephraim v Pastory* (2001) AHRLR 236 (TzHC 1990). University of Oslo. Retrieved 21 June 2022, from https://www.uio.no/studier/emner/jus/jus/US5910/v13/undervisningsmateriale/ephraim-v-pastory-case_tanzania1990-.pdf

⁴⁶ [.pdf](#)

⁴⁷ High Court of Kenya. (2021, March 17). *Tatu Kamau v Attorney General & 2 others; Equality Now & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)* [2021] eKLR.

Module 2: Prevention of Violence Against Women

Overview

Violence against women is a form of gender-based violence that is rooted in women's position in society. Gender-based violence is violence directed at an individual because of their gender or violence that affects persons of a particular gender disproportionately. Although both men and women experience gender-based violence, women and girls suffer from disproportionate levels of such violence.

Violence against women is a serious violation of human rights and a manifestation of the unequal balance of power between women and men. It is caused by widely accepted social and cultural norms that often also contribute to gender inequality, including male entitlement, domination, and control over women's bodies. This Module juxtaposes women's right to dignity and integrity with the right to security in relation to the right to be free from all types of sexual and physical violence.

Violence against women is also premised on stereotypes, false assumptions and myths about women. This is especially the case when it comes to sexual violence as well as violence against women within the domestic setting by persons known to them. Rape myths regarding consent to sex as well as what instances of sexual violence are "legitimate" or "real" work to discourage women from seeking justice when they are sexually violated while ensuring that the women who do seek justice when violated face tough odds of having justice delivered in their case. In the case of violence against women within a domestic setting by perpetrators known to the women, stereotypes, false assumptions and myths might render women incapable of escaping their abusive situations and complicate their justice seeking efforts.

The Module also addresses some of the most prevalent harmful practices against women. Additionally, participants will be invited to identify the common harmful practices in their communities and how their country's laws seek to resolve these harmful practices. Female genital mutilation (FGM) will be specifically dealt with because of its high

prevalence in Africa and because it has been explicitly prohibited by the Maputo Protocol. The Module will also specifically deal with marital rape, sexual harassment and domestic violence.

Session 1: Dignity, Integrity & Security of the Person

Session Objectives

- To explore the right to dignity, integrity and security of the person under the Maputo Protocol.
- To interrogate the link between the right to dignity, integrity and security and the right of women to be free from all forms of violence.

Exercise: Group Discussion

Note to Facilitator: Split the training participants into groups and assign the case below for analysis and discussion.

- **Tatu Kamau v Attorney General & 2 others** [2021] eKLR (Kenya)⁴⁸

In analysing the above cases, the training participants should write down the salient points of their deliberation to be presented during a plenary session that will take place afterwards.

Session 2: Domestic Violence

Session Objectives

- To enhance the participants' understanding of domestic violence.
- To interrogate criminal and civil law approaches in protecting survivors of domestic violence.
- To interrogate the judiciary's role in promoting and protecting the rights of survivors of domestic violence.

This Module will give specific attention to domestic violence for several reasons. First, violence against women in the domestic sphere by persons known to the women in question is widespread and systemic.⁴⁹

⁴⁸ High Court of Kenya. (2021, March 17). *Tatu Kamau v Attorney General & 2 others; Equality Now & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)* [2021] eKLR.

⁴⁹ World Health Organization. (2021, March 9). *Violence against women*. Retrieved 14 July 2022, from <https://www.who.int/news-room/fact-sheets/detail/violence-against-women>

Domestic violence is unique, requiring specialised legal approaches that address the specificities of violence in the domestic and private sphere, perpetrated and endured by individuals known to each other. General laws on violence amongst individuals, such as laws criminalising assault, battery and other forms of abuse, are insufficient in addressing domestic violence. These laws were initially created to address instances of violence among strangers. Additionally, existing laws that restrict the criminalisation of violence to instances of physical violence do not at all address other forms of domestic violence, such as harassment, threats, verbal abuse, financial abuse, manipulative tactics, and stalking, among other forms of harm.

Domestic violence was long overlooked as a serious human rights violation requiring intervention by the state as it was considered a private matter between the intimate partners involved. Additionally, the fact that most instances of sexual violence take place in the private sphere means that this serious human rights violation is further rendered invisible. Lastly, the unwillingness of the state to be seen to interfere in the private affairs of individuals in an intimate relationship meant that law enforcement authorities were unwilling to investigate and prosecute instances of domestic violence even in cases where the survivors, mostly women, report to them.

However, it is now recognised that state responsibility under international law can arise not only from state action but also from state inaction, where a state fails to protect citizens against violence or abuse (the “due diligence” principle).⁵⁰ This approach provides for a way for the state to intervene in instances of domestic violence. Although the state does not actually commit the abuse, its failure to prosecute the abuse and to guarantee legal protection to women survivors of domestic violence amounts to complicity in this abuse.

Guiding Questions

Note to Facilitator: In a plenary session, ask the training participants the following Guiding Questions and record a summary of their answers in a flip chart for discussions.

1. What constitutes “domestic violence”?
2. What are some of the forms of domestic violence that you are aware of?
3. What is the legal status of domestic violence in your country? Is it a distinct crime in your country?

4. If your country has a law specifically criminalising domestic violence, what kind of relationships are covered by this law?
5. If domestic violence is not specifically criminalised in your country? How is the crime prosecuted?
6. What, in your view, are some of the advantages of a law specifically criminalising domestic violence?
7. In addition to criminal sanctions, are there civil law remedies for survivors of domestic violence?

Domestic violence is violence committed by someone in the victim's domestic circle. This includes husbands, partners living in cohabitation and ex-partners, immediate family members, other relatives and family friends, and household employees. The term *domestic violence* is used when there is a close relationship between the offender and the victim.

When domestic violence is addressed under the general laws on assault, it ignores the specific challenges faced by survivors of violence perpetrated by someone living in the same physical space with them, violence by people with emotional ties with the victim, violence against someone who is economically dependent on the abuser; violence against wives in cultures where tradition views that wife abuse is a matter confined to the private sphere etc.

Intimate Partner Abuse as a Special Category of Domestic Violence

In this section focus will be on the abused woman who kills her abuser. A woman who suffers prolonged abuse from her husband but cannot leave the relationship because of the psychological effect of the abuse or even because of socio-economic and cultural constraints may kill her husband.

Using court cases, the section will involve:

Analysis of the judicial response to a victim who turns into an offender by killing her abuser.

Analysis of the defences of self-defence and provocation and how they may apply when a victim kills her abuser.

Should battered woman syndrome be recognised as a defence?

⁵⁰ Barnidge, R. (2006). The Due Diligence Principle Under International Law. *International Community Law Review*, 8(1), 81–121. <https://doi.org/10.1163/187197306779173194>

Exercise: Analysing Self-Defence and Provocation in Cases where a Victim Kills Her Abuser

Note to Facilitator: In a plenary session, invite participants to identify the elements of self-defence on the one hand and provocation on the other. These should be written on a flip chart. For each defence, the participants should discuss and note down their answers to the Guiding Sections below.

Guiding Questions

1. What are the elements of the defence of self-defence?
2. What are the elements of the defence of provocation?
3. In instances where a female victim kills her abuser, how would these defences be applied?

Exercise: Case Analysis

Note for Facilitator: Split the participants into 4 groups and assign each group one of the cases below.

- **Uganda v Kazigati**⁵¹ (Uganda)
- **Rex v Lukhele**⁵² (Eswatini)
- **State v Wanrow**⁵³ (United States)
- **State v Little**⁵⁴ (United States)

These cases deal with a plea self-defence where the accused kills a man who threatens her with rape

but is also useful for discussions on self-defence in cases of domestic violence. Each group is required to discuss the facts of the case, the law applied in this case, the outcome of the case. Additionally, during their discussions, the training participants should address and note down their responses to the Guiding Questions below.

Guiding Questions

- How do judicial officers go about determining what kind of abuse or injury is serious enough to warrant killing the attacker?
- How do judicial officers address the question of reasonable force when analysing the defence of self-defence and provocation in the above cases?

Marital Rape

Simply put, marital rape occurs when a husband engages in a sexual act with the wife without her consent. The Maputo Protocol does not explicitly refer to a state's obligation to legislate against marital rape. However, Article 4 (2) (a) obliges the state to enact and enforce laws to prohibit all forms of violence against women, including unwanted or forced sex, *whether the violence takes place in private or public*. It can be inferred that Article 4 (2) (a) obliges States to prohibit marital rape. Article 2 of the Declaration on the Elimination of Violence against Women (DEVAW) confirms the shift in the legal definition of rape across the globe to include marital rape thus:

Article 2 of the Declaration on the Elimination of Violence against Women (DEVAW)

Violence against women shall be understood to encompass, but not be limited to, the following:

1. Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;
2. Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;
3. Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.

51 Unreported but found in Lillian Tibatemwa-Ekirikubinza (1999) *Women's Violent Crime in Uganda: More sinned against than sinning* page 168.

52 Crim. T. 121/93, High Court of Swaziland, held at Mbabane. Judgement delivered on 10 May, 1994. Cited in Lillian Tibatemwa-Ekirikubinza (1999) *Women's Violent Crime in Uganda*

53 Supreme Court of Washington. (1977, January 7). *State v. Wanrow* 88 Wn.2d 221 (1977) 559 P.2d 548.

54 Court of Appeals of North Carolina. (1975, December 17). *State v. Little* Annotate this Case 219 S.E.2d 494 (1975) 27 N.C. App. 467. Justia.

Guiding Questions

Note to Facilitator: Pose the following questions to the participants.

1. Is marital rape recognised as an offence in your country? If your answer is yes, is there a specific law that criminalises rape within marriage?
2. What has the judicial response to marital rape been in your country?
3. Is the exemption of husbands from prosecution for marital rape a creation of statute or judge-made law?

The marital rape exemption is attributed to Sir Matthew Hale who in the 17th Century stated that “the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself in kind unto her husband which she cannot retract.”⁵⁵ This rule became part of the law in many common law jurisdictions. Although it was not stated as a rule by statute, penal provisions which criminalised “unlawful” carnal knowledge or sexual

intercourse with a woman without her consent were interpreted to exempt husbands. Unlawful was interpreted to mean outside marriage.⁵⁸

Stereotypes and misunderstandings are common in discussions of marital rape. Such beliefs are embedded in notions such as the idea that a woman's sexuality is a commodity owned by her father or husband, the belief that sexual conduct between husband and wife is a private matter and that a man is **entitled** to sexual relations with his wife.⁵⁶

Guiding Question

1. What justifications are provided for exempting husbands from prosecution for raping their wives?

Note to Facilitator: Write down the responses you receive from the participants. Depending on the responses you receive, please note the following arguments in favour of exempting men from prosecution for marital rape. Participants should also be asked to identify the counter-arguments to these justifications, also provided below.

Argument	Counter-Argument
The need to limit the role of the state in interfering with the marital relationship, especially the need to protect the privacy of marital relationships.	The privacy of marital relationships is meant to provide privacy of acts that both husband and wife find agreeable. It is not to shield any party from accountability for their abuse.
The need to protect husbands from “vindictive” wives who may allege rape falsely to place their husbands under criminal or other forms of jeopardy.	Labelling the conduct of women survivors of sexual violence as being “vindictive” regardless of the circumstances in which they are sexually abused is a harmful and negative stereotype that is not borne by evidence and thus cannot be used as a justification for the serious offence of rape.
The difficulty of proving marital rape or distinguish it from other instances of consensual sexual relations between the married parties.	The difficulty encountered in proving a crime is no justification for its decriminalisation.
To preserve the viability of the marriage and promote reconciliation.	Criminalising marital rape does not make marriages unviable; it is rather marital rape which makes marriage unviable.

⁵⁵ Hale, M. (1800), *Historia Placitorum Coronæ: The History of the Pleas of the Crown*, by Sir Matthew Hale. Pub. from the Original Manuscripts by Sollom Emlyn. With Additional Notes and References to Modern Cases Concerning the Pleas of the Crown. By George Wilson. A New Ed. And an Abridgment of the Statutes Relating to Felonies Continued to the Present Time, with Notes and References, by Thomas Dogherty, vol. 1, London: Printed by E. Rider, for T. Payne, H. L. Gardner, W. Otridge, E. and R. Brooke and J. Rider [and seven others in London], Retrieved 21 June 2022, from <https://babel.hathitrust.org/cgi/pt?id=uc2 ark:/h3960/t19k4f990&view=1up&se-q=7&skin=2021>

⁵⁸ Tibatemwa-Ekirikubinza, L. (2005). *Criminal Law in Uganda. Sexual Assaults and Offences Against Morality*. Fountain Publishers.

⁵⁶ Mahoney, P., & Williams, L. M. (2007). *Sexual Assault in Marriage: Prevalence, Consequences, and Treatment of Wife Rape*. http://www.ncdsv.org/images/nfr_partnerviolence_azo-yearliteraturereviewandsynthesis.pdf

Session 3: Elimination of Harmful Practices

Session Objectives

- To interrogate legislative measures towards effective protection of women and girls from gender specific harmful practices.
- To explore the judiciary's role in ending harmful practices against women and girls.

Article 5 of the Maputo Protocol provides that:

Article 5 of the Maputo Protocol

Elimination of Harmful Practices

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

- a) creation of public awareness in all sectors of society regarding harmful practices through information, formal and informal education and outreach programmes;
- b) prohibition, through legislative measures backed by sanctions, of all forms of female genital mutilation, scarification, medicalisation and para-medicalisation of female genital mutilation and all other practices in order to eradicate them;
- c) provision of necessary support to victims of harmful practices through basic services such as health services, legal and judicial support, emotional and psychological counselling as well as vocational training to make them self-supporting;
- d) protection of women who are at risk of being subjected to harmful practices or all other forms of violence, abuse and intolerance.

Article 5 will be discussed alongside **Article 2 (1) (b) of the Maputo Protocol** which states that:

Article 2 of the Maputo Protocol

Elimination of Discrimination Against Women

1. States Parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures. In this regard they shall:

- b) enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination particularly those harmful practices which endanger the health and general well-being of women.

Guiding Questions

Note for Facilitator: Ask the following questions in a plenary session. Write down the responses you receive from the participants. Training participants should identify harmful practices against women and girls in their society.

1. Why are the practices you have noted considered harmful?
2. What steps has your country taken to address these harmful practices?

3. Has your country taken any steps to criminalise these harmful practices?
4. In addition to or in the absence of criminalisation of these harmful practices, what other steps has your country taken to address these harmful practices?

Female Genital Mutilation (FGM)

Article 5 (b) of the Maputo Protocol is the only treaty provision in the world that explicitly obligates States to take measures to prohibit FGM.

Article 5 of the Maputo Protocol

Elimination of Harmful Practices

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

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

The international community has overtly condemned the continuation of female genital mutilation as a practice and has deemed it a serious human rights violation. In the context of abolishing FGM, Article 5 explicitly prefers international human rights norms over local customs and culture. The World Health Organization characterises the practice as alteration or “injury to female genital organs” for purposes unrelated to medical necessity.⁵⁷

In an attempt to curb the perpetuation of FGM, numerous global entities have embarked on a campaign to educate people on the dangers associated with the practice and to lead to a

worldwide abandonment of female genital mutilation. For example, February 6 has become known as “International Day of Zero Tolerance to FGM,” whereby people, entities, and communities worldwide advance awareness about the practice and seek means to bring it to an end.⁵⁸

The United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Convention Against Torture) illustrates an international commitment to safeguarding women and children exposed to female genital mutilation.

⁵⁷ World Health Organization. (2022, January 21). *Female Genital Mutilation: Key Facts*. Retrieved 21 June 2022, from <https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation>

⁵⁸ UN General Assembly. (2012, December 20). *UN General Assembly Resolution A/RES/67/146: Intensifying global efforts for the elimination of female genital mutilations*. United Nations. Retrieved 21 June 2022, from <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N12/487/36/PDF/N1248736.pdf?OpenElement>

Article 1 of the Convention Against Torture

1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

Likewise, CEDAW serves as another example of an international pledge to protect women and girls from genital mutilation.

Article 1 - Convention on the Elimination of All Forms of Discrimination against Women

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.

Female genital mutilation undeniably thrives on its distinction of exclusively subjecting females to the practice and is a contentious issue in African society. The tension between culture and human rights norms is evident in this controversy. Some defend FGM as entrenched in custom and culture. At the same time, opponents point to its gender-based nature and its negative effects on the enjoyment of other rights, health and well-being.

The Maputo Protocol states a clear obligation on the part of States to abolish the practice. Article 5 obligates States to 'prohibit and condemn all harmful practices which negatively affect women's rights and are contrary to recognised international standards'.

States must also implement a multi-pronged approach to eliminate FGM, including, inter alia, legislative prohibition and efforts to increase public awareness. Thus the Protocol adopts the view that a change in custom will require both a legalistic and non-legalistic approach.

Regarding the legalistic approach, the Maputo Protocol requires States to adopt measures, including 'prohibition, through legislative measures backed by sanctions, of all forms of female genital mutilation,

scarification, medicalisation and para-medicalization of female genital mutilation and all other practices to eradicate them'. A non-legalistic approach urges States to implement the 'creation of public awareness in all sectors of society regarding harmful practices through information, formal and informal education and outreach programmes'.

In this way, the Maputo Protocol recognises that the law is ineffective if citizens are unaware or uninformed about what the law says. Moreover, there is evidence that informal, community-based initiatives may be more culturally sensitive and effective than the mere legal prohibition of the practice.

Children and FGM

Furthermore, African countries have also committed to protecting children from FGM. The African Charter on the Rights and Welfare of the Child (ACRWC) acknowledges the unique components of an African child's traditional, cultural, and socio-economic circumstances that make safeguards even more imperative. The ACRWC, however, proceeds to curb any misconception about African nations' stance on culture and tradition versus the human rights obligations under Article 1.

Article 1 of the African Charter on the Rights and Welfare of the Child

Obligations of States Parties

1. The Member States of the Organization of African Unity Parties to the present Charter shall recognize the rights, freedoms and duties enshrined in this Charter and shall undertake to take the necessary steps, in accordance with their Constitutional processes and with the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter.
2. Nothing in this Charter shall affect any provisions that are more conducive to the realization of the rights and welfare of the child contained in the law of a State Party or in any other international convention or agreement in force in that State.
3. Any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall to the extent of such inconsistency be discouraged.

Article 21 of the ACRWC specifically protects children against harmful social-cultural practices.

Article 21 of the African Charter on the Rights and Welfare of the Child

Protection Against Harmful Social and Cultural Practices

1. States 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 eighteen years and make registration of all marriages in an official registry compulsory.

An understanding of the consequences of FGM leaves no doubt that even when the practice is performed on children, it has consequences for their adult lives and negatively impacts them as children. Attempts to eradicate the abuse should, therefore, also be contextualised within the fight against the violation of girls' rights. Acknowledging that the practice is more often than not performed on children also negates the justification that women voluntarily present themselves for the "surgery", and its prohibition interferes with the women's right to practise their culture.

Guiding Questions

Note to Facilitator: Invite participants to answer the following questions during a plenary session. Please note the salient points of the responses on a flip chart, whiteboard or PowerPoint presentation so participants can view the answers in real-time.

1. What is FGM?
2. What are the types of FGM you are aware of?
3. What is FGM referred to in your country? Is it 'female circumcision' or 'female genital cutting' or female genital mutilation?
4. What are some of the effects of FGM that you have seen in your country?

5. Is FGM covered by law in your country? If the answer is yes, what does the law in question state?
6. Does your country have an age of consent at which point a person can choose to undergo the practice?
7. Does your law specify any other conditions under which FGM can take place?

Types of FGM

Note to Facilitator: Follow the enumeration by participants with a short lecture based on the information from the WHO.⁵⁹ Please refer to the image below to discuss the four types of FGM.

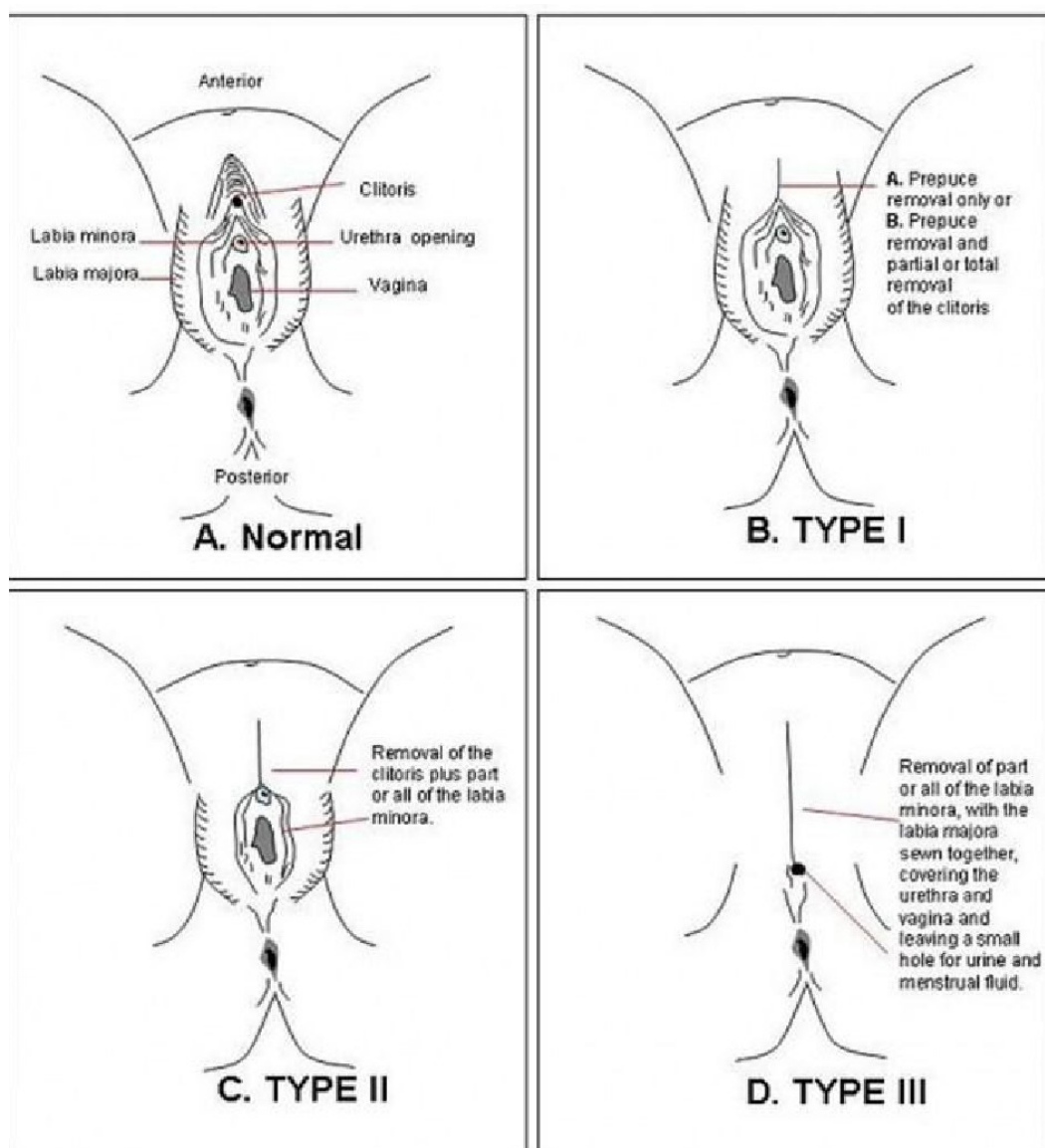
The World Health Organization classifies FGM into four main types:

Type I: Clitoridectomy - The partial or total removal of the clitoris and/or the prepuce.

Type II: Excision - The partial or total removal of the clitoris and the labia minora, with or without excision of the labia majora.

Type III: Infibulation - The narrowing of the vaginal orifice with the creation of a covering seal by cutting and positioning the labia minora and/or the labia majora, with or without excision of the clitoris.

Type IV or "Normal": All other harmful procedures to the female genitalia for non-medical purposes, for example: pricking, piercing, incising, scraping and cauterisation.



⁵⁹ World Health Organization. (2022, January 21). *Female Genital Mutilation: Key Facts*.

The Terminology of FGM

Note to Facilitator: Ask the participants in plenary again: What is FGM referred to in your country? Is it referred to as ‘female circumcision’ or ‘female genital cutting’, or female genital mutilation?

When the practice first came to international attention, it was generally referred to as “female circumcision” However, the term “female circumcision” has been criticised for drawing parallels with male circumcision and creating confusion between the two distinct practices. It is also sometimes argued that the term obscures the serious physical and psychological effects of genital cutting on women. The term “female genital mutilation” is widely used and establishes a clear distinction from male circumcision. The use of the word “mutilation” also emphasises the gravity of the act and reinforces that the practice violates women’s and girls’ fundamental human rights.

Guiding Question

Note to Facilitator: Ask the following question in a plenary discussion and write down the responses you receive so the whole training cohort can see them.

1. What are the human rights implications in the practice of FGM?

Medicalisation of FGM

The World Health Organization defines medicalisation as a “situation in which FGM is practised by any category of health-care provider, whether in a public or private clinic, at home, or elsewhere.”⁶⁰ Medicalisation is an emerging phenomenon that poses significant risks to girls and women worldwide.

The theory behind the medicalisation is that girls and women experience far fewer health-related problems arising out of the act of FGM when a trained healthcare professional performs the procedure. However, this does not change the fact that the procedure provides no medical benefit whatsoever and may pose health complications later in life to the women and girls who undergo this practice, regardless of whether the practice occurs within a medicalised setting. Even within the medical setting, women and young girls still face the risk of various genealogical complications, including lingering pain, scarring, complications passing urine, and dysmenorrhea.⁶¹

Despite the international consensus that female genital mutilation violates human rights, a focus on medicalisation remains important because certain countries still allow the practice when it is performed by healthcare professionals. This phenomenon may impede progress toward the abandonment of FGM because it gives legitimacy to the practice.

Guiding Questions

Note to Facilitator: Ask the following question in a plenary discussion. Write down the responses you receive so the whole training cohort can see them.

1. What are some of the health effects of FGM in the short, medium and long term for the survivor?
2. In your own words, what is the definition of the medicalisation of FGM?
3. From your perspective, what is the rationale for the medicalisation of FGM?
4. Does the medicalisation of FGM address all the human rights concerns around FGM? What are some human rights issues left unaddressed by the medicalisation of FGM?
5. What would be the advantages and the disadvantages of a ban prohibiting *any* medical professional from conducting the operation in public or private practice?

Justifications for FGM

Guiding Questions

Note to Facilitator: Ask the following questions in a plenary discussion. Write down the responses you receive on a flipchart so the whole training cohort can see them.

1. What are some of the religious and cultural justifications in support of FGM that you have heard of?
2. Is there any link between the justifications for FGM and gender stereotypes?
3. Is there a case for alternative practices to FGM? What would be the benefits of these alternative practices?

Many communities that practice FGM have attached cultural, traditional and religious significance to the practice. For instance, though many more examples

60 World Health Organization. (2022, January 21). *Female Genital Mutilation: Key Facts*.

61 World Health Organization. (2022, January 21). *Female Genital Mutilation: Key Facts*.

abound, FGM may be used in initiation rituals marking the transition of a woman or girl from one group or category to another in their community. FGM is also tied to other key events of a woman's life, such as readiness for marriage and parenthood in the eyes of the community. Either distinctly or in relation to the cultural significance of the practice, FGM may also be practised to control female sexual behaviour and preserve women's virginity by attempting to "reduce" their sexual desire and willingness to engage in sexual acts.⁶² Since males are not subjected to similar constraints, FGM is discriminatory against women.

Judicial Response to FGM

Exercise

Note to Facilitator: Split the training participants into groups and assign them a court decision that declares FGM a violation of human rights, even in the absence of specific legislation prohibiting the practice. Have them discuss the facts of the case, the issues in the case, and the reasoning and decision of the court, noting the salient points of the discussion for presentation during the plenary later. Training participants should also be prompted to consider the Guiding Questions below during their group discussion.

Law & Advocacy for Women in Uganda v Attorney General⁶³

Guiding Questions

1. Is the right to practise culture absolute?
2. Does modifying certain cultures to accommodate human rights protections render culture obsolete?
3. Does a person have the right to inflict harm on themselves or permit another to inflict harm on them?
4. What are some of the harmful effects of FGM discussed in the case above?

Session 4: Sexual Harassment

Session Objectives

- To interrogate the legal definition and elements of sexual harassment.
- To interrogate the obligation among States to protect women from sexual harassment.
- To discuss the judiciary's role in promoting and protecting that from sexual harassment and ensuring accountability for sexual harassment.

Under Article 12 of the Protocol, which deals with the right to education and training, States are obliged to take all appropriate measures to eliminate all forms of discrimination against women and guarantee equal opportunity and access in the sphere of education and training.

62 Obiora, O. L., Maree, J. E., & Nkosi-Mafutha, N. (2020). Female genital mutilation in Africa: Scoping the landscape of evidence. *International Journal of Africa Nursing Sciences*, 12. <https://doi.org/10.1016/j.ijans.2019.100189>

63 Constitutional Court of Uganda. (2007, April 5). *Law Advocacy for Women in Uganda v Attorney General (Constitutional Petition 13 of 2005) [2007] UGSC 71 (05 April 2007)*.

Article 12 of the Maputo Protocol

Right to Education and Training

1. States Parties shall take all appropriate measures to:

- a) eliminate all forms of discrimination against women and guarantee equal opportunity and access in the sphere of education and training;
- b) eliminate all stereotypes in textbooks, syllabuses and the media, that perpetuate such discrimination;
- c) protect women, especially the girl-child from all forms of abuse, including sexual harassment in schools and other educational institutions and provide for sanctions against the perpetrators of such practices;
- d) provide access to counselling and rehabilitation services to women who suffer abuses and sexual harassment;
- e) integrate gender sensitisation and human rights education at all levels of education curricula including teacher training.

2. States Parties shall take specific positive action to:

- a) promote literacy among women;
- b) promote education and training for women at all levels and in all disciplines, particularly in the fields of science and technology;
- c) promote the enrolment and retention of girls in schools and other training institutions and the organisation of programmes for women who leave school prematurely.

Article 12 of the Maputo Protocol is related to Article 13 of the treaty which states that:

Article 13 of the Maputo Protocol

Economic and Social Welfare Rights

States Parties shall adopt and enforce legislative and other measures to guarantee women equal opportunities in work and career advancement and other economic opportunities. In this respect, they shall:

- a) promote equality of access to employment;
- b) promote the right to equal remuneration for jobs of equal value for women and men;
- c) ensure transparency in recruitment, promotion and dismissal of women and combat and punish sexual harassment in the workplace;
- d) guarantee women the freedom to choose their occupation, and protect them from exploitation by their employers violating and exploiting their fundamental rights as recognised and guaranteed by conventions, laws and regulations in force;
- e) create conditions to promote and support the occupations and economic activities of women, in particular, within the informal sector;
- f) establish a system of protection and social insurance for women working in the informal sector and sensitise them to adhere to it;
- g) introduce a minimum age for work and prohibit the employment of children below that age, and prohibit, combat and punish all forms of exploitation of children, especially the girl-child;
- h) take the necessary measures to recognise the economic value of the work of women in the home;
- i) guarantee adequate and paid pre- and post-natal maternity leave in both the private and public sectors;
- j) ensure the equal application of taxation laws to women and men;
- k) recognise and enforce the right of salaried women to the same allowances and entitlements as those granted to salaried men for their spouses and children;
- l) recognise that both parents bear the primary responsibility for the upbringing and development of children and that this is a social function for which the State and the private sector have secondary responsibility;
- m) take effective legislative and administrative measures to prevent the exploitation and abuse of women in advertising and pornography.

Guiding Questions

Note to Facilitator: Ask the following question in a plenary discussion. Write down the responses you receive so the whole training cohort can see them.

1. In your own words, what is sexual harassment?
2. How different is it from rape and other sexual abuse?

Sexual harassment is defined as behaviour characterised by the making of unwelcome and inappropriate sexual remarks or physical advances in a workplace or other professional or social situations. The term sexual harassment has both social and legal meanings and is constantly being redefined through legislation, court decisions, and even public discourse.

The definition of sexual harassment by the United States Equal Employment Opportunity Commission (EEOC) adapts the general definition of the term to show how sexual harassment manifests in the workplace. According to the EEOC, sexual harassment is “unwelcome sexual advances, requests for sexual favours, and other verbal or physical harassment of a sexual nature.”⁶⁴ According to the EEOC's definition, a perpetrator of sexual harassment can be the victim's supervisor (or a supervisor in another area), a coworker, or “someone who is not an employee of the employer, such as a client or customer.”⁶⁵ Additionally, for sexual harassment to be illegal, it has to be “so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision”, such as the demotion or firing of a victim of sexual harassment.⁶⁶

The Indian Supreme Court further contextualised sexual harassment in terms of its elements as well as its effects on persons who are subjected to it:

“Sexual harassment includes such unwelcome sexually determined behaviour as physical contact and advances, sexually tinged remarks, showing pornography and sexual demands, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable ground to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment.”

Vishaka & Ors v State of Rajasthan & Ors.⁶⁷

Human Rights Implications of Sexual Harassment

Note to Facilitator: Split the training participants into groups. If participants are from different countries, try to assign each group a different country. Ask them to discuss the following Guiding Questions, specifying that they should write down the salient points of their discussion on a flip chart, whiteboard or PowerPoint presentation so they can present to the whole training cohort during the plenary session.

Guiding Questions

1. What are the human rights implications of sexual harassment?
2. Does your country have laws on sexual harassment? If yes, summarise what the laws say?
3. Has the judiciary in your country pronounced itself on the question of sexual harassment? If yes, summarise what the judicial philosophy on sexual harassment in your country is.
4. How did your country's legislation and/or case law on sexual harassment develop? In summary, what legal gaps did these laws seek to address?
5. Are there gaps in your country's approach to sexual harassment? If yes, please outline some of these gaps.

International Standards and Best Practices on Combatting Sexual Harassment

The United Nations and regional treaty systems have recognised sexual harassment as a form of discrimination and violence against women, primarily through soft law developments such as resolutions, declarations and international standards and best practices. Although non-binding, international soft law offers courts important pointers on how to give effect to the treaty law provisions obligating States to implement measures to eliminate violence against women, including sexual harassment.

The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) directs

64 U.S. Equal Employment Opportunity Commission. (n.d.). *Sexual Harassment*. Retrieved July 20, 2022, from <https://www.eeoc.gov/sexual-harassment>

65 U.S. Equal Employment Opportunity Commission. (n.d.). *Sexual Harassment*.

66 U.S. Equal Employment Opportunity Commission. (n.d.). *Sexual Harassment*.

67 Supreme Court of India. (1997, August 13). *Vishaka & Ors vs State Of Rajasthan & Ors on 13 August, 1997*. Indian Kanoon. Retrieved 21 June 2022, from <https://indiankanoon.org/doc/1031794/>

States to take appropriate measures to eliminate discrimination against women in all fields, specifically including equality under the law, in governance and politics, the workplace, education, healthcare, and in other areas of public and social life.

The United Nations General Assembly Declaration on the Elimination of Violence Against Women defines violence against women to include sexual harassment, which is prohibited at work and in educational institutions. The Declaration also encourages the development of penal, civil or other administrative sanctions and preventative approaches to eliminate violence against women.⁶⁸

Paragraph 178 of the Beijing Platform for Action recognises sexual harassment as a form of violence against women and as a form of discrimination and calls on multiple actors, including government, employers, unions, and civil society, to ensure that governments enact and enforce laws on sexual harassment and that employers develop anti-harassment policies and prevention strategies.⁶⁹

The ILO Committee of Experts on the Application of Conventions and Recommendations has confirmed that sexual harassment is a form of sex discrimination covered by the Discrimination (Employment and Occupation) Convention (No. 111) of 1958.⁷⁰

Exercise: Analysis of Case Law on Sexual Harassment

Note to Facilitator: Split the training participants into groups and assign them a precedent-setting case on sexual harassment. Have them discuss the facts, the issues for determination, and the reasoning and decision of the court, noting the salient points of the discussion for presentation during the plenary.

- **P O v Board of Trustees, A F & 2 others** [2014] eKLR⁷¹ (Kenya)
- **Vishaka & Ors v State of Rajasthan & Ors** (India)⁷²

Discussion: The Vishaka Rules

In the *Vishaka* case, the court delivered a landmark judgment laying down guidelines for dealing with sexual harassment complaints until the enactment of legislation to deal with the issue. India finally enacted its law on preventing sexual harassment against female employees at the workplace, based on the so-called Vishaka Rules.

In coming to its decision, the court noted the importance of international human rights instruments in its consideration of sexual harassment as a violation of the state's constitutionally-enshrined commitment to gender equality and the right to work with human dignity. The court also noted the lack of adequate legislation and the existence of legal loopholes which allowed such heinous crimes to thrive.

The Vishaka Rules are as follows:

1. Employers should take preventive measures like an express preclusion of harassment and provide healthy work conditions.
2. If there is an event of the infringement of administration rules in the workplace, suitable disciplinary action should be taken.
3. If the offences submitted fall under the domain of the Indian Penal Code, 1860, the employer must report them to the authorities.
4. An organisation should have a redressal committee to address harassment. Such a committee must have women as more than half its members, and its head must also be a woman. A report must also be sent to the government annually on the development of the committee.
5. The business should take proper measures to spread awareness of sexual harassment in the workplace.

68 UN General Assembly. (1994). United Nations: General Assembly Resolution 48/104 Containing the Declaration on the Elimination of Violence Against Women. In *Office of the High Commissioner for Human Rights*. Office of the High Commissioner for Human Rights. Retrieved July 14, 2022, from <https://www.ohchr.org/sites/default/files/Documents/ProfessionalInterest/eliminationvaw.pdf>

69 Fourth World Conference on Women. (1995, September). *Beijing Declaration and Platform for Action*. United Nations. Retrieved 14 July 2022, from <https://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20E.pdf>

70 ILO Committee of Experts on the Application of Conventions and Recommendations (ILO Committee of Experts). (2003). *General Observation (CEACR) - adopted 2002, published 91st ILC session (2003)*. International Labour Organisation. Retrieved July 14, 2022, from https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID,P1110_COUNTRY_ID,P1110_COUNTRY_NAME,P1110_COMMENT_YEAR:3066659,,,2002

71 High Court of Kenya. (2014a, February 28). *P O v Board of Trustees, A F & 2 others* [2014] eKLR. National Council for Law Reporting (Kenya Law). Retrieved 21 June 2022, from <http://kenyalaw.org/caselaw/cases/view/95084/>

72 Vishaka & Ors vs State Of Rajasthan & Ors, <https://indiankanoon.org/doc/1031794/>

Module 3: Marriage Rights

Overview

The overarching principle in Articles 6 and 7 of the Maputo Protocol is that: “States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners at marriage, during marriage and at its dissolution.”

This Module will discuss the legal definition of marriage and the different types of marriage recognised in different countries. Many African countries are pluralistic, with different types of marriages (civil, Christian, Muslim, African traditional, Hindu etc.). The Module will also discuss the rights of women in marriage.

Customary marriages and the requirement of bride price as a precondition to marriage will be given special attention and interrogated from a women's rights point of view. The Module will also highlight the legal challenges of cohabitation which is a common form of partnership in many African societies.

The Module will also deal with separation, divorce and annulment of marriage and the related issue of equitable and legal distribution of property between the parties. The Module will also discuss the effects of the termination of marriage on the parties' responsibility and rights (custody) towards the children from the union.

Session 1: Types of Marriage

Session Objectives

- To interrogate the different types of marriage in African societies and their interaction with international women's rights instruments.
- To discuss the elements of a lawful marriage under the Maputo Protocol and other international women's rights instruments.
- To interrogate the obligation of States to promote and protect women's marriage rights.

Guiding Questions

Note to Facilitator: Ask the following question in a plenary discussion. Write down the responses you receive so the whole training cohort can see them.

- What are the different types of marriage in your country?
- For each type of marriage you have mentioned, what are the requirements for the marriage to be lawful?
- What are the rights and responsibilities of the parties in the marriage?
- What is the divorce process for each type of marriage mentioned? What rights do the parties to the marriage have during this process?

Requirements of a Lawful Marriage under the Maputo Protocol

Article 6 of the Maputo Protocol

Marriage

States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that:

- a) no marriage shall take place without the free and full consent of both parties;
- b) the minimum age of marriage for women shall be 18 years;
- c) monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including in polygamous marital relationships are promoted and protected;
- d) every marriage shall be recorded in writing and registered in accordance with national laws, in order to be legally recognised;
- e) the husband and wife shall, by mutual agreement, choose their matrimonial regime and place of residence;
- f) a married woman shall have the right to retain her maiden name, to use it as she pleases, jointly or separately with her husband's surname;
- g) a woman shall have the right to retain her nationality or to acquire the nationality of her husband;
- h) a woman and a man shall have equal rights, with respect to the nationality of their children except where this is contrary to a provision in national legislation or is contrary to national security interests;
- i) a woman and a man shall jointly contribute to safeguarding the interests of the family, protecting and educating their children;
- j) during her marriage, a woman shall have the right to acquire her own property and to administer and manage it freely.

Guiding Question

Note to Facilitator: Ask the following question in a plenary discussion. Write down the responses you receive so the whole training cohort can see them.

- According to Article 6 of the Maputo Protocol what are the elements of a lawful marriage?

Article 6 of the Maputo Protocol provides an exhaustive set of conditions on what counts as a lawful marriage under the Protocol. As a starting point, the Maputo Protocol lays out that marriage should be a voluntary union between the adult parties. All the rights outlined under Article 6 are interconnected to each other and to other rights enshrined in the Maputo Protocol as well as on issues to do with widow inheritance, child marriages and the practice of “marriage” by kidnap and rape.

Note to Facilitator: Split the training participants into groups and have them discuss one or two of the clauses of Article 6 from clause (d) to clause (j).

For each of the above clauses, have participants discuss the provisions based on the Guiding Questions below, noting the salient points of the discussion for presentation during the plenary later.

Guiding Questions

- What gaps do the clauses under Article 6 of the Maputo Protocol seek to address?
- Are these gaps apparent in your country? If yes, please discuss how they manifest.
- Are there laws in your country that address the gaps discussed in the previous question? If yes, summarise these laws.
- Has the judiciary in your country pronounced itself on the issues contained in the clause(s) that was assigned to you? If yes, please provide a brief summary of the case.

Minimum Age of Marriage

Article 6 (b) of the Maputo Protocol provides that:

Article 6 of the Maputo Protocol

Marriage

States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that:

b) the minimum age of marriage for women shall be 18 years.

Inherent in this provision is the presumption that there will be no equality between partners in a marriage where one of them is below 18 years of age, a child. In many areas of the law, there is a presumption that a person defined as a child cannot give consent to a marriage. Article 6 (b) is specifically directed at the practice of child marriages in Africa.

Although the Maputo Protocol addresses the rights of adult women in Africa, it is impossible to ignore the interrelatedness of girls' and women's rights. As discussed in the previous Module during the session on FGM, child marriage has long-lasting negative impacts on girls' rights into adulthood. In rooting out the practice of child marriage, there is a need to address it at the root.

Note to Facilitator: Split the training participants into groups and ask them to discuss the following Guiding Questions. Ask the training participants to write down the salient points of the discussion for presentation during the plenary later.

Guiding Questions

- What is the minimum age of marriage in your country?
 - Does the minimum age apply across the different types of marriages?
 - What are the legal effects of marriage where one or both parties are under the age of marriage as stipulated in legislation or case law?
 - Where one or both parties are under the age of marriage, is the marriage declared null and void from the beginning (*void ab initio*)? If the answer is no, how does the law of your country address this issue?
- What is the legal effect of a marriage being declared null and void in your country? Do men and women experience different outcomes in such a scenario?

The Joint General Comment of the African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on ending child marriage has the potential to guide judicial officers regarding appropriate and effective remedies when faced with a case of child marriages.⁷³ Below are the salient points from the above General Comment:

1. Children under the age of 18 are not capable of giving full and free consent to marriage and there is no exception to this prohibition.
2. The inability of a child to consent to marriage cannot be supplemented or cured through parental consent on behalf of a child.
3. Child marriage is a manifestation of gender inequality and constitutes discrimination based on sex and gender. This manifestation is reflected by the overwhelmingly disproportionate risk and impact it has on girls and women and its correspondingly adverse effects of this practice on the enjoyment of their human rights and fundamental freedoms.
4. Child marriage reinforces harmful social constructions of gender, supports patriarchy and entrenches patterns of discrimination.
5. The commitment to non-discrimination against women and girls requires States to recognise child marriage as a form of sex and gender-based discrimination and take appropriate measures towards its elimination.

⁷³ African Commission on Human and Peoples' Rights (ACHPR) & African Committee of Experts on the Rights and Welfare of the Child (ACERWC). (2017). *Joint General Comment of the African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on Ending Child Marriage*. ACHPR-ACERWC. Retrieved 20 July 2022 from <https://achpr.au.int/en/special-mechanisms-reports/joint-general-comment-african-commission-human-and-peoples-rights-ac>

6. Legislative measures should also ensure that marriage through abduction, kidnapping and rape is prohibited.
7. Legislative measures that prohibit child marriage must take precedence over customary, religious, traditional or sub-national laws and States with plural legal systems must ensure that prohibition is not rendered ineffectual by the existence of customary, religious or traditional laws that allow, condone or support child marriage.
8. To enforce the prohibition against child marriage, penalties and sanctions should be imposed. However, penalties and sanctions should not be imposed on children involved in child marriage and where penalties or sanctions are imposed, States must be careful to avoid any risk of retaliation against a child.
9. If a person employed in the public service of a state is involved or complicit in a child marriage (such as officials tasked with registering the marriage), their status as a civil servant should be regarded as an aggravating factor in the determination of a sanction or penalty.
10. In addition to criminal sanctions, administrative sanctions such as the loss of a marriage license may be imposed.
11. Noting that imposing penalties and sanctions on parents may drive child marriage underground, subjecting parents to sanctions or penalties is not recommended.
12. In addition to any person who is required by law to report child marriage or the suspicion of child marriage, including whistleblowers, teachers, health care providers, marriage officers and other employees in the public service, States should extend broad protection to any other person who, in good faith, reports suspicion or possibility of child marriage.

Registration of Marriages

Article 6 of the Maputo Protocol

Marriage

States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that:

d) every marriage shall be recorded in writing and registered in accordance with national laws, in order to be legally recognised.

Note to Facilitator: Split the training participants into groups and ask them to discuss the following Guiding Questions. Ask the training participants to write down the salient points of the discussion for presentation during the plenary later.

Guiding Questions

1. Which laws regulate the different forms of marriage and their consequences in your country?
2. Who qualifies to be a registrar of marriages in your country?
3. Is registration accompanied by payment of fees?
4. In your country, what contributes to the non-registration of marriages?

5. What are the legal effects of non-registration of marriage in your country?
6. Does failure to register a marriage lead to its invalidation? How have the courts pronounced themselves on this issue?
7. Would a woman's marriage rights be in jeopardy if her marriage was not registered?
8. How can an unregistered marriage be proved to have taken place?

Although registration of all marriages would be the ideal, CEDAW General Recommendation 29 cautions against using registration as the sole means of proving their existence since they may also be “substantiated by the production of a marriage contract, witness accounts of the rituals or other means, as appropriate in the circumstances.”⁷⁷

⁷⁷ Committee on the Elimination of Discrimination against Women. (2013, October). *General recommendation No. 29 on article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (Economic consequences of marriage, family relations and their dissolution)*. Office of the High Commissioner for Human Rights. Retrieved 23 June 2022, from https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/GC/29&Lang=en

Polygamy

Article 6 of the Maputo Protocol

Marriage

States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that:

c) monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including in polygamous marital relationships are promoted and protected.

Guiding Questions

Note to Facilitator: Ask the following question in a plenary discussion. Write down the responses you receive so the whole training cohort can see them.

- What are the characteristics of a polygamous marriage?
- Are polygamous marriages legal in your country? If yes, what requirements must these marriages fulfil?
- Is there a distinction between polygamy according to African customary law and polygamy according to Islamic principles?

Polygamy illustrates a contentious example of the conflict between culture and universal norms of gender equality. The Committee on the Elimination of Discrimination against Women considers polygamy a harmful traditional practice arguing that it contravenes a woman's right to equality with men and can have serious emotional and financial consequences for her and her dependents and that such marriages ought to be "discouraged and prohibited."⁷⁴

However, certain African traditions, customary law, and Islamic law – applied in many African countries – permit polygamy.⁷⁵ Such conflicts with domestic law may be one reason why some countries have yet to sign or ratify the Maputo Protocol.

Article 6 (c) of the Maputo Protocol obligates States to encourage monogamy on the one hand but also recognises the need to protect women's rights in polygamous marriages. The provision does not completely outlaw the practice but elevates monogamy as the "preferred" type of marriage. This compromise is evidence of the complicated interplay between realities in the African context and the promotion of broader human rights norms.

Guiding Questions

Note to Facilitator: Split the training participants into groups and ask them to discuss the following Guiding Questions. Ask the training participants to write down the salient points of the discussion for presentation during the plenary later.

1. How does polygamy affect the principle of equality between men and women in marriage?
2. How does polygamy entrench and propagate stereotypes about women and men?
3. What would be the likely consequences of a sweeping prohibition of polygamy? How would women and their dependents be affected by such a prohibition

Discussion: Judicial Response to Polygamy

As discussed in the previous section, courts have reasoned that women shall be accorded full and equal dignity of the person with men. Laws, customs, traditions and religious practices which undermine the status of women or deny them gender equality at marriage, during marriage and at its dissolution should be outlawed.

Exercise: Case Law Analysis

Note to Facilitator: Split the training participants into groups and assign them a precedent-setting case on polygamy, such as the suggestions below. Have them discuss the facts of the case, the issues in the case, and the reasoning and decision of the court, noting the salient points of the discussion for presentation during the plenary later.

- **Rono v Rono** (2005) AHRLR 107 (KeCA 2005)⁷⁶

⁷⁴ Committee on the Elimination of Discrimination Against Women. (1994). *General recommendation No. 21: Equality in marriage and family relations*. United Nations. [https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/A_49_38\(SUPP\)_4733_E.pdf](https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/A_49_38(SUPP)_4733_E.pdf)

⁷⁵ Kramer, S. (2020, December 8). *Polygamy is rare around the world and mostly confined to a few regions*. Pew Research Center. Retrieved 14 July 2022, from <https://pewrsr.ch/2VQAQHm>

⁷⁶ Court of Appeal of Kenya. (2005, April 29). *Rono v Rono* (2005) AHRLR 107 (KeCA 2005).

Session 2: Bride Price and Bridewealth

Session Objectives

- To interrogate the place of bride price and bridewealth in different social contexts in Africa and their interaction with international women's rights instruments.
- To interrogate the obligation of States to promote and protect women's rights in marriage by regulating bride price and bridewealth.
- To specifically interrogate the judiciary's role in ensuring the bride price and bridewealth conform to international women's rights standards and best practices.

Guiding Questions

Note to Facilitator: Split the training participants into groups and ask them to discuss the following Guiding Questions. Ask the training participants to write down the salient points of the discussion for presentation during the plenary later.

- What do you understand by the term “bride price?”
- What do you understand by the term “bridewealth?”
- Are there any laws in your country regulating bride price or bridewealth? If yes, please summarise these laws.
- Have the courts in your country dealt with disputes regarding bride price or bridewealth? If yes, please summarise the case law on this topic.

The Historical Context of Bride Price and Bridewealth

It is important to consider the historical context and past usefulness of bride price and bridewealth as an ancient and valued practice which aided communities and promoted social cohesiveness and harmony. The payment of bride price or bridewealth, used to validate customary marriages, is a common practice in many African countries. Typically, bride price consists of a contract where the groom or his family pays material items (often cattle or other animals) or money to the bride's family in exchange for the bride.⁷⁷

But recently, the payment of bride price and bridewealth seem to have become a commercialised practice. Its traditional value is now less clear due to the impacts of modernisation and the resulting commercialisation of social customs. Bride price and bridewealth are now often seen as cementing gender inequality, depriving women of their power, and possibly turning them into commodities to be passed on to another man in the family in case her husband dies.⁸²

The Link between Bride Price, Bridewealth and Women's Rights

Note to Facilitator: Ask the following question in a plenary discussion. Write down the responses you receive so the whole training cohort can see them.

Guiding Questions

- How do bride price and bridewealth entrench and perpetuate stereotypes about men and women?
- In your view, does the fact that a groom or the groom's family has paid bride price or bridewealth create a sense of entitlement regarding their relationship with the bride? If the answer is yes, what may be some of the effects of this sense of entitlement on the rights of the bride?

The bride price or bridewealth contribution by the groom or his family may create a sense of entitlement, especially if they believe that this contribution is, in effect, “payment” or the “price” of the bride. Additionally, with the increasing commercialisation of bride price and bridewealth, inequalities may arise because one party to the marriage “pays” while the other is “paid for,” regardless of whether a sense of entitlement exists on the part of the groom.

The inequality and sentiments of entitlement on the groom's part may contribute to some of the domestic violence that women are subjected to discussed in Module 2 of this document. In some communities, there is an expectation that bride price or bridewealth should be returned at the dissolution of a marriage. When the bride's family is unwilling or unable to return this bride price or bridewealth, this state of affairs may prevent the bride from ending an abusive

77 Oguli Oumo, M. (2004). Bride Price and violence against Women: the case of Uganda. In MIFUMI (Ed.), *Report: International Conference on Bride Price* (pp. 47–51). MIFUMI. https://mifumi.org/wp-content/uploads/2021/08/MIFUMI_Bride_Price_Conference_REPORT-compressed.pdf ⁸² Oguli Oumo, M. (2004). Bride Price and violence against Women: the case of Uganda. In MIFUMI (Ed.), *Report: International Conference on Bride Price* (pp. 47–51). MIFUMI.

or otherwise intolerable marriage.⁷⁸ Additionally, this state of affairs may exacerbate the sense of entitlement of the groom's family, contributing to even more violence against the woman in question.⁸⁴ In other instances, women and girls may be forced to marry (in addition to undergoing other harmful practices related to forced marriage, such as FGM) to accumulate wealth for their families.⁷⁹

The above discussion points to how bride price and bridewealth can be used to assert male dominance in marriage and lead to the perception that women are exchangeable for cash, livestock and other goods.

Exercise: Case Law Analysis

Note to Facilitator: Split the training participants into groups and assign them a precedent-setting case on bride price or bridewealth, such as the suggestions below. Have the participants discuss the facts of the case, the issues in the case, as well as the reasoning and decision of the court, noting the salient points of the discussion for presentation during the plenary later.

- **Mifumi (U) Ltd & Anor v Attorney General & Anor** (Constitutional Appeal 2 of 2014)

(Participants are encouraged to read both the lead judgement and the partial dissent).⁸⁰

Session 3: Cohabitation

Session Objectives

- To provide a legal definition of cohabitation
- To discuss the legal effects of cohabitation on women
- To provide solutions on promoting the women's rights in cohabitation relationships

Note to Facilitator: Ask the following questions in a plenary discussion. Write down the responses you receive so the whole training cohort can see them.

Guiding Questions

- What is cohabitation?
- Is cohabitation a form of marriage?

- How is cohabitation distinct from unregistered marriages?
- Does your country have laws that address the issue of cohabitation? If yes, please summarise what these laws say.
- Does your country have laws that place limits on the rights enjoyed by cohabiting couples?
- Does your country have laws that automatically treat cohabiting as formally married couples after a set of conditions have been fulfilled? If yes, what are these conditions?
- If cohabitation is not recognised in your country, what is the legal status of cohabiting couples?
- How do the authorities of your country, including the judiciary, address marital disputes (such as termination of the relationship, property, child custody, and child maintenance) between cohabiting couples?

Cohabitation refers to arrangements in which the parties involved live together and maintain an intimate relationship without formalising through marriage. Women may be exposed to economic risks when a cohabiting relationship ends, including when they have contributed to maintaining a household and other assets.

Session 4: Equal Rights in Regard to Children's Nationality

Session Objectives

- To interrogate women's rights to pass nationality to their children under international human rights law.
- To interrogate the obligation of States to promote and protect the right of women to pass their nationality to their children.
- To specifically interrogate the role of courts in enforcing the right of women to pass their nationality to their children.

78 Matembe, M. R. K. (2004). The relationship between domestic violence and bride price. In MIFUMI (Ed.), *Report: International Conference on Bride Price* (pp. 18–22). MIFUMI. https://mifumi.org/wp-content/uploads/2021/08/MIFUMI_Bride_Price_Conference_REPORT-compressed.pdf⁸⁴ Oguli Oumo, M. (2004). Bride Price and violence against Women: the case of Uganda. In MIFUMI (Ed.), *Report: International Conference on Bride Price* (pp. 47–51). MIFUMI.

79 Kuka, J. F. (2004). Bride Price and Gender Violence Female Genital Mutilation in Uganda. In MIFUMI (Ed.), *Report: International Conference on Bride Price* (pp. 56–58). MIFUMI. https://mifumi.org/wp-content/uploads/2021/08/MIFUMI_Bride_Price_Conference_REPORT-compressed.pdf

80 Supreme Court of Uganda. (2015, August 6). *Mifumi (U) Ltd & Anor v Attorney General & Anor (Constitutional Appeal 2 of 2014)* [2015] UGSC 13.

Article 6 of the Maputo Protocol

Marriage

States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that:

h) a woman and a man shall have equal rights, with respect to the nationality of their children except where this is contrary to a provision in national legislation or is contrary to national security interests.

Note to Facilitator: Ask the following Guiding Questions in a plenary discussion. Write down the responses you receive so the whole training cohort can see them.

Guiding Questions

- Why do you think the exception in Article 6 (h) was inserted into the provision?
- What could be some of the national legislative priorities and national security interests envisaged under the provision?
- In your view, how can one balance the right of women to pass their nationality to their children and national security?

Exercise: Case Law Analysis

Note to Facilitator: Split the training participants into groups and assign them a precedent-setting case on women's nationality rights, such as the suggestion below. Have them discuss the facts of the case, the issues in the case, as well as the reasoning and decision of the court, noting the salient points of the discussion for presentation during the plenary later.

- **Case Law: Unity Dow v Attorney General** (Botswana High Court); *Attorney General v Unity Dow*⁸¹

Session 5: Separation, Divorce or Annulment of Marriage

Session Objectives

- To enable participants to discuss the legal provisions on the grounds of separation, divorce or annulment of marriage.

- To discuss the effects of separation, divorce or annulment of a marriage on women's property rights.

Note to Facilitator: Ask the following question in a plenary discussion. Write down the responses you receive so the whole training cohort can see them.

Guiding Questions

1. What are the legally accepted grounds for separation, divorce or annulment of a marriage in your country?
2. Are the grounds similar for men and women?
3. How accessible are the courts for women seeking separation, divorce or annulment of marriage?
4. What constitutes marital property in your country?
5. What is recognised as a contribution to marital property in your country?

The ACHPR has interpreted women's property rights in marriage at the time of separation, divorce or annulment of a marriage. The Commission adopted General Comment No.6 on this topic in February, 2020.⁸² General Comment No. 6 provides guidance on the interpretation of the rights to property during separation, divorce or annulment of marriage, and the extent to which men and women shall have the right to an equitable sharing of the joint property deriving from marriage as per Article 7(d) of the Maputo Protocol. Specifically, the ACHPR has provided guidance on how marital property should be shared fairly and in a manner consistent with the notion of substantive equality between women

⁸¹ Judiciary of Botswana. (1992, June 3). *Attorney-General v. Dow, Appeal Court*, 1994 (6) BCLR 1. Environmental Law Alliance Worldwide. Retrieved 20 June 2022, from <https://elaw.org/content/botswana-attorney-general-v-dow-appeal-court-1994-6-bclr-1-locus-standi>

⁸² African Commission on Human and Peoples' Rights. (2020). *General Comment No. 6 on the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa (Maputo Protocol): The Right to Property during Separation, Divorce or Annulment of Marriage (Article 7(D))*. Retrieved 21 June 2022, from <https://www.achpr.org/legalinstruments/detail?id=75>

and men. It also outlines the overall and specific obligations of States towards promoting the effective domestication and implementation of Article 7(d) of the Maputo Protocol.

Exercise: Case Law Analysis

Note to Facilitator: Split the training participants into groups and assign them a precedent-setting case on matrimonial property, such as the suggestions below. Using the Guiding Question as a point of departure, ask the training participants to discuss the facts of the case, the issues in the case, as well as the reasoning and decision of the court, noting the salient points of the discussion for presentation during the plenary later.

- **Uganda Association of Women Lawyers and Ors v Attorney General**⁸³ (Uganda)
- **Rwabinumi v Bahimbisomwe Civil Appeal No. 10 of 2009**⁸⁴ (Uganda)

Guiding Question

- To what extent does the decision in the case above align itself with the recommendations contained in General Comment No. 6 discussed above?

83 Constitutional Court of Uganda. (2004, March 10). *Uganda Association of Women Lawyers and Others v Attorney General (Constitutional Petition 2 of 2003)* [2004] UGCC 1. Uganda Legal Information Institute. Retrieved 21 June 2022, from <https://ulii.org/ug/judgment/constitutional-court-uganda/2004/1>

84 Supreme Court of Uganda. (2013, March 20). *Rwabinumi v Bahimbisomwe (Civil Appeal 10 of 2009)* [2013] UGSC 5. Uganda Legal Information Institute. Retrieved 23 June 2022, from <https://ulii.org/ug/judgment/supreme-court-uganda/2013/5#:~:text=The%20learned%20Justices%20of%20Appeal%20de%20clared%20that%20the%20legal%20opposition,under%20the%20Marriage%20Act%2C%20Cap.>

Module 4: Health & Reproductive Rights

Overview

The main objective of this Module is to discuss the legal standard of women's sexual and reproductive health and rights (SRHR). The Module provides elements of SRHR and how judiciaries have enforced

these rights by interpreting international human rights provisions. Through case studies on maternal health rights, the Module provides examples of how the judiciary has and should adjudicate cases related to SRHR.

Article 14 of the Maputo Protocol

Health and Reproductive Rights

1. States Parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted.

This includes:

- a) the right to control their fertility;
- b) the right to decide whether to have children, the number of children and the spacing of children;
- c) the right to choose any method of contraception;
- d) the right to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS;
- e) the right to be informed on one's health status and on the health status of one's partner, particularly if affected with sexually transmitted infections, including HIV/AIDS, in accordance with internationally recognised standards and best practices;
- g) the right to have family planning education.

2. States Parties shall take all appropriate measures to:

- a) provide adequate, affordable and accessible health services, including information, education and communication programmes to women especially those in rural areas;
- b) establish and strengthen existing pre-natal, delivery and post-natal health and nutritional services for women during pregnancy and while they are breast-feeding;
- c) protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.

Session 1: Reproductive Health

Session Objectives

- Interrogate the normative content and legal standard of SRHR
- Explore the extent to which the soft law, in the form of General Comments, can be used as a tool by judicial officers presiding over domestic courts to breathe life into international human rights obligations touching on SRHR.

- Interrogate the judicial response to the doctrine of non-justiciability of SRHR.

Note to Facilitator: Ask the following question in a plenary discussion. Write down the responses you receive so the whole training cohort can see them. Afterwards, follow up on the ensuing discussion by sharing the definition of reproductive health below.

Guiding Question

- What is reproductive health?

At the International Conference on Population and Development Program of Action in 1994, reproductive health was defined as follows:

Reproductive health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes. Reproductive health therefore implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so.⁸⁵

Normative Content and Legal Standard on the Right to Reproductive Health

The normative content of reproductive health rights is provided under two important General Comments by the Committee on Economic, Social and Cultural Rights (CESCR). The General Comments are:

- CESCR General Comment No. 14 on the Right to the Highest Attainable Standard of Health.⁹²
- CESCR General Comment No. 22 on the right to sexual and reproductive health.⁸⁶

Note to Facilitator: Provide training participants with the two General Comments above and ask them to study them before coming to the session. During the training session, ask them the following Guiding Questions in a plenary discussion. Write down the responses so the whole training cohort can see them.

Guiding Questions

1. Does your constitution specifically recognise the right to sexual and reproductive health rights? If yes, please summarise these provisions.
2. Does your country have specific laws that outline ways of implementing sexual and reproductive health rights? If yes, what is the status of the implementation of these laws?
3. Have the courts in your country addressed the obligation of the state to guarantee sexual and reproductive health rights? If yes, please summarise the case law on this topic.
4. What fundamental rights are sometimes violated as women experience pregnancy, child delivery and maternity care?
5. Do the laws of your country capture the **elements of sexual and reproductive health and rights enumerated in General Comment No. 22 (2016): availability; accessibility; affordability; acceptability; and quality of services related to sexual reproductive health and rights?**
6. Is the right to maternal health justiciable? Do courts have the authority to address health issues?

Exercise: Case Law Analysis

Note to Facilitator: Split the training participants into groups and assign them precedent-setting cases on sexual and reproductive health rights, such as the suggestions below. Ask the training participants to discuss the facts of the case, the issues in the case, and the reasoning and decision of the court, noting the salient points of the discussion for presentation during the plenary later.

- **Constitutional Petition No. 16 Of 2011; CEHURD v AG^{87,88}** (Uganda)
- **Constitutional Appeal-2013/1 Center for Health, Human Rights and Development (CEHURD) & Ors v The Attorney General** [2015] UGSC⁸⁹ (Uganda)

⁸⁵ United Nations Population Fund. (2004). *Programme of Action: Adopted at the International Conference on Population and Development, Cairo, 5 to 13 September 1994*. https://www.unfpa.org/sites/default/files/event-pdf/PoA_en.pdf ⁹² Committee on Economic, Social and Cultural Rights. (2000, August). *CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health* (Art. 12). United Nations. <https://www.refworld.org/pdfid/4538838do.pdf>

⁸⁶ Committee on Economic, Social and Cultural Rights. (2016). *General comment no. 22 (2016) on the Right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*. United Nations. <https://digitallibrary.un.org/record/832961?ln=en>

⁸⁷ Constitutional Court of Uganda. (2020, August 19). *Center for Health, Human Rights and Development (CEHURD) & 3 Ors v Attorney General (Constitutional Petition 16 of 2011)* [2020] UGCC 12. Uganda Legal Information Institute. Retrieved

⁸⁸ June 2022, from <https://ulii.org/ug/judgment/constitutional-court-uganda/2020/12>

⁸⁹ Supreme Court of Uganda. (2015b, October 30). *Center for Health, Human Rights and Development (CEHURD) & Ors v The Attorney General (Constitutional Appeal*

Session 2: Maternal Health

Session Objectives

- To interrogate the obligation of States to promote and protect women's rights to maternal health.
- To specifically interrogate the role of courts in enforcing women's rights to maternal health through the application of international human rights provisions such as the Maputo Protocol.

Maternal health refers to women's health during pregnancy, childbirth, and the postnatal period. Three critical components of a maternal healthcare delivery system have been emphasised repeatedly as being essential to saving lives and reducing maternal mortality: skilled birth attendants, an enabling environment and a functioning referral system.^{90 91}

Exercise: Case Law Analysis

Note to Facilitator: Split the training participants into groups and assign them a precedent-setting case on

maternal health, such as the suggestion below. Ask the training participants to discuss the facts of the case, the issues in the case, and the reasoning and decision of the court, noting the salient points of the discussion for presentation during the plenary later.

- **J O O (also known as J M) v Attorney General & 6 others** [2018] eKLR (Kenya)⁹²

Session 3: Abortion and post-abortion care as a health and reproductive right

Session Objectives

- To interrogate the duty placed on States to promote women's right to abortion and post-abortion care.
- To specifically interrogate the role of courts in enforcing women's right to abortion and post-abortion care.

Article 14 of the Maputo Protocol

Health and Reproductive Rights

2. States Parties shall take all appropriate measures to:

c) protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the fetus.

^{1 of 2013}) [2015] UGSC 69. Uganda Legal Information Institute. Retrieved 21 June 2022, from <https://ulii.org/ug/judgment/supreme-court-uganda/2015/69>

⁹⁰ Thorsen, V. C., Meguid, T., Sundby, J., & Malata, A. (2014). Components of maternal healthcare delivery system contributing to maternal deaths in Malawi: a descriptive cross-sectional study. *African Journal of Reproductive Health*,

⁹¹ (1), 16–26. <https://pubmed.ncbi.nlm.nih.gov/24796165/>

⁹² High Court of Kenya. (2018, March 24). *J O O (also known as J M) v Attorney General & 6 others* [2018] eKLR. ESCR-Net. Retrieved 14 July 2022, from https://www.esr-net.org/sites/default/files/caselaw/petition_5_of_2014.pdf

Guiding Questions

Note to Facilitator: Ask the following Guiding Questions in a plenary discussion. Write down the responses so the whole training cohort can see them.

1. Does your country's constitution address the issue of abortion? If yes, please summarise the constitutional provisions on this issue.
2. Does your country's legislation address the question of abortion? If yes, please summarise the law in your country on this issue.
3. Have the courts in your country addressed the question of abortion, including post-abortion care? If yes, please summarise the case law of your country on this issue.
4. Does your country have any guidelines on how to treat patients who present with complications arising from the termination of a pregnancy?

Exercise: Case Law Analysis

Note to Facilitator: Split the training participants into groups and assign them precedent-setting cases on abortion and post-abortion care as a sexual and reproductive health right, such as the suggestions below.

Ask the training participants to discuss the facts of the case, the issues in the case, and the reasoning and decision of the court, noting the salient points of the discussion for presentation during the plenary later.

- **R v Bourne** [1938] 3 All ER 615 [79]⁹³ (United Kingdom)
- **Federation of Women Lawyers (Fida – Kenya) & 3 others v Attorney General & 2 others** [2019] eKLR (Kenya)⁹⁴

In analysing this case, the training facilitator should ask the training participants the following Guiding Questions.

Guiding Questions

- Do these decisions represent the legal position of your country on the issue of abortion?
- How do these decisions address the obligation of States to promote and protect women's health and reproductive rights, even in circumstances where the right to an abortion is restricted?

⁹³ Central Criminal Court of England and Wales. (1938, July 19). *R v Bourne* [1939] 1 K. B. 687 3 All E. R. 615 (1938). Women's Link Worldwide. Retrieved 21 June 2022, from <https://www.womenslinkworldwide.org/files/2769/gjo-reinounido-1939-en-pdf.pdf>

⁹⁴ High Court of Kenya. (2019, June 12). *Federation of Women Lawyers (Fida – Kenya) & 3 others v Attorney General & 2 others; East Africa Center for Law & Justice & 6 others (Interested Party) & Women's Link Worldwide & 2 others (Amicus Curiae)* [2019] eKLR. National Council for Law Reporting (Kenya Law). Retrieved 21 June 2022, from <http://kenyalaw.org/caselaw/cases/view/175490/>

Module 5: Economic, Social & Cultural Rights

Overview

The interdependence and indivisibility of political and civil rights, on the one hand, and social, economic and cultural rights, on the other hand, are now universally accepted. Both categories of rights should be treated equally under the law. However, while implementing all human rights is challenging, realising economic, social and cultural rights is particularly difficult. It is also true that this challenge is even more complicated when society attempts to bring on board historically marginalised groups such as women.

Session 1: Economic and Social Welfare Rights

Session Objectives

- To interrogate the content and scope of economic, social and cultural rights under the Maputo Protocol and other international women's rights instruments.
- To interrogate the obligation placed on States to promote and protect women's economic, social and cultural rights.
- To specifically interrogate the role of courts in enforcing women's economic, social and cultural rights in line with the Maputo Protocol and other international women's rights instruments.

Article 13 of the Maputo Protocol

Economic and Social Welfare Rights

States Parties shall adopt and enforce legislative and other measures to guarantee women equal opportunities in work and career advancement and other economic opportunities. In this respect, they shall:

- a) promote equality of access to employment;
- b) promote the right to equal remuneration for jobs of equal value for women and men;
- c) ensure transparency in recruitment, promotion and dismissal of women and combat and punish sexual harassment in the workplace;
- d) guarantee women the freedom to choose their occupation, and protect them from exploitation by their employers violating and exploiting their fundamental rights as recognised and guaranteed by conventions, laws and regulations in force;
- e) create conditions to promote and support the occupations and economic activities of women, in particular, within the informal sector;
- f) establish a system of protection and social insurance for women working in the informal sector and sensitise them to adhere to it;
- g) introduce a minimum age for work and prohibit the employment of children below that age, and prohibit, combat and punish all forms of exploitation of children, especially the girl-child;
- h) take the necessary measures to recognise the economic value of the work of women in the home;
- i) guarantee adequate and paid pre- and post-natal maternity leave in both the private and public sectors;
- j) ensure the equal application of taxation laws to women and men;
- k) recognise and enforce the right of salaried women to the same allowances and entitlements as those granted to salaried men for their spouses and children;
- l) recognise that both parents bear the primary responsibility for the upbringing and development of children and that this is a social function for which the State and the private sector have secondary responsibility;
- m) take effective legislative and administrative measures to prevent the exploitation and abuse of women in advertising and pornography.

Article 13 is premised on the principles of non-discrimination and equality between men and women already explored under Module 1. Article 13's essence is a call for integrating these principles in the employment sector - both formal and informal - public and private, through legislative and other measures. It is a call for mainstreaming gender into the world of work. States are obliged to guarantee women equal opportunities with men to access employment and promotion, to ensure a safe working environment for women, and to ensure that women's work or input is valued as much as men's work. Clauses (a), (b), (j) and (k) of Article 13 of the Maputo Protocol, in effect, prohibit discrimination, while Clause (c) deals with sexual harassment already dealt with in Session 4 of Module 2. Clause (h) deals with the need to recognise the economic value of women's work in the home. Rights issues related to this Clause usually crop up during divorce proceedings and have been dealt with in Module 3. The principle inherent in the Clause should also be central to the right of a widow to property registered in the name of a deceased husband, a topic dealt with in Module 7.

Clause (i) recognises the duty of the State to support women employed in the formal and informal sectors in their reproductive and maternal roles.

Guiding Questions

Note to Facilitator: Ask the following Guiding Questions in a plenary discussion. Write down the responses you receive on a flip chart, whiteboard or PowerPoint presentation so the whole training cohort can see them.

1. Does your country's constitution have specific provisions on women's workers' rights, such as provisions on equal pay for equal work, paid maternity leave etc.? If yes, please summarise these provisions.
2. Do courts in your country attach equal value to a woman's work as that given to employment outside the home?
3. Does your country have any employment and work laws that capture the spirit of Article 13 of the Protocol?
4. What practices may constitute discrimination against women in the workplace?
5. Does legislation in your country entitle women to full pay while on maternity leave?

Session 2: Right to Food Security

Session Objective

- To provide an overview of the right to food under the Maputo Protocol and other international women's rights instruments
- To interrogate the obligation of States to promote and protect women's right to food.
- To specifically interrogate the role courts play in enforcing women's right to food under the Maputo Protocol and other international women's rights instruments

Article 15 of the Maputo Protocol

Right to Food Security

States Parties shall ensure that women have the right to nutritious and adequate food. In this regard, they shall take appropriate measures to:

- a) provide women with access to clean drinking water, sources of domestic fuel, land, and the means of producing nutritious food;
- b) establish adequate systems of supply and storage to ensure food security.

Elements of the Right to Adequate Food

Article 11 of the International Covenant on Economic Social and Cultural Rights

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent.

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

According to the Committee on Social, Economic and Cultural Rights, the right to adequate food is realised when every man, woman and child, alone or in community with others, have physical and economic access at all times to adequate food or means for its procurement. And the *right to adequate food* shall not be interpreted in a narrow or restrictive sense which equates it with a minimum package of calories, proteins and other specific nutrients.

In its *General Comment No. 12 on the Right to Adequate Food*, the Committee on Social, Economic and Cultural Rights affirms that the right to adequate food is indivisibly linked to the inherent dignity of the human person and is indispensable for the fulfilment of other human rights enshrined in the International Bill of Human Rights.⁹⁵

The following are some key excerpts from the General Comment about the right to adequate food:

⁹⁵ Committee on Economic, Social and Cultural Rights. (1999, May 12). *CESCR General Comment No. 12: The Right to Adequate Food (Art. 11)*. United Nations. Retrieved 21 June 2022, from <https://www.refworld.org/pdfid/4538838c11.pdf> para 4

The Committee considers that the core content of the right to adequate food implies: The availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture; The accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights. - *General Comment No. 12 on the Right to Adequate Food*, paragraph 8.

Availability refers to the possibilities either for feeding oneself directly from productive land or other natural resources, or for well-functioning distribution, processing and market systems that can move food from the site of production to where it is needed in accordance with demand. - *General Comment No. 12 on the Right to Adequate Food*, paragraph 12.

Accessibility encompasses both economic and physical accessibility: Economic accessibility implies that personal or household financial costs associated with the acquisition of food for an adequate diet should be at a level such that the attainment and satisfaction of other basic needs are not threatened or compromised. Economic accessibility applies to any acquisition pattern or entitlement through which people procure their food and is a measure of the extent to which it is satisfactory for the enjoyment of the right to adequate food. Socially vulnerable groups such as landless persons and other particularly impoverished segments of the population may need attention through special programmes. Physical accessibility implies that adequate food must be accessible to everyone, including physically vulnerable individuals, such as infants and young children, elderly people, the physically disabled, the terminally ill and persons with persistent medical problems, including the mentally ill. Victims of natural disasters, people living in disaster-prone areas and other specially disadvantaged groups may need special attention and sometimes priority consideration with respect to accessibility of food. A particular vulnerability is that of many indigenous population groups whose access to their ancestral lands may be threatened. - *General Comment No. 12 on the Right to Adequate Food*, paragraph 13.

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Guiding Questions

Note to Facilitator: Ask the following Guiding Questions in a plenary discussion. Write down the responses you receive so the whole training cohort can see them.

1. What are some of the rights linked to the right to food?
2. What are the threats to women's right to food? How do these threats affect women compared to how they would affect men?
3. Women have specific dietary needs, particularly concerning their reproductive health. What are some of these specific needs?

In rural areas, there is a link between the right to food security and women's right to own, control and access land and other property. Consequently, the analysis of the rights of female offspring to inherit the property of a deceased father discussed in Session 2 of Module 7, the right of a widow to inherit her husband's

property addressed in Session 1 of Module 7, and the distribution of property between husbands and wives on divorce discussed in Module 3 are relevant here.

Exercise: Case Law Analysis

Note to Facilitator: Split the training participants into groups and assign them a precedent-setting case on women's rights in the area of employment and work, such as the suggestion below. Ask the training participants to discuss the facts of the case, the issues in the case, as well as the reasoning and decision of the court, noting the salient points of the discussion for presentation during the plenary later.

- **Communication 155/96: Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria** (African Commission on Human and Peoples' Rights)⁹⁶

⁹⁶ African Commission on Human and Peoples' Rights. (2001). *Communication 155/96: Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria*. Retrieved 23 June 2022, from https://www.achpr.org/public/Document/file/English/achpr30_155_96_eng.pdf

In 2000, the ACHPR appointed a Special Rapporteur on the right to food, with a mandate to promote this right through the adoption of measures at the national, regional and international level, including through the mainstreaming of gender and age analyses in the realisation of the right.⁹⁷ CEDAW also acknowledges that women have specific dietary needs, in particular in relation to their reproductive health and thus States are obliged to ensure adequate nutrition for women during pregnancy and lactation (Article 12).

Session 3: Right to Adequate Housing

Session Objectives

- To provide an overview of the elements and scope of the right to housing under international human rights law
- To explore the obligation of States to address the specific challenges women face in exercising their right to adequate housing.
- To specifically explore the role of courts in enforcing women's right to adequate housing.

Article 16 of the Maputo Protocol

Right to Adequate Housing

Women shall have the right to equal access to housing and to acceptable living conditions in a healthy environment. To ensure this right, States Parties shall grant to women, whatever their marital status, access to adequate housing.

Adequacy as an essential component of the right to housing

The right to adequate housing should be interpreted broadly and beyond the contention that it only encompasses the right to have a roof over one's head. The right to adequate housing is linked to other human rights and to the Covenant's fundamental principles, such as the right to dignity.⁹⁸

In **CESCR General Comment No. 4**, adequate housing is defined as meaning: adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities - all at a reasonable cost.⁹⁹

Key Aspects of the Right to Adequate Housing

According to UN-Habitat, the right to adequate housing contains both freedoms and entitlements.¹⁰⁰ These *freedoms* include:

1. Protection against forced evictions and the arbitrary destruction and demolition of one's home;
2. The right to be free from arbitrary interference with one's home, privacy and family; and
3. The right to choose one's residence, to determine where to live and to freedom of movement

The *entitlements* include:

1. Security of tenure;
2. Housing, land and property restitution;

97 United Nations Office of the High Commissioner for Human Rights. (2010, April). *Factsheet No. 34: The Right to Food*. United Nations. <https://www.ohchr.org/sites/default/files/Documents/Publications/FactSheet34en.pdf>

98 Committee on Economic, Social and Cultural Rights. (1996, December 31). *CESCR General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*. Refworld. Retrieved 23 June 2022, from <https://www.refworld.org/pdfid/47a7079a1.pdf>

99 United Nations General Assembly. (1991, December 19). *Global Strategy for Shelter to the Year 2000 A/RES/46/163*. United Nations. Retrieved 23 June 2022, from <https://digitallibrary.un.org/record/136151?ln=en>

100 United Nations Office of the High Commissioner for Human Rights. (2009, November). *The Right to Adequate Housing: Fact Sheet No. 21/Rev.1*. United Nations. Retrieved 23 June 2022, from <https://unhabitat.org/the-right-to-adequate-housing-fact-sheet-no-21rev-1>

3. Equal and non-discriminatory access to adequate housing; and
4. Participation in housing-related decision-making at the national and community levels.

The freedoms and entitlements laid out by UN-Habitat are also reiterated in CESCR General Comment No. 4 on the Right to Adequate Housing, which prescribes the following criteria in determining whether this right has been met:

1. *Security of tenure*: the right to housing incorporates a degree of security of tenure which guarantees legal protection against forced evictions, harassment and other threats.
2. *Availability of services, materials, facilities and infrastructure*: housing must be accompanied by access to safe drinking water, adequate sanitation, energy for cooking, heating, lighting, food storage or refuse disposal.
3. *Affordability*: the cost of housing must not threaten or compromise the occupants' enjoyment of other human rights.
4. *Habitability*: housing must guarantee physical safety or provide adequate space and protection against cold, dampness, heat, rain, wind, and other threats to health and structural hazards.
5. *Accessibility*: housing must meet the specific needs of disadvantaged and marginalised groups.
6. *Location*: housing must not be removed from employment opportunities, health-care services, schools, childcare centres and other social facilities or located in polluted or dangerous areas.
7. *Cultural adequacy*: housing must respect and take into account the expression of cultural identity.

Guiding Question

Note to Facilitator: Ask the following Guiding Question in a plenary discussion. Write down the responses you receive so the whole training cohort can see them.

- What other rights can you link or are linked to the right to adequate housing?

Exercise: Case Law Analysis

Note to Facilitator: Split the training participants into groups and assign them a precedent-setting case on women's rights in employment and work, such as the suggestions below. Ask the training participants to discuss the facts of the case, the issues in the case, and the reasoning and decision of the court, noting the salient points of the discussion for presentation during the plenary.

- **Communication 155/96: Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria** (African Commission on Human and Peoples' Rights)¹⁰¹

Access to drinking water and adequate sanitation facilities are additional basic needs directly associated with housing. On the other hand, having access to adequate, safe and secure housing strengthens the likelihood of people to enjoy additional rights. For example, the adequacy of one's housing and living conditions is closely linked to the degree to which the right to environmental hygiene and the right to the highest attainable level of mental and physical health can be enjoyed.

Women's Right to Housing

Note to Facilitator: Ask the following Guiding Questions in a plenary discussion. Write down the responses so the whole training cohort can see them.

Guiding Questions

1. What are the gendered implications of violating the right to adequate housing?
2. In which ways does the violation of the right to housing impact women differently than it does men?

In its General Recommendation No 34 of 2016 on the rights of rural women, the CEDAW committee emphasises the need to protect women living in rural areas and restates the obligations of States in this regard.¹⁰² The need to protect women living in rural areas is significant for women in Africa since as many as 80% of African women live in rural areas.^{103 104}

¹⁰¹ African Commission on Human and Peoples' Rights. (2001). *Communication 155/96: Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria*.

¹⁰² UN. Committee on the Elimination of Discrimination against Women. (2016). *General recommendation No. 34 (2016) on the rights of rural women*. United Nations Digital Library. <https://digitallibrary.un.org/record/835897?ln=en>

¹⁰³ UN Women. (2018, March 13). *Empower Women and Girls in Rural Areas to Achieve the SDGs and Africa's Agenda*

¹⁰⁴ Retrieved 14 July 2022, from <https://africa.unwomen.org/en/news-and-events/stories/2018/03/empower-women-and-girls-in-rural-areas#:~:text=Women%20make%20oup%20more%20than,them%20reside%20in%20rural%20areas.>

The Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights specifically address the right to housing and include references to women concerning titles to housing and land, as well as equal rights to compensation when the right to adequate housing has been violated (para. 79 (xvii) – (xviii)).

Article 16 of the Maputo Protocol explicitly mentions the principle of equal access (between men and women) and equal access (between married and unmarried women). The article also mentions a healthy environment as an aspect of women's right to adequate housing.

Guiding Questions

Note to Facilitator: Ask the following Guiding Questions in a plenary discussion. Write down the responses you receive so the whole training cohort can see them.

1. Is the right to adequate housing provided for in your country's constitution? If yes, please discuss what the provision states.
2. Does your country have any laws that seek to enforce the right to adequate housing? If yes, please discuss what the laws state.
3. To what extent do constitutional and statutory provisions on the right to adequate housing deal with women's specific housing needs in your country?
4. What legal, cultural and other barriers in your country prevent women from exercising their right to adequate housing?

A discussion of women's rights to adequate housing necessarily involves a discussion of their right to own and use land and their right to own property in general. Women's enjoyment of the right to adequate housing depends on their access to and control over land and property, especially in rural areas. Consequently, the analysis of the rights of female offspring to inherit the property of a deceased parent discussed in Session 2 of Module 7, the right of a widow to inherit her husband's property discussed in Session 1 of Module 7, and the distribution of property between husbands and wives on divorce, separation or annulment discussed in Module 3 are relevant here.

Forced Evictions

For women residing in urban areas the right to housing is often violated through forced evictions. There is therefore a need to interrogate the human rights implications of "forced eviction".

The Committee on Economic Social and Cultural Rights (CESCR) defined forced eviction as the permanent or temporary removal against their will of individuals, families and/ or communities from the homes and/ or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.¹⁰⁵

In its resolution on the right to adequate housing and protection from forced evictions,¹⁰⁶ the African Commission on Human and Peoples' Rights noted with concern that each year hundreds of thousands of people in Africa are forcibly evicted from their homes by States and other non-state actors, without prior consultation and notice, adequate compensation or appropriate alternative housing solution.

Guiding Questions

Note to Facilitator: Ask the following Guiding Questions in a plenary discussion. Write down the responses you receive so the whole training cohort can see them.

1. What are the human rights implications of forced evictions?
2. What are the human rights implications of forced evictions on women; how do women suffer differently from men as a result of forced evictions?

Exercise: Case Law Analysis

Note to Facilitator: Split the training participants into groups and assign them a precedent-setting case on forced evictions, such as the suggestions below. Ask the training participants to discuss the facts of the case, the issues in the case, as well as the reasoning and decision of the court, noting the salient points of the discussion for presentation during the plenary later.

- **279/03-296/05 Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan**¹⁰⁷

¹⁰⁵ UN Committee on Economic, Social and Cultural Rights. (1997, May 20). *General Comment No. 7: The right to adequate housing (Art.11.1): Forced evictions*. Refworld. Retrieved 23 June 2022, from <https://www.refworld.org/docid/47a70799d.html>

¹⁰⁶ African Commission on Human and Peoples' Rights. (2012, October). *Resolution on the right to adequate housing and protection from forced evictions - ACH-PR/Res.231(LII)2012*. Retrieved 23 June 2022, from <https://www.achpr.org/sessions/resolutions?id=258>

¹⁰⁷ African Commission on Human and Peoples' Rights. (2009, May 27). *279/03-296/05 Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) / Sudan*. Retrieved 23 June 2022, from <https://www.achpr.org/sessions/descions?id=190>

- **Communication 155/96: Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria** (African Commission on Human and Peoples' Rights) ¹⁰⁸

What other rights are linked to forced evictions?

Forced evictions violate a host of other rights, including civil and political rights, such as: the right to health, education, food, employment, rights to non-discrimination and equality, the right to privacy, cultural rights, self-determination, the right to life, to freedom of expression and assembly, due process and access to justice, and to arbitrary detention.¹⁰⁹ Some also argue that forced evictions violate the right to development.¹¹⁴

In its Resolution on the Right to Adequate Housing and Protection from Forced evictions, the ACHPR also noted with concern that forced evictions lead to violations of other economic, social and cultural rights, such as access to drinking water, stable employment, health care and education.¹¹⁰ The Resolution also noted that vulnerable groups including women suffer disproportionately from forced evictions and their effects.

The Committee on Economic Social and Cultural Rights (CESCR) has deemed forced eviction a *prima facie* violation of the right to adequate housing¹¹¹ and justifiable only in the most exceptional circumstances, and only when in accordance with the relevant principles of international law.

Session 4: Right to Positive Cultural Context

Session Objectives

- To explore women's right to live in a positive cultural context, in line with the Maputo Protocol and other international human rights instruments.
- To interrogate how the right to a positive cultural context interacts with other rights under the Maputo Protocol and other international human rights instruments.
- To specifically interrogate the role of courts in enforcing women's right to a positive cultural context.

Article 17 of the Maputo Protocol

Right to Positive Cultural Context

1. Women shall have the right to live in a positive cultural context and to participate at all levels in the determination of cultural policies.

2. States Parties shall take all appropriate measures to enhance the participation of women in the formulation of cultural policies at all levels.

¹⁰⁸ African Commission on Human and Peoples' Rights. (2001). *Communication 155/96: Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria*.

¹⁰⁹ United Nations Office of the High Commissioner for Human Rights & UN Habitat. (2014). *Forced Evictions Fact Sheet No. 25/Rev.1*. United Nations. https://www.ohchr.org/sites/default/files/Documents/Publications/FS25_Rev.1.pdf ¹¹⁴ UN Habitat. (2022). *Forced Evictions, Global Crisis, Global Solutions*. <https://unhabitat.org/forced-evictions-global-crisis-global-solutions>

¹¹⁰ African Commission on Human and Peoples' Rights. (2012, October). *Resolution on the right to adequate housing and protection from forced evictions - ACHPR/Res.231(LII)2012*

¹¹¹ UN Committee on Economic, Social and Cultural Rights. (1997, May 20). *General Comment No. 7: The right to adequate housing (Art.11.1): Forced evictions*. Para 181.

Article 17 of the Maputo Protocol guarantees women's right to participate in their community's cultural life. Article 17 is also closely related to Article 22 of the African Charter on Human and Peoples' Rights, which provides for the right to the cultural development of peoples and the equal enjoyment of the common heritage of humans. The provision is also closely related to Article 29 of the African Charter, which obligates individuals to preserve and strengthen positive African cultural values such as tolerance and dialogue. While acknowledging and recognising the importance of culture and traditional values in African society, these provisions also recognise the need to subject culture from a human rights perspective. This is why these provisions qualify the right to culture: it must be positive. Article 17 of the Maputo Protocol integrates women's right to participate in the formulation of cultural policies to fulfil the obligation by States to guarantee the right of all, including women, to live within a positive cultural context.

Exercise: Case Law Analysis

Note to Facilitator: Split the training participants into groups and assign them a precedent-setting case on forced evictions, such as the suggestions below. Ask the training participants to discuss the facts of the case, the issues in the case, as well as the reasoning and decision

of the court, noting the salient points of the discussion for presentation during the plenary later.

- **Tatu Kamau v Attorney General & 2 others** [2021] eKLR (Kenya)¹¹²
- **Mifumi (U) Ltd & Anor v Attorney General & Anor** (Constitutional Appeal 2 of 2014) (Uganda)¹¹³

Session 5: Right to a Healthy and Sustainable Environment

Session Objectives

- To explore women's right to a healthy and sustainable environment, in line with the Maputo Protocol and other international human rights instruments.
- To interrogate the obligation placed on States to guarantee women's right to a healthy and sustainable environment under the Maputo Protocol and other international human rights instruments.
- To specifically interrogate the role of courts in enforcing women's rights to a healthy and sustainable environment.

Article 18 of the Maputo Protocol

Right to a Healthy and Sustainable Environment

1. Women shall have the right to live in a healthy and sustainable environment.
2. States Parties shall take all appropriate measures to:
 - a) ensure greater participation of women in the planning, management and preservation of the environment and the sustainable use of natural resources at all levels;
 - b) promote research and investment in new and renewable energy sources and appropriate technologies, including information technologies and facilitate women's access to, and participation in their control;
 - c) protect and enable the development of women's indigenous knowledge systems;
 - d) regulate the management, processing, storage and disposal of domestic waste;
 - e) ensure that proper standards are followed for the storage, transportation and disposal of toxic waste.

¹¹² High Court of Kenya. (2021, March 17). *Tatu Kamau v Attorney General & 2 others; Equality Now & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)* [2021] eKLR.

¹¹³ Supreme Court of Uganda. (2015, August 6). *Mifumi (U) Ltd & Anor v Attorney General & Anor (Constitutional Appeal 2 of 2014)* [2015] UGSC 13.

Under the International Covenant on Economic, Social and Cultural Rights, the environment is mentioned directly in Article 12(2) on the right to health:

Article 12 of the International Covenant on Economic, Social and Cultural Rights

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

- (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
- (b) The improvement of all aspects of environmental and industrial hygiene;
- (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
- (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

Guiding Questions

Note to Facilitator: Ask the following Guiding Questions in a plenary discussion. Write down the responses you receive so the whole training cohort can see them.

1. Does your constitution have specific provisions on the right to a healthy and sustainable environment? If yes, please summarise the provision.
2. Does your country have national laws on the right to a healthy and sustainable environment? If yes, please summarise these laws.
3. Is the right to a healthy and sustainable environment justiciable in your country?

Exercise: Case Law Analysis

Note to Facilitator: Split the training participants into groups and assign them a precedent-setting case on the right to a healthy and sustainable environment, such as the suggestions below. Ask the training participants to discuss the facts of the case, the issues in the case, and the reasoning and decision of the court, noting the salient points of the discussion for presentation during the plenary later.

- **Communication 155/96: Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria** (African Commission on Human and Peoples' Rights)¹¹⁴
- **The Minors Oposa v. Secretary of the Department of Environmental and Natural Resources**¹¹⁵
- **M.C. Mehta v. Union of India**^{116,117}

Gender and Environmental Protection

Article 18 (a) and (b) of the Protocol recognise women's central role in the sustainable use of natural and renewable energy resources and calls on States to involve women in the planning, management, preservation and control of the environment. In clause (c), the article recognises that African women play a critical and central role in indigenous knowledge systems and practices.¹¹⁸ Indigenous knowledge directly connects to resource management, conservation, and environmental protection. Women till the land for food production and are also responsible for food security and food preservation for the family. Article 18 (d) and (e) are based on women's role as homemakers and thus responsible for the disposal of domestic waste.

¹¹⁴ African Commission on Human and Peoples' Rights. (2001). *Communication 155/96: Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria*.

¹¹⁵ Supreme Court of the Republic of the Philippines. (1983, July 10). *Oposa v. Factoran G.R. No. 101083*. University of Minnesota. Retrieved 23 June 2022, from <https://lawyerly.ph/digest/c7aba?user=2372>

¹¹⁶ Supreme Court of India. (1986, December 20). *M.C. Mehta And Another vs Union Of India & Others* 1987 AIR 1086.

¹¹⁷ SCR (1) 819. Indian Kanoon. Retrieved 23 June 2022, from <https://indiankanoon.org/doc/1486949/>

¹¹⁸ Nyasimi, M. (2014, August 21). *Gender, Agriculture, Climate Change and Policy Responses in Africa*. CGIAR Research Program on Climate Change, Agriculture and Food Security (CCAFS). Retrieved 23 June 2022, from <https://ccafs.cgiar.org/news/gender-agriculture-climate-change-and-policy-responses-africa>

Implicit in the two clauses is that it calls for greater participation of women in environmental management. The thread that runs through Article 18 is that society must enhance women's participation in strategies for protecting the environment precisely because the gender roles played by women necessarily make them central actors and stakeholders in the use of the environment.

Session 6: Right to Sustainable Development

Session Objectives

- To explore women's right to sustainable development in line with the Maputo Protocol and other international human rights instruments.
- To interrogate the obligation placed on States to guarantee women's right to sustainable development under the Maputo Protocol and other international human rights instruments.
- To specifically interrogate the role of courts in enforcing women's rights to sustainable development.

Article 19 of the Maputo Protocol

Right to Sustainable Development

Women shall have the right to fully enjoy their right to sustainable development. In this connection, the States Parties shall take all appropriate measures to:

- a) introduce the gender perspective in the national development planning procedures;
- b) ensure participation of women at all levels in the conceptualisation, decision-making, implementation and evaluation of development policies and programmes;
- c) promote women's access to and control over productive resources such as land and guarantee their right to property;
- d) promote women's access to credit, training, skills development and extension services at rural and urban levels in order to provide women with a higher quality of life and reduce the level of poverty among women;
- e) take into account indicators of human development specifically relating to women in the elaboration of development policies and programmes; and
- f) ensure that the negative effects of globalisation and any adverse effects of the implementation of trade and economic policies and programmes are reduced to the minimum for women.

What is meant by “sustainable development”?

Sustainable development was defined in the World Commission on Environment and Development as ‘**development that meets the needs of the present without compromising the ability of future generations to meet their own needs**’.¹¹⁹

Article 19 (a), (b) and (e) of the Maputo Protocol are in line with Article 2 (1) (c) already discussed in

Module 1, Session 2 which is a call to States to integrate a gender perspective, concerns, experiences in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life.

Article 19 (a), (b), and (e), read together with Article 2, create an obligation among state parties to the Maputo Protocol to ensure that women should have

a voice in national development processes, including processes geared towards ensuring that the needs of today's generation do not compromise those of the next generation. Article 19 (c) also relates to the discussion of women's right to own property already discussed under Module 1, Module 3, and Module 7. Article 9 (d) calls for equality between men and women in accessing inputs critical to self-development.

Guiding Question

Note to Facilitator: Ask the following Guiding Question in a plenary discussion. Write down the responses you receive so the whole training cohort can see them.

- How does Article 19 of the Maputo Protocol link to the Sustainable Development Goals (SDGs)?

¹¹⁹ Emas, R. (2015). *The Concept of Sustainable Development: Definition and Defining Principles*. GSDR. https://sustainabledevelopment.un.org/content/documents/5839GSDR%202015_SD_concept_definiton_rev.pdf

Module 6: Women's Right to Peace and Protection During Armed Conflict

Overview

This Module seeks to introduce participants to key concepts around protecting and promoting women's rights in relation to conflict. The Maputo Protocol is one of the few human rights treaties that addresses the obligation of States to promote and protect women's rights in relation to armed conflict. Additionally, the Maputo Protocol is unique in its attempts to go after the root causes of the violation of women's rights in relation to armed conflict.

This Module will introduce participants to the Maputo Protocol provisions on women's rights to peace, the protection of women in armed conflict as well as the interplay of these provisions with

international humanitarian law, international criminal law and the increasing acknowledgement by the international community that women's rights are integral to efforts aimed at bolstering peace and security worldwide.

Session 1: The Right to Peace

Session Objectives

- To interrogate women's right to peace under Article 10 of the Maputo Protocol.
- To interrogate the judiciary's role in the women, peace and security agenda.

Article 10 of the Maputo Protocol

Right to Peace

1. Women have the right to a peaceful existence and the right to participate in the promotion and maintenance of peace.

2. States Parties shall take all appropriate measures to ensure the increased participation of women:

- a) in programmes of education for peace and a culture of peace;
- b) in the structures and processes for conflict prevention, management and resolution at local, national, regional, continental and international levels;
- c) in the local, national, regional, continental and international decision making structures to ensure physical, psychological, social and legal protection of asylum seekers, refugees, returnees and displaced persons, in particular women;
- d) in all levels of the structures established for the management of camps and settlements for asylum seekers, refugees, returnees and displaced persons, in particular, women;
- e) in all aspects of planning, formulation and implementation of post-conflict reconstruction and rehabilitation.

3. States Parties shall take the necessary measures to reduce military expenditure significantly in favour of spending on social development in general, and the promotion of women in particular.

Women's participation in conflict prevention and resolution can improve outcomes before, during, and after conflict. Women are, however, often excluded from formal peace processes.¹²⁰ The international community has progressively realised the importance of gender perspectives in peace processes, not only because of the gendered nature of conflict – which has a differential impact on women and girls, men and boys – but also due to the added value of women's agency in these processes. As such, an issue that has become pivotal in peacekeeping is gender mainstreaming, holding that the inclusion of gender perspectives in peacekeeping work has a central role in the continued credibility of peacekeeping operations and the overall achievement of sustainable peace and security.¹²¹

The primary instrument for integrating gender perspectives on peace and security is the UN Security Council Resolution 1325 on Women, Peace and Security.¹²² The Resolution addresses the impact of war on women and reaffirms women's important role in preventing and resolving conflicts, peace negotiations, peace-building, peacekeeping, humanitarian response and post-conflict reconstruction. The Resolution stresses the importance of their equal participation and full involvement in all efforts to maintain and promote peace and security.

Resolution 1325 provides critical operational mandates with implications for Member States and the entities of the United Nations system. It outlines the gender-related responsibilities of the United Nations in different political and programmatic areas. The Women, Peace and Security agenda rests on four pillars.¹²³

- **Prevention:** Prevention of conflict and all forms of violence against women and girls in conflict and post-conflict situations. Resolution 1325 calls on States to protect women and girls from gender-based violence, explicitly calling out the use of rape and other forms of sexual violence in conflict situations.

- **Participation:** Women's equal participation and gender equality in peace and security decision-making processes at all levels.
- **Protection:** Women and girls are protected from all forms of sexual and gender-based violence, and their rights are protected and promoted in conflict situations.
- **Relief and Recovery:** Women can access health services and trauma counselling.

The Committee on the Elimination of Discrimination against Women had, over time, repeatedly expressed concern about the gendered impacts of conflict and women's exclusion from conflict prevention efforts, post-conflict transition and reconstruction processes and the fact that reports of States Parties do not provide sufficient information on the application of the convention in such situations.

In 2013, the CEDAW Committee adopted *General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations*, a landmark document giving authoritative guidance on concrete measures to ensure women's rights are protected before, during and after conflict.^{124,125} The General Recommendation expounds on the CEDAW Convention's protection of women's rights at all times, advancing substantive gender equality before, during and after conflict and ensuring that women's diverse experiences are fully integrated into all peacebuilding, peace-making and reconstruction. The General Recommendation makes it clear that the Convention applies in all forms of conflict and post-conflict settings and addresses crucial issues women face in these settings, including violence and challenges in access to justice and education, employment and health. It gives specific guidance on States' obligation of due diligence regarding crimes against women by non-State actors. It reinforces women's critical role in conflict prevention, peacebuilding and reconstruction. The General Recommendation highlights the need for a concerted and integrated approach with the Security Council

120 Council on Foreign Relations. (n.d.). *Including Women at the Peace Table Produces Better Outcomes*. Retrieved 14 July 2022, from <https://www.cfr.org/womens-participation-in-peace-processes/>

121 Carreiras, H. (2010). Gendered Culture in Peacekeeping Operations. *International Peacekeeping*, 17(4), 471–485. <https://doi.org/10.1080/13533312.2010.516655>

122 United Nations Security Council. (2000, October). *S/RES/1325. Security Council Resolution on women and peace and security*. United Nations. Retrieved 14 July 2022, from <https://peacemaker.un.org/node/105>

123 United Nations. (2020, January). *Gender Equality and Women, Peace and Security: Resource Package*. https://peacekeeping.un.org/sites/default/files/gewps19_respack_v7_eng_digital.pdf

124 Committee on the Elimination of Discrimination against Women. (2013, October 18). *General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations*. Office of the High Commissioner for Human Rights. Retrieved 23 June 2022, from <https://www.ohchr.org/sites/default/files/Documents/HRBodies/CEDAW/GComments/CEDAW.CG.30.pdf>

125 UN Women. (2015). *Guidebook on CEDAW general recommendation no. 30 and the UN Security Council resolutions on women, peace and security*. <https://www.unwomen.org/en/digital-library/publications/2015/8/guidebook-cedawgeneralrecommendation30-womenp eacesecurity>

agenda on women, peace and security, based on a model of substantive equality and allows for better monitoring of women's rights in conflict-affected settings.¹²⁶

The General Recommendation covers acts of private individuals or entities. It explicitly guides States on implementing their obligation of due diligence regarding acts of private individuals or entities that impair the rights enshrined in the Convention and suggests how non-State actors can address women's rights in conflict-affected areas.

Guiding Question

Note to Facilitator: Ask the following Guiding Question in a plenary discussion. Write down the responses you receive so the whole training cohort can see them.

- What is the role of domestic courts in implementing UN Resolution 1325?

Is Resolution 1325 legally binding?

It may be argued that Resolution 1325 is binding because it authorises acts that are *intra vires* the UN Charter and other international laws. Several countries have taken action to affirm Resolution 1325 by adopting it into national laws or action plans.¹²⁷

Exercise: Discussion of the Resolutions from the ACHPR on Women's Rights related to Conflict

Note to Facilitator: Split the training participants into groups and assign them one of the Resolutions by the ACHPR below. Ask the training participants to discuss the thematic scope of the resolution, its legal basis, as well as proposals made in the resolution, noting the salient points of the discussion for presentation during the plenary later.

1. Resolution 283 on the Situation of Women and Children in Armed Conflict.¹³²
2. Resolution 103 on the Situation of Women in the Democratic Republic of Congo.¹²⁸
3. Resolution 111 on the Right to a Remedy and Reparation for Women and Girls Victims of Sexual Violence¹²⁹

Session 2: Protection of Women in Armed Conflict

Session Objectives

- To interrogate the obligation among States to prohibit women and girls from armed conflict.
- To discuss the judiciary's role in securing access to justice for women and girl victims and survivors of armed conflict.

¹²⁶ UN Women. (2013, November 5). *New CEDAW recommendation a landmark for women in conflict-- UN Women Executive Director* [Press release]. <https://www.unwomen.org/en/news/stories/2013/11/ed-statement-on-adoption-of-cedaw-general-recommendation-onwomen-in-conflict>

¹²⁷ A list of all national action plans on women, peace and security can be found on 1325 National Action Plans website by the Women's International League for Peace and Freedom. (n.d.). *1325 National Action Plans*. 1325 National Action Plans. Retrieved 14 July 2022, from <https://1325naps.peacewomen.org/>

¹³² African Commission on Human and Peoples' Rights. (2014). *Resolution on the Situation of Women and Children in Armed Conflict - ACHPR/Res.283(LV)2014*. Retrieved 23 June 2022, from <https://www.achpr.org/sessions/resolutions?id=330>

¹²⁸ African Commission on Human and Peoples' Rights. (2006, November). *Resolution on the Situation of Women in the Democratic Republic of Congo - ACHPR/Res.103(XXX)06*. Retrieved 23 June 2022, from <https://www.achpr.org/sessions/resolutions?id=109>

¹²⁹ African Commission on Human and Peoples' Rights. (2007, November). *Resolution on the Right to a Remedy and Reparation for Women and Girls Victims of Sexual Violence - ACHPR/Res.111(XXXII)07*. Retrieved 23 June 2022, from <https://www.achpr.org/sessions/resolutions?id=163>

Article 11 of the Maputo Protocol

Protection of Women in Armed Conflicts

1. States Parties undertake to respect and ensure respect for the rules of international humanitarian law applicable in armed conflict situations, which affect the population, particularly women.
2. States Parties shall, in accordance with the obligations incumbent upon them under international humanitarian law, protect civilians including women, irrespective of the population to which they belong, in the event of armed conflict.
3. States Parties undertake to protect asylum seeking women, refugees, returnees and internally displaced persons, against all forms of violence, rape and other forms of sexual exploitation, and to ensure that such acts are considered war crimes, genocide and/or crimes against humanity and that their perpetrators are brought to justice before a competent criminal jurisdiction.
4. States Parties shall take all necessary measures to ensure that no child, especially girls under 18 years of age, take a direct part in hostilities and that no child is recruited as a soldier.

Acts of violence, including sexual violence, often occur extensively during armed conflict. In recent times, rape committed during such hostilities has been defined and treated as an international crime, prosecutable as torture, genocide, as a war crime, and as a crime against humanity.¹³⁰

International criminal judicial mechanisms have been at the forefront of interpreting international criminal law to underwrite access to justice for victims and survivors of sexual violence in conflict and bring perpetrators of these crimes to justice. This underlines the importance of judicial actors in addressing gaps in existing laws as part of the quest to guarantee access to justice for women and girls. For example, the International Criminal Tribunal for the former Yugoslavia (ICTY) was the first international

court to find an accused person guilty of rape as a crime against humanity.¹³¹ Furthermore, the Court expanded the definition of slavery as a crime against humanity to include sexual slavery.¹³²

Ultimately, rape ceased to be perceived as the unrestrained sexual behaviour of individuals and was recognised as a powerful tool of war, used to intimidate, persecute and terrorise the enemy.¹³³ The International Criminal Tribunal for Rwanda has also found rape to be a war crime and a crime against humanity, becoming the first international judicial mechanism to find an accused person guilty of rape as a crime of genocide in 1998.¹³⁴

¹³⁰ ICRC Advisory Service on International Humanitarian Law. (2015, March). *Prevention and Criminal Repression of Rape and Other forms of Sexual Violence during Armed Conflicts*. International Committee of the Red Cross. <https://www.icrc.org/en/download/file/4865/prevention-criminal-repression-rape-sexual-violence-armed-conflicts-icrc-en.pdf>

¹³¹ International Criminal Tribunal for the former Yugoslavia. (1998, November 16). *Prosecutor v. Zejnil Delalić, Zdravko Mucić also known as "Pavo," Hazim Delić, Esad Landžo also known as "Zenga"*. Retrieved 14 July 2022, from https://www.icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf

¹³² International Criminal Tribunal for the former Yugoslavia. (2001, February 22). *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic IT-96-23-T & IT-96-23/1-T*. Retrieved 14 July 2022, from <https://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf>

¹³³ International Residual Mechanism for Criminal Tribunals. (n.d.). *Landmark Cases*. Retrieved 23 June 2022, from <https://www.icty.org/en/features/crimes-sexual-violence/landmark-cases>

¹³⁴ International Criminal Tribunal for Rwanda (ICTR). (1998, September 2). *The Prosecutor v Jean-Paul Akayesu Case No. ICTR-96-4-T*. International Residual Mechanism for Criminal Tribunals. Retrieved 23 June 2022, from <https://unictr.irmct.org/sites/unictr.org/files/case-documents/ict96-4/trial-judge-ments/en/980902.pdf>

Exercise: Case Law Analysis

Note to Facilitator: Split the training participants into groups and assign them a precedent-setting case on the protection of women from armed conflict, such as the suggestion below. In line with the Guiding Question below, ask the training participants to discuss the facts of the case, the issues in the case, as well as the reasoning and decision of the court, noting the salient points of the discussion for presentation during the plenary later.

- **The Prosecutor versus Jean-Paul Akayesu Case**
No. ICTR-96-4-T¹³⁵
- **Coalition on Violence Against Women & 11 others v Attorney General of the Republic of Kenya & 5 others** [2020] eKLR¹³⁶

Guiding Questions

1. How are the above cases aligned with Article 11 of the Maputo Protocol?

¹³⁵ International Criminal Tribunal for Rwanda (ICTR). (1998, September 2). *The Prosecutor v Jean-Paul Akayesu Case No. ICTR-96-4-T*. International Residual Mechanism for Criminal Tribunals. Retrieved 23 June 2022, from <https://unictr.irmct.org/sites/unictr.org/files/case-documents/ict-96-4/trial-judge-ments/en/980902.pdf>

¹³⁶ High Court of Kenya. (2020, December 10). *Coalition on Violence Against Women & 11 others v Attorney General of the Republic of Kenya & 5 others; Kenya Human Rights Commission(Interested Party); Kenya National Commission on Human Rights & 3 others(Amicus Curiae)* [2020] eKLR. National Council for Law Reporting (Kenya Law). Retrieved 14 July 2022, from <http://kenyalaw.org/caselaw/cases/view/206218/>

Module 7: Rights of Women with Special Needs

Overview

This Module introduces participants to key concepts around protecting and promoting the rights of women with special needs. The Maputo Protocol is unique in that it provides human rights protections for women who face sets of challenges that are unique to the African continent.

This Module represents an acknowledgement that women are not a homogeneous group. A woman may suffer multiple and intersecting forms of discrimination - discrimination based on gender can be compounded by the fact that a woman is older, has a physical or mental disability, is in distress or is a widow. Therefore, we will discuss how the Maputo Protocol seeks to illuminate the gendered aspects of disability and age that have historically been treated as separate by the law.

This Module will also introduce participants to Maputo Protocol provisions around the rights of widows and daughters in the context of inheritance and dignity, the rights of older women and the rights of women with disability.

Session 1: Widows Rights

Session Objectives

- To interrogate the obligation among States to protect women with special needs from violence and discrimination.
- To discuss the judiciary's role in securing access to justice for women and girls with special needs.

The right to inherit property

Under Article 21 of the Protocol, the property rights of widows and daughters are protected.

Property rights economically empower women by creating opportunities for earning income, securing their place in the community and ensuring their livelihoods.¹³⁷

A considerable hurdle to realising women's rights in Africa is the pervasive denial of a woman's right to inherit land and other property.

Article 21 of the Maputo Protocol

Right to Inheritance

1. A widow shall have the right to an equitable share in the inheritance of the property of her husband. A widow shall have the right to continue to live in the matrimonial house. In case of remarriage, she shall retain this right if the house belongs to her or she has inherited it.

2. Women and men shall have the right to inherit, in equitable shares, their parents' properties.

¹³⁷ International Center for Research on Women. (2010). *Property Rights and Gender: A Training Toolkit*. <https://www.icrw.org/wp-content/uploads/2016/10/Property-Rights-and-Gender-A-Training-Toolkit.pdf>

In many traditional societies in sub-Saharan Africa, land use, housing, and the transfer of land and housing between generations are regulated by customary law, which excludes women from property ownership and inheritance. Without secure land and property rights, widows and other dependents are often left homeless and destitute after the death of their husbands or fathers. Disinheritance seriously undermines women's economic security, independence, and access to adequate food and housing. The denial of land rights to women also contributes to the feminisation of poverty and stunted economic development in countries where harmful inheritance practices are common.¹³⁸

Ownership through inheritance is highly gendered and culturally determined. Under customary law rules of inheritance, male family members, such as the oldest son or the oldest male relative of the deceased, usually inherit the control (as opposed to ownership outright) of the family property and make the decisions about the property. The wife does not inherit the family property, although she may use it. Often, customary law does not recognise the widow's indirect contribution to the matrimonial home, which restricts the widow's interest in the property. For example, widows may only be allowed to use the property for the remainder of their lives or until they remarry. The discriminatory effects of implementing customary laws relating to the rights of widows create tension for pluralist States whose constitutions protect the right to practise one's culture individually and as part of a group while recognising gender equality as a foundational principle of democracy, as discussed in previous Modules. Research suggests that the conflict between those values can be intense, and enforcing the entire panoply of individual rights against customary norms would invalidate 85% of them.¹³⁹

Guiding Questions

Note to Facilitator: Ask the following Guiding Questions in a plenary discussion. Write down the responses you receive so the whole training cohort can see them.

1. Based on your understanding of Article 21 (1) of the Protocol, please answer the following questions:
 - a) What constitutes an equitable share?

- b) What is the justification for the guarantee under Article 21 (1) of a widow's user rights and not inheritance rights of the matrimonial house?
- c) Does the Maputo Protocol recognize the direct and indirect contribution of a widow to the matrimonial house?
- d) Can a widow go to court to prove her indirect contribution to the house?
- e) Does the law define what constitutes a "matrimonial house"?
- f) What is the difference between a matrimonial house and a matrimonial home? What may the implications be for the widow?
- g) Does your country's statutes affirm a widow any right in the property of a deceased husband?
- h) Does your country's statutes affirm a widow's right to stay in the matrimonial house or home after the death of her husband?
- i) Does re-marriage by a widow dispose of the right to stay in the matrimonial house of her former marriage?

Considering the high reliance on customary law in determining civil issues, it is in the areas of marriage, divorce and inheritance that customary law is most often applied. This means that courts will be faced with the need to interrogate the extent to which culture and custom align with women's rights recognised by human rights instruments such as the Maputo Protocol, especially the right not to be discriminated against and the right to equal protection by the law.

Exercise: Case Law Analysis

Note to Facilitator: Split the training participants into groups and assign them a precedent-setting case on the right of widows, such as the suggestions below. Ask the training participants to discuss the facts of the case, the issues in the case, and the reasoning and decision of the court, noting the salient points of the discussion for presentation during the plenary later.

- **Dlamini v Prince Chief Gasawa Ngwane** (93 of 2018) [2019] SZSC 40 (Eswatini)¹⁴⁰
- **Naftal Joseph Kalalu v. Angela Mashirima** (PC Civil Appeal No. 145 of 2001) (Tanzania)¹⁴⁶

¹³⁸ Richardson, A. M. (2004). Women's Inheritance Rights in Africa: The Need to Integrate Cultural Understanding and Legal Reform. *Human Rights Brief*, 11(2), 19–22. <https://www.corteidh.or.cr/tablas/r38906.pdf>

¹³⁹ Tebbe, N. (2016). Customary Law and Constitutional Rights. In *Religion and Equality Law* (1st ed., pp. 466–496). Routledge.

¹⁴⁰ Supreme Court of eSwatini. (2019, October 9). *Dlamini v Prince Chief Gasawa Ngwane* (93 of 2018) [2019] SZSC 40. eSwatiniLII. Retrieved 14 July 2022, from <https://www.eswatiniilii.org/naftal-joseph-kalalu-v-angela-mashirima> ¹⁴⁶ High Court of Tanzania. (n.d.). *Naftal Joseph Kalalu v. Angela Mashirima* (PC Civil Appeal No. 145 of 2001). DocPlayer. Retrieved 14 July 2022, from <https://docplayer.net/67568378-In-the-high-court-of-tanzania-at-dar-es-salaam-p-c-civil-appeal-no-145-of-2001-naftal-jos-eph-kalalu-appellant-versus.html>

The Prohibition of widow inheritance

Article 20 of the Maputo Protocol

Widows' Rights

States Parties shall take appropriate legal measures to ensure that widows enjoy all human rights through the implementation of the following provisions:

- a) that widows are not subjected to inhuman, humiliating or degrading treatment;
- b) that a widow shall automatically become the guardian and custodian of her children, after the death of her husband, unless this is contrary to the interests and the welfare of the children;
- c) that a widow shall have the right to remarry, and in that event, to marry the person of her choice.

One practice which violates Article 20 (a) and (c) of the Maputo Protocol is widow inheritance. Widow inheritance is a cultural practice whereby a widow is expected and forced to marry her late husband's brother-in-law or close male relative.¹⁴¹

Guiding Questions

Note to Facilitator: Ask the following Guiding Questions in a plenary discussion. Write down the responses you receive so the whole training cohort can see them.

1. Is widow inheritance practised in your country? If yes, how is it practised?
2. What are the justifications for widow inheritance?
3. What are the human rights implications of widow inheritance?
4. Does your country have constitutional or

statutory provisions that outlaw widow inheritance? If yes, please summarise the provisions.

5. How are the provisions structured? Do they, for instance, ban both consensual and consensual marital relationships between women and a close male relative of the deceased husband?

Session 2: Daughter's Right to Inheritance

Session Objectives

- To interrogate the obligation of States to protect the rights of daughters to the inheritance of their parents' property.
- To discuss the judiciary's role in securing daughters' inheritance rights.

Article 21 of the Maputo Protocol

Right to Inheritance

2. Women and men shall have the right to inherit, in equitable shares, their parents' properties.

¹⁴¹ Richardson, A. M. (2004). Women's Inheritance Rights in Africa: The Need to Integrate Cultural Understanding and Legal Reform.

The norms that may prohibit a widow from inheriting her husband's property also often disentitle a girl in favour of her male sibling. In several societies, unmarried daughters have a right to use land within the paternal homestead, but cannot plant permanent crops or build structures. When a father decides to allocate land to any unmarried or divorced daughters, these women in most instances are likely to be forcefully evicted from the land by their male siblings, who believe that daughters should not have a share of paternal land.

Guiding Questions

Note to Facilitator: Ask the following Guiding Questions in a plenary discussion. Write down the responses you receive so the whole training cohort can see them.

1. What is the justification for practices that disinherit female offspring?
2. Does your country's constitution have provisions that specifically guarantee women's right to inheritance? If yes, please summarise the provisions.
3. Is there any statute in your country that provides ways of implementing women's right

to inheritance? If yes, please summarise the statutory provisions.

Exercise: Case Law Analysis

Note to Facilitator: Split the training participants into groups and assign them a precedent-setting case on women's inheritance rights, such as the suggestion below. Ask the training participants to discuss the facts, the issues in the case, and the reasoning and decision of the court, noting the salient points of the discussion for presentation during the plenary later.

- **Rono v Rono (2005)** AHRLR 107 (KeCA 2005 (Kenya)¹⁴²

Session 3: Special Protection of Older Women

Session Objectives

- To interrogate the obligation among States to protect the rights of older women.
- To discuss the judiciary's role in securing access to justice for older women.

Article 22 of the Maputo Protocol

Special Protection of Elderly Women

The States Parties undertake to:

- a) provide protection to elderly women and take specific measures commensurate with their physical, economic and social needs as well as their access to employment and professional training;
- b) ensure the right of elderly women to freedom from violence, including sexual abuse, discrimination based on age and the right to be treated with dignity.

¹⁴² Court of Appeal of Kenya. (2005, April 29). *Rono v Rono* (2005) AHRLR 107 (KeCA 2005).

Article 22 of the Maputo Protocol has been further bolstered by the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa, 2016.¹⁴³

Article 8 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa, 2016 deals with the protection of older persons from Abuse and Harmful Traditional Practices.

Article 8 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa

Protection from Abuse and Harmful Traditional Practices

States Parties shall:

1. Prohibit and criminalise harmful traditional practices targeted at Older Persons; and
2. Take all necessary measures to eliminate harmful traditional practices including witchcraft accusations, which affect the welfare, health, life and dignity of Older Persons, particularly Older women.

Article 9 focuses explicitly on the Protection of **Older Women**.

Article 9 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa

Protection of Older Women

States Parties shall:

1. Ensure the protection of the rights of Older Women from violence, sexual abuse and discrimination based on gender;
2. Put in place legislation and other measures that guarantee protection of Older Women against abuses related to property and land rights; and
3. Adopt appropriate legislation to protect the right of inheritance of Older Women.

¹⁴³ African Union. (2016, January 31). *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons*. Retrieved 23 June 2022, from <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-older-persons>

In General Recommendation No. 27 on Older Women and Protection of their Human Rights, the Committee on the Elimination of Discrimination Against Women restates the obligations international human rights law placed upon States to pay special attention to the violence suffered by older women.¹⁴⁴ The general recommendation also emphasises the multidimensional aspect of ageing and how different groups of women experience ageing differently. Additionally, the General Recommendation discusses how stereotypes about older women, whose role in the community is undermined once they are considered past their productive and reproductive years, contribute to violence and discrimination against older women.

In many societies today, a culture of abuse and neglect of older people is rising.¹⁵¹ Vulnerability to violence among older persons tends to be higher among older women and older persons with disability, among other vulnerable groups.¹⁴⁵ According to the international organisation HelpAge, older women face a unique vulnerability to abuse which must be addressed by laws and policies that specifically address their needs.¹⁴⁶ Elder mistreatment is now recognised internationally as a pervasive and growing problem.

Guiding Questions

Note to Facilitator: Ask the following Guiding Questions in a plenary discussion. Write down the responses you receive so the whole training cohort can see them.

1. What types of violence and abuse do older women face in your country?
2. What are the underlying negative beliefs, myths and stereotypes that lead to violence against older women?
3. In addition to criminal sanctions against perpetrators of this abuse, what measures has your country put in place to cater for the needs of older women?
4. Does your country have a policy addressing the specific human rights needs of older women,

or, are the specific human rights needs of older women addressed in a policy that addresses abuse against older persons?

5. Has your country ratified the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons (Protocol on the Rights of Older Persons) adopted in 2016?
6. If your country has ratified the Protocol on the Rights of Older Persons, what steps has it taken to implement the treaty?

According to the Centre for Human Rights at the University of Pretoria, States must provide for the following social goods and entitlements to comply with international and regional human rights instruments touching on the rights of older women.¹⁴⁷ These are:

- Sufficient budgetary allocations to those services required by the older population;
- Acknowledgement, support and information for those older persons providing care and financial support for their HIV-infected relatives;
- An opportunity for representatives of this section of society to voice their specific concerns and for those concerns to be heard and addressed by law and policy;
- Measures to increase the awareness of those concerns amongst the younger population, as well as any social, health and law enforcement workers responsible for dealing with survivors of violence or those at risk of HIV;
- Publicly condemn harmful practices such as spreading myths about using sex with older women as a cure for HIV or accusations of witchcraft; and
- Public awareness programmes to highlight the plight of older people and stop traditional harmful and discriminatory practices and accusations of witchcraft.

¹⁴⁴ Committee on the Elimination of Discrimination against Women. (2010, October). *General recommendation No. 27 on older women and protection of their human rights*. Office of the High Commissioner for Human Rights. Retrieved 23 June 2022, from <https://www2.ohchr.org/english/bodies/cedaw/docs/CEDAW-C-2010-47-GC1.pdf> 151 Pillemer, K., Burnes, D., Riffin, C., & Lachs, M. S. (2016). Elder Abuse: Global Situation, Risk Factors, and Prevention Strategies. *The Gerontologist*, 56(Suppl 2), S194–S205. <https://doi.org/10.1093/geront/gnw004>

¹⁴⁵ Gavi, P. S. (2020). Elder Abuse in Africa. In M. K. Shankardass (Ed.), *International Handbook of Elder Abuse and Mistreatment* (pp. 633–649). Springer. https://link.springer.com/chapter/10.1007/978-981-13-8610-7_34

¹⁴⁶ HelpAge International. (n.d.). *Violence against older women*. Retrieved 14 July 2022, from <https://www.helpage.org/what-we-do/rights/violence-against-older-women/>

¹⁴⁷ University of Pretoria Centre for Human Rights. (2009). *The Impact of the Protocol on the Rights of Women in Africa on Violence Against Women in Six Selected Southern African Countries*.

Session 4: Special Protection of Women with Disabilities

Session Objectives

- To interrogate the obligation among States to protect the rights of women with disabilities.
- To interrogate the links between the provisions of the Maputo Protocol and other treaties dedicated explicitly to promoting and protecting the rights of women with disabilities.
- To discuss the judiciary's role in securing access to justice for women with disabilities.

Article 23 of the Maputo Protocol

Special Protection of Women with Disabilities

The States Parties undertake to:

- a) ensure the protection of women with disabilities and take specific measures commensurate with their physical, economic and social needs to facilitate their access to employment, professional and vocational training as well as their participation in decision-making;
- b) ensure the right of women with disabilities to freedom from violence, including sexual abuse, discrimination based on disability and the right to be treated with dignity.

Disability and the right to work, to training and participation in decision-making

The right of people with disabilities to work is frequently denied.¹⁴⁸ People with disabilities, particularly women with disabilities, face enormous attitudinal, physical and informational barriers to equal opportunities in the world of work. People with disabilities generally face difficulties entering the open labour market. Still, by adopting a gender perspective, men with disabilities are almost twice more likely to have jobs than women with disabilities. When women with disabilities work, they often experience unequal hiring and promotion standards. Furthermore, women with disabilities experience unequal access to training and retraining and experience occupational segregation. They rarely participate in economic decision-making.

Disability and violence

Article 23 (b) of the Maputo Protocol obligates States to protect women with disabilities from violence (including sexual abuse), discrimination based on disability, and to further guarantee their right to be treated with dignity.

To comply with Article 23, governments must enact disability-sensitive laws and affirmative action

policies to address discrimination based on disability as well as decrease the risks of violence and sexual abuse of women with disabilities.

Guiding Questions

Note to Facilitator: Ask the following Guiding Questions in a plenary discussion. Write down the responses you receive so the whole training cohort can see them.

1. What does the law consider to be a disability?
2. Based on your observations, how are women with disabilities discriminated against? Relatedly, do women with disabilities face violence?
3. What are the underlying myths, stereotypes and vulnerabilities that contribute to violence against women?
4. Does your country have laws in place that prohibit violence against women with disabilities? If yes, please provide a summary of these laws. What forms of violence are prohibited, and what are some that are not?

¹⁴⁸ International Labor Organization. (2002). *The Right to Decent Work of Persons with Disabilities*. https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/publication/wcms_bk_pb_93_en.pdf

Exercise: Case Law Analysis

Note to Facilitator: Split the training participants into groups and assign them a precedent-setting case on the rights of women with disabilities, including some of the suggested cases below. Ask the training participants to discuss the facts of the case, the issues in the case, as well as the reasoning and decision of the court, noting the salient points of the discussion for presentation during the plenary later.

- **PBU & NJE v Mental Health Tribunal** [2018] VSC 564 (Australia)¹⁴⁹
- **X v United Republic of Tanzania**, Communication No. 22/2014 (Committee on the Rights of Persons with Disability)¹⁵⁰
- **Purohit & Another v Gambia** (Communication No. 241/2001) [2003] (African Commission on Human and Peoples' Rights)¹⁵¹

¹⁴⁹ Supreme Court of Victoria. (2018, November 1). *PBU & NJE v Mental Health Tribunal* [2018] VSC 564. AustLII. Retrieved 14 July 2022, from <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2018/564.html>

¹⁵⁰ Committee on the Rights of Persons with Disabilities. (2017, August 31). *X v United Republic of Tanzania* (Communication No. 22/2014) CRPD/C/18/D/22/2014. Office of the High Commissioner for Human Rights. Retrieved 14 July 2022, from <https://www.ohchr.org/sites/default/files/Documents/HRBodies/CRPD/CRPD-C-18-DR-22-2014.pdf>

¹⁵¹ African Commission on Human and Peoples' Rights. (2003, May 29). *Purohit & Another v Gambia* (Communication No. 241/2001) [2003] ACHPR 49. AfricanLII. Retrieved 14 July 2022, from <https://africanlii.org/afu/judgment/african-commission-human-and-peoples-rights/2003/49>

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8. African Commission on Human and Peoples' Rights. (2014). Resolution on the Situation of Women and Children in Armed Conflict - ACHPR/Res.283(LV)2014. Retrieved 23 June 2022, from <https://www.achpr.org/sessions/resolutions?id=330>
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