

## **Policing bodies, punishing lives: The African Women's Protocol as a tool for resistance of illegitimate criminalisation of women's sexualities and reproduction**

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### **Summary**

*Sexual and reproductive conduct and identities are all too often the target of criminal laws and policies worldwide, which disproportionately impact women and marginalised individuals in violation of their sexual and reproductive rights. Women and girls in Africa, in particular, are policed, investigated and penalised for engaging in sex work, sex outside of marriage, obtaining abortions, for HIV exposure and transmission and same-sex intimacy. While some advocates rely on international human rights norms and standards to demand that states punish and prevent certain conduct through criminal justice systems, less attention is paid to restraining states' power to police sexuality and reproduction. In fact, there is little guidance within human rights law generally regarding the legitimacy of states criminalising sexual and reproductive conduct and identities, absent harm to others. For example, similar to other human rights instruments, the African Women's Protocol calls upon states to enact legislation, policy and programmes to fulfil and realise women's rights and prevent violence and rights violations, yet it fails to explicitly address the outer limits of states' policing power. Moreover, there is little foundation for challenging states' failure to criminalise particular conduct, in accordance with their human rights obligations, yet illegitimately criminalise sexual and reproductive conduct and identities, to the detriment of women's and marginalised individuals' sexual and reproductive rights. This article explores existing normative guidance*

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*regarding the illegitimate criminalisation of women's and girls' sexual and reproductive conduct and identities, highlighting gaps in such guidance, and reviews the African Women's Protocol with an eye toward locating potential restraints on African states' police power in the realms of sexuality and reproduction. It also provides additional human rights-based arguments that can be used to constrain states' overbroad and discriminatory criminalisation of sexuality and reproduction and to potentially pave the way for further normative developments in this regard.*

**Key words:** *criminalisation; sexuality; reproduction; gender; human rights*

## 1 Introduction

One of the most politically-scrutinised and heavily-regulated aspects of peoples' lives is their sexuality.<sup>1</sup> While sex and sexuality are essential to the human experience, states are increasingly using criminal laws and policies to control and punish particular expressions of sexuality and gender, and women's reproduction. Such punitive regulation disproportionately affects women and marginalised individuals and in many cases, and violates their fundamental human rights.<sup>2</sup>

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1 According to the World Health Organisation, '[s]exuality encompasses sex, gender identities and roles, sexual orientation, eroticism, pleasure, intimacy and reproduction. Sexuality is experienced and expressed in thoughts, fantasies, desires, beliefs, attitudes, values, behaviours, practices, roles and relationships. While sexuality can include all of these dimensions, not all of them are always experienced or expressed. Sexuality is influenced by the interaction of biological, psychological, social, economic, political, cultural, ethical, legal, historical, religious and spiritual factors.' World Health Organisation 'Defining sexual health' (2006) 5, report of a technical consultation on sexual health 28-31 January 2002, Geneva, [http://www.who.int/reproductivehealth/topics/gender\\_rights/defining\\_sexual\\_health.pdf](http://www.who.int/reproductivehealth/topics/gender_rights/defining_sexual_health.pdf) (accessed 11 November 2013).

2 See generally Report of the UN Special Rapporteur on Violence against Women, its Causes and Consequences, Pathways to, Conditions and Consequences of Incarceration for Women, UN General Assembly 68th session, 21 August 2013, UN Doc A/68/340. (Women are increasingly being incarcerated worldwide due to violence, coercion to commit crimes, abortion, purported moral crimes (eg extramarital sex and adultery), leaving home without permission, 'protection' from 'honour crimes,' 'rehabilitation' from prostitution, anti-drug policies, and political activities.) Notably, some research indicates that approximately 50% of women in prisons have been convicted of 'moral' crimes. See United Nations Office on Drugs and Crime 'Afghanistan: Implementing alternatives to imprisonment, in line with international standards and national legislation' (2008) para 14; Human Rights Watch "'1 had to run away.' The imprisonment of women and girls for 'moral crimes' in Afghanistan' (2012) 1.

In the African context, sexuality is mediated and experienced through legislation, custom and religion.<sup>3</sup> Those who do not conform to conscripted sexual norms, such as sex workers, rape survivors, young people, those who are or perceived to be lesbian, gay, bisexual, transgender or intersex (LGBTI), widows, single mothers and people living with HIV, are marginalised. According to Tamale, it is<sup>4</sup>

[t]hrough the intersection of religion, the law and reinterpreted customs, [that] the complexity of African sexualities (particularly women's) is instrumentalised, controlled and regulated by the patriarchal state.

Laws regulating sexuality, often labelled 'Offences against morality', are enumerated in African penal codes prohibiting and/or regulating various sexual relations and identities. These laws 'squarely place issues of "sexual morality" between consenting adults within the realm of the state and the public'.<sup>5</sup> While much of the conduct targeted by criminal laws in Africa are framed as 'un-African' and 'Western imports', rather it is the actual criminalisation of such conduct that is a relic of the countries' colonial pasts.<sup>6</sup> Before colonialism, most African traditional practices were characterised by their sexual tolerance and openness.<sup>7</sup> Sexual acts that were 'acceptable in pre-colonial, pre-Islamic and pre-Christian Africa [were later labeled] "deviant", "illegitimate" and "criminal" through the process of proselytisation and acculturation'.<sup>8</sup>

While human rights standards regarding the criminalisation of sexuality and reproduction are patchy and, at times, inconsistent, such penalisation is not a new human rights issue – it has been over two decades since international human rights jurisprudence established that the criminalisation of sexual relations between consenting adults is a violation of the rights to privacy and non-discrimination on the basis of sex.<sup>9</sup> Since that time, international human rights bodies and experts have increasingly recognised the human rights impact of criminalising a wide range of sexual and reproductive conduct and identities. While the African human rights system has yet to make such pronouncements, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of

3 See generally S Tamale 'Exploring the contours of African sexualities: Statutory, customary and religious laws' 2013, paper presented at a conference on 'Law and religion in Africa: Comparative practices, experiences and prospects' University of Ghana, Accra, 14-15 January 2013.

4 Tamale (n 3 above) 19.

5 As above.

6 African Men for Sexual Health and Rights and the Coalition of African Lesbians 'Violence based on perceived or real sexual orientation and gender identity in Africa' (2013) 6-9.

7 See Amnesty International 'Making love a crime: Criminalization of same-sex conduct in sub-Saharan Africa' (2013) 15, citing interview, Dr Basile Ndjio, Senior Academic, University of Douala, Cameroon, 27 April 2011).

8 Tamale (n 3 above) 4.

9 See Communication 488/1992, *Toonen v Australia* UNHR Committee, 4 April 1994, UN Doc CCPR/C/50/D/488/1992.

Women in Africa (African Women's Protocol) may provide a strong platform for advocacy on these issues, as it contains some of the most progressive pronouncements of women's sexual and reproductive rights. Most notably, article 14(2)(c) explicitly calls on state parties to<sup>10</sup>

[take all appropriate measures to] ... protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.

This article lays the groundwork for strategic advocacy to challenge states' illegitimate criminalisation and punishment of various aspects and expressions of sexuality and reproduction. First, it discusses the global trend of overcriminalising people's sexualities and reproduction, and provides an overview of the various legislative, policy and enforcement means states use to police and punish individuals' bodies and lives. Next, the article summarises the existing international human rights standards that advocates have used to confront such overcriminalisation, highlighting the gaps in standards that can hinder advocacy. The article then specifically reviews the African Women's Protocol with the eye toward locating further substantive restraints on states' policing power that may enable advocates to not only contest rights violations that result from the overcriminalisation of sexuality and reproduction, but also the very legitimacy of such application and enforcement of criminal law. Finally, the article provides additional human rights-based arguments that can be used to constrain states' overbroad and discriminatory criminalisation of sexual and reproductive conduct and identities and

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10 See Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2nd ordinary session, Assembly of the AU, adopted 11 July 2003, entered into force 25 November 2005, art 14(2)(c). Other provisions which support women's sexual and reproductive rights include art 2 (elimination of discrimination against women, including modifying social and cultural patterns and elimination of harmful cultural and traditional practices and other practices based on the idea of the inferiority or superiority of either sex or on stereotyped roles for women and men); art 3 (right to dignity, including prohibiting exploitation and degradation of women and protection from sexual and verbal violence); art 4 (rights to life, integrity and security of the person, including enforcing laws to prohibit all forms of violence against women in private and public spheres, including unwanted sex, ensuring prevention, punishment and eradication of all forms of violence against women, providing adequate budgeting and resources to prevent and eradicate violence, and ensuring the death penalty is not carried out on pregnant or nursing women); art 5 (elimination of harmful practices, including through punishing female genital mutilation); art 8 (access to justice and equal protection before the law); art 13 (economic and social welfare rights, including combatting and punishing sexual harassment, adequate and paid pre- and post-natal maternity leave, preventing exploitation and abuse in advertising and pornography); art 23 (special protection of women with disabilities, including freedom from violence and sexual abuse); and art 24 (special protection of women in distress, including the right of pregnant or nursing women or women in detention to be treated with dignity), among other rights. See also generally C Ngwenya 'Inscribing abortion as a human right: Significance of the Protocol on the Rights of Women in Africa' (2010) 32 *Human Rights Quarterly* 783.

to potentially pave the way for further normative developments in this regard.

## 2 Global trend of overcriminalisation of sexuality and reproduction

According to the 2012 Risks, Rights and Health Report of the Global Commission on HIV and the Law, approximately 78 countries criminalise same-sex sexual activity, with penalties ranging from decades of imprisonment, to whipping, to execution.<sup>11</sup> Sex workers are also frequently stopped, questioned, searched, and arrested for loitering or vagrancy; offences which are categorised anywhere on the spectrum of criminal, civil or administrative crimes.<sup>12</sup> Women and girls who obtain abortions, as well as service providers who support them in terminating their pregnancies, continue to face harsh penalties despite legal reforms that have expanded the grounds for abortion as a necessary medical procedure in many countries.<sup>13</sup> Women are also increasingly being punished for their conduct during pregnancy and for pregnancy- and birth-related complications. For example, authorities have prosecuted women for 'depraved heart murder' after they have experienced a stillbirth, without any scientific evidence that drug use or any other action, inaction or circumstance faced by the woman actually caused the death of her foetus.<sup>14</sup>

In the context of HIV, it is a crime to expose another person to HIV or to transmit it, especially through sex, in over 60 countries.<sup>15</sup> The Global Commission on HIV and the Law has further reported that '[a]t least 600 individuals living with HIV in 24 countries have been convicted under HIV-specific or general criminal laws'.<sup>16</sup> In some of these cases, laws criminalising HIV exposure have been applied

11 See Global Commission on HIV and the Law 'Risks, rights and health' (2012) 44, <http://www.hivlawcommission.org/resources/report/FinalReport-Risks,Rights&Health-EN.pdf> (accessed 5 November 2013).

12 See UNAIDS 'Guidance note on sex work and HIV' (2012) 4; see generally Human Rights Watch 'Sex workers at risk: Condoms as evidence of prostitution in four US cities' (2012) [http://www.hrw.org/sites/default/files/reports/us0712ForUpload\\_1.pdf](http://www.hrw.org/sites/default/files/reports/us0712ForUpload_1.pdf) (accessed 5 November 2013).

13 See generally Ipas 'When abortion is a crime: The threat to vulnerable women in Latin America' (2013) [http://www.ipas.org/~media/Files/Ipas%20Publications/CRIMRPT13.ashx?utm\\_source=resource&utm\\_medium=meta&utm\\_campaign=CRIMRPT13](http://www.ipas.org/~media/Files/Ipas%20Publications/CRIMRPT13.ashx?utm_source=resource&utm_medium=meta&utm_campaign=CRIMRPT13) (accessed 5 November 2013).

14 K Sheppard 'Mississippi could soon jail women for stillbirths, miscarriages' *Mother Jones* 23 May 2013, <http://www.motherjones.com/politics/2013/05/buckhalter-mississippi-stillbirth-manslaughter> (accessed 5 November 2013).

15 See Global Commission on HIV and the Law (n 11 above) 8.

16 As above.

broadly to convict individuals based on conduct when HIV transmission was virtually impossible, such as spitting.<sup>17</sup> Finally, the mere provision or distribution of sexual and reproductive health information is zealously controlled through administrative and public health laws and anti-pornography legislation.

While the intent behind some of these laws and policies may be to promote public health or to 'protect' women and children, such legislation is often overbroad, infringing on a range of human rights, and disparately applied to the detriment of women, young people and marginalised groups. Furthermore, it may often be the case that the purported intent is actually a mask for bias or the true aim of enforcing a uniform 'moral' code and/or strict gender roles. To this end, questions can and should be raised regarding the legitimacy of states regulating such intimate aspects of peoples' lives, absent harm to others.

### 3 How states criminalise sexuality and reproduction

States criminalise sexuality and reproduction directly through criminal laws and policies that target particular sexual and reproductive conduct and identities, and indirectly through the selective enforcement of general criminal, civil and religious laws against particular individuals and groups.<sup>18</sup> Such application of punitive regulation in these realms not only permits arrests, prosecutions and punishment, but also extortion, harassment and violence by state and non-state actors against people simply for who they are, for expressing their innate sexualities and identities, or for transgressing sexual and gender norms. Regardless of the motives underlying states' enforcement of laws and policies that directly or indirectly criminalise sexuality or reproduction, the result is the same – a significant risk of grave human rights violations.

The various means states use to regulate, police and punish individuals' sexual and reproductive conduct and identities are discussed in greater detail below. The range of regulations used highlights how entrenched state control is over women's and marginalised individuals' bodies and lives and the extent of the phenomenon of illegitimate criminalisation in this regard.<sup>19</sup>

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17 See 'Gay-rights group protests HIV-positive man's sentence' *Houston Chronicle* 17 May 2008, <http://www.chron.com/news/houston-texas/article/Gay-rights-group-protests-HIV-positive-man-s-1650528.php> (accessed 26 April 2013).

18 States also use criminal laws to punish individuals' status in life (eg impoverished, widow, transgender). See generally African Men for Sexual Health and Rights and the Coalition of African Lesbians (n 6 above).

19 While all people suffer the impact of illegitimate criminalisation of sexuality and reproduction, this article largely focuses on women and girls because its overarching aim is to forge new analysis and advocacy under the African Women's Protocol.

### 3.1 Direct criminalisation

Governments can criminalise sexuality or reproduction directly through passing and implementing criminal laws that explicitly punish specific sexual or reproductive conduct and identities. Examples of this type of criminalisation include laws that prohibit same-sex sexual conduct, sex outside of marriage, consensual buying and selling of sex, obtaining and/or providing an abortion, consensual sex between young people, cross-dressing, HIV exposure and transmission and dissemination of information or education on sexuality or reproductive rights issues.

People living under these laws may face investigations, prosecutions, criminal or financial sanctions, loss of liberty and public judgment or disgrace, for attempting to assert their basic sexual and reproductive rights. The particular behaviours that these laws tend to criminalise and the power structures that often exist in the countries that enforce these laws mean that certain groups of people are more vulnerable to policing and punishment – primarily women, young people, sex workers, people identified as LGBTI, and people living with HIV. For example, laws banning abortion disproportionately impact poor women and girls who may lack resources and education to prevent unwanted pregnancies and/or cannot afford to pay for safe clandestine abortions.

### 3.2 Indirect criminalisation

States also criminalise sexual and reproductive behaviour and identities indirectly by enforcing general criminal, civil or religious laws against particular individuals in a targeted manner. These laws are predominantly enforced against individuals who challenge sexual and gender norms or because of their socio-economic status. Even if these laws were not originally intended to prohibit particular sexual and reproductive behaviour, they may be selectively enforced against people regardless of whether they have committed any crime, in an effort to punish, shame or, in extreme cases, eradicate them. Such laws may be applied in this way because they are poorly written, vague or overbroad, making them open to misinterpretation and abusive enforcement, or due to biased and corrupt law enforcement officials having the power to enforce the law in a discriminatory manner with impunity.

Examples of general criminal, civil law or religious laws that can be used to criminalise sexuality or reproduction and punish individuals based on their socio-economic status include vagrancy or loitering provisions that are misused by police to disproportionately punish, disperse, harass or even extort sex workers, and laws targeting LGBTI people gathering in public spaces, regardless of whether there is

evidence that a crime was committed.<sup>20</sup> Public indecency or morality provisions (for example, 'shameless public acts' or 'contempt for religion') are also most commonly used against LGBTI individuals, sex workers or women accused of sex outside of marriage, in countries where non-heteronormative, non-marital sex is considered morally unacceptable.

In some instances, regulations intended to manage public health emergencies are also misused to control or punish individuals' sexual or reproductive conduct and decisions. People living with HIV, sex workers or pregnant women most often face punishment under these regulations based on the assertion that they could pose a risk to others or their foetuses. These regulations are often relied upon by the police or prosecutors despite having little or no evidence that a public health risk exists. Assault, reckless injury, or even murder charges have also been used in some countries to prosecute women for purportedly causing harm to other people or to a foetus based on their sexual or reproductive behaviour or choices. These laws are most often used against people living with HIV who are accused of exposing or transmitting the infection to another person. They have also been used in recent years in the United States of America and some parts of South America to prosecute pregnant women who, in some cases, are unfairly accused of harming their foetuses.

Finally, in some instances, sexual offence laws designed to protect young people from abuse or harm are used to punish people for consensual sex with another person of a similar age. A small number of countries also misuse sexual offence legislation to prosecute same-sex sexual activity and sex work. People convicted under these statutes often face prison sentences and/or statutory requirements to register as sex offenders.

### **3.3 Criminal justice approaches - A blunt tool to address complex social and public health issues**

Studies have confirmed that the enforcement of laws and policies that punish specific sexual or reproductive conduct does not necessarily increase safety, reduce harm, or encourage health-promoting behaviour. For example, pregnant women who use drugs may not seek prenatal care or drug treatment if they fear arrest; individuals living with HIV may not get tested or disclose their status to their partner if doing so would increase their chances of arrest and prosecution; and sex workers may not carry and use condoms if these could be used as evidence to detain, harass and punish them. Instead, the enforcement of overbroad punitive laws and policies to suppress

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20 As above. See also generally R Thoreson & S Cook (eds) *Nowhere to turn: Blackmail and extortion of LGBT people in sub-Saharan Africa* (2011); Open Society Foundation 'Ten reasons to decriminalize sex work: A reference brief' (2012) 2, <http://www.soros.org/sites/default/files/decriminalize-sex-work-20120713.pdf> (accessed 5 November 2013).

peoples' consensual sexual and reproductive conduct and identities can negate individuals' bodily autonomy, lead to discrimination and violate a wide range of human rights. Such punitive laws also encourage criminality by placing those targeted by the law outside of criminal justice protection, and giving a licence to law enforcement officials to commit blackmail, extortion and violence, and foster corruption within criminal justice systems.<sup>21</sup>

Not only are criminal laws and policies regulating sexuality and reproduction often ineffective at preventing harm and promoting health, but they have a disproportionate impact on racial and ethnic minorities, women, gender non-conforming people and/or the resource poor. For example, transgender and other gender non-conforming people are regularly profiled and arrested for doing nothing more than walking down the street.<sup>22</sup> Moreover, most people punished or imprisoned for sexual and reproductive 'crimes' are often being sanctioned for actions and decisions related to poverty, social exclusion or their status in society.<sup>23</sup> Drawing attention to the causes of criminalisation of sexuality and reproduction does not deny that actual harm occurs within sexual and reproductive spheres. Rather, it places criminal law enforcement within social, economic, political and colonial contexts, and highlights that individuals are not equally regulated and punished by criminal justice systems.<sup>24</sup> It also provides the opportunity to consider the underlying intent behind such laws and the legitimacy of states' exercise of police power in this manner.

While states have a positive obligation under international human rights law to provide a functioning legal and policy framework for the safety and public health of those who live in their territories, they do not have unlimited power to regulate lives in a manner that violates people's human rights and infringes upon their human dignity.<sup>25</sup> When states criminalise individuals' sexual and reproductive conduct or identities, absent harm to others, they are most likely overstepping these limits.

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21 R Thoreson 'Responding to blackmail and extortion as human rights violations' in Thoreson & Cook (n 20 above) 130.

22 See S Lamble 'Transforming carceral logics: Ten reasons to dismantle the prison industrial complex through queer/trans analysis and action' in E Stanley & N Smith (eds) *Captive genders: Trans embodiment and the prison industrial complex* (2011) 241; see also generally INCITE! Women of Color Against Violence 'Law enforcement violence against women of color & trans people of color: A critical intersection of gender violence and state violence', [http://www.incite-national.org/media/docs/3696\\_TOOLKIT-FINAL.pdf](http://www.incite-national.org/media/docs/3696_TOOLKIT-FINAL.pdf) (accessed 5 November 2013).

23 See Lamble (n 22 above) 246.

24 Lamble 246-247.

25 See D Uberoi *et al* 'Using human rights to address consequences of criminal laws on sexuality and reproductive autonomy' (2012) 16 *International Journal of Human Rights* 7 11.

#### 4 Outer limits: Human rights-based restraints on states' policing power

Criminal justice systems are built on the notion that criminal law enforcement can provide redress, deter future harm and rehabilitate those who offend. While principles of self-governance permit states to criminalise particular conduct and pursue criminal justice initiatives to regulate society, this discretion has limits. International human rights standards provide some guidance for what states can criminalise, how they go about criminal law enforcement, and what constitutes appropriate punishment, yet this guidance is spotty and, at times, inconsistent. It also fails to specifically set limits on states' policing power in the realms of sexuality and reproduction,<sup>26</sup> enabling states to pass and enforce laws and policies in the name of 'morality' to punish acts that do not harm others and inhibit actions that may in fact be beneficial to the 'criminal' and/or society as a whole (for instance, the possession of condoms, the disclosure of a drug addiction to obtain treatment, the termination of a pregnancy to save a woman's life, and so forth). This lack of clear guidance is complicated by the fact that human rights systems are often used to call upon states to criminalise conduct as a means to 'realise' rights. For example, international 'due diligence' obligations clearly require states to use their policing power to prevent, punish and provide redress for violence, in order to respect, protect and fulfil individuals' rights to life, health, security of person, equality and non-discrimination and to be free from torture and cruel, inhuman and degrading treatment, among other rights.<sup>27</sup>

Advocates often base their challenges to states' punishment of sexuality and reproduction on the disproportionality between an 'offence' and the punishment, and/or the rights violations that directly result through the process of criminalisation. While some success has been achieved using this approach, it fails to get to the heart of the issue – the legitimacy of states using their police power to socially engineer society and enforce a uniform 'moral' code and/or strict gender roles through the application of laws against particular individuals who challenge patriarchy and heteronormativity, and states' failure to enforce laws and policies aimed at tackling gender stereotyping and sex and gender discrimination (for instance sexual violence legislation).

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26 While international criminal law also provides some guidance on the scope of states' police power, it says very little about states' discretion to regulate sexuality and reproduction specifically. This is an area for further exploration, as it is not fully addressed within this article.

27 See Committee on the Elimination of Discrimination against Women, General Recommendation 19 (1992) (Violence against Women); see also Declaration on the Elimination of Violence Against Women, General Assembly Resolution 48/104, art 4(c).

Set forth below is an overview of the substantive international human rights-based limits on states' power to criminalise and otherwise punish sexuality and reproduction and related procedural protections. This discussion is followed by an overview of the range of emerging human rights standards that provide further support for restraining states' policing power over sexual and reproductive conduct and identities.

#### 4.1 Substantive limits on how states criminalise

While states generally have a broad discretion to pursue criminal justice within their country contexts and in some instances are required to do so under international law, there are limits on how they go about criminalising conduct. For example, while law enforcement officials have a pivotal role in respecting, protecting and fulfilling human rights, their actions and the structure and implementation of criminal justice systems may lead to restrictions on individuals' human rights. United Nations (UN) human rights bodies have developed a framework to safeguard against unjust restrictions.<sup>28</sup> For example, for such restrictions to be permissible, states must demonstrate that the criminal sanctions have a legitimate aim.<sup>29</sup> While punishing and deterring harm and providing remedies for rights violations may be legitimate aims, penalising innate human behaviour, such as consensual sexual and reproductive conduct and expression that does not cause harm or pose a significant risk of harm to others, is arguably not legitimate. To that end, human rights bodies and experts are increasingly speaking out regarding the human rights violations posed by criminalising particular sexual and reproductive conduct and identities.<sup>30</sup>

Criminal laws and policies must also clearly outline what behaviour is criminalised. Laws that aim to prevent intangible societal harms, such as generic public morality laws, can work to punish a wide range of behaviours and can be misinterpreted and enforced in an abusive

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28 See UN Commission on Human Rights, *Siracusa Principles on the Limitation and Derogation of Provisions of the International Covenant on Civil and Political Rights* (1984) UN Doc E/CN.4/1985/4. Similar frameworks have been developed across international and regional human rights systems and are used by national courts.

29 As above. Notably, the *Siracusa Principles* primarily relate to situations involving national security. Nevertheless, these principles have been further elaborated upon by UN human rights bodies. See also *International Covenant on Civil and Political Rights*, adopted 16 December 1966, GA Res 2200A (XXI), UN GAOR, 21st session, Supp No 16, UN Doc A/6316 (1966), 999 UNTS 171 (entered into force 23 March 1976), art 19(3) (requires restrictions on freedom of expression to be 'provided by law' and 'necessary' to respect of the rights or reputations of others, protect national security, or for public order, public health or morals); *Communication 550/1993, Faurisson v France*, UNHR Committee (8 November 1996) UN Doc CCPR/C/58/D/550/1993, para 8 (concurring opinion). (The restriction on freedom of expression must be necessary to protect the given value. This requirement of necessity implies an element of proportionality to the value which the restriction serves to protect.)

30 See sec 4.3 discussing emerging international human rights standards further setting limits on states' policing power.

manner.<sup>31</sup> Criminal laws and policies must also be proportionate and suitable to pursue their legitimate aim.<sup>32</sup> This means that the punishment meted out by the law should fit the crime committed; so non-serious crimes that do not pose significant harm to others should not call for severe penalties. Equally, the criminal law should not be used where other non-punitive measures could better achieve the aim. For example, in areas of public health it may be far more effective to develop responsive health and education programmes instead of enforcing criminal punishment.

The criminal law and the impact it has must also be reasonable.<sup>33</sup> The severity or the effect of a particular law should not outweigh the benefit. Simply speaking, if criminalising an activity causes more harm to people and society than good, it cannot be considered reasonable or fair. Equally, the law should not interfere with individuals' day-to-day lives in an overly broad way and should not create an excessive burden on the exercise of their rights.

#### 4.2 Procedural protections within criminal justice endeavours

In addition to the substantive limits on how states go about criminalising conduct, there are certain procedural protections that states must abide by in carrying out criminal justice endeavours. These limits are generally based on procedural safeguards provided under international human rights and international criminal law. For example, every person charged with a criminal offence is entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The right to a fair hearing includes a presumption of innocence until proven guilty; prompt information on the nature and cause of the charges against him or her in a language which he or she understands; adequate time and facilities to prepare a defence; communication with counsel; language assistance in court; and access to appeal procedures, among other things.<sup>34</sup>

While human rights law calls for accountability for crime, it simultaneously recognises the difference between justice and gravely disproportionate or discriminatory punishment.<sup>35</sup> In terms of punitive sanctions for sexual and reproductive conduct and identities, states are prohibited from punishing people in a manner far greater than the purported 'harm' done. The human rights principle of proportionality requires both that punishment is commensurate with the severity of the crime and that those convicted for engaging in similar prohibited

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31 See Siracusa Principles (n 28 above); see also *Naz Foundation (India) Trust v Government of NCT of Delhi & Others*, Writ Petition (Civil) 7455/2001, Delhi High Court (2 July 2009).

32 See Siracusa Principles (n 28 above).

33 As above.

34 Art 9 ICCPR.

35 See J Fellner 'The human rights paradigm: The foundation for a criminal justice system we can be proud of' in *The Sentencing Project 25 Experts Envision the Next 25 Years of Reform* (2012).

conduct receive similar punishments.<sup>36</sup> While the concept of proportionality is somewhat culturally-specific, particularly with regard to notions of 'seriousness', 'normality' and 'acceptability', punishment is generally considered 'disproportionate' if the balance between the seriousness of the offence and the severity of the penalty is outside that which is considered normal and acceptable.<sup>37</sup>

States are also prohibited from punishing particular conduct or expression in a manner that is arbitrary or discriminatory. Therefore, sentencing that punishes people for something other than the crime itself would be contrary to the rights to liberty and security of person and to not be subjected to arbitrary arrest or detention.<sup>38</sup> With regard to prohibitions of discrimination under international law, states cannot impose sentences that punish people for something other than the crime, such as not conforming to a particular gender role. Overarching principles of non-discrimination also prohibit the discriminatory enforcement of criminal laws and policies against individuals.<sup>39</sup>

Finally, capital punishment or the death penalty may only be used to punish the 'most serious crimes'<sup>40</sup> or 'intentional crimes with lethal or extremely grave consequences'.<sup>41</sup> 'Illicit sex' is not an offence that rises to the level of 'most serious' which could justify capital punishment.<sup>42</sup> Additionally, international law prohibits the imposition of the death penalty for crimes committed by people under 18 and pregnant women.<sup>43</sup>

36 See D Husak *Overcriminalization: The limits of criminal law* (2008) 28; see generally Report of the 8th UN Congress on the Prevention of Crime and Treatment of Offenders, UN Doc A/Conf144/28/Rev1, Res 1(a), 5(c) (1990) (punishments imposed upon conviction following a fair trial must be proportionate to the gravity of the crime and the circumstances of the offender).

37 The Human Rights Committee has provided some insight into the concept of 'arbitrariness' of punishment. In *AW Mukong v Cameroon*, the Committee noted that art 9 of ICCPR prohibits arbitrary arrest or detention, meaning not only that which is outside the law, but also where the law imposed 'include[s] elements of inappropriateness, injustice, lack of predictability and due process of law'. Communication 458/1991, *AW Mukong v Cameroon*, UNHR Committee (21 July 1994), UN Doc GAOR, A/49/40 (vol II) para 9.8.

38 See ICCPR (n 29 above) art 9.

39 See E Blower *et al* 'The human rights implications of contemporary patterns of social control' (2012) 4 *Journal on Human Rights Practice* 2 207.

40 Art 6(2) ICCPR.

41 UN Commission on Human Rights Resolution 2003/67, UN Doc E/CN.4/RES/2003/67/add.2 (9 January 2003); see also Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN Commission on Human Rights, 59th session, UN document E/CN.4/2003/3/Add.1 on Nigeria.

42 Concluding observations of the Human Rights Committee: Sudan, UN Doc CCPR/C/79/Add.85 (1997) para 8.

43 See R Hood *The death penalty: A worldwide perspective* (2002) 230 (highlighting a survey regarding the relation between the death penalty and homicide rates worldwide, conducted by the UN in 1988 and updated in 2002).

### 4.3 Emerging international human rights standards further limiting states' policing power in the realms of sexuality and reproduction

In addition to general substantive human rights-based limits on states' policing power and procedural protections, there are emerging standards that more specifically critique illegitimate criminalisation and provide additional support for restraining states' punitive regulation of sexuality and reproduction. Almost two decades ago, the UN Human Rights Committee handed down the landmark decision *Toonen v Australia*, where it held that laws criminalising sexual relations between consenting adults in private is a violation of the rights to privacy and non-discrimination based on sex under the International Covenant on Civil and Political Rights (ICCPR).<sup>44</sup> Notably, the Committee rejected the government's public morality justification for its criminal law. Moreover, while reviewing Australia's criminal sodomy law, the Committee's reasoning did not solely focus on sexual orientation-based discrimination. Rather, it based its decision on the fact that the law interfered with adult consensual sex, suggesting that all laws prohibiting sex outside marriage may be in breach of article 17 (privacy) of ICCPR.

Since that time, several human rights bodies and experts have expressed concern regarding states' use of criminal or punitive measures in the areas of sexuality and reproduction. Notably, the UN Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health (Special Rapporteur on the Right to Health) has observed that the criminalisation of sexual and reproductive conduct is discriminatory, impedes the public health goals that ostensibly justify the interventions, impairs human dignity, interferes with autonomous decision making and creates and perpetuates stigma.<sup>45</sup> In two separate reports, the Special Rapporteur analysed the negative impact of punitive approaches to many of the above-referenced sexual and reproductive health and rights issues on the realisation of the right to health.<sup>46</sup> In those reports, the Special Rapporteur has specifically called for the decriminalisation of abortion,<sup>47</sup> the provision of sexual and reproductive health-related information,<sup>48</sup> sex work and the

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44 See generally *Toonen v Australia* (n 9 above).

45 See generally Report of the Special Rapporteur on the Right to the Highest Attainable Standard of Health, UN General Assembly, 66th session, 3 August 2011, UN Doc A/66/254.

46 As above. See also Report of the Special Rapporteur on the Right to the Highest Attainable Standard of Health, Human Rights Council, 14th session, 27 April 2010, UN Doc A/HRC/14/20.

47 See 2011 Report of the Special Rapporteur on the Right to Health (n 45 above) para 65(h).

48 2011 Report (n 45 above) para 65(e).

practices around it,<sup>49</sup> and the unintentional transmission of or exposure to HIV.<sup>50</sup> The Special Rapporteur has further called upon states to suspend the application of criminal laws to various forms of conduct during pregnancy,<sup>51</sup> and to take immediate steps to decriminalise consensual same-sex conduct, as well as to repeal discriminatory laws relating to sexual orientation and gender identity.<sup>52</sup>

#### 4.3.1 Limits on states' authority to criminalise abortion

With regard to abortion, UN human rights bodies have expressed great concern regarding rising maternal mortality rates due to unsafe abortion, and have recommended that states overturn abortion bans or decriminalise the procedure, in particular when women's lives or health are at risk,<sup>53</sup> when the pregnancy results from rape<sup>54</sup> or incest, or in cases of fetal impairment. The UN Human Rights Committee has specifically confirmed that criminal provisions on abortion are incompatible with women's right to life,<sup>55</sup> and repeatedly called upon states to decriminalise abortion.<sup>56</sup> The UN Committee on the Elimination of Discrimination Against Women has also called upon state parties to review legislation criminalising abortion and to potentially remove barriers restricting access to safe abortion,

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49 See 2010 Report of the Special Rapporteur on the Right to Health (n 46 above) para 76(b).

50 2010 Report (n 46 above) para 76(c).

51 2011 Report para 65(n).

52 See 2010 Report (n 46 above) para 76(a). The UN High Commissioner for Human Rights has similarly recommended that states '[r]epeal laws used to criminalize individuals on the grounds of homosexuality for engaging in consensual same-sex conduct, and [to] harmonize age of consent laws for heterosexual and homosexual conduct'. Report of the United Nations Office of the High Commissioner for Human Rights, Discriminatory Laws and Practices and Acts of Violence against Individuals Based on their Sexual Orientation and Gender Identity, Human Rights Council, 19th session, 17 November 2011, UN Doc A/HRC/19/41 para 84(d). The High Commissioner further recommended that states 'ensure that other criminal laws are not used to harass or detain people based on their sexuality or gender identity and expression, and abolish the death penalty for offenses involving consensual sexual relations'.

53 See Concluding Observations of the UN Human Rights Committee: Chile, UN Doc CCPR/C/CHL/CO/5 para 8 (2007); Madagascar, UN Doc CCPR/C/MDG/CO/3 para 14 (2007); Mauritius, UN Doc CCPR/CO/83.MUS para 9 (2005); and Venezuela, UN Doc CCPR/CO/71/VEN para 19 (2001).

54 See Concluding Observations of the UN Human Rights Committee: The Gambia, UN Doc CCPR/CO/75/GMB para 17 (2004).

55 See Concluding Observations of the UN Human Rights Committee: Peru, UN Doc CCPR/CO/70/PER para 20 (2000).

56 See Concluding Observations of the UN Human Rights Committee: Ecuador, UN Doc CCPR/C/79/Add.92 para 11 (1998); Mongolia, UN Doc CCPR/C/79/Add.120 para 8(b) (2000); and Poland, UN Doc CCPR/C/79/Add.110 para 11 (1999).

connecting such barriers to women's rights to health.<sup>57</sup> The Committee further expressed concern regarding laws criminalising abortion when the pregnancy resulted from rape or incest<sup>58</sup> and, in at least one case, called upon a state to liberalise its law to allow abortion in cases of rape.<sup>59</sup>

#### 4.3.2 Limits on states' authority to criminalise HIV exposure and transmission

In the context of HIV, the Global Commission on HIV and the Law recently issued a report observing that 'punitive laws, discriminatory and brutal policing and denial of access to justice for people with and at risk of acquiring HIV are fueling the epidemic'.<sup>60</sup> The report further confirmed that HIV-specific criminal laws and policies do not increase safer sex practices, but rather discourage individuals from obtaining HIV tests or treatment, due to fear of prosecution, thus fuelling the HIV epidemic.<sup>61</sup> The Commission also noted that such<sup>62</sup>

legal practices create and punish vulnerability ... promote risky behaviour, hinder people from accessing prevention tools and treatment, and exacerbate the stigma and social inequalities that make people more vulnerable to HIV infection and illness.

As such, the Commission has recommended that states<sup>63</sup>

[r]epeal punitive laws and enact laws that facilitate and enable effective responses to HIV prevention, care and treatment services for all who need them ... [e]nact no laws that explicitly criminalise HIV transmission, exposure or non-disclosure of HIV status, which are counterproductive.

57 See Concluding Observations of UN Committee on the Elimination of Discrimination against Women: Andorra, UN Doc A/56/38 para 48 (2001); Argentina, UN Doc A/52/38 Rev.1, Part II para 319 (1997); Belize, UN Doc A/54/38 para 57 (1999); Burkina Faso, UN Doc A/55/38 para 276 (1999); Cameroon, UN Doc A/55/38 para 60 (2000); Chile, UN Doc A/54/38 para 229 (1999); Chile, UN Doc A/50/38 para 158 (1995); Chile, UN Doc CEDAW/C/CHI/CO/4 paras 19-20 (2006); Colombia, UN Doc A/54/38 para 394 (1999); Dominican Republic, UN Doc A/53/38 para 349 (1998); Ireland, UN Doc A/54/38 para 186 (1999); Jordan, UN Doc A/55/38 para 181 (2000); Mauritius, UN Doc A/50/38 para 196 (1995); Mexico, UN Doc A/53/38 para 408 (1998); Namibia, UN Doc A/52/38/Rev.1, Part II para 127 (1997); Nepal, UN Doc A/54/38 paras 139 & 148 (1999); Panama, UN Doc A/55/38/Rev.1 para 201 (1998); Paraguay, UN Doc A/51/38 para 131 (1996); Peru, UN Doc A/53/38/Rev.1 para 340 (1998); Peru, UN Doc A/50/38 paras 446 & 447 (1995); Saint Vincent and the Grenadines, UN Doc A/52/38/Rev.1 para 148 (1997); United Kingdom, UN Doc A/55/38 para 310 (1999); and Zimbabwe, UN Doc A/53/38 para 159 (1998).

58 See Concluding Observations of the UN Committee on the Elimination of Discrimination against Women: Nepal, UN Doc CEDAW/A/54/38 para 147 (1999).

59 See Communication 22/2009, *LC v Peru*, Committee on the Elimination of Discrimination against Women (4 November 2011), UN Doc CEDAW/C/50/D/22/2009 para 9(b)(iii).

60 Global Commission on HIV and the Law (n 11 above) 7.

61 Global Commission on HIV and the Law 8.

62 Global Commission on HIV and the Law 7.

63 Global Commission on HIV and the Law 9.

International policy guidance similarly recommends against the specific criminalisation of HIV transmission.<sup>64</sup>

#### 4.3.3 Limits on states' authority to criminalise sex work and adult consensual sex

With regard to sex work, both the Global Commission and UN Women have recognised sex workers as rights holders and recommended the decriminalisation of sex work.<sup>65</sup> The International Labour Organisation (ILO) has also recommended that sex work be recognised as an occupation so that it can be regulated in ways that protect workers and customers.<sup>66</sup>

As noted earlier, it has been confirmed that the criminalisation of adult consensual sexual conduct in private violates the right to privacy.<sup>67</sup> To that end, various international and regional human rights declarations and recommendations have called for the decriminalisation of consensual same-sex conduct.<sup>68</sup> Moreover, around 20 different judgments, rulings and decisions from a variety of international, regional and sub-regional courts have found that the

64 See generally UNAIDS, UNDP, 'Policy brief: Criminalization of HIV Transmission' (2008), [http://data.unaids.org/pub/basedocument/2008/20080731\\_jc1513\\_policy\\_criminalization\\_en.pdf](http://data.unaids.org/pub/basedocument/2008/20080731_jc1513_policy_criminalization_en.pdf) (accessed 8 September 2012).

65 Global Commission on HIV and the Law (n 11 above) 10. The Global Commission on HIV and the Law has recently recommended that states 'decriminalise private and consensual adult sexual behaviours, including ... voluntary sex work ... enforce laws against all forms of child sexual abuse and sexual exploitation, clearly differentiating such crimes from consensual adult sex work ... and ensure human trafficking laws are used to prohibit sexual exploitation, as opposed to consensual sex work'. See also UN Women 'Note on sex work, sexual exploitation and trafficking' (2013) <http://www.nswp.org/sites/nswp.org/files/UN%20Women's%20note%20on%20sex%20work%20sexual%20exploitation%20and%20trafficking.pdf> (accessed 29 October 2013). UN Women's statement further confirmed the organisation's position that sex work should not be conflated with trafficking and that sex work should be regulated in a manner as to protect sex workers from abuse and violence.

66 See International Labour Organisation 'Recommendation concerning HIV and AIDS and the world of work (No 200)' (2010), [http://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---ilo\\_aids/documents/normativeinstrument/wcms\\_194088.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/normativeinstrument/wcms_194088.pdf) (accessed 11 November 2013). The ILO's labour standard on HIV/AIDS, adopted in 2010, includes non-discriminatory access to health services and occupational safety for sex workers, including empowerment to insist on safe and protected paid sex in their workplaces.

67 See *Toonen v Australia* (n 9 above).

68 See Human Rights Council, UN General Assembly Resolution: Human rights, Sexual Orientation and Gender Identity, UN Doc A/HRC/17/L.9/Rev.1 (adopted 15 June 2011); Organization of American States, General Assembly Resolution: Human rights, Sexual Orientation and Gender Identity, OAS Doc AG/RES.2435 (XXXVIII-O/08) (adopted 3 June 2008); Organization of American States, General Assembly Resolution: Human rights, Sexual Orientation and Gender Identity, OAS Doc AG/RES.2504 (XXXIX-O/09) (adopted 4 June 2009); Council of Europe, Committee of Ministers Recommendation (Measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Identity, CM/Rec(2010)5 (adopted 31 March 2010).

criminalisation of sexual orientation is incompatible with international human rights law.<sup>69</sup>

#### 4.3.4 Limits on states' authority to criminalise pregnant women's conduct and the provision of sexual and reproductive health information

Finally, the Special Rapporteur on the Right to Health has called upon states to<sup>70</sup>

[s]uspend/abolish the application of existing criminal laws to various forms of conduct during pregnancy, such as conduct related to treatment of the foetus, most notably miscarriage, alcohol and drug consumption and HIV transmission.

Moreover, he has called on states to '[d]ecriminalise the provision of information relating to sexual and reproductive health, including evidence-based sexual and reproductive health education'.<sup>71</sup>

## 5 African Women's Protocol: A tool to further resist states' illegitimate criminalisation of sexuality and reproduction

While there is no clear guidance that explicitly sets forth what states can criminalise in the realms of sexuality and reproduction under international human rights law, the African Women's Protocol, as one of the most progressive pronouncements of women's sexual and reproductive rights,<sup>72</sup> may provide an additional platform to resist states' illegitimate criminalisation of women's bodies and lives.

Similar to international law, the African Women's Protocol contains provisions that call upon states to criminalise and prevent violence (for instance articles 3, 4, 5 and 13),<sup>73</sup> yet lacks explicit normative

69 See 'Jurisprudential annotations to the Yogyakarta Principles' <http://www.yogyakarta-principles.org/yogyakarta-principles-jurisprudential-annotations.pdf> (accessed 21 August 2012).

70 2011 Report of the Special Rapporteur on the Right to Health (n 45 above) para 65(n).

71 2011 Report (n 45 above) para 65(e).

72 See earlier discussion provided in n 10.

73 Art 3 (right to dignity) calls for the adoption and implementation of measures to prohibit any exploitation or degradation of women and to 'ensure the protection of every woman's right to respect for dignity and protection of women from all forms of violence, particularly sexual and verbal violence'. Art 4 (rights to life, integrity and security of the person) calls for the enactment and enforcement of laws to prohibit all forms of violence against women, including unwanted or forced sex, whether the violence takes place in private or public, the punishment of perpetrators of violence against women, and the prevention and condemnation of trafficking in women and the prosecution of traffickers. Art 5 (elimination of harmful practices) calls for the prohibition of all forms of female genital mutilation through legislative measures backed by sanctions. Art 13 (economic and social welfare rights) calls for 'effective legislative and administrative measures to prevent the exploitation and abuse of women in advertising and pornography'.

restraints on states' police power in the realms of sexuality and reproduction. Nevertheless, there are key provisions within the Women's Protocol that can be relied upon to not only address rights violations that result from criminalisation, but to challenge the very legitimacy of passing and enforcing criminal laws that punish women's exercise of their sexual and reproductive rights, absent harm to others. More broadly, the Protocol's strong textual language and incorporation of substantive equality principles can be used to articulate human rights claims for accountability for rights violations resulting from states' illegitimate policing and punishment.

Set forth below are proposed arguments advocates can make relying upon the African Women's Protocol to further restrain states' policing power and to seek redress for rights violations resulting from unjust intrusions into peoples' personal sexual and reproductive lives under the guise of 'protecting the public' and 'safeguarding culture and morality'.

### **5.1 States' overarching obligations to respect, protect and fulfil human rights**

In the absence of specific human rights-based restraints on what states can criminalise, advocates generally focus on the violations that result from the passage and enforcement of punitive laws and policies. State laws and policies that criminalise individuals' sexual and reproductive conduct, identities or socio-economic status (which do not harm others) violate the right to equality and non-discrimination. Such penalisation also leads to a wide range of human rights violations, including the rights to life, integrity and security of person,<sup>74</sup> to be free from cruel, inhuman and degrading treatment, health and reproductive rights,<sup>75</sup> access to justice and equal protection of the law,<sup>76</sup> economic and social welfare rights,<sup>77</sup> and special protection of women.<sup>78</sup> Article 2 of the African Women's Protocol explicitly requires that states reform laws and practices that discriminate against women.<sup>79</sup>

The African Women's Protocol also specifically recognises women's right to redress, requiring states to 'provide for appropriate remedies to any woman whose rights or freedoms ... have been violated'.<sup>80</sup> Moreover, as part of states' overarching obligations to respect, protect and fulfil human rights, they must remedy these violations and prevent similar violations in the future.

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74 Art 4 African Women's Protocol.

75 Art 14.

76 Art 10.

77 Art 13.

78 Art 24.

79 Art 2.

80 Art 25(a).

## 5.2 Accountability for prioritisation of resources

In addition to seeking redress under the African Women's Protocol for rights violations that result from the passage and enforcement of criminal legislation, advocates can challenge states' failure to adequately budget for and prioritise state initiatives to prevent and eradicate violence against women under article 4 and, more broadly, to realise all of the rights (including sexual and reproductive rights) contained within the Protocol under article 26.

Notably, the Women's Protocol is the first human rights instrument to introduce a hierarchy of budget priorities.<sup>81</sup> Advocates should rely on this novel aspect of the Protocol and seek justice for the disparities between state expenditure on the military and security, and anti-violence and other rights-promoting programmes. These disparities may be particularly revealing and compelling given the Protocol's explicit call of reduction in military spending in favour of social development and the promotion of women.<sup>82</sup> States' lack of commitment to anti-violence programmes is also ironic, given that it is one area where international law and the Protocol have explicitly affirmed states' power to legislate, criminalise and police.

## 5.3 States' duty to combat discrimination against women and modify cultural patterns of discrimination

States' illegitimate criminalisation of sexuality and reproduction can also be challenged under the African Women's Protocol's requirement to combat all forms of discrimination against women through legislative, institutional and other measures, and to modify social and cultural patterns to eliminate 'harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men'.<sup>83</sup> The enforcement of laws and policies that police and punish women's exercise of their sexual and reproductive rights undoubtedly amounts to discrimination against women. Moreover, states' failure to address violence, abuse and harassment of individuals who do not conform to restrictive gender norms (often at the hands of law enforcement officials) amounts to gender stereotyping, which states are obligated to combat. The fact that states in Africa (and worldwide) unabashedly criminalise women's sexual and reproductive conduct and identities is particularly egregious when reviewed under the Women's Protocol, since it contains the most explicit pronouncement of women's sexual and reproductive rights as compared to other human rights instruments.<sup>84</sup>

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81 See F Viljoen 'An introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 16 *Washington and Lee Journal of Civil Rights and Social Justice* 11 31.

82 Art 10(3) African Women's Protocol.

83 Art 2(2).

84 Art 14(2)(c) and further discussion in n 10.

#### 5.4 Women's rights to equal protection of the law

Article 8 of the African Women's Protocol specifically recognises that '[w]omen and men are equal before the law and shall have the right to equal protection and benefit of the law'.<sup>85</sup> Passing and enforcing criminal laws that specifically target women's expression of their sexuality and attempt to control women's fertility are by definition contrary to equal protection. The disparate impact on women of criminal laws that punish particular sexual and reproductive conduct and identities similarly contravenes states' duties to ensure that women are equally protected under and benefit from the law. As noted by the UN Special Rapporteur on Violence against Women, its Causes and Consequences, the 'principle of non-discrimination requires states to take into account and address any disparate impact of criminal justice strategies on women,<sup>86</sup> even if they have been adopted for legitimate goals'.<sup>87</sup>

Article 8 also requires that 'law enforcement organs at all levels are equipped to effectively interpret and enforce gender equality rights'.<sup>88</sup> As an initial matter, non-discriminatory laws are a necessary precursor to ensuring that law enforcement representatives can assist with promoting gender equality. Moreover, many rights violations that stem from the criminalisation of sexuality and reproduction are often at the hands of law enforcement personnel (for instance extortion, harassment, blackmail and violence), as discussed earlier. Therefore, greater progress must be made to ensure that rights violations no longer occur at the hands of those who are tasked with purportedly 'carrying out justice'.

### 6 Looking forward: Additional steps to promote justice and accountability

In the absence of a clear standard of legitimacy under international and regional human rights law regarding what states can criminalise in the realms of sexuality and reproduction, at a minimum, resources should be directed toward ensuring transparency and accountability within justice systems.<sup>89</sup> To that end, the first step must be to raise peoples' awareness of their human rights and knowledge of laws that prohibit blackmail, extortion and violence by law enforcement personnel.<sup>90</sup> Additionally, the rule of law and criminal justice reform

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85 Art 8.

86 See UN General Assembly Resolution: Intensification of Efforts to Eliminate all Forms of Violence Against Women, UN Doc A/RES/61/143 (adopted 30 January 2007) para 8(f).

87 UN Special Rapporteur on Violence against Women, Report to the General Assembly (n 2 above) para 81.

88 Art 8(d) African Women's Protocol.

89 See Thoreson (n 21 above) 131.

90 Thoreson 132-33.

initiatives should be prioritised by advocates, governments and funders.

Advocates should also continue to search for normative restraints on states' policing power. While outside of the scope of this article, human rights advocates should engage with international and national criminal justice advocates to clarify traditional criminal law principles that count against states' intrusion into personal matters such as sexuality and reproduction, absent clear harm to others. Normative restraints may also be located in religious law. These explorations may be particularly salient in the African context where countries have pluralistic legal systems and codified law that – formally or informally – operate side-by-side with customary law and/or Shari'a (Islamic law). Further research in this regard may reveal additional limits on states' power to control and punish individuals' bodies and intimate lives.

Finally, when leaders are fuelling a 'moral panic'<sup>91</sup> and proposing increased penalties for particular 'non-normative' sexual and reproductive conduct and identities, advocates should look beyond the rhetoric to determine whether their government is trying to distract the public's attention from its own deficiencies. All too often, states use non-conforming sexualities as a metaphor for immorality and degradation of society to instil fear in and paralyse the public at times when political and civil mismanagement and faltering economies are looming.<sup>92</sup> Identifying this hypocrisy and the politics of distraction is yet another way of delegitimising states' overzealous criminalisation of sexuality and reproduction.

In the end, there are many tools advocates can use to tackle the illegitimate criminalisation of sexuality and reproduction. In addition to challenging the means through which states punish particular conduct and identities and seeking redress for rights violations, advocates should think more broadly and consider ways to locate additional normative restraints and/or foster normative developments that explicitly confine states' policing power, to ensure that it is not exercised to infringe on individuals' sexual and reproductive rights and lives. States may have a pivotal role in promoting public safety and safeguarding health, but these justifications can only go so far. They cannot be used to intrude on individuals' sexual and reproductive autonomy and matters so intimately connected to their dignity, sense of self and fundamental human rights.

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91 See generally S Cohen *Folk devils and moral panics* (1972).

92 Tamale (n 3 above) 24.