**Submission to the Special Rapporteur on Violance Against Women on criminalization and prosecution of rape**

**AIDS and Rights Alliance for Southern Africa and Botswana Network on Ethics, Law and HIV and AIDS**

**December 2020**

1. This submission is made by the AIDS and Rights Alliance for Southern Africa (ARASA)[[1]](#footnote-0) and the Botswana Network on Ethics, Law and HIV/AIDS (BONELA).[[2]](#footnote-1) ARASA is a regional partnership of progressive civil society actors working in 18 countries in southern and east Africa to advance the rights to bodily autonomy and integrity in the region, particular as relates to HIV prevention, gender eqaulity, access to safe abortion, and universal healthcare coverage.
2. BONELA (Botswana Network on Ethics, Law and HIV and AIDS) is a network of individuals, groups and organisations concerned to protect and promote the rights of people affected and infected by HIV and AIDS. BONELA works through advocacy and capacity and network building, aiming to strengthen awareness, participation and partnership.

**Introduction**

1. In this submission, we will use the Southern African Development Community (SADC) as our primary point of reference, bringing in individual examples from member states - particularly Botswana which has often been a conservative voice in negotiations pertaining to the sexual rights of women, where pertinent. The decision to analyse SADC policies and institutions as an entity is in recognition of the changing status of regional economic communities, as supranational international law actors, who hold significant sway in the adoption and national implementation of universal human rights norms.
2. Indeed the report of the Special Rapporteur comes at a crucial time as SADC through its Parliamentary Forum (SADC-PF) is developing a model law for the southern African region on gender based violence which will set the standards that member States will strive to attain for the foreseeable future. It is crucial that progressive ideas are incorporated into the model law, and that recommendations on rape speak to the role that regional economic communities play in the international human rights system. In this submission we will identify where regional standards towards rape exist and share insights from the region with an emphasis on Botswana.

**The crucial role of RECs in advancing women’s human rights in Africa**

1. Africa, like many regions, has a multilevel governance system and the principle of subsidiarity is instrumental in its functioning. Whereas scholars often recognise a three-tier system within international human rights law, in Africa it would be most accurately depicted as a four tier system namely: the international human rights system, the African regional system, the sub-regional RECs based system, and finally the Member States.
2. Regional Economic Communities and the African Union have a symbiotic relationship. Indeed the former play a large role both in enabling the fulfillment of the African Union’s mandate, but also as standalone entities independent of the African Union and created through the will of Member States that also contribute to norm setting at the regional level. Indeed the current formation of the AU and the drafting of the constitutive act could be read as having been influenced by the structure and policy direction of SADC at the time. Additionally, the African Union is committed to the regional and political integration of the entire continent, and in order to achieve this feat, recognises 8 RECs as the building blocks of this process of integration, and of the creation of a future Pan-African state. Although the latter is still a long way off, at a sub-regional level efforts to create common markets, free movement of persons and the right to establishment, the alignment of inter alia security and foreign policy objectives are already underway. Member states of SADC whilst explicitly recognising each other’s right to sovereignty[[3]](#footnote-2), have clearly yielded space for supranational policy development.
3. The African Union recognises within its constitutive act - the central role of human rights, democracy, and good governance in its work and also recognises gender equality as a core principle[[4]](#footnote-3). These values are mirrored in the Consolidated text of the Treaty of the Southern African Development Community, as Amended (SADC Treaty), and the SADC institutions are core mechanisms through which these values are enacted in the southern African region. Indeed, as a component of its institutional understanding of the principle of subsidiarity, the AU often carries out its functions through the RECs, at the behest of the RECs, or taking the RECs lead. An example of this is the centrality of the RECs in the AU’s peace and security functions.
4. RECs are at the very frontlines of developing relevant policies and standards that allows for the contextualisation and enunciation of rights. The SADC Treaty was clearly drafted with an understanding and intent of the creation supranational entity from the article on principles[[5]](#footnote-4), to the complementarity between national and regional (as in subregional) mechanisms[[6]](#footnote-5), to the obligation to ensure that everything in the treaty is given the force of law[[7]](#footnote-6), to article 12 creating mechanisms for integration of member states through the committee system.
5. The SADC has also been implicated in advancing the rights of women and girls by setting standards that member States aim to emulate, policy development in this area has accelerated over the last decade in particular, with the adoption of the SADC Protocol on Gender and Development, the SADC Sexual and Reproductive Health Strategy, and the SADC Key Populations Strategy. SADC has also been part of efforts to encourage legislative reform with a recent example being through the campaign to end child marriage which included the drafting of the SADC model law. It is important that we engage with, advocate to, and advise RECs as key entities in the international human rights system.

**What is rape in southern Africa?**

1. Under the updated Southern African Development Community Protocol on Gender and Development, member states made commitments that gender equality and equity would be a cornerstone of all constitutions by 2015[[8]](#footnote-7) and that they would have domesticated all of the rights in the protocol.
2. Sexual violence and rape are mentioned at different points in the Protocol, and under article 11(1)(d) there is an obligation to ‘protect girls from economic exploitation, trafficking, and all forms of violence including sexual violence. Additionally, freedom from rape is addressed as part of the broader provisions starting at article 20, which speak to gender based violence. Article 20(2), recognises the adverse impacts of sexual forms of GBV and requires State parties to prevent them by providing access to contraceptives, ready access to post exposure prophylaxis and safe abortions.
3. Gender based violence is defined under article 1(2) as, “all acts perpetrated against women, girls, and boys on the basis of their sex which cause or could cause them physical, sexual, psychological, emotional or economic harm, including the threat to take such acts, or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed or other forms of conflict.” Additionally the Regional Strategy and Framework of Action for Addressing Gender Based Violence (2018 – 2030),[[9]](#footnote-8) acknowledges that the SADC region has a high prevalence of gender based violence, with sexual violence and rape being amongst the most common forms. It also recognises multiple causes of GBV that “can be traced back to harmful cultural and traditional practices, gender inequalities and discrimination in all aspects of life (social, economic, religious and political) and entrenched institutional arrangements that are patriarchal”.[[10]](#footnote-9)
4. Despite being refered to frequently in the Protocol, rape and sexual assualt are not specifically defined in the protocol. The implication seems to be that members states have sufficiently cohesive definitions of rape that will allow the SADC region to address the scourge of sexual violence. In reality, there is however, quite a bit of variation amongst member states. Ten (10) Member States, (Angola, Comoros, Eswatini, Lesotho, Mauritius, Namibia, Seychelles, South Africa, Zambia and Zimbabwe) have provisions that incorporated a broad definition of sexual assault that include rape including marital rape. Six member states - Botswana, DRC, Madagascar, Malawi, Mozambique, Tanzania do not include marital rape under the definition of sexual assault.
5. Additionally, definitions of sexual assault and rape in the region tend to have a narrow and gendered scope. In Southern Africa in order for an offense to qualify as rape it must be committed against a cisgender girl or woman, and by a cisgender man through penile penetration. There is also a failure to ‘to recognise and proscribe other invasive sexual acts, such as oral rape and the use of objects to perpetrate rape, both of which have been found to constitute rape under international law.’[[11]](#footnote-10)
6. Botswana’s statutory provision is as follows:

Botswana Penal Code as amended by Penal Code Amendment Act of 2018:

Section 141 Definition of rape.

*Any person who has unlawful carnal knowledge of another person, or who causes the penetration of a sexual organ or instrument, of whatever nature, into the person of another, or who causes the penetration of another person's sexual organ into his or her person, without the consent of such other person, or with such person's consent if the consent is obtained by force or means of threats or intimidation of any kind, by fear of bodily harm, or by means of false pretences as to the nature of the act, or, in the case ofa married person, by personating that person's spouse, is guilty of the offence termed rape.*

1. Botswana’s criminal law provision on rape is unique in that it is gender neutral[[12]](#footnote-11) whereas in a number of jurisdictons within Southern Africa, the offense of rape is gendered, with rape commonly used to refer to offenses against adult women on the basis of violation of consent, the use of force or violence. Violations against men commonly fall under indecency or sodomy laws. However, sodomy laws are sometimes broader in scope than non-consensual sexual contact between men, and have instead been used to criminalise consensual sexual activity between men on the grounds of morality. That is, any penetrative sexual contact between men is in some jurisdictions considered to be criminal, despite the fact that anal penetration is not inherently the sole purview of men who have sex with men. Indeed it is also worth noting that the offence of sodomy can also be committed against women. What must be penetrated in order to constitute the offences of rape, defilement, or sodomy are the mouth, the anus, and/ or the vagina.
2. With regards to marital rape, there are still several Member States that are yet to criminalise it. Ten (10) SADC countries criminalise marital rape and the six (6) Member States that do not criminalise marital rape in legislation often rely on customary law to support this position. In some jurisdictions, they have noted that once a family pays bride price, a woman is deemed to permanently consent to sexual intercourse with her husband. Botswana is one of the member States still using this customary law approach in 2020, as its customary law holds that sex within a marriage is always consensual. There was some debate on whether s141 of the penal code intended to cover marital rape and findings were negative as this was deemed to violate the interpretation of criminal law statutes.[[13]](#footnote-12)
3. In Malawi the Divorce and Family Relations Act recognises marital rape only when the married couple are on judicial separation. This was confirmed in the case of *Moffat v Moffat[[14]](#footnote-13)* where a husband had non-consensual intercourse with his wife but it was not qualified as rape. Furthermore, in the case of *R v Mwasomola[[15]](#footnote-14),* the Court held that a wife could not lawfully deny her husband sexual intercourse. The Malawi Law Commission during the review of the Prevention of Domestic Violence Act on the issue of marital rape stated that *“it is important to keep issues of that matter private and in the home as that is how our society views it .*” [[16]](#footnote-15) Further, the Law Development Commission rejected the proposal by the Ministry responsible for Gender to criminalise marital rape. This is because culturally a woman cannot be raped in marriage and it violates the concept of conjugal rights. The Commission stated that marital rape could be amongst separated and divorced couples. Further, the Commission highlighted that society is not yet ready to accept concepts like marital rape.
4. In Seychelles, marital rape is recognised but not explicitly criminalised whilst DRC, Madagascar and Tanzania do not have legal provisions against marital rape.

**Defilement, statutory rape, and criminalising consensual adolescent sex**

1. It is imperative that Member States of SADC protect minors from sexual exploitation by adults, regardless of gender, consistent with their international law obligations. Member States have attempted to do so in different ways, often with a hybrid approach with regards to whether “consent” is relevant in the construction of the offence.
2. Sexual contact with girls under the age of consent tends to fall under statutory rape or defilement laws, even where adolescents have engaged in consensual sex acts. What constitutes the age of consent to sex generally varies within Southern Africa between the ages of 16-18, indeed it was recently raised to 18 in Botswana, partially due to the conflation of the age of consent to marriage with the age of consent to sex. Due to the broad nature of statutory rape and defiliment provisions, there is the risk that adolescents engaging in consensual sex without exploitation or coercion will be caught in the net, and adolescent boys will be charged as sex offenders.
3. This risk of criminalisation of adolescent sexuality has been subject to numerous legal challenges. An example from South Africa is the case of *Teddy Bear Clinic v. Minister of Justice and Constitutional Development*. In this case sections 15 and 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act of South Africa were challenged in the Constitutional Court for criminalizing consensual sexual conduct between adolescents in the age group 12 to 16 years. The provisions were found the be unconstitutional for ‘imposing criminal liability on adolescent sexual conduct that is otherwise normative [which] has the effect of harming the adolescents they intend to protect, in a manner that constitutes a deep encroachment into the rights of the child, including, dignity and privacy, and is against the best interests of the child principle.’[[17]](#footnote-16)
4. In Malawi there is currently an ongoing legal challenge in the High Court on the constitutionality of the offence of defilement under section 138(1) of the penal code, where the act in question was consensual and between two adolescents. The representatives of the accused child argue that the provision is overly broad, and in addition to targeting the mischief of exploitation of children, also criminalises normal, consensual sexual exploration between adolescents.
5. Botswana has attempted to address the issue of criminalisation of adolescent sexual activity through the defences incorporated into the definition of defilement in the penal code under section 147(5), which places an emphasis on power relations and adults exploiting children. Relevant provisions are reproduced below:

Botswana Penal Code as amended by Penal Code Amendment Act of 2018:

*Section 147 Defilement of person under 18 years*

*(1) Any person who unlawfully and carnally knows any person under the age of 18 years is guilty of an offence and on conviction shall be sentenced to a minimum term of 10 years, imprisonment or to a maximum term of life imprisonment.*

*(2) Any person convicted under subsection (1) shall be required to undergo a Human Immune-system Virus test before he or she is sentenced by the court.*

*(3) Any person who is convicted under subsection (1) and whose test for the Human Immune-system Virus under subsection (2) is positive shall on conviction be sentenced to a*

*­(a) minimum term of 15 years' imprisonment and a maximum term of life imprisonment with or without corporal punishment, where it is proved that such person was unaware of being Human Immune-system Virus positive; or*

*(b) minimum term of 20 years' imprisonment and a maximum term of life imprisonment with or without corporal punishment, where it is proved that on a balance of probabilities such person was aware of being Human Immune-system Virus positive.*

*(4) Any person who attempts to have unlawful carnal knowledge of any person under the age of 18 years is guilty of an offence and is liable to imprisonment for a term not exceeding 14 years, with or without corporal punishment.*

*(5) It shall be a sufficient defence to any charge under this section if it appears to the court before whom the charge is brought that the person so charged is –*

*(i) less than two years older than the person so defiled,*

*(ii) not in a position of trust or authority toward the person so defiled,*

*(iii) not a person with whom the person so defiled is in a relationship of dependency, and*

*(iv) not in a relationship with the person so defiled that is exploitative of the person so defiled.*

1. In a similar case in the Zimbabwe High Court, *State v B Masuku*, Judge Amy Tsunga provided key arguments, stating that, ‘Sex among peers is a reality of adolescent sexuality. It does not justify a suspended imprisonment term for the teen male offender who has had sex as part of a romantic relationship with a peer.’ She further noted that the criminal law was probably the incorrect vehicle for protecting adolescents from possible negative outcomes from sex and instead, ‘To stem the dangers that arise for girls in particular from teenage sex, part of the answer would appear to lie in policy makers and society accepting the prevalence of youth sex and fashioning appropriate interventions. Availing contraceptive protection is one such intervention. A more rigorous and open approach to what is actually taught as sexual education in schools is another.’
2. It is imperative that that consensual and non-exploitative sex between adolescents be decriminalised, in line with General Comment 20, paragraph 40 of the Commmittee on the Rights of the Child. Additionally, adolescents should be provided with comprehensive sexuality education, and the age of consent to services needs to be delinked from the age of consent to sex - with an adult, such that adolescents can access the HIV related services, and contraceptives that they need in order to more safely explore their sexualities *with each other.* ARASA has published a policy brief on the matter that we respectfully draw the Special Rapporteur’s attention to [here](https://www.arasa.info/media/arasa/Resources/research%20reports/policy-brief-v3-interactive.pdf).

**Access to justice**

1. As outlined earlier, State Parties must ensure that perpetrators of GBV including rape are tried by a court of competent jurisdiction. Additionally, States must review criminal laws or penal codes so that they incorporate all subcomponents of GBVas listed in the Protocol crimes as well as define their essential elements. Additionally, the provision requires State Parties to look at how evidence should be collected and adduced and the sentencing patterns.
2. The Regional Strategy and Framework reaffirms the SADC region aim of strengthening and ‘where necessary, facilitate the enactment and amendment of Member States’ legislation for the elimination of GBV, especially violence against women and violence against children; to prevent, investigate, prosecute and punish perpetrators of such violence as well as to enhance the protection, provision of services, rehabilitation, education and training, recovery and reintegration of victims/survivors.”
3. The Protocol under article 20(7) requires that state parties establish special counselling services, legal, and police units to provide dedicated and sensitive services to survivors of GBV. Having an overall ecosystem of support is particularly key as prosecutions in the region are prosecuted ex officio.
4. In Botswana, plea bargains of “friendly settlements” are not permitted with regards to sexual offences.

**Additional barriers to the reporting and prosecution of rape**

1. Those viewed by society as being sexually deviant in some way struggle to have sexual violence against them taken seriously. Two examples of this are female sex workers and those with non-normative sexualities and gender identities. The adverse social perceptions, hostile political contexts, and in some jurisdictions criminal provisions against their work, or aspects of the performance of their identity, all affect the ability of sex workers and LGBTI+ people to report violations against them.
2. Sex work is criminalised in all 16 member states of the SADC, and sex workers are largely perceived as deviant, and due to their association with HIV discourse as key populations, are also sometimes presented as purveyors of diseases. Sex workers face a lot of harassment anyway in the course of their work often at the hands of law enforcement who sometimes sexually assault sex workers in lieu of or in addition to making arrests.
3. Due to prevailing conservative and patriarchal attitudes towards women’s sexuality in general, female sex workers experience a lot of stigma. This is because sex work is regarded as an identity or a status, as opposed to a form of labour with all workers deserving of equal protections. This makes them less likely to report any form of sexual assault when they are harmed. If they do report the harm, sex workers are often deemed to permanently consent to sex, due to the nature of their work.
4. With regards to the LGBTI+ community, whilst there are jurisdictions where same sex sexual conduct has been decriminalised, there continue to be homophobic and transphobic sentiments in wider southern African societies. Indeed despite being perceived as the bastion of LGBT+ related rights in Africa, South Africa has a violence problem that all to often manifests as homophobic rape and murder, many of which remain unsolved.
5. Fear of experiencing violence and discrimination at the hands of law enforcement acts as a barrier to reporting LGBTII+ people, as does the law’s inability to understand harm outside of its non-heteronormative bounds. Where rape is gendered, and heteronormatively defined - rape by a person of the same sex is not a legal possibility and there is therefore inadequate remedy. Additionally, victims of sexual violence may fear being outted through the process of pursuing legal recou

**What is the punishment for rape?**

1. Under article 20(1)(c) of the Protocol on Gender and Development, member states have an obligation to ensure that perpetrators of rape are tried by a court of *competent* jurisdiction. Additionally, article 20(3)(c) requires States to review and reform criminal laws and procedures applicable to cases of sexual offences and GBV with the aim of ensuring that ‘justice and fairness are accorded to survivors...in a manner that ensures dignity, protection, and respect.’ Member states have interpreted these articles in a way that has seen an incremental regional move towards increasing penalties for offences - including the setting of minimum sentences, and increasing the age limits for offences committed against children.
2. Mandatory sentences for rape are common among the member states, with eleven (11) having them, and five (5) member states (Angole, Comoros, Madagascar, Mozambique, and Tanzania) without. The use of mandatory minimum sentences is often justified on the basis that it is important that the sentences imposed reflect the gravity of the offences,[[18]](#footnote-17) that having predictably harsh sentencing acts as a deterrent, and that mandatory sentences also serve to address a public perception to the effect that some judicial officers are imposing woefully inadequate sentences for serious crimes, such as rape.[[19]](#footnote-18) Member States such as South Africa, Tanzania and Lesotho introduced minimum sentences for sexual offences which are varied and dependent on certain specified aggravating factors.
3. Whilst a number of member states of SADC have separate mandatory minimums for rape and other sexual offences, others have a uniform mandatory minimum regime. For example, in Tanzania and Zambia, mandatory minimum sentences were imposed for all cases of rape or defilement regardless of the circumstances of the case. In Zambia, the minimum is 15 years for rape or defilement, 5-14 years for attempt. In Tanzania, the minimum sentence is 30 years for rape/defilement and attempted rape.
4. In Botswana the punishment for rape is under section 142 of the Penal Code as amended:

*(1) Any person who is charged with the offence of rape shall­*

*(i)not be entitled to be granted bail; and*

*(ii) subject to subsections (2) and (4), upon conviction be sentenced to a minimum term of10 years' imprisonment or to a maximum term of life imprisonment.*

*(2) Where an act of rape is attended by violence resulting in injury to the victim, the person convicted of the act of rape shall be sentenced to a minimum term of 15 years' imprisonment orto a maximum term of life imprisonment with or without corporal punishment.*

*(3) Any person convicted of the offence of rape shall be required to undergo a Human Immune-system Virus test before he or she is sentenced by the court.*

*(4) Any person who is convicted under subsection (1) or subsection (2) and whose test for the Human Immune-system Virus under subsection (3) is positive shall be sentenced­*

*(a) to a minimum term of 15 years' imprisonment or to a maximum term of life imprisonment with corporal punishment, where it is proved that such person was unaware of being Human Immune-system Virus positive; or*

*(b) to a minimum term of 20 years' imprisonment or to a maximum term of life imprisonment with corporal punishment, where it is proved that on a balance of probabilities such person was aware of being Human Immune-system Virus positive.*

1. For offences relating to those below the age of consent, not only is the question of consent irrelevant, but aggravation can also be irrelevant in some jurisdictions. For example a case of consensual sexual intercourse involving a nineteen-year-old with his fifteen-year-old girlfriend carries the same minimum sentence as that of a gang rape of a seven-year-old girl.[[20]](#footnote-19) In other countries, there are more detailed sentencing guidelines for sexual offences based on various factors. For example, in Botswana, the minimum sentence for rape or defilement is from ten years up to life imprisonment. The minimum sentence increases to fifteen years if the offence is violent or causes injury; and fifteen to twenty, if the perpetrator is infected with HIV. Attempted rape or defilement carries a penalty of not less than 5 years imprisonment to life. [[21]](#footnote-20)
2. With regards to statutory rape or defilement, in Botswana the statutory minimum under section 147 excerpted in paragraph X above is ten years, which depending on the applicability of aggravating factors, can increase up to life imprisonment.
3. The SADC Protocol and Gender and Development does not provide any kind of framework for possible reparations relating to rape and other sexual offences, although some remedies may exist in Member states’ approaches to delict or torts. Rather, there is just an obligation to provide survivors with certain (primarily medical) services such as post-exposure prophylaxis, and an obligation to create a support ecosystem to enable the reporting and prosecution process.

**HIV criminalisation and sexual offences**

1. Although the SADC protocol does not advocate this position, there is still the use of HIV status as a means of determining aggravation. Whilst the number of member states with wilful transmission of HIV offences on their books may be stagnant or even dwindling, there continues to be indirect criminalisation of HIV through the application of aggravating factors.
2. The argument for the continued retention of HIV as an aggravating factor seems to largely be based on dated scientific information about HIV exposure, the risks of HIV transmission, and about possible health outcomes in the event that one is infected with HIV. Additionally, there is a flawed application of the law of evidence. In order to support the judicial system in making evidence based decisions, 20 of the world’s leading HIV scientists developed an Expert Consensus Statement to address use of HIV science within the criminal justice system.
3. The argument for HIV criminalisation also tends to rely on the idea that it protects women by acting as a deterrent or by ensuring thorough punishment for harm inflicted. However, this argument excludes the experiences of women and girls who live with HIV and who are also survivors of rape and other sexual offences. Any form of HIV criminalisation laws or policies, can complicate these women and girls’ ability or willingness to report violations that they have experienced, for fear that they themselves will be criminalised. Ineed in a study in Canada, some WLHIV reported not reporting rape for fear of legal repurcussions relating to non disclosure.[[22]](#footnote-21)

**Recommendations**

1. Marital rape should be recognised as a crime.
2. Review age of consent laws and align them with the principles that recognise the best interests of the child and the evolving capacity for sexual, protecting adolescents them from exploitative sexual conduct and support their developing sexual agency
3. Decriminalise exposure to and transmission of HIV, and use the expert consensus document to reform criminal law systems, to ensure that all victims of sexual violence can be protected by the law without fear of persecution because of HIV status
4. Ensure that provisions relating to sexual offences are gender neutral and not heteronormative to ensure that harm experienced by people of all sexualities and gender identities can be reported.
5. Decriminalise sex work, to ensure that sex workers are no longer deemed to perpetually consent to sexual contact, and to ensure that they can work safely with recourse to justice if they are harmed.

1. [www.arasa.info](http://www.arasa.info) [↑](#footnote-ref-0)
2. [www.bonela.org](http://www.bonela.org) [↑](#footnote-ref-1)
3. Under article 4(a) of the Consolidated text of the Treaty of the Southern African Development Community, as Amended, the sovereign equality of all Member States is recognised [↑](#footnote-ref-2)
4. See article 4(l)-(m) of the African Union Constitutive Act [↑](#footnote-ref-3)
5. See article 4 of the Consolidated text of the Treaty of the Southern African Development Community, as Amended [↑](#footnote-ref-4)
6. A few examples are under article 5(e) and (h) of the Consolidated text of the Treaty of the Southern African Development Community, as Amended [↑](#footnote-ref-5)
7. See article 6(5) of the Consolidated text of the Treaty of the Southern African Development Community, as Amended [↑](#footnote-ref-6)
8. See article 4(1) of the Southern African Development Community Protocol on Gender and Development, as Amended [↑](#footnote-ref-7)
9. Approved by SADC Ministers of Gender and Women’s Affairs in July 2018. The Regional Strategy is informed by international and regional instruments on GBV response that the CEDAW (1979); CRC (1990); Dakar Platform for Action (1994); ICPD, 1994; Beijing Declaration and Platform for Action (1995); African Plan of Action to Accelerate the Implementation of the Dakar and Beijing Platforms for Action for the Advancement of Women (1999) and UN Resolution 1325 on Women Peace and Security (2000). In addition, the Strategy is informed by several United Nations General Assembly (GA) resolutions on Intensification of efforts to eliminate all forms of violence against women (i.e. GA resolutions 61/143, 62/133, 63/155, 64/137, 65/187, 67/144); CSW Resolution 60/2 on Women, the Girl Child and HIV (2016); and the UN updated Model Strategies and Practical Measures on the Elimination of Violence against Women and Girls in the Field of Crime Prevention and Criminal Justice (General Assembly resolution 65/228). In addition, the SDGs provide opportunity for the prevention and mitigation of GBV in SADC Member States. Of particular importance to GBV response are: SDG 1 – No poverty; SDG 3 – Good health and wellbeing; SDG 4 – Quality education; SDG 5 – Gender equality; SDG 8 – Decent work and economic growth; and SDG 10 – Reduced inequalities. At the continental level, the Strategy is informed by the Maputo Protocol. The Strategy acknowledges that the Maputo Protocol “brings to the forefront the need to eliminate GBV”. It is also informed by the AU Agenda 2063 that identifies GBV as a major obstacle to human security, peace and development and often fuelled by armed conflict, terrorism, extremism and intolerance. The Revised SADC Protocol on Gender and Development underpins this Strategy. Other instruments that inform this Strategy are the SADC Declaration on Gender and Development (1997), and its Addendum on the Prevention and Eradication of Violence against Women and Children (1998); SADC Gender Policy; 10 Year SADC Strategic Plan of Action on Combating Trafficking in Persons, especially Women and Children (2009-2019). [↑](#footnote-ref-8)
10. Ibid. [↑](#footnote-ref-9)
11. For a further discussion on these limitations in the case of Zimbabwe see International Commission of Jurists, 2020. *The Case For Reform: Criminal Law And Sexual Violence In Zimbabwe*. [online] Geneva: International Commission of Jurists, p.7. Available at: <https://www.icj.org/wp-content/uploads/2020/11/Zimbabwe-Sexual-violence-Advocacy-Analysis-brief-2020-ENG-1.pdf> [Accessed 31 December 2020]. [↑](#footnote-ref-10)
12. There is some tension in this neutrality however, as section 178(5) of the Criminal Procedure and Evidence Act does not recognise rape as a compenent offense against men and boys between 15 years and above. The said provisions moreover do not appear to cover rape and attempted rape on boys. [↑](#footnote-ref-11)
13. United States of America Department of State, 2017. *Botswana Human Rights Report 2017*. [online] USA Department of State. Available at: <https://www.state.gov/reports/2017-country-reports-on-human-rights-practices/botswana/> [Accessed 31 December 2020]. [↑](#footnote-ref-12)
14. Case 10 of 2007 11 [↑](#footnote-ref-13)
15. 4 ALR (Mal) 572 [↑](#footnote-ref-14)
16. Kamanga, I., Kazima, J., Hiwa, G., Kalemba, F., Kachika, T. and Sibande, C., 2015. *Report Of The Law Commission On The Technical Review Of The Prevention Of Domestic Violence Act*. [online] The Malawi Gazette Supplement. Available at: <https://lawcom.gov.mw/sites/default/files/Law%20Commission%20Report%20on%20the%20Review%20of%20the%20Prevention%20of%20Domestic%20Violence%20Act.pdf> [Accessed 31 December 2020]. [↑](#footnote-ref-15)
17. Kangaude G, and Skelton A, '(De)Criminalizing Adolescent Sex: A Rights-Based Assessment Of Age Of Consent Laws In Eastern And Southern Africa' (2018) 8 SAGE Open [↑](#footnote-ref-16)
18. Geoff Feltoe,’Sentencing of sexual offenders (2019) at <https://zimlii.org/zw/journals/UZJL%202%281%29-09-feltoe-sentencing.pdf> [↑](#footnote-ref-17)
19. Ibid. [↑](#footnote-ref-18)
20. Geoff Feltoe,’Sentencing of sexual offenders (2019) at <https://zimlii.org/zw/journals/UZJL%202%281%29-09-feltoe-sentencing.pdf> [↑](#footnote-ref-19)
21. Jill Thompson and Felly Simmonds, “Rape Sentencing Study: Statutory Sentencing Provisions for Rape, Defilement and Sexual Assault in East, Central and Southern Africa’ at <https://www.svri.org/sites/default/files/attachments/2016-07-18/Rape%20sentencing%20study%20ECSA_0.pdf> [↑](#footnote-ref-20)
22. Krusi A, Ranville F, Gurney L, Lyons T, Shoveller J, Shannon K, ‘Positive sexuality: HIV disclosure, Gender, Violence, and the Law’ (2018) 13:8 PLOS One <<https://doi.org/10.1371/journal.pone.0202776>> accessed 20 November 2020 [↑](#footnote-ref-21)