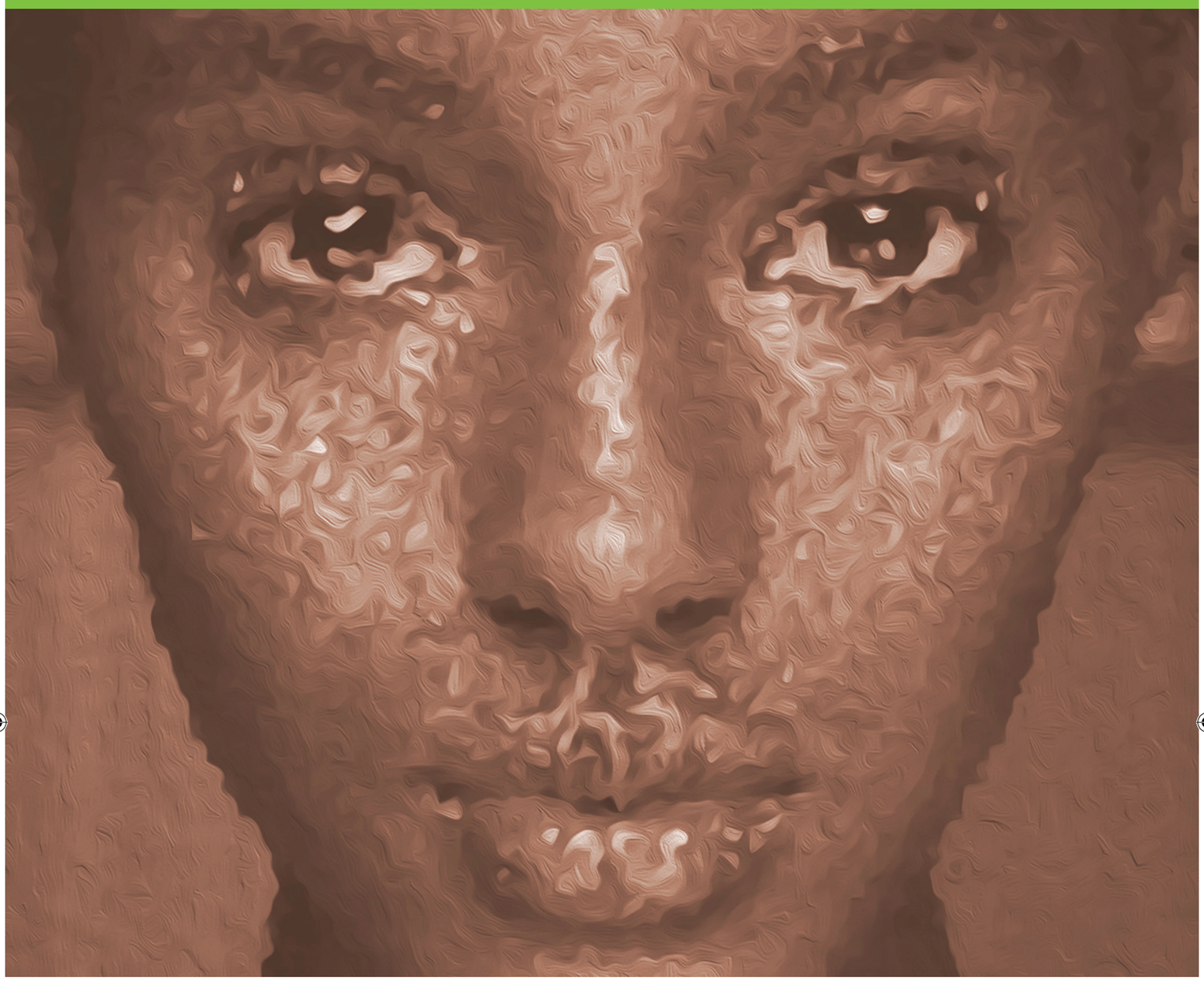

THE STATE OF AFRICAN WOMEN

Regional Report/The East African Community (EAC)

July 2019

This project is funded by the European Union

A project implemented by

IPPF Africa Region · IPPF European Network · giz Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH · KIT Royal Tropical Institute · DSW youth can · Faith to Action Network · OAFLAD · YWCA Kenya

RIGHT WHERE BY DO HER YOU STAND?

The State of African Women Regional Report/The East African Community (EAC)

This report was developed and published in the context of the State of African Women project, implemented by a consortium of eight partners.

This publication has been produced with the financial support of the European Union. The contents of this publication are the sole responsibility of the State of African Women Campaign Project Consortium Partners under the leadership of IPPF Africa Region, and can in no way be taken to reflect the views of the European Commission.

Authors: Elsbet Lodenstein, Anouka van Eerdewijk, Mariam Kamunyu, Marlies Visser (KIT, Royal Tropical Institute).

This project is funded by the European Union

RIGHT WHERE BY DO HER YOU STAND?

Table of Contents

Chapter 1

Introduction

BACKGROUND

Health and bodily integrity lie at the heart of well-being for all. Sexual and reproductive health and rights are critical elements of health and bodily integrity, especially for women and girls. Poor health and violations of bodily integrity are not only poor development outcomes, but also violations of fundamental human rights. Healthy and well-spaced and timed pregnancies, together with protection from infections with HIV, and other sexually transmitted diseases, have a large impact on women and girls' health and lives. In order for that impact to be positive, women and girls need to have the freedom to make choices about fertility, pregnancies, contraception and on how to protect themselves and be protected from HIV and other STIs. Access to sexual and reproductive health services as well as comprehensive information and education is indispensable to support women and girls in making these choices.

For that impact to be positive and women and girls' health and bodily integrity to be promoted and realised, they need to be able to choose and decide on sexual partners and relations, and when desired, on their marriage partner. And it requires that women and girls are free from violence, discrimination and coercion, and in particular are free from child marriage, female genital mutilation and other harmful practices. That points to the need to challenge gender inequalities and patriarchal norms and practices, and to promote gender equitable relations that respect and promote consent, freedom and choice of all women and girls. These gender relations manifest themselves in intimate relations, marriage, and communities, as well as in interactions with health service providers or police or judiciary officers.

This year marks the fifteenth anniversary of the Maputo Protocol, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted in 2003. This anniversary offers an excellent opportunity to take stock of gaps and contestations around the realisation of women and girls' rights, and to identify where progress needs to be accelerated. The upcoming 25-year review of the ICPD (International Conference on Population and Development, ICPD+25) also calls for review of progress made. This review, especially in connection to the five-year review of the Addis Ababa Declaration of Population and Development in Africa Beyond 2014 (AADPD+5), provides the moment to see where progress has stalled, and what the unfinished business is for the near future in realising women and girls' sexual and reproductive health and rights.

Achieving full gender equality in all spheres of life is a critical element of the 'aspirations of the Africa we want' articulated in Agenda 2063. Addressing the unfinished agenda is also key to realising the SDGs, and in particular SDG Three and Five. Sexual and reproductive health as well as financing for health systems are key priorities to meeting SDG Three (to promote healthy lives and promote well-being for all at all ages). In order to meet SDG Five (to achieve gender equality and empower all women and girls), more efforts are needed to end gender-based violence against women and girls, as well as harmful practices, such as child marriage and FGM. It also requires women and girls being able to make decisions about sexual relations and partners, and about choice of contraception and access to and use of SRH services and information.

Addressing this unfinished business is of pivotal importance as we embark on the last three years of the Africa Women's Decade (2010-20), that aims to hold government to account on their continental and international commitments for gender equality and women and girls' empowerment. This State of African Women report aims to contribute to the realisation and promotion of women and girls' rights, in particular in SRHR, by raising awareness of the commitments and tracking progress made towards their full implementation.

AIM OF THE REGIONAL REPORT

This regional report is produced on the basis of data in The *State of African Women Report* (2018) which is published as part of the State of African Women Campaign project. This project seeks to contribute to securing, realising and extending women's rights enshrined in African Union policies in African countries. The *State of African Women Report* focuses on women and girls' rights in sexual and reproductive health and rights (SRHR).

This regional report aims to provide insight into the role of the East African Community and its member states in advancing women and girls' right in SRHR. It presents the findings of the *State of African Women* report related to:

- The **EAC normative and institutional framework** on gender equality and women's rights and its strengths, challenges and opportunities (chapter 2)

- **EAC member states'** national legal and policy frameworks (chapter 3) on women and girls' rights, its trends, gaps, and contestations in the areas of:
  - Gender-based violence against women
  - Harmful practices
  - Reproductive rights and sexual and reproductive health
  - HIV and AIDS (chapter 3)

This report aims to reach a broad audience including:

- Parliamentarians, first ladies, journalists, religious leaders, youth leaders, feminist organisations and activists, and representatives of CSOs (including women's rights, SRHR, child rights and faith-based organisations)
- AU and REC representatives including high-level political decision-makers, as well as technocrats and thematic experts
- National (and subnational) government decision-makers
- EU (Brussels) and donors

Chapter 2

The EAC normative and institutional framework on gender equality and women's rights

EAC is increasingly involved in gender equality and women and girls' rights agendas. The legal and institutional framework is evolving, with the EAC Gender Equality and Development Bill (awaiting assent from EAC Heads of State) and the Sexual and Reproductive Health Rights Bill (awaiting re-tabling at EALA) showing recognition of the AU Maputo Plan of Action and ICPD commitments. Table 1. provides an overview of the commitments and infrastructure in EAC related to women and girls' rights and gender equality. Sections 1-6 provide further details.

Table 1.
Overview of women and girls' rights and gender equality commitments and infrastructure in EAC

Reference to women and girls' rights or gender equality in EAC Treaty	Good governance, gender equality, human rights; mainstreaming of gender; participation; addressing discrimination
Normative framework of EAC on gender equality/women and girls' rights	EAC Gender Equality and Development Bill (2016) awaiting assent from EAC Heads of State: • Non-discrimination • Harmonisation of gender equality commitments across the sub-region • Women's rights, including GVAW, health, peace and security, marginalised groups
Monitoring mechanisms	-
Other commitments on women and girls' rights areas central in Right By Her report	HIV and AIDS Prevention and Management Act
Gender infrastructure in EAC	Gender Department
Regional advocacy networks at REC level	• EASSI • EALS • EACSOF • EAHP • EANNASO
Other aspects	• EAC Consultative Dialogue Framework (on participation of civil society) • EAC Court of Justice • 50 Million African Women Speak campaign • EAC Gender Equality and Development Barometer

Source: SOAWC full report, p. 39.

2.1. EAST AFRICAN COMMUNITY (EAC) TREATY

The EAC is a regional intergovernmental organisation that was initially established in 1967. It became defunct in 1977 and was re-established in 1999 via the adoption of a new treaty: the Treaty for the Establishment of the East African Community (2000) ('the EAC Treaty').

EAC: created in 1977 (and re-established 1999)

Member states: Burundi, Kenya, Rwanda, South Sudan, Tanzania and Uganda

The EAC is both state- and donor-funded. Its main mandate is that of economic and social integration, the achievement of which should take into cognisance human rights and gender equality. The **EAC Treaty** provides that the *fundamental principles* include 'good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights' (Art. 6.2). The EAC's *operational principles* equally require states 'to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights' (Art. 7.2). More specifically, the entry point for women's rights promotion within EAC work is found among the objectives of the Community in Art. 5(3)(e) of the EAC Treaty, which requires the EAC to ensure 'the mainstreaming of gender in all its endeavours and the enhancement of the role of women in cultural, social, political, economic, and technological development'. Further, Art. 121 calls on states to recognise and enhance the role of women and girls in socioeconomic development through legislative and other measures on participation in decision-making; addressing harmful practices and discrimination; and awareness creation aimed at countering prejudices against women and girls, among others. Art. 122 makes a similar call with regard to the role of women in business.

2.2. STATUS OF RATIFICATION OF THE MAPUTO PROTOCOL BY EAC MEMBER STATES

Currently (2018), out of the 55 AU member states, 41 have ratified the Protocol. South Sudan ratified recently, in 2017. All but one of the EAC member states have ratified the Maputo Protocol. Burundi has not yet ratified the Protocol but has signed it, which carries along an obligation not to undermine it[1]. Kenya, Uganda and South Sudan have ratified the Maputo Protocol while entering reservations on certain articles. Reservations concern article 14(2)(c) on access to safe abortion (Kenya, Uganda, South Sudan), marriage (South Sudan), women's rights to control fertility (Uganda) and government expenditure for social development (Kenya). Except for Rwanda, EAC member states have not met requirements to report on the implementation of the Maputo Protocol[2].

1 EASSI. (nd). 'The EAC Gender Equality and Development Bill'. Factsheet.

2 According to the *Guidelines for State Reporting under the Maputo Protocol* (AUC, 2009). www.chr.up.ac.za/images/files/research/gender/achpr/Guidelines%20on%20State%20Reporting%20on%20the%20Protocol%20%20English%20Version.doc

2.3. GENDER EQUALITY AND DEVELOPMENT BILL AND NORMATIVE FRAMEWORK ON GENDER EQUALITY

The EAC Treaty provides a strong normative framework for the promotion of women and girls' rights. Further to this, the finalisation of the **draft Gender Policy** together with the enactment of the EAC Gender Equality and Development Bill 2016 will present the greatest opportunity to strengthen women and girls' rights protection in the EAC. The Policy will offer clear modalities and strategic priority areas and guide the EAC on the planning, implementation, monitoring and evaluation of programmes to address women and girls' rights issues in the region.

The **EAC Gender Equality and Development Bill 2016**, once it becomes law, will be binding on states and therefore will create a greater imperative for gender mainstreaming and for states to harmonise and align their laws and programmes across the region. The alignment of the EAC Gender Equality and Development Bill 2016 with the Maputo Protocol—such as in the definition of GVAW—represents a useful step towards harmonisation, as all but one of the EAC member states have ratified the Maputo Protocol. Burundi has not yet ratified the Protocol but has signed it, which carries along an obligation not to undermine it[3].

Box 1. EAC Gender Equality and Development Bill 2016

The EAC Gender Equality and Development Bill has been passed by the East African Legislative Assembly (EALA)8 and is awaiting assent from Heads of State. Its objectives include to realise the EAC's commitment to gender equality as set out in the EAC Treaty, to promote non-discrimination as a process of governance and to harmonise gender equality commitments so as to ensure women and girls' rights are uniformly protected across the sub-region. The legislation prohibits discrimination and calls for various legislative, programmatic and other measures to be implemented in order to realise gender equality.

The legislation prohibits SGBV and follows the definition of the Maputo Protocol. Its provisions are drafted within a human rights-based approach and relate SGBV to the protection of women and girls' various rights, including the right to life, dignity, integrity and security of the person. All forms of exploitation and cruel and inhuman degrading treatment are prohibited. Harmful practices, including SGBV and FGM, early and forced marriage, widow inheritance and albino and child sacrifices, are prohibited. States are required to enact laws to protect women and girls in relation to human trafficking and sexual exploitation and notably to enact specific penal laws against rape during conflict: sexual violence during conflict is considered a crime against humanity. It further calls for the harmonisation of SGBV penal laws across the EAC countries and for ratification, domestication and implementation of the Maputo Protocol.

On health, the legislation has in place provisions covering the reduction of maternal mortality and a call for the development of policies and programmes for SRHR. It also calls for the enactment of gender-sensitive laws, policies and programmes for the management of HIV and AIDS.

On peace and security, there is recognition of the need for special protection for women and girls during conflict. The provisions also include measures to ensure women have equal representation in conflict resolution and peace-building processes. The legislation also highlights interrelationships with UNSCRs, such as 1325 on Women, Peace and Security.

Other provisions in the legislation relate to the requirement to mainstream gender in media policies programmes and the right to free and quality education for children. Also provided for is inclusion of women and girls in power and decision-making, economic empowerment, agriculture and food security, land rights, trade, environmental management and special measures for marginalised groups.

In terms of more specific rights areas, the **HIV and AIDS Prevention and Management Act** sets out to regulate an effective response to HIV across the region from a rights-based approach. In addition, the Act classifies women and girls as a vulnerable or most at-risk population and highlights their rights to information, equality, non-discrimination and protection from all forms of violence, among other contextualised rights (see also case study 28 in Chapter 8). A **Sexual and Reproductive Health Rights Bill** has been drafted 2017, in recognition of the AU Maputo Plan of Action and ICPD commitments. It is currently waiting for its third reading in the EALA.

3 EASSI. (nd). 'The EAC Gender Equality and Development Bill'. Factsheet.

2.4. GENDER INSTITUTIONAL ARRANGEMENTS

The EAC Secretariat has designated a Gender Department to lead on the mainstreaming of gender-related issues. In addition, the Department is charged with overseeing the inclusion of children, youth, persons with disabilities and the elderly and further tasked with matters of community development. This huge spread of issues undermines the effectiveness of the gender mainstreaming project. The Department in fact comprises only one officer; the limited human and financial resources allocated seem to be at a mismatch with its broad mandate.

The budget of the EAC is internally sourced through member state contributions, with a significant part supported by development partners. However, in practice, states are often late or non-compliant in disbursing their contributions, thereby hindering operations[4]. This general challenge in finances is particularly crippling for the implementation of gender activities. Women and girls' rights work is yet to attract prioritisation, and not deemed worthy of independent funding, under the explanation that gender issues will be mainstreamed in all other endeavours.

2.5. REGIONAL ADVOCACY NETWORKS

There are a number of regional-level advocacy networks working on human rights issues. These are largely concerned with enhancing the space for participation at the EAC and influencing policies, laws and implementation on various rights areas including women and girls' rights. These regional actors have made significant contributions from a rights perspective, among others in the piloting of the Barometer. Many cite the development and passing of the HIV and AIDS Prevention and Management Act as a civil society-led initiative and victory. The Gender Equality and Development Bill is equally civil society-driven.

The Eastern African Sub-Regional Support Initiative for the Advancement of Women (EASSI) has had a leading role in the development of and advocacy for the Gender Equality and Development Bill. EASSI is a sub-regional CSO working on women and girls' rights issues in the Eastern African region across eight countries[5]. Further, in terms of monitoring the impending gender equality and development legislation as well as the general gender responsiveness of EAC member states, EASSI in partnership with national focal points has developed an EAC Gender Equality and Development (GED) Barometer.

Box 2. The EAC Gender Equality and Development Barometer

The GED Barometer is a tool to track implementation of the EAC's gender equality and development legislation, once it is in effect. It also has utility beyond the legislation and can therefore be utilised prior to its passing. The Barometer is intended to be used by member states to monitor, measure and document the progress of gender equality in key result areas. This will further facilitate a regional conversation on strategies for the enhancement of substantive gender equality and sustainable development. The result areas include legal and state obligations to protect human rights; power and decision-making; GVAW; SRH and HIV and AIDS; economic justice; employment, land, trade and agriculture; education; peace and security; media; climate change and environmental management; and extractive industries.

The GED Barometer undertakes documentation from three perspectives, which enable it to give a holistic view of gender responsiveness in the sub-region.

1.An index presenting the statistics on the various result areas

2.A scorecard capturing information sourced from EAC residents/respondents using a questionnaire10

3.Case studies highlighting lessons learnt and areas for improvement

The Barometer is intended to have various impacts. To begin with, it enhances evidence-based advocacy using empirical data, beyond reliance on anecdotal evidence and rhetoric. It contributes to increased awareness among rights-holders and human rights advocates, who will accordingly be in a stronger (more informed) position to engage their respective governments. At the national level, the Barometer has great potential to further facilitate gender-responsive budgeting, planning and advocacy. The comparisons on compliance are also likely to enhance compliance with commitments among member states.

4 For instance, as at September 2017, only Kenya had fully met its payment obligations. See Ligami, C. (2017). 'Cash-Strapped EAC Raids Reserve Funds'. *The East African*, 4 September; Karuhanga, J. (2017). 'Council of Ministers Says No to Increase in 2017/18 EAC Budget'. *The New Times*, 8 May.

5 www.eassi.org/home/

Other regional advocacy networks include the **East African Law Society** (EALS)[6]. This regional bar association concerns itself with professional development of its members as well as advocacy and public interest litigation on human rights issues within the East African region. Its projects include those on women and girls' rights issues. EALS has observer status before the EAC and access to many institutions and processes. The **East African Civil Society Organisations' Forum** (EACSOF)[7] is an umbrella body that provides a platform for the representation and participation of East African CSOs with the EAC. Its work areas are aligned with EAC working areas, including gender equity and equality, and it has been very involved in the EAC Gender Equality and Development Bill and the GED Barometer.

The **East African Health Platform** (EAHP[8]) is mandated by the EAC Treaty to bring together the voices of non-state actors from civil society, the private sector and faith-based organisations on health as part of the EAC's consultative dialogue framework of engagement. It does this primarily through advocacy with a focus on reproductive health rights issues, HIV and sexually transmitted infections (STIs). The **Eastern Africa National Networks of AIDS Service Organisations** (EANNASO)[9] is a regional network comprising national networks of AIDS service organisations. It works with the EAC with a view to influencing polices on HIV response. EANNASO was at the forefront of efforts that led to the passing of the EAC HIV and AIDS Prevention and Management Act 2012.

Towards creating an enabling environment for the participation of advocacy actors, the EAC adopted the **Consultative Dialogue Framework** (CDF). This is grounded in the EAC Treaty, which envisages that other actors be consulted and contribute to the development agenda. The CDF creates structured avenues for dialogue and consultation for CSOs, the private sector and other interest groups with the EAC Secretariat as well as states. One example of this is the Secretary General's Forum (SG's Forum). For various civil society actors, the annual SG's Forum is a platform to interface with the Secretariat, dialogue on various issues and make recommendations. Aside from this, the EAC Secretariat has not yet engaged in any women and girls' rights campaigns such as those seen at the regional level, for instance the AU Campaign to End Child Marriage. There may be room for such an engagement in collaboration with regional-level advocacy actors.

6 www.ealawsociety.org/
7 http://eacsof.net/EACSOF/
8 http://www.eahplatform.org/
9 http://www.eannaso.org/

2.6. STRENGTHS, OPPORTUNITIES AND CHALLENGES

The normative framework of the EAC on gender equality and women and girls' rights is potentially strong, in anticipation of the formal adoption of the Gender Equality and Development Bill. There are also frameworks in place or developed for specific areas of women and girls' rights, such as HIV legislation. The binding nature of EAC legislation offers leverage for harmonisation and implementation in the region. Moreover, the EAC has in place an East African Court of Justice (EACJ) that has in the past adjudicated on human rights issues. The EACJ is charged with the interpretation of and compliance with the application of the EAC Treaty. It can hold states accountable for violation of laws and presents an opportunity for holding states to account for the violation of women and girls' rights.

With its CDF, the EAC is the only REC that speaks to the consultation of civil society in an institutionalised, as opposed to *ad hoc*, manner. The CDF both is envisaged in the EAC Treaty and has been provided for within EAC structures. In combination with the presence of strong regional networks working on women and girls' rights issues, with a dedicated advocacy programme on the EAC's work, this has contributed to significant involvement of civil society in driving legislation within the EAC (HIV and AIDS Act, Gender Bill, SRHR Bill). CSOs have a strong role to play in influencing and driving the women and girls' rights agenda here.

Gender equality and women and girls' rights issues are not yet prominent at the EAC in practice. This may owe to a lack of both political will and strong guidance on gender mainstreaming. This also has to be understood in the stronger emphasis of the EAC on economic interests than on social and human rights issues. At the Secretariat, the mainstreaming of gender that is envisaged by the Treaty is yet to be realised, with women and girls' rights not prioritised. Funding issues in light of unpaid state dues and insufficient resource mobilisation have in turn affected the implementation of gender-related interventions.

These challenges equally present opportunities for growth as the EAC has in place structures to deal with all actors ranging from states to civil society and private actors. Taking into account current human resource constraints and financial challenges, the greatest opportunity here lies in the planning, gender mainstreaming and genuine implementation of women and girls' rights issues within all mandates of the institutional infrastructure. In this regard, the pending draft Gender Policy may prove critical.

Table 2.
EAC: strengths, opportunities and challenges

Strengths	Opportunities	Challenges
• Alignment with existing international and continental commitments, contributing to harmonisation • Binding nature of EAC legislation, contributing to harmonisation • Both comprehensive gender equality frameworks and specific ones relating to HIV and AIDS and SRHR in place or in development • Institutionalisation of role and consultation of CSOs in CDF • Existence and active engagement of regional networks on women and girls' rights issue in EAC • Significant involvement of CSO in driving legislation within the EAC (HIV and AIDS Act, Gender Bill, SRHR Bill), with a strong role in influencing and driving the women and girls' rights agenda	• Gender Equality and Development Bill 2016, which is awaiting assent • The EACJ offers an opportunity for holding states to account for violation of women's rights • Focus on the role of women in business and socioeconomic development can serve as an entry point for advocacy on SRHR issues • ESA commitment on Comprehensive Sexuality and Sexual and Reproductive Health Services for Adolescents and Young People in ESA (Case study 21 in the full SOAWC report).	• Practice on gender equality and women and girls' rights issues is not yet prominent • Human resource capacity constraints, combined with broad mandate for gender department • Funding constraints

Table 3.

EAC: Key documents and institutional infrastructure for women's rights and gender equality

Mandate and history	
2000	Treaty for the Establishment of the EAC
2011	4th EAC Development Strategy (2011/12–15/16)
2016	EAC Vision 2050
TBA	5th EAC Development Strategy *(in development)*
Women and girls' rights/gender equality commitments	
2011	EAC Framework for Gender and Social Development Outcome Indicators for EAC Development Strategy (2011–16)
2012	EAC Strategic Plan for Gender, Youth, Children, Persons with Disability, Social Protection and Community Development (2012–16) *(renewal in progress)*
2012	EAC HIV and AIDS Prevention and Management Act
2012	EAC Consultative Dialogue Framework
2013	Guidelines and Checklists for Gender Mainstreaming in EAC Organs and Institutions
2013	Gender Mainstreaming Strategy for EAC Organs and Institutions
2013	EAC Youth Policy
2016	EAC Regional Health Policy
2016	EAC Integrated Reproductive Maternal, Newborn, Child and Adolescent Health Policy
2016	EAC Integrated Reproductive Maternal, Newborn, Child and Adolescent Health Policy Guideline (2016–30)
2016	EAC Integrated Reproductive Maternal, Newborn, Child and Adolescent Health Strategic Plan (2016–21)
2016	Gender Equality, Equity and Development Bill *(passed by EALA, awaiting assent by Heads of State)*
2016	EAC Gender Equality and Development Barometer *(pilot and civil society-led)*
TBA	Draft Gender Policy *(in development)*
TBA	EAC Sexual and Reproductive Health Rights Bill (2017)
Gender infrastructure (institutional)	
Council of Ministers	Policy-making organ of the EAC, determines development and implementation of development strategies
Sectoral Council on Gender, Youth, Children, Social Protection and Community Development	Conceptualising and mainstreaming cross-cutting issues, including gender, in EAC policies and programmes
EAC Secretariat—Gender, Community Development and Civil Society Sector	Guides implementation and domestication of gender-related policies, laws and standards in EAC and states
East African Health Research Commission	Advisory, research and knowledge generation institution of the EAC on health-related matters
East African Legislative Assembly	The legislative organ of the EAC
East African Court of Justice	The key judicial organ of the EAC
Regional and/or REC-level CSO networks	
Eastern African Sub-Regional Support Initiative for the Advancement of Women	
East African Law Society	
East African Civil Society Organisations' Forum	
East African Health Platform	
Eastern Africa National Networks of AIDS Service Organisations	

Chapter 3

National legal and policy frameworks of EAC member states

This section looks at how commitments agreed by African states regarding women and girls' rights in SRHR (as presented in previous section) are being implemented at the national level. The section addresses four rights areas:

- Gender-based violence against women (3.1)
- Harmful practices (3.2)
- Reproductive rights and sexual and reproductive health (3.3)
- HIV and AIDS (3.4)

For each of these rights areas, the section will present i) definitions ii) key prevalence data iii) commitments and required response according to the Maputo protocol; iv) legal and policy indicators by EAC member states and, v) trends in legal, policy and institutional reform, and vi) gaps and contestations in the national legal and policy frameworks.

3.1. GENDER-BASED VIOLENCE AGAINST WOMEN

Definitions

The Maputo Protocol defines violence against women in a **comprehensive** way, to include acts or threat of violence in both public and private spheres, in peacetime as well as during war and armed conflict. It also includes in its definition exploitation, intimidation, coercion, arbitrary restrictions and deprivations of fundamental liberties. GVAW includes multiple **types** of violence: physical violence, sexual violence, psychological abuse and violence, and economic abuse and exploitation. It occurs in different public and private **settings**, including in the family, in the community, in the workplace and in educational institutions, in formal and state institutions, and in situations of armed conflict and insecurity[10].

Prevalence

There is a strong need for reliable data on the many ways in which women and girls are exposed to and experience GVAW, and how it affects their lives. The collection of data on GVAW is difficult and its reliability is uncertain, owing to underreporting and the sensitivity of the issue. Most data is on intimate partner violence (IPV) or non-partner violence, with less available on other forms of violence (in particular trafficking of women and girls and GVAW in contexts of armed conflict and war).

- One in three African women experience GVAW in their life[11]. Lifetime prevalence of some form of physical and/or sexual violence by an intimate partner is estimated to be 36.6% for African women. IPV varies between countries from 5% to 57%[12].
- Non-partner sexual violence is estimated at 11.9% among African women[13]. It is higher in Central and Southern Africa (21% and 17.4%, respectively) than it is in Eastern and Western Africa (11.5% and 9.2% respectively), and lowest in Northern Africa (4.5%)[14].
- Not all women and girls are exposed to or experience GVAW in the same way. Young and adolescent women, elderly women, women with disabilities, female sex workers and lesbian, bisexual or transgender women can face specific and multiple challenges and be more exposed and vulnerable to certain types of violence.

Key commitments and required response

The Maputo Protocol provisions call for:

- The prohibition and eradication of **all forms of violence against women**. This explicitly includes unwanted or forced sex in **either the private or the public sphere**, and hence articulates a prohibition of marital rape and violence. It also requires states to combat and punish sexual harassment in the **workplace**, **in schools or other educational institutions**.
- The Maputo Protocol explicitly refers to marginalised groups, and provides for the rights of elderly women, widows and women with disabilities to be free from violence, including sexual abuse, and discrimination.
- It also explicitly addresses GVAW in **armed conflict** situations, and provides for the protection of asylum-seeking women, refugees, returnees and internally displaced persons against all forms of violence, rape or other sexual exploitation. Very importantly, the Protocol provides that states respect international humanitarian law. This implies that sexual violence and other forms of GVAW and violence experienced by women and girls during armed conflict constitute war crime, genocide and/or a crime against humanity. International humanitarian law applies to all states, including those that are not under a treaty.

The Maputo Protocol sets a high bar for **state responsibility** regarding GVAW, to ensure the prevention, punishment and eradication of all forms of GVAW. This requires states to:

- enact and enforce laws that prohibit all forms of GVAW;
- identify causes and consequences of GVAW;
- punish perpetrators;
- support, rehabilitate and offer reparation of victims and survivors of GVAW; and

10 Men and boys also experience gender-based violence. Reports that document sexual violence against men and boys are available for Burundi, CAR, DRC, Kenya, Libya, Rwanda, Sierra Leone, Somalia, South Africa, South Sudan and Sudan: https://allsurvivorsproject.org/countries/

11 WHO. (2013). 'Global and Regional Estimates of Violence against Women: Prevalence and Health Effects of Intimate Partner Violence and Non-Partner Sexual Violence'. Geneva: WHO

12 UN Women. (n.d.) 'Global Database on Violence against Women'. http://evaw-global-database.unwomen.org/en

13 WHO. (2013). 'Global and Regional Estimates of Violence against Women: Prevalence and Health Effects of Intimate Partner Violence and Non-Partner Sexual Violence'. Geneva: WHO.

14 WHO. (2013). 'Global Health Data Repository. Non-Partner Sexual Violence Prevalence'. Retrieved 19 January 2017 from http://apps.who.int/gho/data/view.main.NPSVGBDREGION

- prevent and condemn trafficking in women and girls. It also requires the provision and operationalisation of adequate budgets and other resources to implement and monitor these actions aimed at the eradication and prevention of GVAW.

The *ACHPR Guidelines on Combating Sexual Violence and its Consequences in Africa* (2017)[15] that includes a reference to *Resolution 275 of the ACHPR* (2014)[16], further articulate the principles and obligations for state responses to GVAW. The Maputo Protocol also endorses the international *Women, Peace and Security* agenda, and in particular *UNSCRs 1325 and 1820* and later resolutions.

Key legal and policy indicators for EAC member states

Table 4 presents the legal and policy indicators regarding harmful practices. Definitions of these indicators can be found in annex 1. Burundi, Kenya, Rwanda and Uganda stand out as the countries with the more comprehensive legal and policy frameworks on GVAW. Kenya and Rwanda have laws and legal provisions on all indicators. Burundi and Uganda have legislation on domestic violence, sexual harassment and human trafficking, and have adopted a NAP 1325, but have not criminalised marital rape. South Sudan has a NAP 1325 but lacks legislation on domestic violence, marital rape, sexual harassment and human trafficking. Within this overall picture of high unevenness and variation across the REC, lack of legislation on marital rape stands out as the weakest point: 4 out of 6 countries have not criminalised rape within marriage.

Table 4.
Legal and policy indicators for EAC member states regarding GVAW

	INDICATORS				
Country	Legislation on domestic violence	Criminalisation of marital rape	Law on sexual harassment	Law on human trafficking	NAP 1325
Burundi	Yes[17]	No	Yes	Yes[18]	Yes
Kenya	Yes	Yes[19]	Yes	Yes	Yes
Rwanda	Yes[20]	Yes	WP	Yes	Yes
South Sudan	No	No[21]	No	No	Yes
Tanzania	No[22]	No	Yes[23]	Yes	No
Uganda	Yes	No	WP	Yes	Yes

Trends in legal, policy and institutional reform

Constitutional provisions: The constitutions of all EAC member states contain broad provisions that are useful with regard to addressing GBV. These cover, among others, the principles of non-discrimination and equality before the law and the right to physical and mental integrity, to freedom from cruel, inhuman and degrading treatment, to freedom from slavery or servitude and to freedom from torture. Some countries have specific provisions on a form of GBV; South Sudan's constitution, for example, speaks to trafficking and has specific provisions that allude to addressing harmful practices and traditions, and this may be inferred to have a bearing on GBV, depending on the rights violation in question.

15 The guidelines articulate four obligations of states in combating sexual violence: (1) to prevent sexual violence, (2) to provide protection and support to victims of sexual violence, (3) to guarantee access to justice and investigate and prosecute perpetrators of sexual violence and (4) to provide effective remedy and reparation for victims of sexual violence.

16 Resolution 275 of the ACHPR (adopted in 2014). This Resolution notes and condemns violence and human rights violations, by both state and non-state actors, against persons on the basis of their imputed or real sexual orientation or gender identity.

17 Law No. 1/13/2016 on Prevention, Protection of Victims and Expression of GBV.

18 Loi N1/28 du 29 Octobre 2014 portant Prévention et Répression de la Traite des Personnes et la Protection des Victims de la Traite.

19 Kenya's Protection Against Domestic Violence Act (2015) includes marital rape in its definition of domestic violence in its provision in Section 3(a)(vi): 'In this Act, "violence" means abuse that includes sexual violence within marriage'. A contradictory provision in the Sexual Offences Act (2006) that had excluded marital rape from the definition of sexual violence (in section 43(5)) however persists. The more recent legislation overrides the application of the former one where there is a contradiction.

20 Law No. 59/2008 on Prevention and Punishment of GBV.

21 The law is explicit that marital rape is not an offence (Art. 247(3) of the 2008 Penal Code).

22 Whereas the Tanzanian Law of Marriage Act provides that corporal punishment may not be inflicted on a spouse, this provision is not backed by a penalty and therefore not criminalised. Corporal punishment, which is undefined, also fails to account for the various ways domestic violence may be inflicted including non-physical forms of violence.

23 Various laws including the Employment and Labour Relations Act, the Penal Code, the Sexual Offences Special Provisions Act and the newly amended Education Act, which includes provisions on sexual harassment in schools.

Statutory law on GVAW: Virtually all states reviewed (except for South Sudan) have a statutory law that prohibits a form of GBV. Four countries have specific legislation on *domestic violence* (Burundi, Kenya, Rwanda and Uganda), and South Sudan and Tanzania lack legislation on domestic violence. The picture with respect to criminalisation of *marital rape* is grim, with only Kenya and Rwanda legally providing that rape within marriage is criminalised. In Kenya, the Protection Against Domestic Violence Act (2015) includes marital rape in its definition of domestic violence where it provides in Section 3(a)(vi) that 'In this Act, "violence" means abuse that includes sexual violence within marriage'. By virtue of this provision, women in Kenya can now rely on the protective and relief provisions in the Act in instances of marital rape. This recent legislation overrides the provision in the 2006 Sexual Offenses Act that had excluded marital rape from the definition of sexual violence.

With respect to *sexual harassment*, three countries have specific legislation regarding this in place (Burundi, Kenya, and Tanzania). Rwanda and Uganda have specific provisions on sexual harassment in the workplace and Tanzania has legislation specifically addressing sexual harassment in schools. In addition, all of the countries reviewed criminalise rape; in four countries, legal provisions exist regarding statutory rape[24] (defilement): Kenya, South Sudan, Tanzania and Uganda.

Legislation on *human trafficking* is lacking in one country, South Sudan, but present in the five other countries: Burundi, Kenya, Rwanda, Tanzania and Uganda. None of the EAC member states meets the minimum standards for the elimination of trafficking. Burundi and South Sudan are also not making significant efforts in this direction. On the other hand, Kenya, Rwanda, Tanzania and Uganda are making significant efforts to comply with these standards. For example, the Tanzanian government has been investigating, prosecuting and convicting more trafficking offenders compared with under the previous reporting period, and has conducted an anti-trafficking awareness-raising campaign.

NAP 1325: All EAC member states, with the exception of Tanzania, have adopted a National Action Plan 1325.

Policy frameworks and institutional mechanisms on GVAW: Each EAC member state has a policy and/ or institutional mechanism in place that addresses GVAW, either broadly or in specific terms. In five countries (Burundi, Kenya, Tanzania, Rwanda and Uganda), institutional reforms have taken place in the police service or in military personnel efforts. These relate to community policing, gender desks in police stations, special prosecution units and revisions of requisite police forms outlining GBV violations and evidence thereto. Rwanda has established GBV Committees, and has also developed Clinical Guides for Rape Victims. South Sudan has developed Standard Operating Procedures for GBV Prevention and Protection.

Key gaps and contestations

In light of these trends, we can observe a number of key gaps and contestations that relate to GBV. A first is that, although most countries have some legal framework or provision on a form of GVAW, only Burundi and Kenya have specific and dedicated laws on domestic violence and sexual harassment. Some others have provisions in the penal or labour code but lack dedicated and comprehensive GVAW laws. In addition to that, there is no **holistic** approach to addressing GVAW. Whereas the Maputo Protocol provides for a broad set of measures to address the causes and consequences of violence against women, including not only a comprehensive legal framework that prohibits all forms of GVAW but also the provision of support services to victims and survivors, and the prosecution of perpetrators, the legal, policy and institutional reforms in most EAC member states do not live up to these standards.

A second and prominent gap is the failure to legally recognise marital rape. Of the 6 EAC member states, 4 do not have a law that explicitly outlaws/prohibits **marital rape**. Worse still, two countries explicitly exclude marital rape from the definition of rape, and as such actively allow it. The law in South Sudan is explicit that marital rape is not an offence.[25] Another worrisome example is from Tanzania, which not only does not address the criminalisation of marital rape but also expressly exempts sexual intercourse with 'married girls' above the age of 15 years from the definition of rape, whereas rape of girls is sanctioned.[26] This is not only a problematic inconsistency but also contrary to Tanzania's own definition of a child as being below 18. In Kenya, the 2015 Protection Against Domestic Violence Act (2015) includes marital rape in its definition of domestic violence; the older Sexual Offences Act (2006) however contains a contradictory provision, and had excluded rape from applying to 'persons who are lawfully married to each other' (section 43(5)). The more recent legislation overrides the application of the former one where there is a contradiction. It is nonetheless desirous for the laws to be harmonised through the repeal of the offending provision in the Sexual Offences Act.

24 Statutory rape, or defilement, defines sexual activity between an adult and a minor as a sexual offence. It pertains to minors, and physically or mentally incapacitated individuals, who are legally incapable of giving consent to the sexual act. (This means that, in statutory rape, overt force or threat is usually not present, and that the law presumes coercion because consent cannot be legally given.)

25 Art. 247(3) of the 2008 Penal Code.

26 Section 130(2) of the Penal Code.

3.2. HARMFUL PRACTICES

Definitions

The Maputo Protocol has a clear definition of harmful practices as 'all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity' (Art. 1). This report focuses on child marriage and FGM, given among others their high prevalence in African countries and their strong inter-linkages in certain contexts.

Child marriage refers to 'a marriage in which either one of the parties, or both, is or was under the age of 18 at the time of union' (Joint General Comment ACHPR and ACERWC on Ending Child Marriage, Point 6).

Female genital mutilation refers to 'the practice of partially or wholly removing the external female genitalia or otherwise injuring the female genital organs for non-medical and non-health related reasons'. (Committees on CEDAW and CRC Joint General Recommendation No. 31/General Comment No. 18 on Harmful Practices 2014, Point 19 (Part VI.A.19, p. 6).

Prevalence

Child marriage is practised in many regions in the world. However, rates in the African region are the highest, with 39% of women and girls in Sub-Saharan Africa married before 18 years old.[27] In East and Southern Africa 12% of the girls are married before the age of 15 and 39% by the time they turn 18.[28] South Sudan has a high prevalence rate of child marriage: over 50% of the women and girls are married when they turn 18.[29] Countries with high levels of child marriage also have high rates of maternal deaths and high adolescent birth rates.[30]

FGM is concentrated in 27 African countries from the Horn of Africa to the Atlantic coast. FGM prevalence varies strongly between regions within a country. Tanzania, for example, is a country with low levels of FGM prevalence (10%) but prevalence ranges from 0% to 71% in regions.[31] FGM prevalence rates also vary between ethnic groups and in the age at which girls are cut. In almost all countries, even in those where FGM is almost universal, more girls are cut than the percentage of girls who support the practice.[32]

Key commitments and required response

Art. 2 of the Maputo Protocol requires state parties to 'combat all forms of discrimination against women'. It especially states that state parties 'shall 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' (Art. 2, sub 1, b).

Under the Maputo Protocol, the obligations of states to eliminate harmful practices encompass four strategies:
1. prohibition of harmful practices and FGM, through legislative measures backed by sanctions;
2. going beyond prohibition and prevention by calling for support and rehabilitation services to victims of harmful practices;
3. protecting women who are at risk of being subjected to such practices, abuse and violence and;
4. further prevention through public awareness-raising.

Child marriage and FGM are identified as two of the four harmful practices in the Joint General Recommendation/Comment on harmful practices adopted by the CEDAW Committee and the Committee on the Rights of the Child in 2014.[33]

Child marriage is prohibited under the Maputo Protocol, which also states that women and men shall enjoy equal rights and are regarded as equal partners in marriage. The Joint General Comment from the ACHPR and ACERWC on ending child marriage (2017) elaborates on the obligations of states with respect to ending child marriage that arise from the Maputo Protocol and the African Children's Charter. The Joint General Comment provides, among others, that:

27 Data from UNICEF global databases 2018, based on DHS, MICS and other nationally representative surveys, 2008–16.
28 UNICEF Global Databases. (2018). 'Child Marriage Is a Violation of Human Rights, But Is All Too Common'. https://data.unicef.org/topic/child-protection/child-marriage/#
29 Data from UNICEF global databases 2018, based on DHS, MICS and other nationally representative surveys, 2008–16.
30 Centre for Child Rights. (2018). 'A Report on Child Marriage in Africa'. Pretoria: University of Pretoria, in collaboration with ACHPR and SRRWA.
31 Data from UNICEF global databases 2018, based on DHS, MICS and other nationally representative surveys, 2008–16.
32 UNICEF. (2013). 'Female Genital Mutilation and Cutting. A Statistical Overview and Exploration of the Dynamics of Change'. New York: UNICEF.
33 Joint General Recommendation No. 31/General Comment No. 18 addresses four specific forms of harmful practices: FGM, child and/or forced marriage, polygamy and 'crimes committed in the name of so-called honour'.

- child marriage and the betrothal of girls and boys are prohibited;
- the legal age of marriage is 18 years;
- no exceptions can be made to the legal age of marriage at 18 for betrothal and marriage, as the Africa Children's Charter defines a child as every human being below the age of 18 years;
- the prohibition of marriage under the age of 18 applies to all marriages, under all forms of law, including customary or religious law;
- no marriage shall take place without the full and free consent of both parties.

Another important provision in relation to harmful practices is in Art. 17 of the Maputo Protocol. This provides that 'women shall have the right to live in a positive cultural context' (Art. 17.1). The Protocol provides a holistic interpretation of positive cultural context in its Preamble that refers to 'the preservation of African values based on the principles of equality, peace, freedom, dignity, justice, solidarity and democracy'. This should be read in conjunction with the Maputo Protocol provisions on non-discrimination and the right of women 'to participate in all levels in the determination of cultural policies' and that states should take all appropriate measures to enhance this participation (Arts 17.1 and 17.2).

Key legal and policy indicators for EAC member states

Table 5 presents the legal and policy indicators regarding harmful practices. Definitions of these indicators can be found in annex 2. The legal and policy frameworks of EAC member states show positive signs on many fronts, but also some notables gaps and weak spots. With respect to child marriage, Kenya scores positively on all four legal and policy indicators. Rwanda and South Sudan also live up to the legal requirements of the Maputo Protocol regarding child marriage, but lack an action or strategic plan. The countries with the weakest legal and policy frameworks regarding child marriage in EAC are Tanzania and Uganda.

Looking at FGM and harmful practices, Uganda has the strongest profile on the three indicators; Burundi and Rwanda score lowest. The profiles of Kenya and Tanzania are more mixed: they lack a constitutional provision on harmful practices but score positively on FGM legal provisions and policies. South Sudan has constitutional and legal provisions on harmful practices and FGM in place but lacks a programmatic response towards FGM.

Table 5.
Legal and policy indicators for EAC member states regarding harmful practices

Country	INDICATORS						
	Legal age at marriage at 18	No exceptions (full and free consent)	Applies to all marriages	Action/ strategic plan/ campaign to end child marriage	Constitutional provision eliminating harmful practices	Legal provisions prohibiting FGM	Programmatic response or action plan to end FGM
Burundi	Yes	Yes	Yes	No	No	No	No
Kenya	Yes	Yes	Yes	Yes	No[34]	Yes	Yes
Rwanda	Yes[35]	Yes	Yes	No	No	No	No
South Sudan	Yes	Yes	Yes	No	Yes	Yes	No
Tanzania	No[36]	No[37]	Yes	No	No	Yes	Yes
Uganda	Yes*	No[38]	No[39]	Yes	Yes	Yes	Yes

34 Article 53 and 55 of the Kenyan Constitution protects children and youth from harmful practices. Because this prohibition is not explicitly related to all ages, Kenya has a negative score in this table.

35 21 years of age. A woman may enter marriage at 18–20 years with the permission of, *inter alia*, the minister of justice.

36 Girls can marry at 15, boys at 18. In July 2016, the Constitutional Court ruled that marriage under the age of 18 was illegal, and stated that Sections 13 and 17 of the Marriage Act were unconstitutional (see Case study 11 on Tanzania in this chapter on the High Court decision, and the appeal).

37 Law of Marriage Act 1971: Third party consent is utilised to override minimum age of marriage requirements.

38 Marriage Act (Cap 251) requires consent for parties who have not attained 21 years of age.

39 Customary Marriage (Registration) Act (Cap 248) finds marriages of girls 16 years of age valid.

Trends in legal, policy and institutional reform

Constitutional provisions: South Sudan and Uganda have constitutional provisions that explicitly outline the state's obligations with respect to harmful practices, child marriage and/or FGM.

Art. 16(4)(b) of the Transitional Constitution of South Sudan places an obligation on the state to enact laws that combat *harmful customs and traditions* that undermine the dignity and status of women. Further, Art. 17(1)(g) states that 'Every Child has the right not be subjected to negative and harmful cultural practices which affect his or her health, welfare and dignity.'

With respect to the age of marriage, Art. 31 of Uganda's 1995 Constitution states that the *age of marriage* is 18. This is, however, contra-indicated in other national laws, such as the Customary Marriage, which validates the marriage of a 16-year-old girl.

All other states—Burundi, Kenya, Rwanda and Tanzania—have provisions that may be used to address harmful practices. These focus on the principles of non-discrimination and equality before the law, torture, inhuman and degrading treatment, the right to liberty and security of the person, consent to marriage unions and the right to choose one's spouse and respect of international instruments such as the Maputo Protocol, CEDAW and the UNCRC, which have provisions that prohibit harmful practices and outline state obligations thereto.

Statutory law and policy responses on child marriage: All the EAC member states have laws that outline the age of marriage. In the majority of the countries, the legal *age of marriage* is set at 18 (Burundi, Kenya, South Sudan and Uganda). Tanzania does not guarantee 18 as the minimum age of marriage; it is 14/15 years for girls. Rwanda stands out for its higher age of marriage, at 21 years of age; a woman may enter into a marriage between 18 and 20 years with the permission of, *inter alia*, the minister of justice.

In all but one country, the minimum age of marriage applies to formal as well as *customary and religious marriage*. In Uganda, customary marriages with a girl of 16 years can be considered valid. In 2 out of 6 countries, the *full and free consent* of the woman entering a marriage is not guaranteed; Tanzania and Uganda allow parents, guardians or other third parties to provide consent to a marriage.

Two states have launched a national *campaign* to end child marriage: Kenya and Uganda. Uganda has established a coordination mechanism, a national plan and implements activities. These national campaigns are part of and in line with the AU Campaign to End Child Marriage. In this campaign, the AU provides key policy guidance on highlighting the harms and redress mechanisms needed to tackle child marriage in Africa.

Kenya has a specific policy that outlines how to address FGM and child marriage with respect to adolescents. Beyond this, all other states have gender development plans that broadly outline their commitment to address GVAW. This can provide a basis for policy responses on child marriage, as well as FGM, if these are considered acts of GVAW. Unfortunately, there is no guarantee that this is the case, in the absence of explicit references to the same.

Statutory law and policy frameworks on FGM: Two out of six states have statutory laws that specifically prohibit *FGM*: Kenya, South Sudan, Tanzania and Uganda. In certain instances, this is linked to the advancement of other rights issues. For instance, in Tanzania it is linked to addressing GVAW and the right to education in the context of the 2016 Education Act and the 1998 Sexual Offences (Special Provisions) Act, respectively. Burundi and Rwanda do not prohibit FGM, and also lack constitutional provisions to eliminate harmful practices. All countries that prohibit FGM also have a programmatic response to end the practice; the only exception here is South Sudan.

Institutional reform: With regard to institutional measures, commendable strides can be observed in Kenya. It established the Anti-FGM Board in 2012; two years later (2014) it established the Office of the Director of Public Prosecutions Anti-FGM and the Child Marriage Prosecution Unit.

Key gaps and contestations

Key gaps with respect to child marriage relate to discrepancies in the **minimum age** of marriage. Tanzania, for example, does not see 18 as the minimum age, as outlined in the Maputo Protocol. There is also a difference for girls and boys: boys have a later minimum age of marriage. A second key gap concerns **contradictions** in legal provisions regarding the age of marriage (Uganda). A third relates to provisions where third parties, such as parents, guardians, the minister of justice or others can **consent** to a marriage union. This can be utilised to override general minimum age of marriage requirements.

A fourth gap is the **lack of comprehensive policies and strategies to address child marriage**. In most of the states reviewed, there is an absence of clear laws and policies that specifically outline the steps states should take to address the issue of child marriage. Taking normative guidance from the Joint General Comment on Child Marriage (ACHPR and ACEWRC), as well as developing strategies in line with the AU Campaign to End Child Marriage, can resolve this policy gap.

A fifth gap is that half of the countries do **not outlaw harmful practices**, and some lack legal provisions prohibiting FGM. Retrogressive trends are also emerging with respect particularly to FGM. A critical issue undermining the elimination of FGM relates to arguments for the **medicalisation of FGM**, which are gaining root. Initial advocacy against FGM pointed to the crudeness of the methods used, among other harms. Medicalisation is in part a way to respond to this criticism by sanitising the FGM process. However, this approach fails to take into account other, non-medical, harms such as the assault on women and girls' bodily integrity, dignity and equality, and is therefore at odds with the Maputo Protocol.

Another worrisome issue is the trend, for instance in Kenya, towards convicting victims and/or survivors of FGM. This **penalises victims**, especially when they are sentenced to prison terms and/or fines for failure to report FGM. Conviction of the victim also goes against the spirit and intention of the Prohibition of FGM Act 2011, as it was intended to protect and not further victimise victims of FGM. This trend is now the subject of court litigation towards establishing a more protective legal stance for victims.

Claims that adult women allegedly **consensually engage in FGM** also work against the prohibition of FGM. Pro-FGM campaigners are intentionally misrepresenting well-established human rights and constitutional principles that forbid FGM by arguing that adult women can 'consensually' engage in FGM. In Kenya, this has been vigorously challenged in court by state and non-state actors; a determination on the matter is anticipated in 2018/19.

3.3. REPRODUCTIVE RIGHTS AND SEXUAL AND REPRODUCTIVE HEALTH

Definitions

Art. 14 of the Maputo Protocol guarantees the respect and promotion of women's right to health, including sexual and reproductive health (SRH). This encompasses the rights to control one's fertility, to decide on the number, timing and spacing of pregnancies, and to choose a method of contraception. In addition, the Maputo Protocol provides for the rights of women and girls to information and education on family planning and contraception, to non-discriminatory access to SRH services and to access safe abortion on specific grounds (Arts 14(1)(a)(b)(c) and (f)). This report focuses on contraception and safe abortion.

Contraception/family planning comprises 'the measures taken for an individual to control their fertility, including the use of contraception, if they choose not to have children neither immediately nor in the future'. General Comment No. 2 refers to 'family planning/contraception'.

Safe abortion refers to 'services provided through specific medicines or methods, with all the necessary information and the informed consent of concerned individuals, by primary, secondary and tertiary level health professionals, trained in safe abortion, in line with the WHO standards. These services also include surgical techniques and treatments' (General Comment No. 2 on the Maputo Protocol, para. 10). WHO distinguishes between medical and surgical abortion. [40]

An *unsafe abortion* is 'a procedure for terminating unwanted pregnancy either by persons lacking the necessary skills or in an environment lacking minimal medical standards or both' (WHO, 2012).[41]

Prevalence

One in three African women use a modern method of contraception. Contraception use is higher in Southern (64%), Northern (53%) and Eastern Africa (40%), and lowest in the Central (23%) and Western regions (17%).[42] About one in five African women who are married have an **unmet need for contraception**. This is about 25% of the women in Eastern, Western and Central Africa, and 15% in Northern and Southern Africa.[43] The total unmet need for contraception is likely to be higher, as these figures do not include unmarried women and women from sexual minorities. In a total of 14 countries, more than 30% of young women aged 15–19 years (married and unmarried) have an unmet need for contraception.

More than half of maternal deaths worldwide occur in Sub-Saharan Africa. Globally as well as in Africa, **maternal mortality** ratios have fallen over the past 25 years. Maternal mortality ratios vary strongly across countries and regions. There are 70 maternal deaths per 100,000 live births for North Africa and 546 for Sub-Saharan Africa. Within the latter category, 19 countries have high maternal mortality ratios (above 500 deaths per 100,000 live births).[44] Adolescent girls face a higher risk of maternal mortality. Complications in pregnancy and childbirth are the leading cause of death among adolescent girls under 15 years.[45]

During 2010–14, an estimated 8.2 million induced **abortions** occurred each year in Africa. Whereas the abortion rate remained constant in comparison with in the period 1990–94, the absolute number of abortion almost doubled in those two decades. This suggests a sharp increase in unwanted pregnancies. Abortion rates vary only slightly between subregions

40 WHO. 2012. *Safe Abortion: Technical and Policy Guidance for Health Systems*. Geneva: WHO, p. iv.

41 WHO. 2012. *Safe Abortion: Technical and Policy Guidance for Health Systems*. Geneva: WHO, p. 18.

42 UNDESA. (2015). 'Trends in Contraceptive Use Worldwide'. Population Division, Fertility and Family Planning Section. www.un.org/en/development/desa/population/publications/pdf/family/trendsContraceptiveUse(2015Report.pdf

43 ibid.

44 WHO, UNICEF, UNFPA, World Bank Group and the UNPD (2015). Trends in maternal mortality: 1990 to 2015. https://data.unicef.org/wp-content/uploads/2015/12/Trends-in-MMR-1990-2015_Full-report_243.pdf

45 WHO. (2016). 'Maternal Mortality'. Fact Sheet. http://www.who.int/mediacentre/factsheets/fs348/en/; also Patton, G.C., Coffey, C., Sawyer, S.M. et al. (2009). 'Global Patterns of Mortality in Young People: A Systematic Analysis of Population Health Data'. The Lancet 374: 881–92.

on the African continent.[46] Three out of four abortions in Africa are unsafe abortions.[47] This is also the case in Eastern Africa (76%). Southern Africa has an opposite picture, with a much lower share of unsafe abortions (27%).[48] Every year, an estimated 1.4 million unsafe abortions take place among girls aged 15–19 in Africa. Both married and unmarried adolescent girls are more at risk of being exposed to unsafe abortions.[49]

Access to quality SRH services and information is critical for the three concerns highlighted. Generally, women and girls face social, financial, legal and informational barriers to accessing SRH services and information, as well as discriminatory attitudes and practices in health facilities. Barriers can be more challenging for different groups of women and girls.

Key commitments and required response

Art. 14 of the Maputo Protocol offers a progressive and innovative framework for women and girls' reproductive rights and SRH. It covers women's reproductive freedoms, including their rights to information and education, SRH services and safe abortion. It also pays specific attention to women and girls' human rights in relation to HIV. The provisions on reproductive rights and SRH are further articulated in General Comment No. 2 (2014) which provides interpretative guidance on the normative content and obligations of state parties for the effective domestication and implementation of Art. 14 of the Maputo Protocol. The right to SRH encompasses the following:

- Women and girls' rights to control their fertility, and to decide on maternity and the number and spacing of children, are inextricably linked to women and girls' right to dignity, which implies their freedom to make such personal decisions without interference from state or non-state actors.
- Women and girls have the right to non-discriminatory access to SRH services that are inclusive and sensitive to their diverse realities. Access to SRH services must be guaranteed to *all* women.[50] Furthermore, women and girls' own full, free and informed consent to their use if SRH services and cannot be denied access to SRH services.
- General Comment No. 2 provides that women, and especially adolescent girls and young women, have the right to comprehensive information and education on sexuality, reproduction and SRHR, including family planning, contraception and safe abortion. This information and education should be comprehensive, based in clinical findings, and complete; it should be age-appropriate and take into account the level of maturity of adolescent girls and youth; and it should rights-based and without judgement.
- The right to access safe abortion is guaranteed on four grounds: (1) in case of sexual assault, rape or incest, (2) to save the mother's life, (3) when the physical or mental health of the mother is threatened and (4) in case of foetal impairment.
- Women and girls have the right to access to safe abortion services, free from discrimination, and ensuring privacy and confidentiality. This also calls for the decriminalisation of abortion and post-abortion care (PAC).

With respect to women and girls' reproductive rights and SRH, including safe abortion care (SAC), General Comment No. 2 articulates both general and specific obligations of states. The general obligations are:
1. to respect (to refrain from hindering women's rights, directly or indirectly)
2. to protect (to prevent third parties from interfering with the enjoyment of women and girls' sexual and reproductive rights)
3. to promote (to create the conditions that enable women and girls to exercise these rights and
4. to ensure the fulfilment, *de jure* and *de facto*, of women and girls' sexual and reproductive rights.

The *specific obligations* of states are
1. to put in place an enabling legal and political framework
2. to ensure access to information and education on contraception and safe abortion
3. to ensure access to contraception and safe abortion services
4. to provide procedures, technologies and services for SRH
5. to remove obstacles to the right to contraception and safe abortion services
6. to allocate financial resources and
7. to ensure compliance.

46 Guttmacher Institute. (2017). 'Abortion Worldwide: Uneven Progress and Unequal Access'. https://www.guttmacher.org/sites/default/files/report_pdf/abortion-worldwide-2017.pdf; Ganatra, B., Gerdts, C., Rossier, C. et al. (2017). 'Global, Regional, and Subregional Classification of Abortions by Safety: Estimates from a Bayesian Hierarchical Mode'. The Lancet 390: 2373–81.

47 This is much higher than for the world as a whole, and for all developing countries (where respectively 45% and 50% of abortions are unsafe).

48 Sedgh, G., Bearak, J., Singh, S. et al. (2016). 'Abortion Incidence between 1990 and 2014: Global, Regional, and Subregional Levels and Trends'. Lancet 388(10041): 258–67; Guttmacher Institute. (2017). 'Abortion Worldwide: Uneven Progress and Unequal Access'. https://www.guttmacher.org/sites/default/files/report_pdf/abortion-worldwide-2017.pdf

49 UNFPA. (2013). State of the World Population: Motherhood in Childhood. Facing the Challenge of Adolescent Pregnancy. New York: UNFPA.

50 General Comment No. 2 notes that multiple forms of discrimination prevent women and girls from exercising and enjoying their SRHR, including but not limited to those related to ethnicity, race, sex, gender, age marital status, HIV status, sexual orientation, socio-economic status, disability, geographic residence, legal residence and/or traditional, religious and cultural beliefs.

Key legal and policy indicators for EAC member states

Table 6 presents the legal and policy indicators regarding reproductive rights and SRH. Definitions of these indicators can be found in annex 3. With the exception of Tanzania, all states have constitutional provisions on health, and five states have joined the CARMMA campaign. The legal framework provisions on legal guarantees to access safe abortion are relatively strong. Kenya and Uganda have legal guarantees in line with the Maputo Protocol. So does Rwanda, which has the strongest provisions, including all grounds provided in the Maputo Protocol, as well as additional circumstances. The most restrictive provisions are found in South Sudan, where safe abortion is only allowed if the life of the mother is threatened. There are no countries in the EAC region where abortion is completely prohibited.

Table 6.
Key legal and policy indicators for EAC member states regarding reproductive rights and SRH

Country	INDICATORS								
					Legal access to safe abortion in specified circumstances				
	Constitutional provision on health	Joined/ launched CARMMA campaign	Government funding for health >5% of GDP	Government funding for health >15% of general government expenditure	*When the life of the mother is threatened*	*When pregnancy poses threat to mental or physical health of mother*	*In cases of foetal impairment*	*In cases of sexual assault, rape or incest*	*Allowed under other circumstances*
Burundi	Yes	Yes	No	No*	Yes	H	No	No	-
Kenya	Yes*	Yes	No	No*	Yes	H	Yes	Yes	-
Rwanda	Yes	Yes	No	No	Yes	H	Yes	Yes	Yes[51]
South Sudan	Yes[52]	No	-	-	Yes	No	No	No	-
Tanzania	No	Yes	No	No*	Yes	H	No	No	-
Uganda	Yes[53]	Yes	No	No*	Yes	H	Yes	Yes	-

Trends in legal, policy and institutional reform

Constitutional provisions: Except for Tanzania, all states have a constitutional provision on the right to health; Kenya is the only country that has a constitutional provision that specifically articulates the right to reproductive health. The constitutions of Rwanda, South Sudan, and Uganda outline the right to access publicly funded social and health services. All states have constitutional provisions that may be referred to in making the case for the right to contraceptives. These provisions concern the need to respect the rights and liberties of all persons, through equality and non-discrimination on the basis of sex or any other status before the law. Kenya has provisions in their constitutions regarding access to safe abortion care (see below).

Statutory law on reproductive health: Most states do not have laws that specifically elucidate on the right to contraceptives. Kenya has a Health Act that covers the right to reproductive health care, which includes the right to safe, effective, affordable and acceptable family planning services.

Legal guarantees to safe abortion: The constitution of Kenya explicitly outline the right to safe abortion care. Art. 26(4) in Kenya's Constitution outlines broad legal indications with regard to safe and post-abortion care where this is necessary in the opinion of a trained health professional, in emergency situations and where the life or health of the mother is in danger, or if permitted in any other written law. All EAC members states have constitutional provisions that can be utilised to make the case for access to safe abortion care.[54]

51 Abortion also permitted on other grounds such as woman's age and capacity to care for a child.

52 Art. 31: 'All levels of government shall promote public health, establish, rehabilitate and develop basic medical and diagnostic institutions and provide free primary health care and emergency services for all citizens.'

53 Art XX: 'The State shall take all practical measures to ensure the provision of basic medical services to the population.'

54 These constitutional provisions touch on, *inter alia*, the need to respect the rights and liberties of all persons, through equality and non-discrimination on the basis of sex or any other status before the law, the right to health, including access to emergency treatment, and the right to be free from inhuman, cruel and/ or degrading treatment.

All countries have statutory laws that outline the legal indications for the provision of and access to safe abortion and post-abortion care services. These are either within the penal code (all states) or in laws specifically dedicated to health-related services (Kenya). They cover when a woman can access services, who can provide such services and penalties for non-compliance with the law. Access to safe abortion is allowed in all EAC countries when the life of the mother is endangered. In South Sudan this is the only ground for abortion. The other five countries allow abortion on one of the other legal guarantees. In five countries, abortion can be accessed when the pregnancy poses a risk to the health of the mother. Three countries allow abortion in cases of foetal impairment. Sexual assault, rape or incest is provided as a grounds for abortion in three countries: Kenya, Rwanda, and Uganda. In Rwanda, the woman's age and capacity to care for a child is a reason for permitting abortion.

Kenya makes mention of addressing unsafe abortion in national health policies (National Adolescent Sexual and Reproductive Health Rights Policy 2015; National Guidelines for Quality Obstetrics and Perinatal Care and National Guidelines on Management of Sexual Offences 2014). States that have specific policies and procedures that relate to post-abortion care include Kenya, Tanzania and Uganda. Kenya adopted specific standards and guidelines in 2013 but senior government officials un-procedurally withdrew these in early 2014. Uganda developed National Standards and Guidelines for Reducing Maternal Morbidity and Mortality from Unsafe Abortion in Uganda in 2015; these suffered the same fate as the Kenyan guidelines.

Policy and institutional reforms on reproductive rights: All EAC countries have policy instruments that touch on family planning, specifically meeting unmet need. Policy frameworks specifically targeting *adolescents* with respect to family planning are present in Kenya (National Adolescent Sexual and Reproductive Health Rights Policy 2015); South Sudan (Health Sector Development Plan 2011–15); and Tanzania (National Road Map Strategic Plan to Improve Reproductive, Maternal, Newborn, Child and Adolescent Health 2016–20). Guidelines and/or standards for adolescent- and youth-friendly health services are present in Burundi, Kenya, Rwanda, Tanzania and Uganda, and these countries all offer a standard minimum package of SRH services that should be provided to youth and adolescents.

Access of adolescents to SRH services and information can further be affected by the legal age of sexual consent. Except for Tanzania, the EAC countries set the minimum age of consent to different-sex sexual activity at 18 for both girls and boys. In some countries, this minimum age is lower for girls than for boys. For example, in Tanzania, girls can consent to sexual activity at 15, whereas boys can consent at 18[55]. Provisions on the age of sexual consent are often articulated with reference to sexual defilement or rape; although such provisions protect young people from non-consensual sex, exploitation and abuse, they may restrict their expression of their sexuality and their ability to access SRH services.[56]

All EAC member states are part of the ESA Commitment on Comprehensive Sexuality Education (SCSE). Burundi, Tanzania, Kenya and Uganda report that CSE is provided in at least 40% of primary and secondary schools and all countries report having CSE training programmes for teachers.[57] A national CSE policy has been reported to be in place in Burundi, Kenya, Tanzania and Uganda.[58] CSE is provided in an integrated way in mandatory subjects in primary and secondary curricula and according to benchmarked standards in Tanzania and Uganda. Its provision is in progress in Burundi, Kenya and Rwanda.[59] All EAC member states have developed national policies and/or strategies related to CSE for out-of-school youth.[60]

With respect to contraception, innovation and progress in policy and institutional reforms has been observed in different countries. The Ministry of Health in Tanzania has established a Reproductive and Child Health Section, which is tasked with implementing reproductive health commitments. In Burundi, the Ministry of Health formulated a Technology Reference Manual in 2013 to increase the quality of access to contraceptives. All EAC member states, except for South Sudan, have joined and launched a CARMMA campaign.

In none of the countries government *spending* on health is higher than 5% of GDP or 15% of the government budget. Burundi, Kenya, Tanzania and Uganda are reported to be making progress in this regard. In terms of costing implementation plans, Kenya is set to launch a costed family planning policy in line with the Global Family Planning 2020 Commitment. South Sudan intends to have a dedicated budget line of 1% in the Ministry of Health budget in 2017/18.

55 Ibid
56 IPPF. (2017). 'Sexual Rights, Young People and the Law'. Washington, DC: IPPF
57 UNESCO, UNFPA and UNAIDS. (2016). 'Fulfilling Our Promise to Young People Today: 2013-2015 Progress Review'. Paris, Geneva and New York: UNESCO, UNFPA and UNAIDS.
58 See UNESCO. (2015). 'Emerging Evidence, Lessons and Practice in Comprehensive Sexuality Education: A Global Review'. Paris: UNESCO.
59 Ibid.
60 Ibid.

Key gaps and contestations

Provision of good quality, integrated and fully compulsory **comprehensive sexuality education** is not yet realised, and continues to be contested, despite progress made. In countries making progress in the implementation of the ESA Commitment, not all schools are being reached, neither are all out-of-school youth, and the quality and comprehensive of the CSE varies.

Access to SRH services is constrained when adolescents need **parental consent**. Kenya, for example, requires parental consent for HIV testing. Legal or practical requirements for third-party consent of a husband severely restricts the free and voluntary consent of women and girls in terms of access to SRH services.

With respect to legal guarantees for access to safe abortion, a first concern is that abortion laws are mostly **outlined in countries' penal or criminal codes**. This indicates that the right is not framed using a human rights perspective. Rather, the allowed grounds, such as to save a mother's life or health, are premised within the strictures of criminality; this contributes to increasing stigma on access to and provision of safe abortion care, on the basis that, from the onset, the service is viewed as illegal. This framing also risks driving access underground, potentially leading to unsafe practices.

Another gap is the **absence of safe abortion care standards and guidelines**. The withdrawal or stalling of SAC/PAC guidelines in, for instance in Kenya and Uganda, obstructs implementation of existing law and can restrict women and girls' access to safe abortion even when the law permits it.

A key contestation with regard to domestication and implementation of the Maputo Protocol provisions on safe abortion are the **constraints that some religious actors put on legal, policy and institutional reforms**. This is what has happened in Kenya: inclusion of provisions on abortion in the 2010 Constitution was a contentious issue, which meant Art. 26 was drafted in such a way as to appeal to both pro-life and pro-choice advocates. This has led to a lack of clarity among state and non-state actors on the legality of abortion in Kenya.

3.4. HIV AND AIDS

Prevalence

Seven of the ten people living with HIV in 2016 lived in the Sub-Saharan African region—25.6 million people.[61] More than half of the people living with HIV in Sub-Saharan Africa are **women and girls**—59% in Eastern and Southern Africa and 56% in the Western and Central region.[62] Also, more than half of the new infections in the region occur in women; for **young women** aged 15–22 years, the rate is as high as 67%[63]. Young women aged 15–24 in Sub-Saharan Africa are 2.5 times more likely to be infected with HIV than men.[64] For the African continent, AIDS-related illnesses are the second leading cause of death for young women aged 15–24.[65] **Female sex workers** are particularly vulnerable to HIV, and 13.5 times more likely to be living with HIV than other women.

Key commitments and required response

The Maputo Protocol is ground-breaking as the first human rights instrument that refers to women and girls' rights in relation to HIV and AIDS, and STIs more generally. These provisions are in Art. 14, and have been further articulated in General Comment No. 1 (2012).

Under women and girls' right to health, including SRH, Art. 14 provides for (1) the right of women and girls to **self-protection and to be protected** against STIs, including HIV and AIDS and (2) the right of women and girls **to be informed on their HIV status and on the health status of their partner**, particularly with STIs and HIV and AIDS, in accordance with internationally recognised standards.

Table 7.
Provisions and state obligations

The **right to self-protection and to be protected** against STIs and HIV and AIDS includes:	• Women and girls have the **right to access information and education** on sex, sexuality, HIV and sexual and reproductive rights. This should be evidence-based, facts-based, rights-based, non-judgemental and understandable in content and language, and should also address and deconstruct taboos, misconceptions and gender stereotypes. They have the right to access **SRH services** that should be available **to all women and girls**, and not be based on a discriminatory assessment of risk. • Women and girls' right to access SRH services **cannot be denied** based on conscientious objection. • Women and girls' right to equality and **non-discrimination based on HIV status**[66] also implies that their HIV status is **not used as a condition to access SRH services**, contraception and safe abortion services.
The **obligations** of states in relation to the **right to self-protection and to be protected** are:	• To ensure access to **information and education**, in particular for youth and adolescents (including through the training of health providers and educators on health and human rights) • To ensure **access to SRH services to all women** and • To create an **enabling legal and policy framework** allowing women and girls to control their sexual and reproductive choices and HIV prevention and protection (including enactment of non-discrimination legislation).
The right of women and girls **to be informed on their HIV status and on the health status of their partner,** includes:	• Women and girls have the right to **access information about their health** that is adequate, reliable, non-discriminatory and comprehensive. • **All women, irrespective** of their marital status, and including young and adolescent women, women living with HIV, migrant and refugee women, indigenous women, detained women and women with disabilities, have access to such information about their health. • Women and girls have the right to **be informed of the health status of their partner**. • There is an emphasis on informed consent in revealing one's health status to a partner. Information about a partner's health status can be obtained through **disclosure** by that person, or through **notification** by a third party (usually a health worker). • Health workers are authorised, but not obliged, to decide whether to inform a patient's sexual partners. A set of **principles** guides health workers in revealing a person's health status (General Comment 1).
The **obligations** of states in relation to the **right to be informed on one's health status and on the health status of one's partner** are to ensure:	• **Access to information and education** (including pre- and post-test counselling, and guaranteeing privacy and confidentiality) and • **Non-discriminatory access to SRH procedures, technologies and services for all women** (including through training of health workers on non-discrimination, confidentiality, respect for dignity, autonomy and informed consent). • With respect to both rights provisions on HIV and AIDS, state obligations also include (1) the **removal and elimination of all barriers** to women and girls' enjoyment of their SRH (including gender disparities, harmful practices, patriarchal attitudes and discriminatory laws and policies, as well as geographical and economic barriers), (2) the provisions of **financial resources** and (3) to allow for **redress** for SRH violations.

61 UNAIDS. (2017). Number of people living with HIV in 2016. http://aidsinfo.unaids.org/

62 ibid

63 UN Women. (2017). 'Facts and Figures: HIV and AIDS'. http://www.unwomen.org/en/what-we-do/hiv-and-aids/facts-and-figures

64 WHO. (2017). 'Global AIDS Epidemic Shows No Sign of Abating; Highest Number of HIV Infections and Deaths Ever'. Media Center. http://www.who.int/mediacentre/news/releases/2003/prunaids/en/

65 UNAIDS. (2017). 'Ending AIDS: Progress towards the 90-90-90 Targets' (p. 22). http://www.unaids.org/sites/default/files/media_asset/Global_AIDS_update_2017_en.pdf

66 Discrimination has been noted to be based on various grounds, including race, sex, sexuality, sexual orientation, age, pregnancy, marital status, HIV status, social and economic status, disability, harmful customary practices and/or religion (General Comment No. 1, para. 4).

Key legal and policy indicators for EAC member states

This sections looks at the legal and policy frameworks at the national level regarding women's rights and HIV and AIDS. It tracks a selected number of legal and policy indicators at the national level to see the extent to which the Maputo Protocol provisions are being domesticated and implemented. These legal and policy indicators are complemented with a narrative analysis on the legal, policy and institutional changes in the countries.

Table 8 presents the legal and policy indicators regarding harmful practices. Definitions of these indicators can be found in annex 4. The majority of EAC member states show a strong profile on four key indicators regarding women's rights and HIV and AIDS. Kenya and Tanzania score positively on non-discrimination provisions on HIV, on guarantees for voluntary HIV testing and on programmatic responses to access ART and also MTCT. Burundi, Rwanda, South Sudan, and Uganda have three positive scores on these indicators. All EAC countries have legislation that criminalises wilful transmission of HIV.

The EAC HIV Prevention and Management Act 2012 has been operational since December 2014 (see also Case study 28 in annex 5). Given the Constitution of the Community at the time, this happened following signature of the said Act 2014 by the then Tanzanian Head of State President Jakaya Kikwete.[67] South Sudan only recently joined the community and thus is yet to sign this Act.

Table 8.
Key legal and policy indicators in Eastern Africa, HIV and AIDS

Country	INDICATORS				
	Non-discrimination legislation based on HIV	Policy and/or legal regulations regarding voluntary HIV testing	Criminalisation of wilful transmission on HIV	Programmatic responses to access ART	Programmatic responses on MTCT
Burundi	Yes[68]	MAN[69]	Yes	Yes	Yes
Kenya	Yes[70]	VOL[71]	Yes	Yes	Yes
Rwanda	No	VOL[72]	Yes	Yes	Yes
South Sudan	No	VOL	Yes	Yes	Yes
Tanzania	Yes	VOL[73]	Yes	Yes	Yes
Uganda	Yes	MAN	Yes	Yes	Yes

Trends in legal, policy and institutional reform

Constitutional provisions: Out of all the EAC member states, Burundi's Constitution is explicit with respect to the rights of persons living with HIV and AIDS. Art. 22 asserts that all citizens are equal before the law and that no Burundian citizen is to be the subject of discrimination on the basis of, among others, sex and/or HIV and AIDS status. Kenya has an implied provision as it prohibits discrimination on the basis of health status in Art. 27(4) of the Constitution. All countries have provisions that can be utilised to advance the rights of girls and women living with HIV and AIDS. Generally, these focus on the principles of non-discrimination and equality before the law, the right to health, the right to inherent dignity and physical integrity and the right to privacy.

Statutory law on HIV and AIDS and women's rights: Four EAC member states have specific laws dedicated to the *rights of PLWHIV*: Burundi, Kenya, Tanzania and Uganda. These laws cover testing and disclosure, addressing discrimination and stigma linked to PWLHIV, PMTCT and access to and use of ART. In Kenya, these laws also grant access for HIV testing for adolescents who are below the age of consent (18) in specified circumstances. Two other states (Rwanda and South Sudan) have laws that touch on the rights of PLWHIV in other rights areas—for instance labour/worker rights and rights related to GVAW. Art. 3(d) of Uganda's Prohibition of FGM Act also specifically states that aggravated FGM is considered to have taken place where HIV is transmitted as a result.

67 In line with the EAC's regulations, an Act of the Community obtains this status once all member states have signed it.
68 In addition to legislation on the legal protection of persons living with HIV, non-discrimination on the basis of HIV and AIDS status is also explicitly prohibited in the Constitution of Burundi in its non-discrimination clause in Art. 22.
69 The prohibition of mandatory testing is too narrowly drafted such that mandatory testing is expressly prohibited only if it is carried out to allow or for continued stay in social or professional venues or activities.
70 In addition to HIV-specific legislation, Kenya's Constitution prohibits discrimination on the basis of health status in its non-discrimination clause in Art. 27(4).
71 Exception to prohibition of mandatory testing in the context of sexual offenders.
72 The Reproductive Health Act provides for voluntary testing but mandatory testing may be required on request by competent organs in accordance with the law.
73 Exception to prohibition of mandatory testing in the context of sexual offenders.

In four of the six countries, HIV counselling and testing is voluntary. Burundi has a provision that prohibits mandatory testing but this has so many restrictions and exceptions that it effectively renders testing mandatory. Uganda's HIV Prevention and Control Act 2014 allows for mandatory testing of pregnant women living with HIV and AIDS. This infringes on the right to privacy in the 1995 Constitution and also goes against the EAC HIV and AIDS Prevention and Management Act.

All EAC countries have provisions that prohibit *wilful transmission of HIV and AIDS*. These are found either in HIV and AIDS legislation or in the penal code.

Policy and institutional reform: All states have a policy that directly focuses on and/or alludes to HIV and AIDS. This is in the context of national health policies and/or strategic plans or policies that are exclusively dedicated to the rights of PLWHIV (Burundi, Kenya, South Sudan, Tanzania and Uganda). All these policies acknowledge that the HIV and AIDS pandemic disproportionately affects women, including girls and youth. The areas covered in said policies cover scaling-up efforts with regard to testing and disclosure, addressing discrimination and stigma linked to PWLHIV, PMTCT and access to and use of ART. Kenya has a policy to specifically address HIV and AIDS among adolescents (the Fast-Track Plan to End HIV and AIDS among Adolescents and Young People 2015). Notably, all the reviewed states have either policy or programmatic interventions on ART and MTCT.

In addition, all states have an *institutional mechanism/body* that exclusively addresses the rights of PLWHIV. From the desktop research conducted, with the exception of Kenya, whose National AIDS Control Council has a Committee on Gender to ensure the state's plans are responsive to gendered concerns arising out of HIV and AIDS, it was not possible to ascertain the extent to which these bodies have units that exclusively address the rights of girls and women living with HIV and AIDS.

Key gaps and contestations

The key gaps in legal and policy reform regarding women and girls' rights and HIV and AIDS in the EAC region are, first, the **absence of non-discrimination** provisions in Rwanda and South Sudan to protect women and girls living with HIV from stigma and discrimination. A second gap relates to **mandatory HIV testing** for pregnant women in Burundi and Uganda. A third gap entails provisions that allow for **disclosure of HIV and AIDS status to third parties** in Burundi and Uganda. According to Art. 28 of Law Decree 1/018(2005) in Burundi, doctors are in a position to reveal the HIV status of a PLWHIV to their partner or spouse if they are unable to or do not want to. In Uganda according to Section 18 of the HIV Prevention and Control Act [2014], the disclosure is framed very broadly, as HIV test results may be disclosed to 'any other person with whom an HIV infected person is on close or continuous contact including a sexual partner'. These exceptions raise serious questions as to confidentiality and undermine the right of girls and women to make decisions concerning their own bodies, as articulated in the Maputo Protocol and the constitutions of these states.

A key contestation concerns the adoption of laws on **wilful transmission of HIV and AIDS**. Views on the meaning of such laws for women and girls' rights are diverse. Another contestation relates to the criminalisation of same-sex sexual acts. Rwanda is the only EAC country where consensual same-sex sexual relations are not criminalised by provisions in the Penal Code. Contrastingly, Burundi, South Sudan, and Uganda **criminalise same-sex sexual acts** between both men and women. In Kenya and Tanzania the criminalisation applies only to men. To a lesser extent, SOGIE-based NGOs in Tanzania and Uganda face legal barriers, as there are laws prohibiting registration of NGOs whose activities are 'not for public interest' or 'contrary to national written law'.[74]

With respect to policy and institutional reform, an important gap is that, with the exception of Kenya, all states need to institute mechanisms that **specifically address gendered concerns**, with regard to the rights of girls and women living with HIV and AIDS. Moreover, when acknowledging the disproportionate effect of HIV and AIDS on women and girls, it is necessary for states to institute action plans that are solely dedicated to addressing issues that girls and young women face, beyond PMTCT. Such explicit attention to women and girls is missing in many health policies and even HIV and AIDS policies. Yet HIV and AIDS interacts with various other factors, such as sex, gender, socio-economic status, age, marital status and access to reproductive health care, which result in women and girls being more disparately infected and affected. Therefore, failing to consider these intersecting factors while addressing other health-related matters amounts to an ineffective HIV response that does not respond to women and girls' lived realities.

74 Carroll, A. and Mendos, L.R. (2017). 'State Sponsored Homophobia: A World Survey of Sexual Orientation Laws: Criminalisation, Protection and Recognition'. Geneva: ILGA.

ANNEX 1. GVAW LEGAL AND POLICY INDICATORS

Name/description of indicator	Codes	Explanation of the indicator codes
Indicator 1 – **Legislation on domestic violence**	*Yes*	There is specific legislation on domestic violence (footnote added in case this is legislation on GVAW)
	PC	Legal provisions that criminalise domestic violence are in the penal/criminal code
	No	There are no legal provisions that criminalise domestic violence
	M	Missing data; legislation not found
Indicator 2 – **Criminalisation of marital rape**	*Yes*	Marital rape is criminalised in the law
	No	a. the law does not address or criminalise marital rape
		b. footnote added, in case the law explicitly excludes marital rape from the definition of rape
Indicator 3 – **Law on sexual harassment**	*Yes*	Either a broad law dedicated to sexual harassment, or a specific law on sexual harassment, or sexual harassment is addressed in a stand-alone law on GVAW (footnote added in case the legislation is specific to sexual harassment in schools or educational institutions)
	WP	In case the provisions on sexual harassment are specific to legislation on the workplace (i.e. in the labour code)
	No	There is no law or legal provision on sexual harassment
	M	Missing data; legislation not found
Indicator 4 – **Law or legal provision on human trafficking**	*Yes*	Law or legislation on human trafficking in place
	No	No law or legislation on human trafficking
Indicator 5 – **National Action Plan (NAP) 1325**	*Yes*	NAP 1325 adopted and in place
	No	No NAP 1325

ANNEX 2. HARMFUL PRACTICES: LEGAL AND POLICY INDICATORS

Name/description of indicator	Codes	Explanation of the indicator codes
Indicator 1 – **Legal age of marriage set at 18**	*Yes*	Legal age of marriage is set at 18
	*Yes**	Legal age of marriage is set at 18 and guaranteed in the Constitution
	No	Legal age of marriage not guaranteed at 18
	M	Missing data; information could not be found
Indicator 2 – **Full and free consent is guaranteed**	*Yes*	This means there are no exceptions (i.e. consent of parents or other third parties) to the legal age of marriage
	No	This means marriage under the legal age of marriage is allowed when parents or other third parties provide consent (footnote gives explanation on exception)
	M	Missing data; information could not be found
Indicator 3 – **Legal age of marriage applies to all marriages**	*Yes*	This means the legal age of marriage applies to formal, customary, religious and all other marriages, and that this is explicitly stated in the law
	No	This means the legal age of marriage does not apply to all marriages, and customary, religious or other marriages are exempted (footnote gives explanation on the exemption)
	M	Missing data; could not find a specific indication that the legal age of marriage applies to all marriages or not
Indicator 4 – **Action/strategic plan or campaign to end child marriage**	*Yes*	Plan or campaign in place (either national initiative, or part of AU campaign to end child marriage)
	No	Plan or campaign not in place
	M	Missing data; information could not be found
Indicator 5 – **Constitutional provisions to eliminate harmful practices**	*Yes*	When Constitution provides for elimination of harmful practices (footnote added when provisions are formulated in broader terms)
	No	Constitution does not have provisions regarding the elimination of harmful practices
Indicator 6 – **Legal provisions regarding elimination of FGM**	*Yes*	Yes, the law prohibits FGM
	HP	There is a legal provisions that prohibits harmful practices, that could be applied/does apply to FGM
	No	There are no legal provisions that prohibit harmful practices or FGM (footnotes can indicate further qualifications regarding specifications under which they allow or prohibit FGM, i.e. age)
	M	Missing data; information could not be found
Indicator 7 – **Programmatic response or action plan to end FGM**	*Yes*	Programmatic response or action plan to end FGM is in place
	No	There is no programmatic response or action plan to end FGM
	M	Missing data; information could not be found

ANNEX 3. REPRODUCTIVE RIGHTS AND SEXUAL AND REPRODUCTIVE HEALTH: LEGAL AND POLICY INDICATORS

Name/description of indicator	Codes	Explanation of the indicator codes	
Indicator 1 – **Constitutional provision on the right to health**	*Yes*	There is a constitutional provision on the right to health	
	*Yes**	The constitutional provision specifically speaks of right to *reproductive* health	
	No	There is no constitutional provision on the right to health	
Indicator 2 – **Joined CARMMA campaign**	Yes	Country has joined and launched a CARMMA campaign	
	No	Country has not joined the CARMMA campaign.	
Indicator 3 – **Government funding for health at least 5% of GDP**[20]	*Yes*	Government funding for health is at least 5% of GDP	
	No	Government funding for health is less than 5% of GDP	
Indicator 4 – **Government funding for health at least 15% of annual budget**[21]	*Yes*	Government funding for health is at least 15% of annual budget	
	*No**	Target of 15% government funding for health of annual budget is not achieved but country is making progress; percentage is between 10% and 15%	
	No	Target of 15% government funding for health of the annual budget is not achieved; percentage is below 10%	
Indicator 5 – **Legal guarantees to access safe abortion**	*When life mother is endangered*	*Yes*	Abortion is allowed when the life of the mother is in danger
		No	Abortion is *not* allowed when the life of the mother is in danger
	When mental and or physical health of mother is threatened	*PH*	Abortion is allowed when the *physical* health of the mother is threatened
		MH	Abortion is allowed when the *mental* health of the mother is threatened
		PH+MH	Abortion is allowed when the health of the mother is threatened (*physical* and *mental* health both mentioned explicitly)
		H	Abortion is allowed when the *health* of the mother is threatened (no further specification given)
		No	The mother's health is not provided as a grounds for accessing safe abortion
	In case of sexual assault, rape or incest	*Yes*	Abortion is allowed in case of sexual assault, rape or incest
		No	Abortion is *not* allowed in case of sexual assault, rape or incest
	In case of foetal impairment	*Yes*	Abortion is allowed in case of foetal impairment (when survival of foetus is threatened, when foetus suffers from serious deformities incompatible with survival or in case of impairments after birth).
		No	Abortion is *not* allowed in case of foetal impairment (when survival of foetus is threatened, when foetus suffers from serious deformities incompatible with survival or in case of impairments after birth)
	On other grounds	*Yes*	Abortion is allowed on other grounds than the ones listed above[22] (footnote is provided with explanation on grounds for abortion provided for)
		No	Abortion is *not* allowed on other grounds than the ones listed above

ANNEX 4. HIV AND AIDS: POLICY INDICATORS

Name/description of indicator	Codes	Explanation of the indicator codes
Indicator 1 – **Non-discriminatory legislation based on HIV**	*Yes*	Legislation on non-discrimination on basis of HIV is in place
	No	Legislation on non-discrimination on basis of HIV does not exist
	M	Missing data: no data found on whether this legislation exists or not
Indicator 2 – **Voluntary testing guaranteed**	*VOL*	**a.** HIV testing and counselling is voluntary, or provider-initiated with an opt-out
		b. Footnote added in case voluntary testing is guaranteed, and there is an exception allowing for forced testing of people being tried for sexual offences
	MAN	There is a regulation that indicates HIV testing is mandatory for specific groups or circumstances, or that there are exceptions to voluntary testing (i.e. pregnant women, pre-marital testing)
	ABS	There is no regulation regarding HIV testing and counselling
	M	Missing data: no data found on whether regulations exist regarding HIV testing and counselling
Indicator 3 – **Criminalisation of wilful transmission of HIV**	*Yes*	There is legislation that criminalises wilful transmission of HIV
	No	There is no legislation that criminalises wilful transmission of HIV
	M	Missing data: no data found on whether this legislation exists or not
Indicator 4 – **Programmatic response to access ART**	*Yes*	A government programmatic response to access ART is in place (can be a pilot)
	No	There is no government response to access ART
	M	Missing data: no data found on presence of government programmatic responses on access to ART
Indicator 5 – **Programmatic response on MTCT**	*Yes*	A government programme is in place on MTCT
	No	There is no government programme on MTCT
	M	Missing data: no data found on presence of government programmatic responses on MTCT

ANNEX 5. OVERVIEW OF CASE STUDIES FROM EAC MEMBER STATES PRESENTED IN THE STATE OF AFRICAN WOMEN REPORT

Case study number refers to the original number in the report.

Gender-based violence against women (GVAW)

Case study 1 State accountability for sexual violence in Kenya: the 160 Girls project (p. 164)
Case study 4 Great Lakes region civil society initiative to garner sub-regional political commitment to addressing GVAW (p. 168)
Case study 6 Cross-sector coordination in the management of sexual violence: Kenya's Sexual Offences Act implementation workshop (p. 171)

Harmful practices

Case study 11 Ending child marriage in Tanzania (p. 213)
Case study 14 Faith-based approach to tackling FGM in Kenya (p. 217)

Reproductive rights and SRH

Case study 19 The Caravan: a strategy to educate faith based leaders and communities on Family Planning (p. 268)
Case study 20 Council of Anglican Provinces in Africa makes an institutional commitment to promote family planning (p. 270)
Case study 21 The Eastern and Southern Africa Commitment on Comprehensive Sexuality Education (p. 272)
Case study 22 EAC Open Health Initiative (p. 274)
Case study 24 Reforming abortion law in Rwanda (p. 278)
Case study 25 Using coalition-building to advance abortion rights in Uganda (p. 279)
Case study 27 Enhancing judicial capacities on abortion rights in Kenya (p. 283)

HIV and AIDS

Case study 28 East African Community HIV Prevention and Management Act (p. 323)
Case study 29 Free To Shine Campaign (p. 324)
Case study 33 HIV-related forced sterilisation in Kenya (p. 331)

rightbyher.org

This project is funded by the European Union

A project implemented by