

CHAPTER 4

Relevant regional law

4.1 Introduction

This chapter focuses on those rights which are specifically provided for in African regional treaties and other documents. It also discusses how regional law can be used to support litigation relating to violations of sexual and reproductive self-determination and discrimination against particular groups of women in accessing SRH care services. The chapter explains how specific rights recognised in regional law will apply to certain factual scenarios and which actions can be argued to violate these rights. In this way, it aims to support the use of regional law principles in domestic SRHR- related litigation.

This chapter will also discuss relevant jurisprudence from other regional bodies, including the ECHR and the IACHR, which can assist domestic courts in determining the scope and nature of constitutional rights.

For a discussion of why domestic courts should look to regional law, please refer to Chapter 2.

Checklist

- ▶ Which regional human rights are violated in your particular case?
- ▶ Which regional treaties provide for the particular rights you have identified? *[See page 15-17 for case examples of specific rights violations]*
- ▶ Has your country ratified the particular treaty?
- ▶ Did the events in your case take place after the ratification date of the treaty?
- ▶ Has your country made any reservations to the treaty that may be applicable to the facts of your case?
- ▶ Has the African Commission on Human and Peoples' Rights, African Court on Human and Peoples' Rights, or Southern African Development Community (SADC) issued any relevant decisions on these rights? *[See Chapter 7 for a list of relevant online resources]*
- ▶ Are there any relevant resolutions, statements or guidelines issued by the African Commission on Human and Peoples' Rights or SADC institutions?

Relevant documents discussed in this chapter

- African Charter on Human and Peoples' Rights
- African Union Declaration and Continental Plan of Action on African Decade of the Disabled Persons 1999-2009 extended to December 2019
- Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
- SADC Protocol on Gender and Development
- SADC Protocol on Health

Relevant cases discussed in this chapter

- Chávez v Peru
- Doebbler v Sudan
- Good v Botswana
- Huri-Laws v Nigeria
- IG and Others v Slovakia
- IV v Bolivia
- Jacinto v Mexico
- Legal Resources Foundation v Zambia
- NB v Slovakia
- Open Door and Dublin Well Woman v Ireland
- P and S v Poland
- Purohit and Moore v The Gambia
- RR v Poland
- Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria
- Sudan Human Rights Organisation and Centre on Housing Rights and Evictions (COHRE) v Sudan
- Tysiac v Poland
- VC v Slovakia
- Zimbabwe Lawyers for Human Rights (ZLHR) & Associated Newspapers of Zimbabwe (ANZ) v Zimbabwe

The chapter is divided into the following sections:

- Overview of relevant regional law;
- Right to freedom from discrimination;
- Right to equality;
- Right to health;
- Right to information;
- Rights to liberty and security of the person;
- Freedom from cruel, inhuman and degrading treatment and the right to dignity; and
- Right to life.

4.2 Overview of Relevant Regional Law

Lawyers litigating cases involving violations of SRHR in southern Africa can use a number of regional treaties promulgated by the African Union (AU) to support their arguments, including:

- The African Charter on Human and Peoples' Rights (African Charter);²⁰⁶ and
- The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Protocol on Women).²⁰⁷

The process of ratification for these regional human rights instruments is similar to that of the international instruments, described in Chapter 3.

The African Commission is responsible for protecting and promoting human rights and monitoring country compliance with the African Charter and the Protocol on Women.

The African Commission has a number of special experts and committees that oversee and monitor country compliance of specific human rights issues. The most relevant to the issues covered in this manual are the Special Rapporteur on the Rights of Women in Africa, the Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internally Displaced Persons in Africa, and the Committee on the Protection of the Rights of People Living with HIV and Those at Risk, Vulnerable to and Affected by HIV. These special experts and committees sometimes expand on the context of rights through mission reports and other documents.

The African Charter provides that the African Commission shall:

[D]raw inspiration from international law on human and peoples' rights, particularly from the provision of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries...

²⁰⁶ Available at http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf (accessed 26 August 2013).

²⁰⁷ Available at <http://www.au.int/en/sites/default/files/Protocol%20on%20the%20Rights%20of%20Women.pdf> (accessed 26 August 2013).

as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations...²⁰⁸

It furthermore notes that as subsidiary principles of law, the African Commission shall:

[T]ake into consideration... other general or special international conventions... expressly recognised by member states of the Organization of African Unity, African practices consistent with international norms on human and peoples' rights, customs generally accepted as law, general principles of law... as well as legal precedents and doctrine.²⁰⁹

The African Court on Human and Peoples' Rights (African Court) was set up to complement the work of the African Commission. It has jurisdiction over all disputes concerning the application and interpretation of the African Charter and its protocols as well as other human rights instruments ratified by African States.²¹⁰

Recommendations, reports and decisions of the African Commission and the African Court as well as recommendations reports and other documents of Special Rapporteurs and Committees assist in determining the nature and scope of regional and national legal obligations.

In addition, resolutions, protocols and declarations issued by regional and sub-regional bodies, including the African Union and the Southern African Development Community (SADC) can provide guidance to domestic courts in southern Africa on the nature and scope of rights enshrined in national constitutions and legislation.

Relevant sub-regional resolutions, protocols and declarations include:

- Treaty of SADC;²¹¹
- SADC Protocol on Health;²¹² and
- SADC Protocol on Gender and Development (SADC Protocol on Gender);²¹³

The African Union Declaration and Continental Plan of Action on the African Decade of the Disabled Persons is also important in relation to the rights of people living with disabilities.²¹⁴

²⁰⁸ African Charter *supra* note 206, article 60.

²⁰⁹ *Id.*, article 61.

²¹⁰ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights June 9 1998 OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III), article 3 available at <http://www.african-court.org/en/images/documents/Court/Court%20Establishment/africancourt-humanrights.pdf> (accessed 26 August 2013).

²¹¹ (1992) available at http://www.sadc.int/files/9113/5292/9434/SADC_Treaty.pdf (accessed 29 August 2013).

²¹² (1999) available at http://www.sadc.int/documents-publications/show/Protocol_on_Health1999.pdf (accessed 26 August 2013).

²¹³ (2008) available at http://www.sadc.int/files/8713/5292/8364/Protocol_on_Gender_and_Development_2008.pdf (accessed 26 August 2013).

²¹⁴ Available at <http://www.africa-union.org/child/Decade%20Plan%20of%20Action%20-Final.pdf> (accessed 26 August 2013).

Table: Dates of ratification/accession to regional instruments

Country	African Charter	Protocol on Women	Treaty of SADC	SADC Protocol on Health	SADC Protocol on Gender
Angola	2/3/1990	30/9/2007	20/8/1993	-	2010
Botswana	17/7/1986	-	7/1/1998	9/2/2000	-
Dem. Rep. of Congo	20/7/1987	9/6/2008	28/2/2009	-	-
Lesotho	10/2/1992	26/10/2004	26/8/1993	31/7/2001	2010
Malawi	17/11/1989	20/5/2005	12/8/1993	7/11/2000	-
Mozambique	22/2/1989	9/12/2005	30/8/1993	13/11/2000	2010
Namibia	30/7/1992	11/8/2004	14/12/1992	10/7/2000	2009
Swaziland	15/9/1995	Signed 7/12/2004	16/4/1993	-	2012
Zambia	10/1/1984	2/5/2006	16/4/1993	-	2012
Zimbabwe	30/5/1986	15/4/2008	17/11/1992	13/5/2004	2009

African regional human rights mechanisms have yet to specifically examine SRHR related issues but other regional mechanisms such as the IACHR, the European Commission on Human Rights and the ECHR have considered some SRHR issues such as the coerced or forced sterilisation of women and denial of access to services such as abortion. Although the decisions of comparative regional systems are not binding on domestic courts in southern Africa they can be of persuasive value especially where they involve similarly situated countries. The African Commission has cited the ECHR and the European Commission on Human Rights in the decisions of at least three cases brought before it, although none of these African Commission cases specifically dealt with SRHR issues.²¹⁵

4.3 Right to Freedom from Discrimination

The right to freedom from discrimination is central in protecting women's SRH. Sexual and reproductive health laws and practices that deny rights to certain populations, such as pregnant women, WLHIV or women with disabilities may violate the right to non-discrimination. For instance, laws or practices that deny or provide conditional access to SRH services, such as pre-natal care or abortion services, for pregnant women, WLHIV

²¹⁵ *Civil Liberties Organisation Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria* African Commission Communication No. 218/98 (1998) at paras 27, 37 and 41 available at <http://www1.umn.edu/humanrts/africa/comcases/218-98.html> (accessed 26 August 2013); *Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) v Nigeria* African Commission Communication No. 155/96 (2001) at para 57 available at http://www.chr.up.ac.za/chr_old/indigenous/documents/Nigeria/Cases/SERAC1.pdf (accessed 26 August 2013) and *Doebbler v Sudan* African Commission Communication No. 236/2000 (2003) at para 38 available at <http://www1.umn.edu/humanrts/africa/comcases/236-2000.html> (accessed 26 August 2013).

or women with disabilities may amount to discrimination. Similarly, medical procedures, such as forced abortion or sterilisation of WLHIV or women with disabilities may violate the right to non-discrimination.

The African Charter protects the right to be free from discrimination on various grounds under article 2. The right to non-discrimination is often discussed in conjunction with the right to equality in article 3. Article 2 of the African Charter protects every person from discriminatory treatment in the enjoyment of their various rights set out in the African Charter. It states:

Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, *sex*, language, religion, political or any other opinion, national and social origin, fortune, birth or *other status*.²¹⁶

The African Commission has emphasised the importance of the principle of non-discrimination, describing it as “a fundamental principle in international human rights law.”²¹⁷ The African Commission has also noted that “all international and regional human rights instruments and almost all countries’ constitutions contain provisions prohibiting discrimination. The principle of non-discrimination guarantees that those in the same circumstances are dealt with equally *in law and practice*.”²¹⁸

The African Commission has also linked the right to non-discrimination to the enjoyment of all other rights. In *LRF v Zambia*, the African Commission considered the African Charter’s article 2 protection against discrimination. It found that the Zambian constitutional provisions that rendered persons not of Zambian descent ineligible for presidential office violated article 2 of the African Charter.²¹⁹ It explained as follows:

Article 2 of the Charter abjures (sic) discrimination on the basis of any of the grounds set out, among them ‘language...national or social origin...birth or other status...’. The right to equality is very important. It means that citizens should expect to be treated fairly and justly within the legal system and be assured of equal treatment before the law and equal enjoyment of the rights available to all other citizens. The right to equality is important for a second reason. Equality or the lack of it affects the capacity of one to enjoy many other rights.²²⁰

Discrimination against WLHIV and women with disabilities

Women’s right to non-discrimination is specifically protected in regional law. Article 18(3) of the African Charter specifically protects women from discrimination and furthermore links the protection to that contained in international law. It states that countries “shall ensure the elimination of every discrimination against women and also

²¹⁶ African Charter *supra* note 206, article 2 (emphasis added).

²¹⁷ *Good v Republic of Botswana* African Commission Communication No. 313/05 (2010) at para 218 available at <http://www.interights.org/userfiles/Documents/Decisiononthemerits31305KennethGoodvRepublicofBotswana.pdf> (accessed 26 August 2013).

²¹⁸ *Id* (emphasis added).

²¹⁹ *LRF v Zambia supra* note 38 at para 71.

²²⁰ *Id* at para 63 (omissions in original) (first [sic] in original).

ensure the protection of the rights of [women and children] as stipulated in international declarations and conventions.”²²¹

Article 2 of the Protocol on Women states that “[s]tate parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures.” It also states that legislative or regulatory measures shall include “prohibiting and curbing all forms of discrimination particularly those harmful practices which endanger the health and general well-being of women.”²²²

Discrimination against women is defined in article 1 of the Protocol on Women as:

[A]ny distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life.²²³

The SADC Protocol on Gender reinforces article 6(2) of the Treaty of SADC, which emphasises the obligation to prohibit discrimination on the basis of gender and links this to access to health rights; it obliges States to take various measures, including changing national laws that discriminate against women, recognising, protecting and promoting the SRHR of women and girls and ensuring women’s access to health services. The SADC Protocol on Gender also specifically recognises the importance of addressing both HIV and disability issues in strengthening gender equality.²²⁴

Women with disabilities are specifically guaranteed protection from discrimination in various regional human rights documents. Article 18(4) of the African Charter specifically provides people with disabilities with the right to special measures of protection in keeping with their “physical or moral needs”. Article 23 of the Protocol on Women provides special protection for women with disabilities from discrimination based on disability and emphasises their right to be treated with dignity. Similarly, objective 1 of the AU Declaration and Continental Plan of Action on the African Decade of the Disabled Persons which was extended to 2019 requires States to formulate and implement national laws, policies and programmes to promote the full and equal participation of persons with disabilities.²²⁵

The African Commission has not directly addressed whether discrimination on the basis of HIV status is covered under article 2. However, the Protocol on Women is the only international human rights treaty to make specific mention of HIV, noting that women have the right to self-protection and to be protected from HIV and AIDS.²²⁶ Similarly, the African Commission in interpreting the breadth of articles 14(1)(d) and 14(1)(e)

²²¹ African Charter *supra* note 206, article 18(3).

²²² Protocol on Women *supra* note 207, article 2(b).

²²³ *Id.*, article 1.

²²⁴ SADC Protocol on Gender *supra* note 213, articles 9 and 27.

²²⁵ The African Union Declaration and Continental Plan of Action on the African Decade of the Disabled Persons *supra* note 214.

²²⁶ Protocol on Women *supra* note 207, articles 14 (1)(d).

of the Protocol on Women, providing for the right to self-protection against sexually transmitted infections and knowing one's health status, noted that discrimination on the basis of HIV status, among others, limits a woman's ability to access her rights under the Protocol on Women, namely the right to SRHR and self-protection from sexually transmitted diseases.²²⁷

Additionally, in 2001, the African Commission called upon African governments to protect the rights of people living with HIV in its 2001 Resolution on the HIV/AIDS Pandemic²²⁸ and has also recently passed a resolution creating a Committee on the Protection of the Rights of People Living with HIV and Those at Risk, Vulnerable to and Affected by HIV to look specifically at the rights of people living with and affected by HIV, including discrimination.²²⁹

In addition, numerous sub-regional resolutions and declarations acknowledge the importance of non-discrimination against people living with HIV.²³⁰

While there is limited jurisprudence from the African Commission on discrimination in relation to sex, disability or "other status", such as HIV and AIDS, what is clear from the regional instruments and related documents is that the African Commission considers the rights of women, PLHIV and people with disabilities a human rights concern.

Acts that violate the right to non-discrimination

Where the African Commission is called upon to determine whether discrimination in law and practice on the basis of sex, disability or "other status", such as HIV and AIDS, is permissible or impermissible, it will look at:

- Whether equal cases are treated in a different manner;
- Whether a difference in treatment has an objective and reasonable justification; and
- Whether there is proportionality between the aim sought and the means employed.²³¹

²²⁷ General Comment on Article 14 (1)(d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Comment on Article 14 (1)(d) and (e) of the Protocol on Women) at paras 4-5 available at <http://www.achpr.org/news/2012/11/d65/> (accessed 26 August 2013).

²²⁸ African Commission on Human and Peoples' Rights, Resolution on HIV/AIDS Pandemic – Threat against Human Rights and Humanity, AGH/229 (XXXVII) May 2001 available at <http://www.achpr.org/sessions/29th/resolutions/53/> (accessed 26 August 2013).

²²⁹ African Commission on Human and Peoples' Rights, Resolution on the Establishment of a Committee on the Protection of the Rights of People Living with HIV (PLHIV) and Those at Risk, Vulnerable to and Affected by HIV, Res 163 (XLVII) May 2001 available at <http://www.achpr.org/sessions/48th/resolutions/172/> (accessed 26 August 2013).

²³⁰ **See**, for instance SADC Code on HIV/AIDS and Employment in SADC, articles 2 and 3(1); Maseru Declaration on the Fight against HIV/AIDS in the SADC region, 3; SADC HIV AND AIDS Strategic Framework and Programme of Action 2003 – 2007, 8; SADC HIV/AIDS Business Plan: Strategic 5-year Business Plan 2005-2009 (2004), 4; SADC Health Sector Policy Framework Document 2000; and the SADC Declaration on HIV and AIDS (2003).

²³¹ *Good v Republic of Botswana supra* note 217 at para 219.

In *Purohit and Moore v The Gambia*,²³² the African Commission considered the equality and health rights of people with disabilities. It held that the legislative regime in the Gambia for mental health patients violated both articles 16 and 18(4) of the African Charter. In so doing, the African Commission explained:

Enjoyment of the human right to health as it is widely known is vital to all aspects of a person's life and well-being, and is crucial to the realisation of all the other fundamental human rights and freedoms. This right includes the right to health facilities, access to goods and services to be guaranteed to all without discrimination of any kind.²³³

The African Commission also read into article 16 “the obligation on the part of States Party to the African Charter to take concrete and targeted steps, while taking full advantage of its available resources, to ensure that the right to health is fully realised in all its aspects without discrimination of any kind.”²³⁴

Comparative Regional Law: Forced Sterilisation

In the IACHR case of *Chávez v Peru*,²³⁵ a case resolved by friendly settlement, the Peruvian State acknowledged that the forced sterilisation of a woman violated, amongst others, the right to non-discrimination protected in article 1(1) of the American Convention on Human Rights.

The case of *IV v Bolivia*,²³⁶ pending before the IACHR, alleges gender-based discrimination where the petitioner was submitted to a sterilisation procedure allegedly without her informed consent. The case was found admissible in July 2008 and a decision is pending.

The case of *FS v Chile*,²³⁷ also pending before the IACHR raises issues of discrimination on the basis of HIV. The petition alleges that the forced sterilisation of an HIV-positive woman is a violation of articles 1 and 24 of the American Convention on Human Rights, which require States Parties to combat discriminatory practices and to establish norms and other measures that recognise and ensure the effective equality before the law of each individual irrespective of sex or HIV status. The petition highlights that forced sterilisation disproportionately affects women and

²³² African Commission Communication No. 241/2001 (2003) available at <http://www1.chr.up.ac.za/index.php/browse-by-subject/304-the-gambia-purohit-and-another-v-the-gambia-2003-ahrlr-96-achpr-2003.pdf> (accessed 26 August 2013).

²³³ *Id* at para 80.

²³⁴ *Id* at para 84.

²³⁵ IACHR Report No 71/03(2003) available at <http://www1.umn.edu/humanrts/cases/71-03.html> (accessed 26 August 2013).

²³⁶ IACHR (Admissibility decision) (2008) at para 28 available at <http://www1.umn.edu/humanrts/cases/40-08.html> (accessed 26 August 2013).

²³⁷ Litigation brief of the *FS v Chile* case available at <http://reproductiverights.org/en/lbs-fs-vs-chile> (accessed 26 August 2013).

that HIV-positive women experience heightened vulnerability to forced sterilisation and other forms of discrimination in the healthcare setting, despite the fact that health facilities, goods and services must be accessible to all, especially the most vulnerable or marginalised sections of the population.²³⁸

The ECHR has considered forced sterilisation as a violation of the right to non-discrimination in the cases of *VC v Slovakia*,²³⁹ *NB v Slovakia*²⁴⁰ and *IG and Others v Slovakia*.²⁴¹ The three cases involved the forced sterilisation of women of minority ethnic groups. However, in each of the cases the Court did not find it necessary to separately determine whether there had been a violation of the non-discrimination clause.²⁴² This finding was despite the Court acknowledging that the evidence before it indicated that the practice of sterilisation of women without their prior informed consent affected vulnerable individuals from various ethnic groups.²⁴³ The Court however, indicated that notwithstanding the fact that sterilisations without informed consent call for serious criticism, the objective evidence was not sufficiently strong in itself to convince the Court that it was part of an organised policy or that the hospital staff's conduct was intentionally racially motivated and thus discriminatory.²⁴⁴

In *VC v Slovakia*, one judge dissented noting that the failure to find a violation of the right to non-discrimination reduced the case to the individual level. The judge noted that the fact that there are other cases of this kind pending before the Court reinforced his conviction that the sterilisations performed on Roma women were not of an accidental nature, but relics of a long-standing attitude towards the Roma minority in Slovakia. Concluding that there was discrimination, the judge noted that the applicant was “marked out” and further observed that there were no medically relevant reasons for sterilising the complainant.²⁴⁵

The applicants in the sterilisation cases before the ECHR alleged not just discrimination on the basis of race but also on the basis of their sex. In the case of *IG and Others v Slovakia*, the applicants alleged that they had “suffered discrimination on the ground of their sex due to the failure by health services to accommodate the fundamental biological differences between men and women in reproduction”.²⁴⁶

²³⁸ *Id.*

²³⁹ ECHR Application no. 18968/07 (2011) available at <http://www.refworld.org/pdfid/4a648cb42.pdf> (accessed 26 August 2013).

²⁴⁰ ECHR Application no. 29518/10 (2012) available at <http://www.bailii.org/cgi-bin/markup.cgi?doc=/eu/cases/ECHR/2012/991.html> (accessed 29 August 2013).

²⁴¹ ECHR Application no. 15966/04 (2012) available at <http://www.refworld.org/docid/50a289e22.html> (accessed 26 August 2013).

²⁴² **See** *VC v Slovakia supra* note 239 at para 176, *NB v Slovakia supra* note 240 at para 120 and *IG and Others v Slovakia supra* note 241 at para 164.

²⁴³ *VC v Slovakia supra* note 239 at paras 177, *NB v Slovakia supra* note 240 at para 121 and *IG and Others v Slovakia supra* note 241 at para 165.

²⁴⁴ *Id.*

²⁴⁵ *VC v Slovakia supra* note 239 dissenting opinion of Judge Mijovic.

²⁴⁶ *IG and Others v Slovakia supra* note 241 at para 160.

The applicants argued that “their sterilisation, performed without their full and informed consent, was a form of violence against women”.²⁴⁷ They also alleged that “their ensuing infertility resulted in a psychological and social burden which was much heavier on women, in particular in the Roma community where a woman’s status was often determined by her fertility”.²⁴⁸ The Government of Slovakia maintained that the applicants had not been treated differently from other patients in a similar position.²⁴⁹ As discussed above the ECHR did not find it necessary to separately determine whether there had been a violation of the non-discrimination clause whether on the basis of sex or race.

Laws, policies and practices that deny women reproductive self-determination, such as coerced sterilisation or abortion, may be challenged as a violation of the right to non-discrimination given the broad protection against the discrimination of women. In addition, laws, policies and practices that deny SRHR to certain populations, such as practices that target women with disabilities for coerced sterilisation or abortions or practices that force pregnant women to test for HIV as a prerequisite for accessing health care services, may be challenged in a court of law on the grounds that they violate the right to non-discrimination.

4.4 Right to Equality

The African Charter under article 3 provides for the right to equal protection before the law. Article 3 states that “[e]very individual shall be equal before the law” and “entitled to equal protection of the law”. This provision is similar to article 26 under the ICCPR discussed in section 3.5.

The African Commission has held that article 3 “guarantees fair and just treatment of individuals within the legal system of a given country.”²⁵⁰

Women, including women with disabilities are specifically guaranteed protection under article 3. The African Commission has clarified that “[t]he aim of [article 3] is to ensure equality of treatment for individuals irrespective of nationality, sex, racial or ethnic origin, political opinion, religion or belief, disability, age or sexual orientation.”²⁵¹

In the Inter-American system, the IACHR has found that forced sterilisation of women violates the right to equal protection. In *Chávez v Peru*, the IACHR found that the forced sterilisation of a woman violated, amongst others, the right to equal protection of the law protected in article 24 of the American Convention on Human Rights.²⁵²

²⁴⁷ *Id.*

²⁴⁸ *Id.* at para 160.

²⁴⁹ *Id.* at para 162.

²⁵⁰ *Zimbabwe Lawyers for Human Rights (ZLHR) & Associated Newspapers of Zimbabwe (ANZ) v Zimbabwe* African Commission Communication 284/03 at para 155 available at http://www.achpr.org/files/sessions/6th-eo/communications/284.03/achpreo6_284_03_eng.pdf (accessed 26 August 2013).

²⁵¹ *Id.*

²⁵² *Chávez v Peru supra* note 235.

The African Commission has not specifically addressed whether article 3 protects against disparate treatment on the basis of HIV status. However, it is likely, given the African Commission’s indication of its concern regarding disparate treatment of people living with HIV.

To establish a claim under article 3 of the African Charter, a lawyer must show that the client was not treated the same as others in a similar situation or that another in the same situation was given more favourable treatment, in the enjoyment of a fundamental right set out in the African Charter.²⁵³

Like the right to non-discrimination, laws, policies and practices that deny women the right to sexual and reproductive self-determination, such as coerced or forced sterilisation or abortion as well as those which lead to direct or indirect differential treatment in accessing health care services may violate the right to equality.

4.5 Right to Health, Including Right to Sexual and Reproductive Health

The right to health is viewed as an important right in regional human rights law and is often linked to the enjoyment of other rights.

Article 16 of the African Charter provides every person the right “to enjoy the best attainable state of physical and mental health.” As early as 1996, in *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria*,²⁵⁴ the African Commission emphasised the importance of the right to health. The African Commission held that it would make all efforts to apply and enforce socio-economic rights, such as the right to health, in order to meet the needs of people in Africa:

The uniqueness of the African situation and the special qualities of the African Charter imposes upon the African Commission an important task. International law and human rights must be responsive to African circumstances. Clearly, collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa. The African Commission will apply any of the diverse rights contained in the African Charter. It welcomes this opportunity to make clear that there is no right in the African Charter that cannot be made effective.²⁵⁵

In *Purohit and Moore v The Gambia*, the African Commission stated that “[e]njoyment of the human right to health as it is widely known is vital to all aspects of a person’s life and well-being, and is crucial to the realisation of all the other fundamental human rights and freedoms.”²⁵⁶

²⁵³ *ZLHR & ANZ v Zimbabwe supra* note 250 at para 158.

²⁵⁴ *SERAC and CESR v Nigeria supra* note 215.

²⁵⁵ *Id* at para 68.

²⁵⁶ *Purohit and Moore v The Gambia supra* note 232 at para 80.

Right to health includes sexual and reproductive health

The right to health includes the right to SRH and the nature and extent of this right is clearly articulated in article 14 of the Protocol on Women. It provides that States “shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted.”²⁵⁷ The African Commission’s General Comment on article 14(1)(d) and (e) recognises “that women in Africa have the right to the highest attainable standard of health which includes sexual and reproductive health and rights.”²⁵⁸

Under the Protocol on Women, the right to sexual and reproductive health is linked to a range of rights and contains both freedoms and entitlements for women, including:

- The right to control their fertility;²⁵⁹
- The right to decide whether to have children, the number of children and the spacing of children;²⁶⁰
- The right to choose any method of contraception;²⁶¹
- The right to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS;²⁶²
- The right to be informed on one’s health status and on the health status of one’s partner;²⁶³
- The right to have family planning education;²⁶⁴ and
- The right to have access to a range of adequate, affordable and accessible reproductive health care information and services.²⁶⁵

The right to self-protection against HIV and AIDS has furthermore been recognised as linked with other women’s rights “including the right to equality and non-discrimination, life, dignity, health, self-determination, privacy and the right to be free from all forms of violence.”²⁶⁶

Notably, the African Commission has also recognised the link between HIV and the enjoyment of SRHR. It states that:

²⁵⁷ The Protocol on Women is the first regional or international human rights convention to explicitly refer to HIV and to include a right to self-protection against HIV.

²⁵⁸ General Comment on Article 14 (1)(d) and (e) of the Protocol on Women *supra* note 227 at para 5.

²⁵⁹ Article 14(1)(a) of the Protocol on Women.

²⁶⁰ *Id.*, article 14(1)(b).

²⁶¹ *Id.*, article 14(1)(c).

²⁶² *Id.*, article 14(1)(d).

²⁶³ *Id.*, article 14(1)(e).

²⁶⁴ *Id.*, article 14(1)(f).

²⁶⁵ *Id.*, article 14(2).

²⁶⁶ General Comment on Article 14 (1)(d) and (e) of the Protocol on Women *supra* note 227 at para 11.

Amidst high prevalence and significant risk of HIV exposure and transmission, women are unable to fully enjoy [sexual and reproductive health] rights. Notably, the limitation of women's rights in the context of sexual and reproductive health increases the likelihood to HIV exposure and transmission. This is further compounded for women living with HIV whose access to these rights is severely limited or denied as a result of HIV-related discrimination, stigma, prejudices and harmful customary practices.²⁶⁷

States are required under the African Charter and Protocol on Women to make health care services available, accessible, affordable and of quality. In *Sudan Human Rights Organisation and COHRE v Sudan*,²⁶⁸ the African Commission, in examining the meaning of the right to health in the African Charter, recognised the obligations on the State to respect protect and fulfil health rights by providing services that are available, accessible, acceptable and of quality.²⁶⁹ Similarly, article 14(2) of the Protocol on Women enjoins States to take all appropriate measures to provide health services that are “adequate, affordable and accessible.”

Reproductive health information and services are recognised as important in regional law. The Protocol on Women makes specific mention of several reproductive health services critical to SRH care including:

- Information, education and communication programmes for women;²⁷⁰
- Pre-natal, delivery and post-natal health and nutrition services for women during pregnancy and while breastfeeding;²⁷¹
- Medical abortion in cases of sexual assault, rape, incest and where continued pregnancy endangers the health or life of the mother or the foetus;²⁷²
- Family planning education;²⁷³
- Services to protect women from HIV and other sexually transmitted infections; and
- Services to provide women with information on her health (including HIV) status and that of her partner.²⁷⁴

The General Comment on article 14(1)(d) and (e) provides more specifically in the case of HIV and AIDS for:

²⁶⁷ *Id* at para 5.

²⁶⁸ African Commission Communication No. 279/03 and 296/05 (2009) available at <http://www1.umn.edu/humanrts/africa/comcases/279-2003.html> (accessed 30 August 2013).

²⁶⁹ *Id* at paras 208-209.

²⁷⁰ Article 14(2)(a).

²⁷¹ *Id*, article 14(2)(b).

²⁷² *Id*, article 14(2)(c).

²⁷³ *Id*, article 14(1)(f).

²⁷⁴ *Id*, articles 14(1)(d) and (e).

- Access to procedures, technologies and services for the determination of health status, including HIV testing with pre-test and post-test counselling, CD4 count, viral-load, TB and cervical cancer screening;²⁷⁵
- Information and education on sex, sexuality, HIV, SRHR and available health services;²⁷⁶
- Available, accessible, affordable, comprehensive and quality women-centered HIV prevention methods, which include female condoms, microbicides, prevention of mother-to-child transmission and post-exposure prophylaxis to all women without discrimination.²⁷⁷

Provision of services on the basis of voluntary, informed consent

Article 14 of the Protocol on Women emphasises a woman’s right to make informed decisions about her reproductive health. Specifically noting the importance of self-determination when accessing SRH services, article 14 guarantees women the rights to control their fertility, decide whether and when to have children and to choose any method of contraception.

There has been limited expansion of the general right to sexual and reproductive self-determination. However, recently the General Comment on articles 14(1)(d) and (e) of the Protocol on Women has provided detailed information on the understanding of self-determination in the specific context of HIV and AIDS. The interpretation of the right to self-determination in the context of HIV and AIDS provides useful guidance on how the right may be applied to other SRH issues.

The General Comment notes that the right to self-protection against HIV provided under article 14(1)(d) includes access to information and education on “sex, sexuality, HIV, sexual and reproductive rights”²⁷⁸ as well as SRH services that are “free of coercion, discrimination and violence.”²⁷⁹

With particular respect to HIV testing, the General Comment notes that women must be provided with the required information and education, including pre- and post-test counselling in order to ensure informed consent is obtained.²⁸⁰ It further notes that training of health care workers should be provided to ensure amongst others, “respect for dignity, autonomy and informed consent.”²⁸¹

While the General Comment does not specifically mention medical procedures such as coerced abortion or sterilisation of WLHIV, it does note that positive test results should not be used as the basis for “coercive practices.”²⁸²

²⁷⁵ General Comment on Article 14 (1)(d) and (e) of the Protocol on Women *supra* note 227 at paras 13-14.

²⁷⁶ *Id* at paras 26-27.

²⁷⁷ *Id* at para 30.

²⁷⁸ *Id* at para 26.

²⁷⁹ *Id* at para 29.

²⁸⁰ *Id* at para 14.

²⁸¹ *Id* at para 41.

²⁸² *Id* at para 42.

Comparative Regional Law: Denial of Legally Available Health Services Such As Abortion and Post-Abortion Care

In *Jacinto v Mexico*,²⁸³ the IACHR affirmed that access to information and education was critical to accessing health care services. In that case, the patient requested an abortion. Hospital staff tried to dissuade her from the procedure by showing her a series of videos about abortion. Furthermore, a doctor inaccurately described the risks of the procedure to the patient's mother and also told the patient's mother that she would be responsible if her daughter were to die while accessing the abortion. In light of the doctor's erroneous information, the mother chose not to proceed with the abortion. The two parties reached a friendly settlement; however, the IACHR did note that "women cannot fully enjoy their human rights without having a timely access to comprehensive health care services, and to information and education."²⁸⁴

In the case of *P and S v Poland*,²⁸⁵ the ECHR in finding a violation of article 8 (right to respect for private and family life) of the European Convention on Human Rights, as regards the determination of access to lawful abortion, noted that "effective access to reliable information on the conditions for the availability of lawful abortion, and the relevant procedures to be followed", was directly relevant for the exercise of personal autonomy.²⁸⁶ The Court noted that the applicants "received contradictory information as to whether they needed a referral in addition to the certificate from the prosecutor, as to who could perform the abortion, who could make a decision, whether there was any waiting time prescribed by law, and what other conditions, if any, had to be complied with."²⁸⁷ The Court also noted that "the second applicant was requested to sign a consent form to the first applicant's abortion which warned that the abortion could lead to her daughter's death."²⁸⁸

Comparative Regional Law: Forced Sterilisation

The three ECHR sterilisation cases discuss the importance of the provision of proper health information necessary for consent as well as the requirements of informed consent for medical processes like sterilisation. In *VC v Slovakia*, the ECHR noted that it did not appear from the documents submitted that the applicant was fully informed about her health status, the proposed procedure and the alternatives to it. Furthermore, the Court indicated that asking the applicant to consent to an intervention such as sterilisation in labour clearly did not "permit her to take a decision of her own free will, after consideration of all the relevant issues and...after having reflected on the implications and discussed the matter with her partner."²⁸⁹

²⁸³ IACHR Report No. 21/07 (2007) available at <http://www1.umn.edu/humanrts/cases/21-07.html> (accessed 26 August 2013).

²⁸⁴ *Id* at para 19.

²⁸⁵ ECHR Application no. 57375/08 (2012) available at <http://sim.law.uu.nl/SIM/CaseLaw/hof.nsf/1d4d0dd240bfec12568490035df05/6d7967584b877041c1257aae0035e8eb?OpenDocument> (accessed 29 August 2013).

²⁸⁶ *Id* at para 111.

²⁸⁷ *Id* at para 102.

²⁸⁸ *Id*.

²⁸⁹ *VC v Slovakia supra* note 239 at para 112.

Non-Discrimination

The right to non-discrimination in access to health is another central component of the right to health, including SRH.

The African Commission has made it clear that discrimination against people with disabilities and people living with HIV in accessing health care services violates the African Charter. In *Purohit and Moore v The Gambia*, the African Commission stated that “as a result of their condition and by virtue of their disabilities, mental health patients should be accorded special treatment which would enable them not only attain but also sustain their optimum level of independence and performance in keeping with article 18(4) of the African Charter.”²⁹⁰

Similarly, the African Commission in interpreting the breadth of articles 14(1)(d) and 14(1) (e) of the Protocol on Women, providing for the right to self-protection against sexually transmitted infections and to know one’s health status, noted that discrimination on the basis of sex, HIV status and disability, among others, prevent the full realisation of the right to self-protection.²⁹¹ The African Commission further notes that discrimination on the basis of a woman’s HIV status limits her ability to access her SRHR.²⁹²

The General Comment notes that the article 14(1)(d) right to self-protection and to be protected against HIV is intrinsically linked with the right to equality and non-discrimination,²⁹³ obliging States to ensure that women are “in the position to claim and exercise their right to self-protection in a non-discriminatory framework as articulated in article 2 of the Protocol [on Women]”.²⁹⁴ The General Comment specifically states that access to sexual and reproductive health services for HIV should be provided to all women “not based on a discriminatory assessment of risk.”²⁹⁵ It furthermore requires countries to “enact laws and policies to ensure women’s access to health and legal services” and to ensure such access is non-discriminatory.

With respect to coercive practices, such as coerced or forced sterilisation or abortion, the General Comment clearly prohibits the use of HIV testing as a condition for other SRH services and further emphasises that positive HIV test results cannot be the basis for coercing women into specific procedures nor can it be a basis for withholding desired services.²⁹⁶

It is clear that coercing women into abortions, sterilisations or other medical procedures would violate the right to health. In addition, denying women access to SRH services or hindering a woman’s ability to access SRH services could violate the right to health. Practices where pregnant women with disabilities or pregnant WLHIV are coerced into consenting to sterilisation for purposes of accessing ante-natal health care services for

²⁹⁰ *Purohit and Moore v The Gambia supra* note 232 at para 81.

²⁹¹ General Comment on Article 14 (1)(d) and (e) of the Protocol on Women *supra* note 227 at para 4.

²⁹² *Id* at para 5.

²⁹³ *Id* at para 11.

²⁹⁴ *Id* at para 35.

²⁹⁵ *Id* at para 30.

²⁹⁶ *Id* at para 35.

current pregnancies, the failure to provide equal access to services and the discriminatory treatment towards these women may violate the right to health. Additionally, health services provided without voluntary and informed consent, such as forced HIV testing for pregnant women, coerced or forced sterilisation of WLHIV and women with disabilities may breach the right to health.

4.6 Rights to Liberty, Security of the Person and Physical Integrity

Both the African Charter and the Protocol on Women provide for the rights to liberty and security of the person (also known as the rights to bodily integrity and autonomy) which may be relevant in litigation relating to forced or coerced medical procedures such as abortion or sterilisation. Although there is limited interpretation of these rights in the context of coercive medical interventions, the protection of the rights themselves is worth noting.

Article 6 of the African Charter provides that “every individual shall have the right to liberty and to the security of his person” and article 4 of the Protocol on Women protects rights to life, integrity and security of the person. The Protocol on Women goes further in mentioning specific acts that are prohibited in the context of these rights, which includes a prohibition on all forms of violence against women as well as “all medical or scientific experiments on women without their informed consent.”²⁹⁷

The African Commission has yet to address these rights specifically in cases of forced or coerced sexual or reproductive health interventions.

Comparative Regional Law: Forced Sterilisation

In the IACHR case of *Chávez v Peru*, Peru acknowledged that the forced sterilisation of a woman violated, amongst others, the right to personal integrity.²⁹⁸ Similarly, the ECHR found that the sterilisations of Roma women were carried out with complete disregard for the right to autonomy.²⁹⁹ In *VC v Slovakia*, for example, the ECHR noted that “the sterilisation procedure grossly interfered with the applicant’s physical integrity as she was thereby deprived of her reproductive capability.”³⁰⁰

²⁹⁷ *Id* at para 42.

²⁹⁸ *Chávez v Peru supra* note 235.

²⁹⁹ **See** *VC v Slovakia supra* note 239 at para 119 and *NB v Slovakia supra* note 240 at para 73.

³⁰⁰ *VC v Slovakia supra* note 239 at para 116.

Comparative Regional Law: Denial of Legally Available Health Services Such As Abortion and Post-Abortion Care

In *Tysiac v Poland*,³⁰¹ the ECHR ruled that there was a violation of the right to respect for one's private life when a woman was denied a therapeutic abortion even though she stood to lose her eyesight if she continued with the pregnancy, noting that "private life includes a person's physical and psychological integrity".³⁰²

In *P and S v Poland*, the ECHR found a violation of the right to liberty and security of the person where the essential purpose of the applicant's placement in the juvenile shelter had been to separate her from her parents and thus prevent them from carrying out an abortion.³⁰³

4.7 Rights to Dignity and Freedom from Cruel, Inhuman and Degrading Treatment and Torture

Forcing a woman to undergo any sexual or reproductive health procedure without her informed consent or denying or hindering a woman's ability to access sexual and reproductive health care services may infringe upon the right to freedom from CIDT and torture, and the right to dignity, given the wide interpretation of these rights accorded by the African Commission.

Link between CIDT, dignity and other rights of the person

Both the African Charter and the Protocol on Women protect the rights to dignity and freedom from CIDT and torture.³⁰⁴

The African Charter under article 5 states that "[e]very individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."

The Protocol on Women provides for the right to dignity under article 3(1) which states that "[e]very woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights." It further provides for the right to be free from cruel, inhuman or degrading treatment under article 4(1), which states that: "[e]very woman shall be entitled to respect for her life and the integrity and security of her person. All forms of exploitation, cruel, inhuman or degrading punishment and treatment shall be prohibited."

³⁰¹ ECHR Application no. 5410/03 (2007) available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-79812> (accessed 26 August 2013).

³⁰² *Id* at para 107.

³⁰³ *P and S v Poland supra* note 285 at para 148.

³⁰⁴ Article 5 of the ACHPR and articles 3 and 4 of the Protocol on Women.

The African Commission has made it clear that the right to dignity applies to all people without discrimination, holding that:

Human dignity is an inherent basic right to which all human beings, regardless of their mental capabilities or disabilities as the case may be, are entitled to without discrimination. It is therefore an inherent right which every human being is obliged to respect by all means possible and on the other hand it confers a duty on every human being to respect this right.³⁰⁵

The African Commission has allowed for a broad interpretation of actions that constitute torture, cruel, inhuman or degrading treatment or that violate human dignity, including acts that violate “physical and psychological integrity”,³⁰⁶ acts causing physical or psychological suffering and acts that force a person to act against their will.³⁰⁷

In *Sudan Human Rights Organisation and COHRE v Sudan*, the African Commission noted that “exposing victims to personal sufferings and indignity violates the right to human dignity” and further noted that “personal suffering and indignity can take many forms”.³⁰⁸

In the case of *Huri – Laws v Nigeria*, the African Commission noted that “the term ‘cruel, inhuman or degrading treatment or punishment’ is to be interpreted so as to extend to the widest possible protection against abuses, whether physical or mental.”³⁰⁹ In the case of *Doebbler v Sudan*,³¹⁰ the African Commission emphasised that article 5 of the African Charter prohibits not only cruel but also inhuman or degrading treatment or punishment, which includes:

Not only actions which cause serious physical or psychological suffering, but which humiliate or force the individual against his will or conscience... the prohibition of torture, cruel, inhuman or degrading treatment or punishment is to be interpreted as widely as possible to encompass the widest possible array of physical and mental abuses.³¹¹

The Protocol on Women specifically states in article 4 that the rights to life, integrity and security of the person and protection of all forms of exploitation, cruel, inhuman and degrading treatment includes a prohibition on non-consensual scientific experimentation on women.

The African Commission has not yet applied these rights in cases of violations of reproductive self-determination.

³⁰⁵ *Purohit and Moore v The Gambia supra* note 232 at para 57.

³⁰⁶ *Organisations Mondiale Contre La Torture v Rwanda* African Commission Communications 27/89, 49/91 and 99/939 (2000) at para 26 available at <http://www.chr.up.ac.za/index.php/browse-by-subject/423-rwanda-organisation-mondiale-contre-la-torture-and-others-v-rwanda-2000-ahrlr-282-achpr-1996.pdf> (accessed 26 August 2013).

³⁰⁷ **See also** *Doebbler v Sudan supra* note 215 at paras 36-37.

³⁰⁸ *Sudan Human Rights Organisation & COHRE v Sudan supra* note 246 at para 158.

³⁰⁹ African Commission Communication No. 225/98 (2000) at para 40 available at <http://www1.umn.edu/humanrts/africa/comcases/225-98.html> (accessed 26 August 2013).

³¹⁰ *Doebbler v Sudan supra* note 215.

³¹¹ *Id* at paras 36-37.

Comparative Regional Law: Forced Sterilisation

The IACHR recognised in *Chávez v Peru* that the forced sterilisation of a woman violated her right to humane treatment under article 5 of the American Convention on Human Rights.³¹²

Similarly, the ECHR has found that the sterilisation without informed consent of Roma women, a marginalised group, violated their right to be free from torture or inhuman and degrading treatment.³¹³ In *VC v Slovakia*, the Court held that sterilisation as such was not, in accordance with generally recognised standards, a life-saving medical intervention and that where sterilisation was carried out without the informed consent of a mentally competent adult, it was incompatible with the requirement of respect for human freedom and dignity.³¹⁴ In that case, the Court concluded that although there was no indication that the medical staff had acted with the intention of ill-treating the applicant, they had nevertheless acted with gross disregard for her right to autonomy and choice as a patient.³¹⁵ Such treatment was in breach of article 3 of the European Convention on Human Rights, which provides that “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”³¹⁶

In *IG and Others v Slovakia*, the Court reiterated that a “person’s treatment is considered to be ‘degrading’ when it humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority.”³¹⁷ The Court further clarified that it may suffice that the victim is humiliated in his or her own eyes, even if not in the eyes of others.³¹⁸ The Court reiterated that sterilisation in the context of a delivery by Caesarean section was not a life-saving intervention.³¹⁹ The Court also found that where informed consent had not been obtained prior to the procedure, the procedure is incompatible with the requirement of respect for human freedom and dignity it can be qualified as degrading within the meaning of article 3.³²⁰

³¹² *Chávez v Peru supra* note 235.

³¹³ *VC v Slovakia supra* note 239 at para 120, *NB v Slovakia supra* note 240 at para 81 and *IG and Others v Slovakia supra* note 241 at para 124.

³¹⁴ *VC v Slovakia supra* note 239 at para 106-120.

³¹⁵ *Id* at para 119.

³¹⁶ *Id* at paras 106-120.

³¹⁷ *IG and Others v Slovakia supra* note 241 at para 121.

³¹⁸ *Id*.

³¹⁹ *Id* at para 122.

³²⁰ *Id* at paras 123-126.

Comparative Regional Law: Denial of Legally Available Health Services Such As Abortion and Post-Abortion Care

In RR v Poland,³²¹ ECHR found that the applicant had been subjected to inhuman and degrading treatment as a result of the doctors' intentional failure to provide necessary medical treatment in the form of timely prenatal examinations that would have allowed her to take a decision as to whether to continue or terminate her pregnancy within the time-limit laid down by the law. The Court noted that the applicant was in a situation of great vulnerability. She was deeply distressed by information that the foetus could be affected with some malformation. As a result of the procrastination of the health professionals, she had to endure six weeks of painful uncertainty concerning the health of the foetus, her own and her family's future.³²²

It is likely that forced or coerced sexual and reproductive health procedures, especially when they result in clear psychological suffering, may violate the rights to dignity and freedom from cruel, inhuman or degrading treatment and torture as provided for under regional law. It is also likely that where procedures are forced on specific population groups such as WLHIV and women with disabilities with the result that there is a feeling of humiliation or sense of diminished dignity, this may amount to cruel, inhuman or degrading treatment or punishment.

4.8 Right to Information

Article 9 of the African Charter protects the right of every individual to receive information.

Although the African Commission has not specifically stated that the right to information includes the right to reproductive health information, it notes that the right to information relates to information on other rights contained in the African Charter. It has stated that the denial of information on human rights, particularly rights contained in the African Charter constitutes a "particularly grave" violation of the right to information and that information relating to the protection and promotion of human rights is in need of special protection.³²³

The Protocol on Women specifically provides that a women's right to sexual and reproductive health includes an obligation on State Parties to provide health information, education and communication, in terms of article 14(2). However, the African Commission has yet to elucidate on the scope of the rights enshrined in article 14(2) or apply it to particular facts.

³²¹ ECHR Application no. 27617/04 (2011) available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104911> (accessed 26 August 2013).

³²² *Id* at paras 159-162.

³²³ *Law Office of Ghazi Suleiman v Sudan* African Commission Communication No. 228/99 (2003) at paras 49-52 available at <http://www.chr.up.ac.za/index.php/browse-by-subject/457-sudan-law-office-of-ghazi-suleiman-v-sudan-ii-2003-ahrlr-144-achpr-2003.pdf> (accessed 26 August 2013).

Comparative Regional Law: Denial of Legally Available Health Services

In the case of *Open Door and Dublin Well Woman v Ireland*,³²⁴ the ECHR held that the Supreme Court of Ireland's injunction restraining counselling agencies from providing pregnant women with information concerning abortion facilities abroad violated article 10 of the European Convention on Human Rights, which provides for the right to freedom of expression, including the right to receive and impart information. The ECHR found that the injunction interfered with the right of two non-profit organisations to provide information on family planning options and with the ability of women to receive information. The ECHR reasoned that although Ireland has a legitimate interest in protecting the life of the foetus, the injunction had a disproportionate impact, because it prohibited counselling regardless of the age, health, or circumstances of pregnant women.³²⁵ The ECHR noted that the injunction posed a health risk to women, who would likely terminate pregnancies at later stages without adequate counselling.³²⁶

4.9 Right to Life

The African Charter protects the right to life under article 4, which states that “[h]uman beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.”

Article 4(1) of the Protocol on Women links the rights to life, physical integrity, security and protection from cruel, inhuman and degrading punishment or treatment.

The African Commission has yet to expand on the nature and scope of the right to life in the context of SRHR, however, it is possible that denying or hindering access to sexual and reproductive health care services to women, and particularly women with disabilities or WLHIV, which results in a loss of life would violate the right to life.

In the IACHR case of *Chávez v Peru*, a case resolved by friendly settlement, the Government of Peru acknowledged that the forced sterilisation of a woman followed by denial of follow-up health services resulting in her death violated, amongst others, the right to life protected in article 4 of the American Convention on Human Rights.³²⁷

³²⁴ ECHR Application no. 14234/88 (1992) available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=printdoc&docid=3ae6b7020> (accessed 26 August 2013). This decision was upheld in *Women on Waves v Portugal* ECHR Application No.31276/05 (2009) summary is available at <http://sim.law.uu.nl/SIM/CaseLaw/hof.nsf/0/a895393ece0e9077c1257551003239b6?OpenDocument> (accessed 26 August 2013).

³²⁵ *Id* at para 73-74.

³²⁶ *Id* at para 77.

³²⁷ *Chavez v Peru supra* note 235.

4.10 Conclusion

A number of rights under regional law may be implicated in cases of violations of sexual and reproductive self-determination, including the rights to health, liberty and security of the person, equality and non-discrimination, dignity and protection from torture and cruel, inhuman and degrading treatment.

The African regional mechanisms have yet to fully address the application of these rights specifically in cases of sexual and reproductive self-determination. However, African Commission decisions detailing the scope of these rights in other contexts can be useful in domestic litigation. Decisions of other regional bodies such as the IACHR and the ECHR may also be persuasive.