

**Rethinking abortion access for women in conflict and post-conflict situations in Nigeria: A
human rights perspective**

by

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PLAGIARISM DECLARATION

I, ESTHER ADILLI IKENYE, declare that the work presented in this dissertation is original. It has not been presented to any other university or institution. Where the work of other people has been used, it has been duly acknowledged.

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Summary

Historically, women in conflict and post-conflict situations have on the basis of their status been subjected to harmful and discriminatory practices which run contrary to international, regional and domestic provisions guaranteeing various human rights including the rights to freedom from torture, cruel, inhumane and degrading treatment or punishment; discrimination; violence; privacy and autonomous decision making within the context of healthcare etc. Whereas recent years have seen an improvement in State responses globally, in Nigeria the experiences of women in conflict and post-conflict situations remain deplorable. Despite the ratification of various international and regional treaties in this regard, issues revolving around access to safe abortion remain problematic. They are also further complicated by questions of holistic adoption and implementation of ratified instruments in this regard. Consequently, though consensus has been achieved on paper, implementation remains a mirage particularly across the Middle Belt region and the Northeast which are grappling with farmer-herder conflict and insurgency by proscribed armed groups respectively.

This mini-dissertation discusses in-depth the current framework for the protection of women's reproductive health and rights related to access to abortion services in conflict and post-conflict situations in Nigeria in view of international and regional human rights obligations, highlighting the challenges and prospects and identifies key opportunities for consideration in the protection of these rights by municipal law.

This research is relevant to legal, ethical and social discourses as well as issues of policy formulation and implementation related to reproductive health and rights protection in conflict and post-conflict situations within Nigeria.

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RETHINKING ABORTION ACCESS FOR WOMEN IN CONFLICT AND POST-CONFLICT SITUATIONS IN NIGERIA: A HUMAN RIGHTS PERSPECTIVE

CHAPTER ONE: INTRODUCTION

1.1 Background and context

Across the Globe, women have historically been subjected to conflict-related sexual violence in situations of unrest by State and non-State armed groups.¹ Such violence is used against civilians to demoralise, destroy and even change the ethnic compositions of entire communities². The United Nations Security Council (UNSC) noting its systematic and widespread rampancy and recognising gender inequality as one of its root causes has taken steps to ensure that this problem is addressed.³

In 2000 the UNSC reaffirming the important role of women in conflict resolution in a first adopted Resolution 1325.⁴ It urged all parties to conflict to take measures to protect women and girls from gender-based violence particularly rape in situations of armed conflict.⁵ Also, recognising the rampancy of sexual violence during conflict⁶ it passed Resolutions 1960⁷ and 2106⁸ which respectively provide an accountability system for stopping conflict-related sexual violence.⁹

In recent years the lives of people in parts of the Northern region of Nigeria have been characterised by crisis and fear occasioned by the deadly activities¹⁰ of the Boko Haram¹¹ group.¹² The

¹ United Nations 'Report of the Secretary-General on Conflict Related Sexual Violence' S/2019/280 (2019).

² A Radhakrishnan and others 'Protecting safe abortion in humanitarian settings: overcoming legal and policy barriers' (2017) 25 *Reproductive Health Matters* 40.

³ Peace Women 'Security Council Resolution 1960' <https://www.peacewomen.org/SCR-1960> (accessed 13 December 2019).

⁴ S/RES/1325 (2000).

⁵ Office of the Special Adviser on Gender Issues and Advancement of Women 'Landmark resolution on women, peace and security' https://www.un.org/women_watch/osagi/wps/#resolution (accessed 21 February 2020).

⁶ Peace Women (n 3).

⁷ S/2010/604.

⁸ S/RES/2106 (2013).

⁹ UN Women 'Security Council' <https://www.unwomen.org/en/how-we-work/intergovernmental-support/major-resolutions/security-council> (accessed 10 December 2019).

¹⁰ W Ehwarieme & N Umukoro 'Civil Society and terrorism in Nigeria: A study of the Boko Haram crisis' (2015) 32 *International Journal on World Peace* 25.

¹¹ Boko Haram is the popular Hausa name for the group, *Jama'atu Ahlis Lidda'awati Wal-Jihad* ("People committed to the propagation of the Prophet's Teachings and Jihad"). J Falode 'The nature of Nigeria's Boko Haram War, 2010-2015 A Strategic Analysis' (2016) 10 *Perspectives on Terrorism* 41.

L Taylor 'Boko Haram terrorism: reaching across international boundaries to aid Nigeria in the humanitarian crisis' (2014) 21 *ILSA Journal of International & Comparative Law* 4.

¹² *Background Report: Boko Haram*, The Nat'l Consortium for the Study of Terrorism 1-2 (May 2014) available at http://www.start.umd.edu/pubs/STARTBackgroundReport_BokoHaramRecentAttacks_May2014_0.pdf in L Taylor (n 11).

organisation's increasingly violent tactics¹³ targets amongst others, women and girls who are raped, sold off into forced marriages or converted into sex slaves. In extreme cases they are also murdered¹⁴ and these abuses are sometimes exacerbated during counter-insurgency operations by government forces.¹⁵ Across the Middle-Belt region recent years have seen the escalation of a decade-long communal conflict between nomadic herdsman and farmers. In 2018 at least 1,600 people were reportedly killed and another 300,000 displaced.¹⁶ A characteristic common to these clashes is the sexual violence which women suffer.¹⁷

According to the United Nations, conflict in North-East Nigeria raging since 2009 has resulted in the death of an estimated 27,000 people and forced a further 1.8 million from their homes.¹⁸ Edward Kallon, UN Resident and Humanitarian Coordinator in Nigeria, noted that 'the trauma does not fade, it just repeats...'¹⁹ In many cases rescued female abductees are found pregnant or with children born whilst in captivity. Although governments and national organisations step up to offer services including antenatal care, family planning and treatment for malnourished victims, the issue of access to abortion services is ignored due to the country's restrictive abortion laws.²⁰

The Nigerian criminal law provides a framework that criminalises abortion.²¹ Sections 228, 229 and 230 of the Criminal Code Act²² and sections 232 and 233 of the Penal Code Act²³ criminalise abortion except when done to save a woman's life.²⁴ The laws prescribe a 14-year jail term for illegal

¹³ Human Rights Watch *Nigeria: Events of 2018* <https://www.hrw.org/world-report/2019/country-chapters/nigeria> (accessed 23 February 2020).

¹⁴ Human Rights Watch (n 13).

¹⁵ OHCHR 'News and Events - Northeast Nigeria: addressing impunity for sexual violence amidst a decade-long conflict' <https://www.ohchr.org/EN/NewsEvents/Pages/SexualViolenceNortheastNigeria.aspx> (accessed 5 November 2019).

Aljazeera 'Boko Haram survivors starved and raped by Nigeria's military' 24 May 2018 <https://www.aljazeera.com/indepth/opinion/boko-haram-survivors-starved-raped-nigeria-military-180523144207062.html> (accessed 6 November 2019).

¹⁶ Human Rights Watch (n 13).

¹⁷ Gospel Herald 'World: Christian woman raped, killed as Muslim herdsman attack two villages in Nigeria' 9 April 2019 <https://www.gospelherald.com/articles/71947/20190409/christian-woman-raped-killed-muslim-herdsman-attack-two-villages-nigeria.htm> (accessed 23 January 2020).

PUNCH 'Suspected herdsman rape, behead pregnant woman' <https://punchng.com/suspected-herdsman-rape-behead-pregnant-woman/> (accessed 24 February 2020).

¹⁸ OHCHR (n 15).

¹⁹ OHCHR (n 15).

BBC News 'Nigeria to investigate alleged abuses at refugee camps' 10 February 2015. <https://www.bbc.com/news/world-africa-31386340> (accessed 10 December 2019).

²⁰ Sec 228-230, 297, 309 and 328 of the Criminal Code Act, 2004.

Cosmopolitan 'As Boko Haram kidnapping victims are rescued, many of them are pregnant. Why isn't anyone talking about their right to abortion?' 11 May 2015 <https://www.cosmopolitan.com/politics/news/a40182/nigerian-rape-victims-abortion/> (accessed 28 January 2020).

²¹ R Cook 'Stigmatized meanings of criminal abortion law' in R Cook (eds) *Abortion law in transnational perspective: cases and controversies* (2014) 356.

²² Applicable in southern Nigeria.

²³ Applicable in northern Nigeria.

²⁴ F Tafita & O Bamgbose 'Access to justice for reproductive and sexual health rights of women through law faculty clinics' (2015) 5 *University of Ibadan Journal of Public and International Law* 94.

abortion providers and a 7-year jail term for a woman who has an abortion.²⁵ Consequently many victims of sexual abuse in conflict situations resort to unsafe abortions²⁶ and those who have children often suffer backlash from their communities who consider them tainted, rejecting them with attendant consequences for their physical and mental health.²⁷

Several health and human rights bodies have recognised the importance of ensuring the protection of the health and human rights of women and girls.²⁸ At the international level, the Committee on Economic, Social and Cultural Rights and the Committee on the Elimination of Discrimination Against Women have indicated that women's right to health include their sexual and reproductive health and reiterated States commitment in this regard.²⁹

The World Health Organisation (WHO) has recommended that countries permit abortion in cases of rape and incest.³⁰ Furthermore the Human Rights Committee³¹ has consistently urged states to review their restrictive abortion laws to guarantee access to safe abortion by victims of sexual violence.³² Also, the CEDAW Committee's General Comment No. 30 recommends that 'states ensure provision of sexual and reproductive health services including abortion in conflict situations.'³³

²⁵Safe Motherhood Inter-Agency Group 'Unsafe abortion' http://safemotherhood.org/init_facts.htm in N Aniekwu 'A legal perspective on reproductive health and gender-specific human rights in Nigeria' (2004) 3(1) *Journal of Medicine and Biomedical Research* 21-29.

L Omo-Aghoja 'The story of abortion: Issues, controversies and a case for the review of the Nigerian national abortion laws' (2010) 7(4) *East African Journal of Public Health* 339.

B Oye-Adeniran 'Advocacy for reform of the abortion law in Nigeria' (2004) 12 *Reproductive Health Matters* 210.

The Human Rights Committee – Re: Supplementary information for list of issues for the Federal Republic of Nigeria, scheduled for adoption by the Human Rights Committee during its 124th Session, October 2018 at 1-4.

G Gaggioli 'Is there a right to abortion for women and girls who become pregnant as a result of rape? A humanitarian and legal issue' Paper presented at the ICRC Vulnerabilities in armed conflicts: selected issues 14th Bruges Colloquium – 17 and 18 October, 2013.

²⁶ M Bloom & H Matfess 'Women as symbols and swords in Boko Haram's Terror' (2016) 6 *Prism* 116 – 117.

²⁷ Many women and girls also report psychological trauma and rejection from their communities.

Bloom & Matfess (n 26).

Center for Reproductive Rights *Briefing paper - Ensuring sexual and reproductive health and rights of women and girls affected by conflict* (2017) 1.

²⁸ OHCHR (n 15).

²⁹ P Hunt 'Report of the special rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'

<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N06/519/97/PDF/N0651997.pdf?OpenElement> (accessed on 10 December 2019).

³⁰ World Health Organisation 'Safe Abortion: Technical and Policy Guidance for Health Systems' 76 (2012) in Center for Reproductive Rights 'Law and Policy Guide: Rape and Incest Exceptions' <https://reproductiverights.org/law-and-policy-guide-rape-and-incest> (accessed 28 February 2020).

³¹ ICCPR.

Human Rights Committee.

³² Human Rights Committee, *Concluding observations on the fifth periodic report of Cameroon* CCPR/C/CMR/CO/5 (2017).

³³ CEDAW Committee, *General Comment No. 30 on women in conflict prevention, conflict and post-conflict situations*, para 52 (c) UN Doc. CEDAW/C/GC/30 (2013).

G Olaide & T Aderibigbe 'Justification of women's right of access to safe and legal abortion in Nigeria' (2014) 7 *African Journal of Legal Studies* 185.

Regionally the Maputo Protocol to which Nigeria is a party provides that abortion should be permitted in situations of rape amongst other grounds.³⁴ Also article 60 of the African Charter, encourages the African Commission to be guided by the Charter and other international human rights documents adopted by state parties.

In the discharge of its functions, the African Commission in *Doebbler v Sudan*³⁵ arrived at its decision by relying partially on the jurisprudence of other regional human rights bodies. The relevance of the provisions of article 60 of the African Charter in applying jurisprudence from the European Court on Human Rights as well as the Inter-American Court on Human Rights was highlighted in *Law Office of Ghazi Suleiman v Sudan*.³⁶

Since 2006 among countries experiencing humanitarian crises or hosting displaced populations, Burkina Faso, Chad, Colombia, Ethiopia, Kenya, Mali & Sierra Leone have all liberalised their abortion laws.³⁷ In Chad the hitherto restrictive penal laws criminalising abortion except when done to save a woman's life has been expanded to include situations where a woman is a victim of sexual violence.³⁸ Despite these developments and recommendations³⁹ to ensure human rights protection of the rights relating to life⁴⁰, health⁴¹, freedom from cruelty and/or torture⁴², privacy⁴³ and non-discrimination⁴⁴, Nigeria has failed to fulfil its commitments in this regard.

The CEDAW Committee reviewing the Nigeria situation in 2017 observed that a significant number of female Boko Haram abductees had not been rescued and continued to be subjected to rape, sexual slavery, forced marriage and impregnation.⁴⁵ It also expressed concerns about sexual exploitation in internally displaced persons (IDP) camps.⁴⁶ Noting the stigmatisation, discrimination and isolation

³⁴ Art 14 Paragraph 2(c) Maputo Protocol.

K Some 'The impact of the African Charter and the Maputo Protocol in Burkina Faso' in V Ayeni (ed) *The impact of the African Charter and the Maputo Protocol in selected African States* (2016) 17.

V Ayeni 'The impact of the African Charter and the Maputo Protocol in Nigeria' in V Ayeni (ed) *The impact of the African Charter and the Maputo Protocol in selected African States* (2016) 183.

³⁵ The African Commission in this case applied jurisprudence from the European Court of Human Rights Communication 236/2000 – 16th Annual Activity Report in AmSHER 'The violations of human rights on the basis of sexual orientation and gender identity in the Federal Republic of Nigeria under the African Charter on Human and Peoples' Rights' being a report submitted in response to the Periodic Report of the Federal Republic of Nigeria presented at the 50th Ordinary Session of the African Commission, October – November 2011.

³⁶ Communication 288/1999 – 16th Annual Activity Report, 48 – 50.

³⁷ T McGinn & S Casey 'Why don't humanitarian organizations provide safe abortion services?' (2016) 10 *Conflict & Health* 4.

³⁸ Medecins Sans Frontieres 'Chad: Control over women' 29 November 2017 <https://blogs.msf.org/bloggers/liza/chad-control-over-women> (accessed 21 May 2020).

³⁹ Art 14 Para 2(c) Maputo Protocol.

⁴⁰ Art 4 ACHPR.

⁴¹ Art 16 ACHPR.

⁴² Art 5 ACHPR.

⁴³ Art 17 ICCPR.

⁴⁴ Art 2 ACHPR.

⁴⁵ Committee on the Elimination of Discrimination Against Women (CEDAW Committee), *Concluding Observations: Nigeria*, para. 15(a), UN Doc. CEDAW/C/NGA/CO/7-8 (2017).

⁴⁶ Art 3(1)(d) of the Kampala Convention.

which such victims⁴⁷ were subjected to⁴⁸, it urged the government to ensure fulfilment of its obligations.⁴⁹ Regardless of this call, much have remained unchanged.⁵⁰ Women and girls often resort to obtaining unsafe abortions⁵¹ and those who do not face rejection and stigmatisation in their communities.⁵²

1.2 Problem statement

The UNSC Resolutions 1325⁵³, 1960⁵⁴ and 2106⁵⁵ respectively provide an accountability system for stopping conflict-related sexual violence. They reiterate the importance of all actors to ensure implementation of the laid down mandates. Despite these obligations, Nigeria has failed to fulfil its obligations in this regard. Its restrictive laws contained in sections 228 to 230 of the Criminal Code⁵⁶ and sections 232 to 236 of the Penal Code⁵⁷ aggravates the situation of women in conflict situations. The question is whether there can be an expansive interpretation of the restrictive abortion laws to include its permissibility and availability as part of governments responsibility for reproductive rights protection in conflict situations.

1.3 Research aims and objectives

This study analyses the restrictive laws and lack of commitment towards ensuring abortion access for victims of sexual violence in conflict situations in contrast with the provisions of human rights norms and standards. It analyses its strengths and weaknesses and gives reason for the necessity of an expansive interpretation of the provisions of municipal law.

Particularly, it has the following objectives:

- i. to examine government obligations to ensure human and reproductive rights protection in conflict situations.

⁴⁷ E Ekhaton 'The Impact of the African Charter on Human and Peoples' Rights on case law: A case study of Nigeria' (2015) 41 Commonwealth Law Bulletin 3.

⁴⁸ CEDAW Committee (n 45) para 15(c).

⁴⁹ CEDAW Committee (n 45) para 16(e).

⁵⁰ Global Justice Centre 'Factsheet: Shifting good policy to practice: Armed conflict, humanitarian aid and reproductive rights' June 2019 <http://www.globaljusticecenter.net/blog/19-publications/1139-shifting-good-policy-to-practice-armed-conflict-humanitarian-aid-and-reproductive-rights> (accessed 8 December 2019).

⁵¹ Reuters 'Secret abortions spike in Nigeria with Boko Haram chaos' <https://www.reuters.com/article/us-nigeria-health-abortion/secret-abortion-spike-in-nigeria-with-boko-haram-chaos-idUSKBN1WT1M5> (accessed 16 December 2019).

⁵² S. Nabaneh 'A purposive interpretation n of Article 14(2)(c) of the African Women's Protocol to include abortion on request and for socio-economic reasons', LLM mini-dissertation, University of Pretoria 2012, 16 (on file with the author).

⁵³ S/RES/1325.

⁵⁴ S/RES/160 1960.

⁵⁵ S/RES/2106 (2013).

⁵⁶ The Criminal Code Act, 2004.

⁵⁷ The Penal Code, 1990.

- ii. to examine the situation of women and girls in conflict situations and governmental lapses; and -
- iii. to propose an expansive interpretation of the extant laws to include permissibility and availability of abortion for women in conflict situations.

1.4 Research questions

This research seeks to answer the question: what is the basis for rethinking abortion access for women in conflict situations in Nigeria? In addressing this question, the following sub-questions are relevant: (a) What is the scope of Nigeria's obligation to ensure abortion access in conflict situations under international and regional human rights norms? (b) How do the restrictive penal laws impact women in such situations? (c) Can the expansive interpretation of the laws offer some form of respite?

1.5 Research methodology

The methodology adopted in this research is largely qualitative. It is desk-based and uses primary and secondary data from published commentaries, international and regional human rights treaty documents, academic texts, journals, reports, library, internet and online databases to examine the issues.

1.6 Literature review and significance of study

The debate surrounding the issue of abortion access for women and girls in conflict situations in Nigeria centres around the restrictive laws and lack of governmental commitment despite the ratification of relevant human rights treaties.⁵⁸ Okonofua's paper 'Preventing unsafe abortion in Nigeria'⁵⁹ is instructive as it sheds light on the high incidence of unsafe abortions in Nigeria. Okagbue's paper 'Pregnancy termination and the law in Nigeria'⁶⁰ discusses Nigeria's restrictive penal framework and argues for a review of the current position.

Oye-Adeniran and others in the paper 'Advocacy for reform of the abortion law in Nigeria' discuss in depth the country's restrictive legal provisions on abortion highlighting its impact on maternal mortality rates.⁶¹

⁵⁸ Sec 228-230, 297, 309 and 328 of the Criminal Code Act, 2004.

⁵⁹ F Okonofua 'Preventing unsafe abortion in Nigeria' (1997) 1 *African Journal of Reproductive Health* 25-36.

⁶⁰ I Okagbue 'Pregnancy termination and the law in Nigeria' (1990) 21 *Studies in Family Planning* 4.

⁶¹ Oye-Adeniran (n 25).

In the paper ‘Factors contributing to maternal mortality in North-central Nigeria: A seventeen-year review’ Ujah and others⁶² discuss unsafe abortion as one of four the key causes of maternal mortality and morbidity in the North. Also, Sida’s report on ‘Safe abortions’⁶³ though a secondary data source offers an insight on issues of unsafe abortion as a public health threat and human rights issue. It highlights barriers to accessing safe abortion and current trends.

In *Human rights and African abortion laws*,⁶⁴ Ngwena discusses the burden of unsafe abortion and the linkage between the extant abortions laws and barriers to accessing safe abortion. It highlights the application of human rights to frame and interpret domestic abortion laws and sheds light on developments at the African regional level. Furthermore, it clarifies the meaning of health as a ground for abortion in judicial understanding where statute or guidelines are silent through the case law decision in *R v Bourne*.⁶⁵

Ngwena’s paper on ‘Inscribing abortion as a human right: Significance of the Protocol on the rights of women in Africa’⁶⁶ discusses the limitations of the Maputo Protocol related to maternal health as a ground for abortion. It argues about the burdensome nature of the requirements of the Protocol for women and opines that although the maternal health ground contained in the Protocol might appear limiting, it could justify abortion on mental health grounds when arguments are presented from a psychosocial perspective.

Abortion in conflict and post-conflict situations

In ‘Gender-based violence and justice in conflict and post-conflict areas’⁶⁷ Manjoo & McRaith discuss the issue of gender-based violence in conflict situations highlighting how it affects women. Similarly, in Rubio-Marín’s paper on ‘Reparations for conflict-related sexual and reproductive violence: A decalogue’⁶⁸ issues bordering on sexual violence in conflict situations are discussed extensively.

⁶² I Ujah and others ‘Factors contributing to maternal mortality in North-Central Nigeria: A seventeen-year review’ (2005) 9 *African Journal of Reproductive Health* 22-47.

⁶³ Sida ‘Health Brief: Safe Abortions’ (2016) 2, Available at https://www.sida.se/globalassets/sida/sve/sa-arbetar-vi/safe_abortions.pdf (accessed April 2020).

⁶⁴ C Ngwena ‘Human rights and African abortion laws: A handbook for judges (2014) para 6.3.

⁶⁵ (1939) 1 KB 687.

⁶⁶ Ngwena C ‘Inscribing abortion as a human right: Significance of the Protocol on the Rights of Women in Africa’ (2010) 32 *Human Rights Quarterly* 785.

⁶⁷ R Manjoo & C McRaith ‘Gender-based violence and justice in conflict and post-conflict areas’ (2011) 44 *Cornell Int’l Law Journal* 11-31.

⁶⁸ R Rubio-Marín ‘Reparations for conflict-related sexual and reproductive violence: A decalogue’ (2012) 19 *William & Mary Journal of Women & the Law* 69-104.

In the paper ‘CEDAW, the Islamic State and conflict-related sexual violence’⁶⁹ the author, Gibbon’s provides an insight on international efforts to combat conflict-related sexual violence highlighting the various UN resolutions and CEDAW frameworks and states obligations in this regard. Radhakrishnan and others in the paper ‘Protecting safe abortion in humanitarian settings: overcoming legal and policy barriers’⁷⁰ highlight the lapses in humanitarian laws and policies related to the needs of women in conflict situations.

Nigeria

Reports by the World Health Organisation⁷¹ and the Centre for Reproductive Rights⁷² have made recommendations permitting abortion in instances of rape and incest. A report by Reuters⁷³ shares insight into the spike in unsafe conditions following the Boko Haram chaos in Nigeria.

The CEDAW Committee in its 2017 report⁷⁴ after reviewing the Nigerian situation urged the government to ensure fulfilment of its obligations. This study will highlight the considerations for broadening the exceptions permitting abortion in conflict situations with the aim of strengthening advocacy in this regard.

1.7 Scope and limitations

This study is limited to legal issues affecting women and girls in situations of non-international armed conflict in Nigeria. Current research on the subject matter is sparse and arguments are made based on the potential application of international and regional human rights standards based on available information from some other jurisdictions.

1.8 Overview of chapters

This study is divided into five chapters. Chapter one introduces the background and justification of the study. It includes the research background, problem statement, research questions, literature review and significance of the research, limitations and methodology. Chapter two examines the scope and

⁶⁹ C Gibbons ‘CEDAW, the Islamic State and conflict-related sexual violence’ (2018) 51 *Vanderbilt Journal of Transnational Law* 1423.

⁷⁰ Radhakrishnan (n 2).

⁷¹ World Health Organisation ‘*Safe Abortion: Technical and Policy Guidance for Health Systems*’ 76 (2012).

⁷² Center for Reproductive Rights ‘Law and Policy Guide: Rape and Incest Exceptions’ <https://reproductiverights.org/law-and-policy-guide-rape-and-incest> (accessed 2 April 2020).

⁷³ Reuters ‘Secret abortions spike in Nigeria with Boko Haram chaos’ <https://www.reuters.com/article/us-nigeria-health-abortion/secret-abortion-spike-in-nigeria-with-boko-haram-chaos-idUSKBN1WT1M5> (accessed 16 December 2019).

⁷⁴ CEDAW Committee, *Concluding Observations: Nigeria*, para 15(a), UN Doc. CEDAW/C/NGA/CO/7-8 (2017).

significance of the provisions of various human rights instruments in conflict situations and the provisions of municipal law highlighting states obligation in this regard. The third chapter examines the subject matter of abortion in relation to the right to health, highlighting how Nigeria's restrictive laws impact women and girls. Chapter four considers the impact of an expansive interpretation of Nigeria's extant laws on abortion on women and girls. The final chapter summarises the findings from our study and makes recommendations for implementation.

1.9 Description of terms

- Health:

Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.⁷⁵

- Reproductive Health

Reproductive health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity in all matters relating to the reproductive system and to its functions and processes.⁷⁶

- Reproductive rights

Reproductive rights are certain human rights that are already recognised in national laws, international human rights and other relevant documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so and the right to attain the highest standard of sexual and reproductive health. It also includes their right to make decisions regarding reproduction free from discrimination, coercion and violence as expressed in human rights documents.⁷⁷

- Sexual violence

⁷⁵ Paras 1 & 2 of the Constitution of the World Health Organization, Basic Documents, Forty-fifth edition, Supplement, October 2006, 1.

⁷⁶ Para 7.2 ICPD.

United Nations Report of the International Conference on Population and Development, Cairo, Egypt, 5-13 September 1994. United Nations Doc. N.Y.A/Conf.171/13 Rev.1, U.N. Sales No. 95. XIII.18.

Para 94 of the Platform for Action, 1995.

⁷⁷ Para 7.3 of the ICPD.

Sexual violence includes sexual abuse, rape, sexual harassment and indecent assault. Systemic rape during armed conflict, sexual abuse of vulnerable groups of women such as the physically and mentally challenged, demand for sex in return for favours or coerced sex are all manifestations of sexual violence against women.⁷⁸

- Abortion

Abortion refers to a voluntary intervention to terminate an unwanted or unplanned pregnancy. The persons, skills and medical standards considered safe in the provision of abortion are different for medical and surgical abortion and depend on the duration of the pregnancy.⁷⁹

- Safe abortion

This refers to an abortion done with a World Health Organization recommended method, is appropriate to the pregnancy duration and is provided by a trained health-care provider.⁸⁰

- Conflict

Conflict used in this context refers to non-international armed conflict which takes place within the territory of a State between the government on the one hand and armed insurgent groups on the other hand.⁸¹ The armed confrontation must reach a minimum level of intensity and the parties involved in the conflict must show a minimum of organisation.⁸²

- Conflict-related sexual violence

Conflict-related sexual violence refers to rape, sexual slavery, forced prostitution, forced pregnancy, forced abortion, enforced sterilisation, forced marriage and any other form of sexual violence of comparable gravity perpetrated against women, men, girls or boys that is directly or indirectly linked

⁷⁸ Tafita & Bamgbose (n 24) 95.

⁷⁹ Compilation of the World Health Organization's current recommendations on adolescent sexual and reproductive health <https://www.gfmer.ch/SRH-Course-2018/adolescent-health/pdf/WHO-compilation-tool-abortion-section-2018.pdf> (accessed 10 May 2020).

⁸⁰ B Ganatra and others 'Global, regional and sub-regional classification of abortions by safety, 2010 – 2014: estimates from a Bayesian hierarchical model' (2017) *Lancet* 2372 to 2381 in World Health Organisation 'Safe Abortion: Technical and Policy Guidance for Health Systems' 76 (2012).

⁸¹ H Gasser International Humanitarian Law: An introduction, in Humanity for all: the international Red Cross and Red Crescent Movement H Haug (ed) (1993) 555 in ICRC *How is the term 'armed conflict' defined in International Humanitarian Law?* International Committee of the Red Cross (ICRC) Opinion Paper (2008) 3.

⁸² ICRC (n 81).

to a conflict. It also encompasses trafficking in persons for the purpose of sexual violence or exploitation in conflict situations.⁸³

⁸³ United Nations (n 1).

CHAPTER TWO: INTERNATIONAL AND REGIONAL HUMAN RIGHTS OBLIGATIONS RELATED TO VIOLENCE AGAINST WOMEN AND GIRLS IN CONFLICT SITUATIONS.

2.1 Introduction

Generally, in conflict situations both international human rights and humanitarian law apply although both laws have conceptual similarities. Whilst human rights law applies to all situations, international humanitarian law on the other hand only applies to international and internal armed conflict.⁸⁴

Prior to the advent of the Second World War, these laws were dealt with as two distinct bodies of law, each applying in different situations.⁸⁵ This approach has been abandoned over time. Presently within academic and judicial circles there seems to be a consensus that both human rights law and international humanitarian law apply during armed conflict. According to some authors⁸⁶ this stance has been taken by various academic commentators,⁸⁷ the International Court of Justice⁸⁸ and regional and national courts in various jurisdictions⁸⁹ as well as quasi-judicial⁹⁰ bodies with limited opposition⁹¹.

Article 1 of the Geneva Convention imposes an obligation on all parties to ensure implementation of the law and also assist other states to do same.⁹² Since the evolution of human rights and reproductive rights, governments increasingly face a variety of obligations, including specific

⁸⁴ L Doswald-Beck 'International humanitarian law: A means of protecting human rights in time of armed conflict' (1989) 1 *African Journal of International & Comparative Law* 615.

I Siatitsa & M Titberidze 'Human rights in armed conflict: Ten years of affirmative state practice within United Nations resolutions' (2012) 3 *Journal of International Humanitarian Legal Studies* 233-262.

⁸⁵ Doswald-Beck (n 84).

⁸⁶Siatitsa & Titberidze (n 84).

⁸⁷ L Doswald-Beck *Human rights in times of conflict and terrorism* (2011) 5-9.

C Droegge 'The interplay between international humanitarian law and international human rights law in situations of armed conflict' (2007) 40 *Israel Law Review* 310.

F Hampson & I Salama 'The relationship between human rights law and international humanitarian law' Working paper of the UN Sub-Commission on the Promotion and Protection of Human Rights, UN Doc. E/CN. 4/2005/14 (2005).

L Doswald-Beck & S Vite 'International humanitarian law and human rights law' (1993) 33(293) *International Review of the Red Cross Archive* 94-119.

⁸⁸ Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, ICJ (8 July 1996) para 25.

Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ (9 July 2004) para 106.

DRC v Uganda, ICJ [2005] para 216.

⁸⁹ *Isayeva, Yusupova & Bazayeva v Russia* ECHR (6 July 2005) Application No 57950/00.

Loizidou v Turkey ECHR (18 December 1996) Application No 15318/89.

Bamaca Velasquez v Guatemala IACHR (25 November 2000).

Al-Skeini & others v Secretary of State for Defence (2007) UKHL (12 December 2007) 58 House of Lords.

⁹⁰ Human Rights Committee, *General Comment No. 29 on States of Emergency* para 3. CCPR/C/21/Rev.1/Add. 11 (2001).

Concluding observations of the Committee on Economic, Social & Cultural Rights, Israel para 12. E/C.12/1/Add.69 (2001).

⁹¹ Doswald-Beck (n 84) 234.

⁹² Art 55 & 59-63, Fourth Geneva Convention.

Art 69 Protocol I 1977.

obligations that can be applied to particular circumstances and core, immediate and long-term obligations to protect women's reproductive health.⁹³ Based on this position, it is inevitable that during conflict situations where women and girls are victims of sexual violence resulting in pregnancy, questions related to the scope of government obligations under international and regional human rights law, as well as municipal law and their adequacy would arise.

Although such questions cannot be answered in-depth within the scope of this study, this chapter, examines gender-based and sexual violence in conflict situations. It examines the scope and significance of the relevant international and regional human rights instruments to show the extent of state obligations in this regard. It also examines the legal norms relating to state obligations thus providing the framework for further discussions relating to its commitments in this regard.

2.2 Gender-based and sexual violence in conflict and post-conflict situations

Generally, although the effects of armed conflict touch everyone, women and girls have historically been recognised as particularly vulnerable as a result of their sex and status in society.⁹⁴ Acts of sexual violence committed against women and girls are a widespread phenomenon⁹⁵ although men are sometimes victims.⁹⁶

On the international scene, recent years have seen the relationship between gender-based violence and armed conflicts receiving much attention.⁹⁷ Throughout the world women and girls in conflict settings continue to experience acts of gender-based violence and other human rights abuses during armed conflict.⁹⁸

2.3 State obligations under international human rights law

⁹³ N Aniekwu *Reproductive Health Law: A jurisprudential analysis of gender specific human rights for the African region* (2011) 31.

⁹⁴ F Terrell 'Unofficial accountability: A proposal for the permanent women's tribunal on sexual violence in armed conflict' (2005) 15 *Texas Journal of Women and the Law* 108.

⁹⁵ United Nations 'Report of the Special Rapporteur, Ms Radhika Coomaraswamy on Violence Against Women, its causes and consequences' UN Doc. E/CN.4/1998/54, para 8.

⁹⁶ Terrell (n 94) 109.

⁹⁷ R Manjoo & C McRaith 'Gender-based violence and justice in conflict and post-conflict areas' (2011) 44 *Cornell International Law Journal* 12.

⁹⁸ United Nations Economic and Social Council Commission on Human Rights 'Report of the Special Rapporteur, Ms Radhika Coomaraswamy on Violence Against Women, Integration of the Human Rights of Women and the Gender Perspective' U.N. Doc. E/CN.4/2001/73.

The UNSC having noted the systematic and widespread rampancy of sexual violence in conflict situations and its debilitating impact has taken steps to ensure that this problem is addressed.⁹⁹ In 2000 in a first, it adopted Resolution 1325 reaffirming the important role of women in the prevention and resolution of conflicts, peace negotiations, peace-building, peacekeeping, humanitarian response and in post-conflict reconstruction.¹⁰⁰ It urged governments all over the world to see women as key players in conflict resolution and ensure that special measures are taken to protect them from sexual and gender-based violence in conflict situations.¹⁰¹

Also, recognising the rampancy of sexual violence during conflict¹⁰² the UNSC passed Resolutions 1960¹⁰³ and 2106¹⁰⁴ which respectively provide an accountability system for stopping conflict-related sexual violence.¹⁰⁵ In addition, the various United Nations treaty monitoring bodies on reproductive rights have emphasised States obligations for women and girls in conflict situations.¹⁰⁶ They believe these obligations are rooted in the fact that many reproductive rights stem from the human rights to health,¹⁰⁷ privacy¹⁰⁸ and the right to decide freely the number and spacing of children.¹⁰⁹

Both the Committee on Economic, Social and Cultural Rights and the Committee on the Elimination of Discrimination Against Women (CEDAW) have indicated that women's right to health include their sexual and reproductive health and reiterated States commitment in this regard.¹¹⁰ Also, the CEDAW Committee has urged states to ensure that priority attention is given to the provision of sexual and reproductive health services including safe abortion services in conflict situations.¹¹¹ According to

⁹⁹ Peace Women 'Security Council Resolution 1960' <https://www.peacewomen.org/SCR-1960> (accessed 13 December 2019).

¹⁰⁰ S/RES/1325 (2000).

¹⁰¹ Office of the Special Adviser on Gender Issues and Advancement of Women 'Landmark resolution on women, peace and security' https://www.un.org/women_watch/osagi/wps/#resolution (accessed 21 February 2020).

UNITAR Women, Leadership and Peacebuilding Online Training Course Module 1 Narrative 20.

¹⁰² Peace Women 'Security Council Resolution 1960' <https://www.peacewomen.org/SCR-1960> (accessed 13 December 2019).

¹⁰³ S/2010/604.

¹⁰⁴ S/RES/2106 (2013).

¹⁰⁵ UN Women 'Security Council' <https://www.unwomen.org/en/how-we-work/intergovernmental-support/major-resolutions/security-council> (accessed 10 December 2019).

¹⁰⁶ Centre for Reproductive Rights *Breaking Ground 2020: Treaty Monitoring Bodies on Reproductive Rights* (2019) 4.

¹⁰⁷ Art 12 ICESCR.

Art 12 (1) CEDAW provides for the obligation of States to ensure that women have appropriate health care services.

Art 24 (1)(2) CRC.

¹⁰⁸ Art 17 (1)(2) ICCPR.

¹⁰⁹ (n 107).

¹¹⁰ P Hunt 'Report of the special rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'

<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N06/519/97/PDF/N0651997.pdf?OpenElement> (accessed on 10 December 2019).

¹¹¹ CEDAW Committee (n 33).

CEDAW Committee, *Concluding Observations: Central African Republic*, para 40(b), UN Doc. CEDAW/C/CAF/CO/1-5 (2014).

CEDAW Committee, *Concluding Observations: Democratic Republic of the Congo*, paras 35-36, UN Doc. CEDAW/C/COD/CO/5 (2006).

the Committee, in humanitarian settings a human rights-based approach to sexual and reproductive health requires the following:

- i. ensuring available, accessible, adequate, and quality services without discrimination.
- ii. ensuring that those who seek services are able to make informed and autonomous decisions, without spousal, parental, or third-party consent.
- iii. establishing systems for maintaining privacy and confidentiality.
- iv. access to justice and effective remedies when individual rights are violated.¹¹²

Similarly, the Human Rights Committee has been consistent in urging state parties to the International Covenant on Civil and Political Rights to review their restrictive abortion laws in order to guarantee abortion access for victims of sexual violence as such restrictions may result in unsafe abortion.¹¹³

2.4 State obligations under the African regional human rights system

At regional level, African human rights bodies have recognised that human rights apply during peace and war time.¹¹⁴ In addition, they have been active in making recommendations urging states to ensure fulfilment of their obligations related to the protection of women and girls in conflict situations.¹¹⁵

Article 60 of the African Charter encourages the African Commission to be guided by the African Charter as well as other international human rights documents adopted by state parties. In *Doebbler v Sudan*¹¹⁶ the African Commission arrived at its decision by relying partially on the jurisprudence of other regional human rights bodies. Also, in *Law Office of Ghazi Suleiman v Sudan*¹¹⁷ the relevance of the provisions of article 60 of the African Charter in applying jurisprudence from the European Court on Human Rights and the Inter-American Court on Human Rights was highlighted. In this case, the Commission arriving at its decision noted that article 60 of the Charter provides that the African Commission shall draw inspiration from international human rights law.¹¹⁸

¹¹² CEDAW Committee (n 111).

CEDAW Committee, *General Recommendation No. 33 on women's access to justice*, para. 19(d), U.N. Doc. CEDAW/C/GC/33 (2015).

¹¹³ Human Rights Committee, *Concluding observations on the fifth periodic report of Cameroon* CCPR/C/CMR/CO/5 (2017).

¹¹⁴ ACHPR *Addressing human rights issues in conflict situations: Towards a more systematic and effective role for the African Commission on Human and Peoples' Rights* (2019) 31-66.

¹¹⁵ ACHPR (n 114).

¹¹⁶ Communication 236/2000 – 16th Annual Activity Report in AmSHER 'The violations of human rights on the basis of sexual orientation and gender identity in the Federal Republic of Nigeria under the African Charter on Human and Peoples' Rights' Report submitted in response to the Periodic Report of the Federal Republic of Nigeria presented at the 50th Ordinary Session of the African Commission, October – November 2011.

¹¹⁷ Communication No 288/99 (2003) – 16th Annual Activity Report, 48 – 50.

¹¹⁸ Communication No 288/99 (2003) (n 114), para 41 to 52.

Similarly, in *DRC v Burundi & Ors*¹¹⁹ the African Commission took recourse to the provisions of Articles 60 and 61 of the African Charter on Human and Peoples' Rights in arriving at its decision in the case.¹²⁰ In *Egyptian Initiative for Personal Rights and Interights v Egypt*¹²¹ the African Commission emphasised states obligation to ensure protection of women from sexual and gender-based violence particularly in the public sphere whilst drawing inspiration from other regional human rights bodies.

Indeed, the African Commission has adopted a progressive approach aimed at ensuring the protection of the human rights of women.¹²² This is evidenced by the nature of its laws and policies. Article 2 of the African Charter provides that every person regardless of sex has rights and is entitled to enjoy them.¹²³ The Charter urges states to eliminate discrimination against women and ensure protection of their rights.¹²⁴ Furthermore, article 3(1)(d) of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa imposes obligations on states to respect and ensure protection of the human rights of internally displaced persons.¹²⁵

In 2014 the African Commission on Human and People's Rights adopted Resolution 283 on the Situation of Women and Children in Armed Conflict urging States to ensure provision of comprehensive support to women and children affected by war through various means including legislation, provision of redress and support to survivors, etc.¹²⁶ Similarly article 14(2)(c) of the Maputo Protocol¹²⁷ encourages State parties to ensure that all appropriate measures are taken which are aimed at protecting the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest and where the continued pregnancy would endanger the physical and mental health of the mother.

In 2017 the African Commission developed a promising norm known as the Guidelines on Combating Sexual Violence and its Consequences in Africa. The guideline which was developed following the adoption of Resolution 365¹²⁸ by the Commission is aimed at guiding and supporting Member States of the African Union in the effective implementation of their commitments and obligations to combat sexual violence and its consequences.¹²⁹

¹¹⁹ Communication No 227/99 (2003).

¹²⁰ (n 119) para 86.

¹²¹ Communication No 323 (2006).

¹²² AU Echo: The Newsletter of the African Union Commission 2016: *African year of human rights with a focus on the rights of women* at 4-8.

¹²³ ACHPR.

¹²⁴ Art 18(3) ACHPR.

¹²⁵ The Kampala Convention.

¹²⁶ Resolution 283 on the Situation of Women and Children in Armed Conflict, <http://www.achpr.org/sessions/55th/resolutions/283/>.

¹²⁷ The Maputo Protocol.

¹²⁸ ACHPR/Res 365 (EXT.OS/XX1) 2017.

¹²⁹ African Commission on Human and People's Rights *Guidelines on combatting sexual violence and its consequences in Africa* (2017) 6.

Since 2006 among countries experiencing humanitarian crises or hosting displaced populations in Africa, Burkina Faso, Chad, Ethiopia, Kenya, Mali and Sierra Leone have all liberalised their abortion laws.¹³⁰ In Chad the restrictive laws criminalising abortion except when done to save a woman's life was expanded to include situations of sexual violence.¹³¹

2.5 Nigeria: Constitutional provisions on human rights

The Nigerian Constitution¹³² appears very active in the protection of international human rights as chapter IV¹³³ and section 46 of the Constitution specifies the procedures to be followed for the enforcement of human rights. Also, section 42 of the Constitution specifically prohibits discrimination on the grounds of sex. Despite these provisions, the government appears passive in terms of recognition of its gender-specific human rights obligations.¹³⁴ This flaw is however compensated for to an extent by virtue of the enactment of key legislations such as the Violence Against Persons (Prohibition) Act, 2015, the Sexual Offences Act, 2013 and the National Health Act.¹³⁵

Another obvious flaw under the Constitution is the denial of the right of the individual to health. Although section 17(3)(d) of the Constitution guarantees the right of an individual to health,¹³⁶ section 6(6)(c) of the Constitution renders this right non-justiciable.¹³⁷ This non-justiciability clause has been criticised in both academic and judicial circles.¹³⁸ An analysis of these constitutional provisions reflects the seeming lack of government commitment regarding some human rights provisions.¹³⁹ Although many of the treaty documents which affirm the right to health have been ratified, issues of domestication and implementation remains.¹⁴⁰

¹³⁰T McGinn & S Casey 'Why don't humanitarian organizations provide safe abortion services?' (2016) 10 *Conflict & Health* 4.

¹³¹ Medecins Sans Frontieres 'Chad: Control over women' *Blogs From Doctors Without Borders* 29 November 2017 <https://blogs.msf.org/bloggers/liza/chad-control-over-women> (accessed 21 May 2020).

¹³² Constitution of the Federal Republic of Nigeria, 1999.

¹³³ Sec 33-46.

¹³⁴ Aniekwu (n 93) 103.

¹³⁵ Some state laws on women's health and gender issues include, Ogun State's Female Circumcision and Genital Mutilation (Prohibition) Law, 2000. There is also the Rivers State Reproductive Health Service Law, No 3 of 2003 etc.

¹³⁶ Chapter II Fundamental Objectives and Directive Principles of State Policy. The whole of this chapter of the Nigerian Constitution spells out individuals political, economic, social, cultural and developmental rights.

¹³⁷ Sec 6(6)(c) of the Constitution of the Federal Republic of Nigeria.

AG Ondo State v AG Federation (2002) 9 NWLR (pt 772).

¹³⁸O Ikpeze 'Non-justiciability of Chapter II of the Nigerian Constitution as an impediment to economic rights and development' (2015) 18 *Developing Country Studies* 48.

T Olaiya 'Interrogating the non-justiciability of constitutional directive principles and public policy failure in Nigeria' (2015) 8 *Journal of Politics and Law* 23-33.

FRN v Osahon (2006) 10 NWLR (pt 674) 264.

¹³⁹ Aniekwu (n 93) 104.

¹⁴⁰ P Ademola *The role of the Constitution in the domestic application of international human rights norms and standards with particular reference to women* in A Abiola ed. *Gender Gaps in the 1999 Constitution in Nigeria* (2002) Women Advocates Research and Documentation Center Proceedings in N Aniekwu (n 94) 102.

2.6 Conclusion

This chapter focused on the scope and significance of international and regional human rights laws and norms on the protection of women and girls in conflict situations. It gives an overview of the applicable laws and highlights states obligations in this regard. The analysis demonstrates the lack of progress within Nigeria's domestic municipality. It reveals the paucity of laws which directly address the reproductive rights of women in conflict situations in Nigeria's North-East and Middle Belt regions.¹⁴¹

¹⁴¹S Brechenmacher 'Stabilizing Northeast Nigeria after Boko Haram' (2019) *Carnegie Endowment for International Peace Working Paper 1*.

CHAPTER THREE: THE NIGERIAN LEGAL FRAMEWORK ON ABORTION AND ITS HUMAN RIGHTS IMPLICATIONS FOR WOMEN AND GIRLS IN CONFLICT AND POST-CONFLICT SITUATIONS

3.1 Introduction

The analysis contained in the previous chapter provided an insight into states obligations under international and regional human rights norms and standards to ensure reproductive rights protection in conflict situations. The paucity of Nigerian legislation which directly address the rights of women and girls in conflict situations was also highlighted.

Nigeria is a member state of the United Nations¹⁴² at the international level as well as the African Union¹⁴³ at the regional level and its laws on the face of it appear to have evolved from the days of British colonialism.¹⁴⁴ Despite this evolution¹⁴⁵ there has not been much changes in the laws¹⁴⁶ and most laws¹⁴⁷ and policies¹⁴⁸ laid down by the government are not being implemented.¹⁴⁹

This chapter analyses Nigeria's commitments to ensure reproductive rights protection in conflict situations. Also, the extent to which the various human rights instruments have been domesticated, internalised and applied are analysed highlighting their implications for women and girls in humanitarian settings.

¹⁴² United Nations *Member States*, <https://www.un.org/en/member-states/index.html> (accessed 1 June 2020).

¹⁴³ African Union *Member States*, https://au.int/en/member_states/countryprofiles2 (accessed 1 June 2020).

¹⁴⁴ Britannica *Independent Nigeria*, <https://www.britannica.com/place/Nigeria/Independent-Nigeria> (accessed 1 June 2020).

¹⁴⁵ C Okeke 'International law in the Nigerian legal system' (1996) 27 *California Western International Law Journal* 328 at 329.

¹⁴⁶ Sec 12(1) of the Constitution of the Federal Republic of Nigeria, 1999.

E Egede 'Bringing human rights home: An examination of the domestication of human rights treaties in Nigeria' (2007) 51(2) *Journal of African Law* 249-284.

C Okeke & M Anushiem 'Implementation of treaties in Nigeria: Issues, challenges and the way forward' (2018) 9(2) *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 216-228.

¹⁴⁷ Other gender-related laws include the Violence Against Persons (Prohibition) Act 2015, Sexual Offences Act 2013, the HIV/AIDS Anti-Discrimination Law (2014) etc.

¹⁴⁸ Examples of state laws include the Nigerian National Municipal Law on AIDS 2013; the Bauchi, Kano and Gombe States Withdrawal of Girls from School for Marriage (Prohibition) Laws; the Cross River, Akwa Ibom, Delta, Edo, Osun, Rivers, Bayelsa and Ogun states laws criminalising female genital mutilation etc.

E Ikenye 'Analysis of current policy frameworks for the major reproductive health indices in Nigeria: Main indicators of capacity and willingness for reproductive rights protection within the Nigerian legal system' (2014) Unpublished paper.

¹⁴⁹ For example, the CEDAW is yet to be domesticated whilst the ICPD, Programme of Action and the Beijing Platform for Action are yet to be implemented.

3.2 Nigeria's obligations to ensure protection of the reproductive health and rights of women and girls in conflict situations under international and regional human rights standards

3.2.1 Relevant international and regional human rights instruments

3.2.1.1 International human rights instruments

Nigeria is a party to the nine core human rights treaties including, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of the Child, the Convention on the Rights of Persons with Disabilities, Convention for the Protection of All Persons from Enforced Disappearance, the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families and the International Convention on the Elimination of All Forms of Racial Discrimination.

Amongst the treaties, the Convention on the Elimination of All Forms of Discrimination Against Women remains key in terms of women's health and rights protection. The CEDAW Committee, General Recommendation No. 24 affirms that access to health care, reproductive health inclusive, is a basic right and enjoins state parties to fulfil their obligations under article 12. The Committee also called for the review of discriminatory legislations which deny women access to certain reproductive health services.¹⁵⁰

The Committee went further to address State obligations related to ensuring protection of women in conflict situations. It urged states to take measures to ensure the development and dissemination of standard operating procedures and referral pathways to link security actors with service providers on gender-based violence, including one-stop shops offering medical, legal and psychosocial services for sexual violence survivors.¹⁵¹ Despite these recommendations, implementation has been slow in Nigeria.

Also, the International Conference on Population and Development (ICPD), Programme of Action¹⁵² and the Beijing Declaration and Platform for Action¹⁵³ call on state parties to consider law and policy reform that would ensure the protection of reproductive health and rights especially for women.¹⁵⁴ Paragraph 106(j) of the Beijing Platform for Action imposes an obligation on states to recognise and deal with the health impact of unsafe abortion as a major public health concern. This

¹⁵⁰ CEDAW Committee, *CEDAW General Recommendation No 24; Article 12 of the Convention (Women and Health)*, 1999, A/54/38/Rev. 1, chap I.

¹⁵¹ CEDAW Committee, *CEDAW General Recommendation No 30 on women in conflict prevention, conflict and post-conflict situations*, 1 November 2013, CEDAW/C/GC/30, para 37.

¹⁵² United Nations, Report of the International Conference on Population and Development, UN Doc. N.Y.A/Conf.171/13 Rev.1.

¹⁵³ United Nations, Report of the Fourth World Conference on Women, UN Doc. N.Y.A/Conf.177/20, 1995.

¹⁵⁴ Aniekwu (n 93) 3.

implies that states have to fulfil their obligations to ensure provision of essential health care services, including abortion.

3.2.1.2 Regional human rights instruments

Nigeria is a party to various regional human rights treaties which impose related obligations on state parties. Additionally, the African Commission on Human and Peoples' Rights has in place established guidelines aimed at combating sexual violence and its consequences. Under the Guidelines States have an obligation to adopt legislative, regulatory and other necessary measures aimed at protecting victims of sexual violence for purposes of ensuring access to sexual and reproductive health services, including abortion.¹⁵⁵

Also, the Commission noting the inaction of countries towards domesticating the relevant regional human rights treaties adopted General Comment No 2¹⁵⁶ with the aim of reversing this trend. The General Comment provides interpretive guidance on the overall and specific obligations of State Parties towards promoting the effective domestication and implementation of article 14 of the Maputo Protocol. It emphasises states obligations to respect rights including refraining from hindering either directly or indirectly women's rights as well as ensuring the provision of information on family planning/contraception and safe abortion services which should be available, accessible and of good quality.¹⁵⁷ Despite these guidelines, Nigeria is yet to fulfil its obligations in this regard.

3.2.2 Domestic legal and policy frameworks on reproductive health and rights protection in Nigeria

The legal framework on reproductive health and rights protection in Nigeria centres around the provisions of the 1999 Constitution, the HIV/AIDS (Anti-Discrimination) Act, 2014, the Sexual Offences Act, 2013, the Violence Against Persons (Prohibition) Act, 2015, national policies and state laws on reproductive health.

The Constitution sets out fundamental objectives and directive principles of state policy which though not judicially enforceable are required to be applied by all organs of government.¹⁵⁸ One of the listed objectives aimed at guaranteeing social justice can be interpreted to include ensuring the reduction of maternal mortality.¹⁵⁹ Studies have revealed that the incidence of maternal mortality affects some Nigerian women more than others due to factors such as geographical location (rural versus urban, north

¹⁵⁵ African Commission on Human and Peoples' Rights *Guidelines on combating sexual violence and its consequences in Africa* adopted by the Commission during its 60th Session held in Niamey, Niger Republic from 8 - 22 May, 2017, para 24 & 30.

¹⁵⁶ African Commission on Human and Peoples' Rights *General Comment No 2 on Article 14(1)(a), (b), (c) and (f) and Article 14(2)(a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*.

¹⁵⁷ ACHPR (n 155), para 42.

¹⁵⁸ Sec 13, Constitution of the Federal Republic of Nigeria 1999.

¹⁵⁹ Sec 14(1) Constitution of the Federal Republic of Nigeria 1999.

versus south), academic background and financial status¹⁶⁰ in contravention of the principles contained in section 14(1) of the Fundamental Objectives.

Under the Constitution, section 33(1)(d) guarantees the right to life.¹⁶¹ Similarly, Chapter II of the Constitution¹⁶² establishes a state policy of ensuring adequate provision of medical and health facilities for all persons.¹⁶³ Under international human rights law, the International Covenant on Economic, Social and Cultural Rights, contains the most comprehensive provisions regarding the right to health.¹⁶⁴ The Covenant in article 12 guarantees the right of all individuals to the enjoyment of the highest attainable standard of physical and mental health and these rights continue to apply during situations of armed conflict.¹⁶⁵

Although the right to health under the Nigerian Constitution is non-justiciable, some other constitutional provisions can however be interpreted as alluding to this right. For example, section 17 of the Constitution imposes an obligation on the government to direct its policies towards ensuring that adequate medical and health facilities are available for all persons. These provisions clearly recognise that the rights to life, sanctity of the human person and human dignity provided for under the Constitution are clearly connected to the physical and mental health of all persons.¹⁶⁶ Moreso, the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act¹⁶⁷ provides for the enforceability of the provisions of the African Charter in Nigeria.

In *Social & Economic Rights Action Center (SERAC) & the Center for Economic and Social Rights v Nigeria*¹⁶⁸ the African Commission on Human and Peoples' Rights found the government in violation of the right to health as guaranteed under article 16 of the African Charter. Similarly, in *Gbemre v Shell Petroleum Development Company & Others*¹⁶⁹ the Court found the defendants in gross violation of the plaintiff's fundamental right to life and dignity of the human person as enshrined in the relevant Sections of the Nigerian Constitution and the African Charter.

¹⁶⁰ K Harrison 'Maternal mortality in Nigeria: The real issues' (1997) 1 *African Journal of Reproductive Health* 7-13.

Y Adamu and others 'Maternal mortality in Northern Nigeria: A population-based study' (2003) 109 *European Journal of Obstetrics & Gynaecology & Reproductive Biology* 153-159.

E Okereke and others 'Knowledge of safe motherhood among women in rural communities in northern Nigeria: Implications for maternal mortality reduction' (2013) 10 *Reproductive Health* 57.

¹⁶¹ Constitution of the Federal Republic of Nigeria 1999.

¹⁶² Sec 17(3)(d) of the Constitution of the Federal Republic of Nigeria 1999.

¹⁶³ Art 12(1) ICESCR.

Art 14 Maputo Protocol.

¹⁶⁴ Committee on Economic, Social and Cultural Rights *General Comment No 14 on the right to the highest attainable standard of health* Para 2 U.N.Doc. E/C.12/2000/4 (2000).

¹⁶⁵ Center for Reproductive Rights (n 26) 13.

¹⁶⁶ Aniekwu (n 93) 137.

¹⁶⁷ Banjul Charter Enforcement Act, 2004.

¹⁶⁸ Communication No 155/96 (2001).

¹⁶⁹ Suit No. FHC/B/CS/53/05 Nigeria (Unreported), 2005. (2005) AHRLR 151 (NgHC 2005).

3.2.3 Nigeria's commitment's to ensure reproductive health and rights protection for women and girls in conflict and post-conflict situations

Internationally, it has been recognised that sexual violence during conflict violates lives and destroys families and communities.¹⁷⁰ Thus, states have an obligation to ensure fulfilment of their human rights commitments, including ensuring the provision of services, care and treatment for victims of sexual violence in conflict.¹⁷¹ Article 3(1)(d) of the Kampala Convention imposes an obligation on states to respect and ensure protection of the human rights of internally displaced persons. Also, human rights treaty bodies have urged states to review their restrictive abortion laws for victims of sexual violence in conflict situations.¹⁷²

The question which usually arises during arguments in lay circles is whether there is a right to abortion under human rights law. Whilst the right to abortion is not expressly provided in any human rights document, it can however be subsumed under the rights to life, health, privacy and non-discrimination.¹⁷³ The Human Rights Committee in General Comment No. 36 on the right to life, whilst recognising that states may adopt measures designed to regulate the voluntary termination of pregnancy emphasized that such restrictions must not jeopardize their lives, subject them to physical or mental pain or suffering which violates article 7, discriminate against them or arbitrarily interfere with their privacy. The Committee also urged states to ensure abortion access where the life and health of the pregnant woman or girl is at risk and where carrying the pregnancy to term would cause substantial pain or suffering especially where the pregnancy is the result of rape or incest or is not viable.¹⁷⁴

The various recommendations which have been formulated by treaty bodies over the years clearly set out the obligations of states including the Nigerian government to ensure protection of the

¹⁷⁰ Statement of the African Union Commissioner for Social Affairs, Amira Elfadil on International Day for the Elimination of Sexual Violence in Conflict, 19 June, 2020. African Union 'Press Releases' 19 June 2020 <https://au.int/en/pressreleases/20200619/statement-amira-elfadil-mohammed-elfadil-international-day-elimination-sexual> (accessed 21 June 2020).

¹⁷¹ Statement of the African Union Commissioner for Social Affairs (n 170).

¹⁷² Human Rights Committee, *Concluding observations on the fifth periodic report of Cameroon* CCPR/C/CMR/CO/5 (2017). CEDAW Committee, *General Comment No. 30 on women in conflict prevention, conflict and post-conflict situations*, para 52 (c) UN Doc. CEDAW/C/GC/30 (2013).

G Olaide & T Aderibigbe 'Justification of women's right of access to safe and legal abortion in Nigeria' (2014) 7 *African Journal of Legal Studies* 185.

¹⁷³ Aniekwu (n 93).

Centre for Reproductive Rights *Press release: UN Human Rights Committee asserts that access to abortion and prevention of maternal mortality are human rights* 31 October 2018, <https://reproductiverights.org/press-room/un-human-rights-committee-asserts-access-abortion-and-prevention-maternal-mortality-are> (accessed 15 June 2020).

¹⁷⁴ Human Rights Committee, *General Comment No. 36 on the right to life (Art. 6), (124th Session 2018)*, UN Doc. CCPR/C/GC/36 (2018) para 8.

human rights of women and girls in conflict situations.¹⁷⁵ These documents though not binding are considered soft law and serve as a guide for states.¹⁷⁶

Within the African region, article 60 of the African Charter¹⁷⁷ provides that the African Commission shall draw inspiration from the provisions of the various human rights instruments that have been adopted in the field of human rights. In *Doebbler v Sudan*¹⁷⁸ the African Commission arrived at its decision by relying partially on the jurisprudence of other regional human rights bodies. Similarly in the case of *Law Office of Ghazi Suleiman v Sudan*¹⁷⁹ the relevance of the provisions of Article 60 of the African Charter in applying jurisprudence from the European Court on Human Rights as well as the Inter-American Court on Human Rights was highlighted.

Since 2006 among countries experiencing humanitarian crises, Burkina Faso, Chad, Colombia, Ethiopia, Kenya, Mali and Sierra Leone have all liberalised their abortion laws.¹⁸⁰ In Chad the hitherto restrictive laws criminalising abortion except when done to save a woman's life has been expanded to include situations where a woman is a victim of sexual violence.¹⁸¹ Despite these developments, Nigeria has failed to fulfil its obligations¹⁸² to ensure human rights protection of the rights relating to life¹⁸³, health¹⁸⁴, freedom from cruelty and/or torture¹⁸⁵, privacy¹⁸⁶ and non-discrimination.¹⁸⁷

3.3 The Nigerian legal framework on abortion

In many developing countries including Nigeria, many women and girls know little or nothing about contraception and have limited access to contraceptive methods.¹⁸⁸ As a result, many may experience

¹⁷⁵ OHCHR *Key Issues: Information series on sexual and reproductive health and rights – abortion* [Abortion_WEB.pdf&ved=2ahUKewjWyLnOh5XqAhXJA2MBHQFBBqwQFjAEegQIBhAB&usg=AOvVaw1dTTBhEzA3CJyvu3gnapDj](#) (accessed 22 June 2020).

¹⁷⁶ D Shelton 'The legal status of normative pronouncements of human rights treaty bodies' in H Hestermeyer (eds) *Coexistence, cooperation and solidarity* (2 volumes) (2012) 553-575.

¹⁷⁷ ACHPR.

¹⁷⁸ Communication 236/2000 – 16th Annual Activity Report in AmSHER 'The violations of human rights on the basis of sexual orientation and gender identity in the Federal Republic of Nigeria under the African Charter on Human and Peoples' Rights' Report submitted in response to the Periodic Report of the Federal Republic of Nigeria at the 50th Ordinary Session of the African Commission, 2011.

¹⁷⁹ Communication 288/1999 – 16th Annual Activity Report, 48 – 50.

¹⁸⁰ T McGinn & S Casey 'Why don't humanitarian organizations provide safe abortion services?' (2016) 10 *Conflict & Health* 4.

¹⁸¹ Medecins Sans Frontieres, Doctors Without Borders Blog *Chad: Control over women*, 29 November 2017 <https://blogs.msf.org/bloggers/liza/chad-control-over-women> (accessed 21 May 2020).

¹⁸² Art 14(2)(c) Maputo Protocol.

¹⁸³ Art 4 ACHPR.

¹⁸⁴ Art 16 ACHPR.

¹⁸⁵ Art 5 ACHPR.

¹⁸⁶ Art 17 ICCPR.

¹⁸⁷ Art 2 ACHPR.

¹⁸⁸ National Population Commission (Nigeria) & ORC Macro 'Nigeria Demographic and Health Survey: Table 5.4' 2003, 67.

unwanted pregnancies.¹⁸⁹This situation is usually compounded by lack of education and access to contraceptive information particularly in rural areas.¹⁹⁰This situation, coupled with the restrictive abortion laws, the lack of access to safe methods for the termination of pregnancy and the accompanying social stigma may result in many women and girls resorting to procuring illegal abortions in unsafe conditions with grave implications for their physical and mental health.¹⁹¹

Sections 228 to 230 of the Criminal Code¹⁹²replicated in sections 232 to 236 of the Penal Code¹⁹³criminalises abortion unless where performed to save the life of a woman. The Criminal Code also stipulates a term of imprisonment of fourteen years for abortion service providers¹⁹⁴ and seven years imprisonment for a woman who procures an abortion.¹⁹⁵ Also, a person who unlawfully assists in procuring an abortion is liable to three year's imprisonment¹⁹⁶.

These provisions are replicated in sections 232 to 236 of the Penal Code¹⁹⁷ which also stipulates a term of fourteen years imprisonment for abortion providers where the woman dies.¹⁹⁸ It also provides that any act which causes the quick death of an unborn child amounts to culpable homicide and stipulates a term of life imprisonment amongst other penalties for offenders. Due to these laws, women frequently undergo unsafe abortions at high risks to their physical and mental health.¹⁹⁹

Studies reveal that about six hundred thousand illegal abortions are performed annually in Nigeria.²⁰⁰ Furthermore, up to twenty thousand maternal deaths are estimated to have resulted from complications arising from unsafe abortions.²⁰¹ Between 21% and 49% of women who have undergone such procedures require post-abortion care due to complications arising from the procedure.²⁰²

¹⁸⁹ P Makinwa-Adebusoye, S Singh & S Audam 'Nigerian health professionals' perceptions about abortion practice' (1997) 23(4) *International Family Planning Perspectives* 155-161.

¹⁹⁰ E Monjok and others 'Contraceptive practices in Nigeria: Literature review and recommendation for future policy decisions' (2010) 1 *Open Access Journal of Contraception* 9.

B Afolabi and others 'Knowledge, non-use, use and source of information on contraceptive methods among women in various stages of reproductive age in rural Lagos, Southwest Nigeria' (2015) 6 *Open Access Journal of Contraception* 65.

A Bankole and others 'Barriers to safe motherhood in Nigeria' (2009) *Gutmacher Institute* 7-9.

¹⁹¹ Makinwa-Adebusoye, Singh & Audam (n 189).

A Walker 'Africa: Saving Nigerians from risky abortions' *BBC News* 7 April 2008, <http://news.bbc.co.uk/2/hi/africa/7328830.stm> (accessed 23 June 2020).

¹⁹² Criminal Code Act, 2004.

¹⁹³ Penal Code Act, 1990.

¹⁹⁴ Sec 228 Criminal Code Act.

¹⁹⁵ Sec 229 Criminal Code Act.

¹⁹⁶ Sec 230 Criminal Code Act.

¹⁹⁷ Sec 232 Penal Code Act.

¹⁹⁸ Sec 233 Penal Code Act.

¹⁹⁹ N Aniekwu 'Abortion and reproductive rights in Nigeria – A review of criminal laws and legislative policies' (2003) 2(1) *Annals of Biomedical Sciences* 1-10.

²⁰⁰ Centre for Reproductive Law and Policy *Report on Reproductive Rights: Moving Forward* (2002) 27.

²⁰¹ Population Council *1991 Report on Prevention of Morbidity and Mortality for Unsafe Abortions in Nigeria*.

²⁰² Safe Motherhood Inter-Agency Group *Statistics of Unsafe Abortion*, http://safemotherhood.org/init_facts.htm in Aniekwu (n 93) 92.

A Tinker and others 'Making motherhood safe' (1993) *World Bank Discussion Papers* 4.

The most frequent complications arising from unsafe abortions are incomplete abortion, sepsis, haemorrhage and intra-abdominal injury.²⁰³ Also, long-term health problems may include: chronic pelvic pain, pelvic inflammatory disease, tubal blockage and secondary infertility amongst others.²⁰⁴ The World Health Organisation has revealed that restrictive laws are associated with higher rates of unsafe abortion and correspondingly high mortality.²⁰⁵ Consequently ensuring access to safe legal abortions in specific circumstances is an important prerequisite to safeguarding the health of women and girls especially in conflict situations.

3.4 Human rights implications of Nigeria’s restrictive penal provisions on abortion for women and girls in conflict and post-conflict situations.

3.4.1 The current trends in Nigeria

Globally, the routine use of rape as a weapon of war has become an increasing area of concern during conflicts.²⁰⁶ Sexual violence during conflict is used against civilians to demoralise, destroy, terrorise and even change the ethnic compositions of entire communities²⁰⁷. In 2009, the widespread and systematic cases of sexual violence perpetrated against women and girls during armed conflicts was highlighted by the United Nations Secretary-General in his report to the Security Council.²⁰⁸

The UNSC noting its systematic and widespread rampancy has taken steps to ensure that this problem is addressed.²⁰⁹ The Human Rights Committee in General Comment No 28²¹⁰ highlighted the importance of taking measures to protect women from all forms of gender-based violence, including sexual violence during conflict.

In Nigeria, since the Boko Haram conflict began in 2009 more than 2.2 million persons have been internally displaced with over 20,000 civilians killed and as many as 7,000 women and girls

²⁰³ World Health Organization *Abortion: A Tabulation of Available Information* (1997) 3rd ed. Geneva in *Care for post-abortion complications: Saving women’s lives* Population Reports, Volume 24, No 2, September 1997 in World Health Organization *Address unsafe abortion* 7 April 1998 World Health Day 1.

²⁰⁴ *Care for post-abortion complications: Saving women’s lives* Population Reports, Volume 24, No 2, September 1997 in World Health Organization (n 203) 1.

²⁰⁵ World Health Organization (n 203) 2.

²⁰⁶ C Clifford *Presentation at the 7th Global Conference on violence and the contexts of hostility: Rape as a weapon of war and its long term effects on victims and society* 5-7 May, 2008, Hungary, <http://ts-si.org/files/BMJCliffordPaper.pdf> in Global Justice Center *Brief on the right to an abortion for girls and women raped in armed conflict: States’ positive obligations to provide non-discriminatory medical care under the Geneva Conventions* (2011).

²⁰⁷ A Radhakrishnan and others ‘Protecting safe abortion in humanitarian settings: overcoming legal and policy barriers’ (2017) 25 *Reproductive Health Matters* 40.

²⁰⁸ Report of the Secretary-General pursuant to Security Council Resolution 1820 (15 July 2009), UN Doc. S/2009/362 (2009).

²⁰⁹ United Nations Department of Peace Operations *Policy on United Nations field missions: Preventing and responding to conflict-related sexual violence* (2020) Unclassified 5.

Peace Women ‘Security Council Resolution 1960’ <https://www.peacewomen.org/SCR-1960> (accessed 13 December 2019).

²¹⁰ Human Rights Committee *General Comment No 28: Article 3 on the Equality of rights between men and women* para 8, UN Doc. HRI/GEN/1/Rev. 9 (Vol. I) (2008).

abducted. Also more than half of the internally displaced population are women and girls²¹¹ many of whom have been subjected to a myriad of reproductive rights violations including early and forced marriage, sexual and gender-based violence, unsafe abortions, avoidable maternal deaths and injuries etc.²¹² A study conducted by the African Committee of Experts on the Rights and Welfare of the Child in 2016 confirmed the perpetration of acts of gender-based violence and child marriages in camps for displaced people by both State and non-State actors in Nigeria.²¹³ Similarly, the UN Secretary-General reported the impregnation of girls and women by Boko Haram insurgents.²¹⁴

The Committee on the Elimination of Discrimination Against Women²¹⁵ whilst reviewing the report on Nigeria in 2017, expressed concerns that a significant number of girls who were abducted by members of the Boko Haram sect in 2014 had not been rescued and continued to be subjected to rape, sexual slavery, forced marriage and impregnation by insurgents.²¹⁶ It also expressed concerns relating to incidences of sexual exploitation in internally displaced person's camps noting the stigmatisation and discrimination faced by victims.²¹⁷ It urged the government to ensure protection of women and girls disproportionately affected by conflicts and attacks by herdsmen.²¹⁸

Also, reports by humanitarian aid organisations indicate the aggravated physical consequences of sexual violence during armed conflict due to its linkage with increased rates of maternal mortality. Unwanted pregnancy occasioned by rape and adverse conditions²¹⁹ which result from the conflict increases the risks defined by the baseline maternal mortality rate.²²⁰ Furthermore, women who are denied abortions may resort to non-sterile or non-medical methods of interrupting their pregnancies which could lead to death, infection, scarring or sterilisation.²²¹ Additionally, rape resulting in pregnancy has severe psychological and social consequences for women and girls.²²²

²¹¹ UNFPA *Adolescent girls in disaster & conflict: Interventions for improving access to sexual and reproductive health services* (2016) 42, https://www.unfpa.org/sites/default/files/pub-pdf/UNFPA=Adolescent_Girls_in_Disaster_Conflict-Web.pdf (accessed 28 June 2020).

²¹² Human Rights Committee *Concluding observations on the fourth periodic report of the Democratic Republic of the Congo*, para 19, UN Doc. CCPR/C/COD/CO/4 (2017).

F Agbaje 'The objectified female body and the Boko Haram insurgency in Northeast Nigeria: Insights from IDP camps in Abuja' (2020) *African Security Review* 6-8.

²¹³ African Committee of Experts on the Rights and Welfare of the Child *Continental study on the impact of conflict and crises on children in Africa* (2016) 69.

²¹⁴ U.N Secretary-General *Report of the Secretary-General on Children and armed conflict* para 192, UN Doc A/70/836-S/2016/360 (2016).

²¹⁵ The CEDAW Committee.

²¹⁶ CEDAW Committee *Concluding Observations on Nigeria* para 15(a), U.N. Doc. CEDAW/NGA/CO/7-8 (2017).

²¹⁷ CEDAW Committee (n 216) para 15(c).

²¹⁸ CEDAW Committee (n 216) para 16(e).

²¹⁹ Example, malnutrition, anaemia, malaria, exposure, stress, infection and disease.

²²⁰ Harvard School of Public Health & Physicians for Human Rights *Report prepared for the US Agency for International Development: The use of rape as a weapon of war in the conflict in Darfur, Sudan* 1 October 2004 at 20, <https://phr.org/our-work/resources/the-use-of-rape-as-a-weapon-of-war-in-darfur-sudan/> (accessed 22 June 2020).

²²¹ Clifford (n 206) 2.

UNICEF *Beyond Chibok: Over 1.3 million children uprooted by Boko Haram violence* (2015), https://www.unicef.org/infobycountry/files/Beyond_Chibok.pdf&ved=2ahUKewjB_anNmbvqAhWVTBUIHfz2AcsQFjAFegQIAhAB&usq=AOvVaw1sPz2zecG2OzuhIEykVQnN (accessed 28 June 2020).

Article 14(2)(c) of the of the Maputo Protocol provides that abortion should be permitted in situations of rape amongst other grounds.²²³ Various treaty bodies have also made recommendations for States in this regard. In 2013, the CEDAW Committee in its General Comment No. 30 recommended that states take measures to ensure that sexual and reproductive health care services, including safe abortion are provided in conflict situations.²²⁴ The Human Rights Committee has also been consistent in urging states to review their laws to guarantee abortion access by victims of sexual violence.²²⁵ General Comment No. 28 of the Human Rights Committee imposes an obligation on states to provide abortion related information for victims of sexual violence whilst reporting on their compliance with the provisions of articles 7²²⁶ and 27²²⁷ of the International Covenant on Civil and Political Rights.²²⁸

Regardless of these calls, the situation in Nigeria has remained unchanged as there are no legal provisions guaranteeing abortion access in conflict situations²²⁹. The government also does not provide support for victims of conflict in this regard despite its obligations.²³⁰ Furthermore, humanitarian aid organisations offering assistance are unable to provide support related to abortion services due to guidelines prescribed by the World Health Organisation²³¹ which limits the provision of abortion services in humanitarian settings to situations where such service is permitted by law.²³²

This situation results in victims of sexual in conflict situations resorting to obtaining unsafe abortions.²³³ A Shadow report submitted to the Human Rights Committee in 2018 revealed that over 200 of the total number of rescued Boko Haram female abductees in 2015 were pregnant due to serial

M VanRooyen and others 'Now the World is without me: An investigation of sexual violence in Eastern Democratic Republic of Congo (2010) *Harvard Humanitarian Initiative Report Commissioned by Oxfam* 41,

<https://hhi.harvard.edu/publications/now-world-without-me-investigation-sexual-violence-easter-democratic-republic-congo> (accessed 28 June 2020).

²²³ Art 14 para 2(c) Maputo Protocol.

K Some 'The impact of the African Charter and the Maputo Protocol in Burkina Faso' in V Ayeni (ed) *The impact of the African Charter and the Maputo Protocol in selected African States* (2016) 17.

V Ayeni 'The impact of the African Charter and the Maputo Protocol in Nigeria' in V Ayeni (ed) *The impact of the African Charter and the Maputo Protocol in selected African States* (2016)183.

²²⁴ CEDAW Committee (n 216).

²²⁵ Human Rights Committee, *Concluding observations on the fifth periodic report of Cameroon*, para 22, CCPR/C/CMR/CO/5 (2017).

²²⁶ Right to freedom from torture and/or cruel, inhuman or degrading treatment or punishment.

²²⁷ Right to freedom from discrimination.

²²⁸ Human Rights Committee, *Gen. Comment No. 28 on the equality of rights between women and men*, para 11, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (2008).

²²⁹ Global Justice Centre 'Factsheet: Shifting good policy to practice: Armed conflict, humanitarian aid and reproductive rights' June 2019 <http://www.globaljusticecenter.net/blog/19-publications/1139-shifting-good-policy-to-practice-armed-conflict-humanitarian-aid-and-reproductive-rights> (accessed 8 December 2019).

²³⁰ A Isokpan 'Realising the sexual and reproductive health needs of women affected by the Boko Haram insurgency in Nigeria' (2017) 18(3) *Economic and Social Rights in South Africa Review Journals* 5-9.

²³¹ World Health Organisation/United Nations High Commissioner for Refugees *Clinical Management of rape survivors: Developing protocols for use with refugees and internally displaced persons – Revised edition (2004)* Step 7.

²³² World Health Organisation/United Nations High Commissioner for Refugees (n 231).

²³³ Reuters 'Secret abortions spike in Nigeria with Boko Haram chaos' <https://www.reuters.com/article/us-nigeria-health-abortion/secret-abortions-spike-in-nigeria-with-boko-haram-chaos-idUSKBN1WTIM5> (accessed 16 December 2019).

rape.²³⁴ Humanitarian workers were unable to grant these survivors access to safe abortions, consequently some of them resorted to performing illegal abortions.²³⁵

3.4.2 Relevant human rights to reproductive health within the context of abortion for women and girls in conflict and post-conflict situations implicated by Nigeria's restrictive penal provisions on abortion

Across the globe human rights are increasingly being applied to ensure protection of the reproductive health and rights of women and girls in conflict situations. This is due to the recognition of the objectification of women as tools of war by non-state actors²³⁶ during conflict.²³⁷ Below is an outline of the general classification of the human right to health which relates to and has implications for the reproductive health and rights of women and girls within the context of abortion in conflict situations in Nigeria:

i. Right to health

Although several human rights treaty documents recognise the right to health,²³⁸ the International Covenant on Economic, Social and Cultural Rights contains the most comprehensive provisions on this right. Article 12 of the Covenant guarantees the right of all individuals to the enjoyment of the highest attainable standard of physical and mental health. It also identifies the necessary steps required in order to achieve this right including ensuring a reduction in unsafe abortions.²³⁹

²³⁴ Centre for Reproductive Rights *Hidden casualties: Sexual and reproductive health and rights and sexual violence in conflict 1* (2016), https://www.awid.org/sites/default/files/atoms/sexual_reproductive_rights_sexual_violence_in_conflict.pdf in Center for Reproductive Rights, Legal Defence and Assistance Project (LEDAP) & Women's Advocates Research and Documentation Centre *Report submitted in response to the request by the Human Rights Committee for supplementary information for list of issues for the Federal Republic of Nigeria during its 124th Session* (2018) 4, <https://tbinternet.ohchr.org/Treaties/CCPR/Shared%2520Documents/NGA&ved=2ahUKEwju04Th17vqAhU9aRUIHVddb4AQFjABegQIAhAJ&usq=AOvVawInleYk0MB8MnegbxPyTHCD> (accessed 3 March 2020).

²³⁵ Oftentimes, following the rescue of women and girls from Boko Haram captivity, religious and communal leaders intervene to prevent them from being shunned by their own families and communities though it is usually very difficult due to the conservative values and traditions towards pre-marital sex. Many women and girls rescued from Boko Haram captivity report psychological trauma and rejection by their communities despite the efforts of traditional and religious leaders. M Bloom & H Matfess 'Women as symbols and swords in Boko Haram's Terror' (2016) 6 *Prism* 116 – 117.

Nabaneh (n 52).

²³⁶ Non-state actors are addressed specifically within the context of our study.

²³⁷ The consequences could be physical, psychological or social or a combination of one or more of the aforementioned.

²³⁸ Art 25.1 UDHR.

Art 5(e)(iv) of the ICERD.

Art 11.1(f) & 12 CEDAW.

Art 24 CEDAW.

Art 11 ACHPR.

²³⁹ ICESCR.

The ICESCR Committee in its General Comment No 14²⁴⁰ reminds states of their obligation to ensure improved reproductive health services²⁴¹ including removing all barriers which interfere with access to health services.²⁴² Also, the Committee in its General Comment No 22²⁴³, whilst affirming that the right to health embraces the right to sexual and reproductive health emphasised the need for states to ensure fulfilment of their obligations to respect, protect and fulfil these rights.²⁴⁴ The Committee noting that States obligations under the Covenant continue to apply during armed conflict recommended that efforts are increased to ensure sexual and reproductive health services for populations affected by conflict or displacement.²⁴⁵

In addition to the above, states obligation to care for wounded and sick persons during conflict²⁴⁶ has been highlighted under international humanitarian law by virtue of the provisions of Common Article 3(1) of the Geneva Conventions.²⁴⁷ Also, several human rights treaty documents have emphasised States obligations to ensure maintenance of the rights of children to the highest attainable standard of health without discrimination.²⁴⁸ Article 24 of the Convention on the Rights of the Child²⁴⁹ mandates States to ensure non-deprivation of the rights of children to health services. Similarly, the African Charter on the Rights and Welfare of the Child²⁵⁰ mandates states to take the best interests of the child²⁵¹ into account in decisions affecting the child as well as ensure provision of preventive health care and contraceptive services for children.²⁵²

Whilst the above are indicators that the various issues constitute fundamental rights, these issues have remained controversial particularly within the African region.²⁵³ The controversies are

²⁴⁰ ICESCR Committee (n 164).

²⁴¹ ICESCR Committee (n 164) para 14.

²⁴² ICESCR Committee (n 164) para 21.

²⁴³ ICESCR Committee *General Comment No 22 on the right to sexual and reproductive health* UN Doc. E/C.12/GC/22 (2016).

²⁴⁴ O Oluduro & E Durojaye 'The normative framework on the right to health under international human rights law' in E Durojaye (ed) *Litigating the right to health in Africa* (2015) 13-41.

²⁴⁵ ICESCR Committee (n 164).

²⁴⁶ This principle was elaborated on in Additional Protocols I & II to the Geneva Conventions.

A human rights organisation has expressed the opinion that 'wounded and sick' as defined in the Geneva Convention includes women and girls who are raped in conflict situations resulting in pregnancy.

Additional Protocols I & II to the Geneva Conventions, 1977.

Global Justice Center Brief on the right to an abortion for girls and women raped in armed conflict: States' positive obligations to provide non-discriminatory medical care under the Geneva Conventions (n 116) 9.

²⁴⁷ Geneva Conventions of 1946.

²⁴⁸ G Kangaude & T Banda 'Sexual health and rights of adolescents: a dialogues with sub-Saharan Africa' in Ngwena CG & Durojaye ET *Strengthening the Protection of Sexual and Reproductive Health and Rights in the African Region Through Human Rights* (2014) 251-278.

²⁴⁹ CRC.

²⁵⁰ Art 4, ACRWC.

²⁵¹ Kangaude & Banda (n 248).

²⁵² Art 14(2)(f) ACRWC.

²⁵³ W Nowicka 'Sexual and reproductive rights and the human rights agenda: Controversial and contested' (2011) 19 *Reproductive Health Matters* 119 in G Mirugi-Mukundi 'A human rights-based approach to realizing access to sexual and reproductive health rights in sub-Saharan African' in Durojaye (ed) (n 159) 44.

influenced by complex social, environmental, cultural, economic and psycho-social factors. One such issue here examined which has negative consequences for women and girls relates to abortion.

Abortion

Globally, the various international human rights instruments including the International Conference on Population and Development (ICPD), Programme of Action²⁵⁴ and Platform for Action²⁵⁵ which gave birth to the global recognition of abortion related risks and States' commitment in this regard²⁵⁶ implicitly link the right to safe abortion to the right to life. Various human rights treaty bodies including the United Nations Human Rights Committee and the CEDAW Committee have recognised the fact that restricted abortion access threatens women's rights.²⁵⁷ These developments have resulted in the adoption of several human rights documents by State parties.

In Nigeria however, the issue of abortion remains controversial due to restrictive abortion laws dating back to the colonial era which were imported holistically into the extant laws.²⁵⁸ Whereas unsafe abortion accounts for the deaths of an estimated 47000 women and nearly 98% of these procedures take place in developing countries according to the World Health Organisation²⁵⁹ with Africa accounting for 28% of global abortion-related maternal deaths²⁶⁰, the end in sight to this malaise remains distant.²⁶¹ Whilst some States within the continent have reformed their abortion laws and taken steps to ensure fulfilment of their obligations,²⁶² many others including Nigeria continue to lag

²⁵⁴UNFPA ICPD: *What is the ICPD and why does it matter*, <https://www.google.com/url?sa=t&source=web&rct=j&url=https://www.unfpa.org/news/explainer-what-icpd-and-why-does-it> (accessed 15 August 2019).

²⁵⁵UN Women *Fourth World Conference on Women*, <https://www.un.org/womenwatch/daw/beijing/fwcw.html> (accessed 1 August 2019).

²⁵⁶ R Cook & B Dickens 'Human Rights dynamics of Abortion Law reform' (2003) 25 *Human Rights Quarterly* 7.

²⁵⁷ Nowicka (n 253).

²⁵⁸ E Brookman-Amissah & J Moyo 'Abortion law reform in sub-Saharan Africa: No turning back' (2004) 12 *Reproductive Health Matters* 227-228.

C Ngwena *Human rights and African abortion laws: A handbook for judges* (2014) para 4.6.

²⁵⁹ World Health Organisation, *Safe Abortion: Technical and policy guidance for health systems* (2012) 18, <https://www.google.com/url?sa=t&source=web&rct=j&url=https://www.who.int/reproductivehealth/publications/> (accessed 1 August 2019).

²⁶⁰ C Ngwena 'State obligations to implement African abortion laws: Employing human rights in a changing landscape' (2012) 119 *International Journal of Gynaecology and Obstetrics* 198.

²⁶¹ J Moodley & V Akinsooto 'Unsafe abortions in a developing country: Has liberalisation of laws on abortions made a difference?' (2003) 7 *African Journal of Reproductive Health* 34.

²⁶² Ngwena (n 260) 198.

C Ngwena 'Access to safe abortion as a human right in the African region: Lessons from emerging jurisprudence of UN Treaty-Monitoring Bodies' (2013) *South African Journal of Human Rights* 399-448.

behind²⁶³ despite adoption of the ground-breaking Maputo Protocol which expressly affirms abortion as a human right²⁶⁴.

Article 14(2)(c) of the Maputo Protocol imposes an obligation on State parties to authorise abortion where continuation of the pregnancy would endanger the physical and mental health of the woman.²⁶⁵ Additionally, General Comment No. 2 of the African Commission²⁶⁶ highlights states duty to take positive steps to enable women realise the right to safe abortion as guaranteed under the Protocol.²⁶⁷

In 2016, the Special Rapporteur on Torture, Cruel, Inhuman or Degrading Treatment reiterated States obligation to reform restrictive abortion laws which constitute a form of torture and cruel or inhuman/degrading treatment.²⁶⁸ Despite these provisions, restrictive abortion laws are still tenable across many African states, including Nigeria. These laws negatively impact the enjoyment of women's human rights²⁶⁹ including the rights to health²⁷⁰; non-discrimination²⁷¹; privacy and autonomy²⁷²; and freedom from torture and/or cruel, inhuman or degrading treatment or punishment.²⁷³

In recent years there has been a growing consensus within human rights treaty monitoring bodies and national courts recognising States obligations to ensure protection of the human rights of women, including within the context of abortion. In *KL v Peru*²⁷⁴, the Human Rights Committee found the State of Peru liable for the violation of the human rights of KL who was denied access to abortion. Similarly, in *LC v Peru*,²⁷⁵ the CEDAW Committee in its decision, finding a violation of article 12 of CEDAW, lamented the lack of effective procedures to operationalise the law that allowed access to abortion, resulting in the arbitrary denial of access to abortion services by the authorities.

²⁶³ Most African laws permit abortion for the purpose of saving a woman's life.

²⁶⁴ C Ngwena and others 'Human rights advances in women's reproductive health in Africa' (2015) 129 *International Journal of Gynaecology and Obstetrics* 185.

C Ngwena 'A commentary on *LC v Peru*: The CEDAW Committee's first decision on abortion' (2013) 57 *Journal of African Law* 310.

Aniekwu (n 93).

²⁶⁵ Art 14(2)(c) of the Maputo Protocol in C Ngwena, 'Inscribing abortion as a human right: Significance of the Protocol on the Rights of Women in Africa' (2010) 32 *Human Rights Quarterly* 785.

²⁶⁶ General Comment No 2 of the African Commission on article 14(1)(a), (b), (c) & (f) and article 14(2)(a) & (c) of the Protocol.

²⁶⁷ C Ngwena, 'Taking women's rights seriously: Using human rights to require State implementation of domestic abortion laws in African Countries with reference to Uganda' (2016) *Journal of African Law* 110.

²⁶⁸ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment 2016 in *Sida 'Health Brief: Safe Abortions'* (2016) 2, https://www.sida.se/globalassets/sida/sve/sa-arbetar-vi/safe_abortions.pdf (accessed 1 August 2019).

²⁶⁹ Ottawa Human Rights Research and Education Centre *UN: Special Rapporteur Anand Grover Report on Abortion* (2011) https://cdp_hrc.uottawa.ca/en/special-rapporteur-anand-grover-report-abortion (accessed 24 July 2019).

²⁷⁰ Art 12 ICESCR.

²⁷¹ Art 12 CEDAW.

²⁷² Art 17 ICCPR.

²⁷³ Art 5 ACHPR.

²⁷⁴ Communication No. 1153/2003.

²⁷⁵ Communication No 22/2009.

Within Africa, the African Commission in *Egyptian Initiative for Personal Rights and Interights v Egypt*²⁷⁶ held the State in violation of the rights to freedom from torture, cruel, inhuman and/or degrading treatment or punishment as guaranteed under article 5 of the African Charter on Human and Peoples' Rights. Also, in *Federation of Women Lawyers (FIDA-Kenya) & 3 others v Attorney General Kenya & 2 others*²⁷⁷ the court in its comprehensive ruling declared that women and girls have the right to the highest attainable standard of health – which right in its broadest interpretation can be subsumed to include mental and social well-being as well as such physical rights as the right to non-discrimination and the right to life amongst others. It also declared that abortion is permitted for victims of sexual violence.²⁷⁸ Applying these decisions to the situation of women and girls in Nigeria's Northeast and Middle-Belt region, it is obvious that Nigeria's failure to fulfil its obligations amounts to a violation of their human rights.²⁷⁹

The CEDAW Committee has in its general recommendations on women in conflict urged states to ensure access to safe abortion services as well as post-abortion care.²⁸⁰ Also, it has been found that the denial of safe abortion services to survivors of rape in armed conflict amounts to a violation of the rights to health amongst others.²⁸¹ In 2014, the CEDAW Committee whilst reviewing the human rights situation of women caught up in the conflict in Syria urged the state to expand the grounds for which abortion is permitted to include cases of rape and also ensure access to free abortion services in such cases.²⁸² Furthermore, a court has found that restrictive penal provisions on abortion interferes with a woman's body and amounts to a violation of the right to security of the person.²⁸³

Under human rights law, the requirement for States conformity with laid down standards shows governments obligations to comply to ensure reproductive health and rights protection.²⁸⁴ Where a State law on abortion results in maternal mortality and morbidity, the State can be obliged to consider legal reform in compliance with existing human rights standards. The CEDAW Committee whilst noting the high rates of maternal mortality resulting from unsafe abortions in Nigeria in 2004 urged the government to take measures to assess the impact of its abortion laws on the health of women.²⁸⁵ Similarly in 2016, the UN Special Rapporteurs on the right of everyone to the enjoyment of the highest

²⁷⁶ Communication No 334/2006.

²⁷⁷ (2019) eKLR, Petition No 266 of 2015.

²⁷⁸ Legal Grounds Volume III: *Reproductive and Sexual Rights in Sub-Saharan African Courts* (2017) Online Edition, <https://www.law.utoronto.ca/programs-centres/programs/irshl-reproductive-and-sexual-health-law/irshl-legal-grounds-updates/legal> (accessed 24 June 2020).

²⁷⁹ Banjul Charter Enforcement Act Cap. A9, Laws of the Federation of Nigeria 2004.

²⁸⁰ CEDAW Committee, *General Recommendation No 30 on Women in conflict prevention, conflict and post-conflict situations*, para 52(c), U.N. Doc. CEDAW/C/GC/30(2013).

²⁸¹ Nowicka (n 254).

²⁸² CEDAW Committee, *Concluding observations on Syria*, Para 40, UN Doc. CEDAW/C/SYR/CO/2 (2014). Center for Reproductive Rights (n 173) 6-31.

²⁸³ *R v Morgentaler* (1988) 44 DLR (4th) 385.

²⁸⁴ Center for Reproductive Rights (n 173) 31.

²⁸⁵ CEDAW Committee, *Concluding observations on Nigeria*, para 307, UN Doc. A/59/308 (2004).

attainable standard of physical and mental health, on the sale of children, child prostitution and child pornography and on contemporary forms of slavery, including its causes and consequences conducted a joint visit to Nigeria. Upon conclusion of their visit, having reviewed the human rights situation of women and girls caught up in the conflict in the Northeast, they recommended that the government ensures provision of comprehensive reproductive health services, including the authorisation of abortion for survivors of sexual violence.²⁸⁶

Despite these calls a significant number of women and girls in the affected regions cannot access safe abortions. For there to be progress, the government and stakeholders must prioritise access to necessary services. There is also a need to consider broadening the current exceptions in the laws in order to balance the current limitations.

3.5 Argument for broadening the exception

Although the extant penal provisions which criminalise abortion have an exception permitting abortion for the purpose of saving the life of a woman, they do not take into account state obligations under human rights standards related to issues of sexual and gender-based violence in conflict situations. Running through events that occurred during the Nigerian civil war which spanned the period 1967 to 1970, there are several documented accounts of sexual violence particularly rape perpetrated against women and girls by both state and non-state actors.²⁸⁷ Although at the time the question of abortion did not form part of the considerations for rape victims, evidence indicates that children who were born from rape were stigmatised by members of their communities.²⁸⁸

A comparison of Nigeria's past history with current events shows that the cycle repeats hence the need for broadening the exception permitting abortion for rape victims in conflict situations.

²⁸⁶ Human Rights Council, *Report of the Special Rapporteurs on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, on the sale of children, child prostitution and child pornography and on contemporary forms of slavery, including its causes and consequences on their joint visit to Nigeria* (2016), UN Doc. A/HRC/32/32/Add.2, para 94(b).

²⁸⁷ C Adichie *Half of a yellow sun* (2008).

A Adams 'It's a woman's war: Engendering conflict in Buchi Emecheta's "Destination Biafra"' (2001) 24 *Callaloo* 287-300.

A Ihueze 'Women and violent conflicts in Destination Biafra, Half of a Yellow Sun and Rose and Bullets' (2016) 10(2) *Creative Artist: Journal of Theatre and Media Studies* 1-22.

I Ogonna-Nwaogu 'Civil wars in Africa: A gender perspective of the cost on women' (2008) 16(3) *Journal of Social Science* 251-258.

CNN World *Biafra War - 'I looked for death but I couldn't find it,' a Nigerian town relives the brutal war, 50 years after it ended* 16 January 2020, <https://www.cnn.com/2020/01/15/africa/biafra-nigeria-civil-war/index.html> (accessed 12 July 2020).

²⁸⁸ A Ikuomola 'The Nigerian civil war of 1967 and the stigmatisation of children born of rape victims in Edo state' in R Branche & F Virgili (eds) *Genders and sexualities in history series: Rape in war time* (2012) 169-183.

3.6 Conclusion

The current Nigerian reality related to abortion access for victims of sexual violence during conflict perfectly sums up the opinion expressed by an author²⁸⁹ that Africa is associated more with human rights problems and humanitarian crises than with their solutions, more with the need for international human rights law than its application and more with the failure of national law than with its success.²⁹⁰ Whilst the ratification and domestication of various human rights instruments indicate capacity and willingness to ensure human rights protection, there is need for full implementation of these standards particularly during humanitarian crises.

Current available evidence detailing the plight of women and girls in conflict situations indicate the need for a review of the provisions under the extant laws which deny women and girls access to safe abortion services as needed.

²⁸⁹ Pliny in his book *Natural History* Book VIII referred to the common Greek saying that Africa always produces some novelty. F Viljoen 'Africa's contribution to the development of international human rights law and humanitarian law' in E Sahle (ed) *Human Rights in Africa: Contemporary debates and struggles* (2019) 203.

²⁹⁰ Viljoen (n 289) 203.

CHAPTER FOUR: CONSIDERATIONS FOR BROADENING THE EXCEPTION PERMITTING ABORTION UNDER THE CRIMINAL AND PENAL CODES

4.1 Introduction

The analysis contained in the previous chapter provided an insight into the legal framework on abortion and its implications for women and girls in conflict situations in the Northeast and Middle-Belt region. In this chapter, I will briefly analyse some considerations for broadening the exception permitting abortion under the extant laws. I will also highlight recent developments in some jurisdictions within the African continent.

4.2 Considerations for broadening the exception permitting abortion under the extant laws

Under this section, discussions will focus on the identified considerations that exist for broadening the exception permitting abortion under the extant laws. Generally, various strategies exist for formulating reproductive health laws. One major strategy is the conceptualisation of issues of reproductive health rights into a separate national law due to the belief that this approach helps to better clarify reproductive health issues within national legal frameworks. Another strategy which is used is the inclusion of reproductive health issues into existing legal provisions and enactments.

The African Union in its revised Maputo Plan of Action, 2016-2030 urged states to enact, review and enforce laws which would ensure abortion access for women and girls.²⁹¹ This recommendation was made in recognition of the factors which negatively impact the progressive realisation of sexual and reproductive rights within the continent. Furthermore, various treaty bodies have emphasised the need for review of restrictive abortion laws in order to guarantee abortion access in conflict situations.²⁹²

Several countries in African and non-African jurisdictions have enacted laws on reproductive health matters. Furthermore, restrictive penal provisions on reproductive rights are recording gradual

²⁹¹ Para 18(ii), African Union *Maputo Plan of Action for the Operationalization of the Continental Policy Framework for Sexual and Reproductive Health and Rights 2016-2030 (Revised)*.

²⁹² Human Rights Committee, *Concluding observations on the fifth periodic report of Cameroon CCPR/C/CMR/CO/5* (2017).

CEDAW Committee, *General Comment No. 30 on women in conflict prevention, conflict and post-conflict situations*, para 52 (c) U.N. Doc. CEDAW/C/GC/30 (2013).

G Olaide & T Aderibigbe 'Justification of women's right of access to safe and legal abortion in Nigeria' (2014) 7 *African Journal of Legal Studies* 185.

changes through the decriminalisation process in several countries.²⁹³ In Nigeria, there has been a gradual shift from the era of restrictive laws to one which recognises the need for human rights protection. Currently 13 states including the Federal Capital have adopted the Violence Against Persons (Prohibition) Act, 2015 which is the most robust piece of legislation that responds to sexual and gender based violence for all persons in Nigeria.²⁹⁴ Similarly, several countries affected by conflict within the African continent such as Burkina Faso, Chad, Colombia, Ethiopia, Kenya, Mali and Sierra Leone have all liberalised their abortion laws.²⁹⁵ In Chad, the law permitting abortion to save a woman's life was expanded to include cases of sexual violence.²⁹⁶

Reconceptualising the penal provisions on abortion to cover victims of sexual violence in conflict situations is necessary in order to ensure advancement of the reproductive health and rights. Also, integrating the various international human rights provisions into the Nigerian legal framework would help ensure promotion and protection of the human rights of women and girls in conflict situations. The below provide some considerations for this restructuring:

4.2.1 Human rights

The right of the individual to the highest attainable standard of health under which the right to abortion can be subsumed is one important ground which justifies broadening the exception permitting abortion.²⁹⁷ This rights also includes the right to make decisions concerning reproduction free from discrimination, coercion and violence as often occurs in rape cases,²⁹⁸ especially in conflict settings.²⁹⁹

²⁹³ In 2015, Mozambique decriminalised gay and sexual relationships making it one of the few African countries where same-sex relationships are legal. Also, the United States Supreme Court legalised same-sex marriages in 2015. Similarly, in 2020, Costa Rica passed a legislation allowing same-sex marriage.

BBC Mozambique decriminalises gay and lesbian relationships <https://www.bbc.com/news/world-africa-33342963> (accessed 24 July 2020).

(2015) Case No. 14-556.

Business Insider The 29 countries around the world where same-sex marriage is legal,

<https://www.businessinsider.com/where-is-same-sex-marriage-legal-world-2017-11> (accessed 24 July 2020).

²⁹⁴ NAPTIP VAPP Act, <https://www.naptip.gov.ng/vapp-act/> (accessed 10 January 2021).

²⁹⁵ T McGinn & S Casey 'Why don't humanitarian organizations provide safe abortion services?' (2016) 10 *Conflict & Health* 4.

²⁹⁶ Medecins Sans Frontieres 'Chad: Control over women' 29 November 2017 <https://blogs.msf.org/bloggers/liza/chad-control-over-women> (accessed 21 May 2020).

²⁹⁷ Para 7.2 ICPD.

A Ikuomola 'The Nigerian civil war of 1967 and the stigmatisation of children born of rape victims in Edo state' in R Branche & F Virgili (eds) *Genders and sexualities in history series: Rape in war time* (2012) 169-183.

M Bloom & H Matfess 'Women as symbols and swords in Boko Haram's Terror' (2016) 6(1) *Prism: Women, peace and security* 116 – 117.

Center for Reproductive Rights *Briefing paper - Ensuring sexual and reproductive health and rights of women and girls affected by conflict* (2017) 1.

²⁹⁸ A Ikuomola 'The Nigerian civil war of 1967 and the stigmatisation of children born of rape victims in Edo state' in R Branche & F Virgili (eds) *Genders and sexualities in history series: Rape in war time* (2012) 169-183.

²⁹⁹ Bloom & Matfess (n 297).

Center for Reproductive Rights *Briefing paper - Ensuring sexual and reproductive health and rights of women and girls affected by conflict* (2017) 1.

Studies have shown that many rape victims suffer both physically and psychologically as a result of their experience.³⁰⁰ The psychological consequences which they suffer are sometimes accentuated or diminished by the nature of responses of health providers and the criminal justice system.³⁰¹ Hence, state fulfilment of its obligation to ensure protection of the physical and mental health of rape victims in conflict settings is paramount. In *R v Bourne*³⁰² the Court illustrating a judicial understanding of the concept of health stated that health is not limited to physical health but also includes mental health which could be threatened.³⁰³

Paragraph 106(j) of the Beijing Platform for Action imposes an obligation on states to recognise and deal with the health impact of unsafe abortion as a major public health concern. Similarly, the African Union, in its 2006 Maputo Plan of Action³⁰⁴ recognising the crucial role of effective implementation of abortion laws as a tool for reducing unsafe abortions imposed an obligation on countries within the continent to take action in this regard.³⁰⁵ It urged states to enact, review and enforce laws that would ensure access to safe abortion.³⁰⁶

It is a truism that law is intended as an instrument to ensure order in society as well as the protection of the weak and vulnerable and should be applied for this sole purpose.³⁰⁷ There is an urgent need for the Nigerian government to affirm the right to health as a fundamental right.³⁰⁸ The Constitution³⁰⁹ establishes a state policy of ensuring adequate provision of medical and health facilities for all persons and recognises the right to health though in a non-justiciable context.³¹⁰

On the surface level, the present position of Nigeria merely includes the attainment of health as a social objective in promoting a social order founded on the ideals of freedom, equality and justice.³¹¹ Although a close reading of this provision together with the provisions of the African Charter on Human and People's Rights³¹² and the African Charter on Human and Peoples' Rights (Ratification and

³⁰⁰ E Horvath and others in collaboration with Centre for Reproductive Rights *Gender-based violence laws in sub-Saharan Africa* (2007) http://reproductiverights.org/sites/default/files/documents/GBV_Laaws_in-Sub_Saharan_Africa.pdf (accessed 19 May 2014) in S Mavundla & C Ngwena 'Access to legal abortion for rape as a reproductive health right: A commentary on the abortion regimes of Swaziland and Ethiopia' in C Ngwena & E Durojaye (eds) *Strengthening the protection of sexual and reproductive health and rights in the African region through human rights* (2014) 62.

³⁰¹ Horvath (n 300) 6.

³⁰² (1938) 3 All England Law Reports 615.

³⁰³ C Ngwena *Human rights and African abortion laws: A handbook for judges* (2014) para 6.3.

³⁰⁴ African Union *Maputo Plan of Action for the Operationalization of the Continental Policy Framework for Sexual and Reproductive Health and Rights 2007-2010*.

³⁰⁵ Mavundla & Ngwena (n 300)13-14.

³⁰⁶ Para 18(ii), African Union *Maputo Plan of Action for the Operationalization of the Continental Policy Framework for Sexual and Reproductive Health and Rights 2016-2030 (Revised)*.

³⁰⁷ Art 3(1)(d) Kampala Convention.

³⁰⁸ Art 12 ICESCR.

³⁰⁹ Sec 17(3)(d) Constitution of the Federal Republic of Nigeria 1999.

³¹⁰ Sec 6(6)(c) Constitution of the Federal Republic of Nigeria 1999.

³¹¹ Sec 17 Constitution of the Federal Republic of Nigeria 1999.

³¹² Art 16 ACHPR.

Enforcement) Act³¹³ seems to assert that the right to health is enforceable in Nigeria this is not the case. This position is amplified by the decision of the Supreme Court in the case of *Fawehimi v Abacha*³¹⁴ to the extent that where there is a conflict between the African Charter and the Constitution of the Federal Republic of Nigeria, the latter instrument would take precedence.

Generally, the right to health is dependent on a wide range of socio-economic factors that promote conditions in which people can lead a healthy sexual and reproductive life. Since the adoption of the Vienna Declaration and Programme of Action, the concept of health has widened in scope. Despite this development, within the African continent some economic, social and cultural rights have not been given due recognition as they remain non-justiciable. In 2020 during one of the sessions of the African Commission, this situation was noted by the outgoing Chairperson of the Working Group on Economic, Social and Cultural Rights, Hon. Jamesina Essie L. King.³¹⁵

In Nigeria there is need for the adoption of a National Reproductive Health Law in view of the many problems bedeviling the health sector.³¹⁶ Also, recommendations have been made for the review of the extant abortion laws to ensure reduction in high maternal mortality rates.³¹⁷ In 2017, the CEDAW Committee noting the high incidence of unsafe abortion and its implications for women recommended that Nigeria reviews its abortion laws.³¹⁸ Also, the United Nations Security Council following its adoption of Resolution 2349³¹⁹ urged Nigeria to provide rapid access for survivors of abduction and sexual violence to specialized medical and psychosocial services amongst others.³²⁰

The African Commission's Human Rights Committee has consistently urged states to review their restrictive laws in order to guarantee effective abortion access by victims of sexual violence.³²¹ Broadening the exceptions on abortion in the extant penal laws to include women and girls

³¹³ Banjul Charter Enforcement Act Cap. A9, Laws of the Federation of Nigeria 2004.

³¹⁴ (1997) SC 45.

³¹⁵ Speech delivered by the Chairperson of the Working Group on Economic, Social and Cultural Rights, Hon. Jamesina Essie L. King whilst briefing participants on her activity report prior to her handover to her successor during the 66th Ordinary Session of the African Commission on Human and People's Rights held from 13 July - 7 August, 2020, <https://www.achpr.org/sessions/view?id=100>.

³¹⁶ N Aniekwu (n 93) 117.

C Ngwena 'Access to legal abortion: Legal developments in Africa from a reproductive and sexual health rights perspective' (2004) 19 *South Africa Public Reg Public Law Journal* 328-350.

³¹⁷ L Omo-Aghoja and others 'The story of abortion: Issues, controversies and case for the review of Nigerian national abortion laws' (2010) 7(4) *East African Journal of Public Health* 333-340.

³¹⁸ CEDAW Committee, *Concluding observations on the combined seventh and eighth periodic reports of Nigeria*, para 37, U.N. Doc. CEDAW/C/NGA/CO/7-8.

³¹⁹ S/RES/2349(2017).

³²⁰ Centre for Reproductive Rights & Legal Defence and Assistance Project (LEDAP) *Research Report on the Conflict in Northeast Nigeria: Impact on the Sexual and Reproductive Rights of Women and Girls* (2020) 2-26.

³²¹ Center for Reproductive Rights, Legal Defence and Assistance Project (LEDAP) and Women Advocates Research and Documentation Centre (WARDC) *Joint letter submitted to the Human Rights Committee ahead of its adoption of list of issues for Nigeria during its 124th Session* (2018) 4, https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/NGA/INT_CCPR_ICO_NGA_32074_E.pdf (accessed 21 August 2020).

in conflict situations would help promote safe motherhood, protect human rights as well as women's health and reproductive choices.

4.2.2 Humanitarian law

Humanitarian law standards require that the wounded and sick are provided as a matter of urgency the necessary medical attention required by their condition without discrimination on any grounds other than medical ones.³²² Rape victims in conflict situations can be considered as falling within the category of wounded and sick³²³ as the gravity of the physical, emotional and psychological injuries which they suffer does not pale in consideration to the injuries suffered by soldiers during battle. Both parties are victims and require the same level of protection related to medical care. Providing essential medical care for wounded soldiers whilst neglecting essential care related to abortion for rape victims is somewhat discriminatory and runs contrary to Nigeria's obligations both under international humanitarian law and the Kampala Convention.³²⁴

This position is consequent upon Nigeria's adoption and incorporation of the four Geneva Conventions into its domestic legislation, though it is yet to domesticate the Additional Protocols. In addition, the failure to provide needed protections is an internationally wrongful act under the laws of state responsibility. Hence there is an urgent need for affirmative action related to the fulfilment of its obligations in this regard.³²⁵

The government must also prioritise domestication of the Additional Protocols³²⁶ to the Geneva Conventions in order for them to be enforceable in Nigeria.³²⁷ There is also a need for the adoption of the National Policy on Internally Displaced Persons.³²⁸ This is because studies have shown that maternal mortality ratios in countries affected by conflict remain high and have been shown to increase during

³²² Common Articles 1 & 3 of the Geneva Conventions, 1949.

J James-Eluyode 'Enforcement of international humanitarian law in Nigeria' (2003) 3(2) *African Human Rights Law Journal* 264-274.

³²³ Art 10, Protocol I to the Geneva Conventions, 1949.

Commentary on the Additional Protocols to the Geneva Conventions, Paragraphs 4646 & 4647 on Article 7, Protocol II to the Geneva Conventions, 1949.

³²⁴ Commentary to Article 12 *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, U.N.Doc. A/56/10 (2001).

³²⁵ E Egede 'Bringing human rights home: An examination of the domestication of human rights treaties in Nigeria' (2007) 51(2) *Journal of African Law* 249-284.

³²⁶ Art 10, Protocol I to the Geneva Conventions, 1949.

Commentary on the Additional Protocols to the Geneva Conventions, Paragraphs 4646 & 4647 on Article 7, Protocol II to the Geneva Conventions, 1949.

³²⁷ J James-Eluyode 'Enforcement of international humanitarian law in Nigeria' (2003) 3 *African Human Rights Law Journal* 264.

³²⁸ PSI 10 years of the Kampala Convention: Uphold human rights of IDPs!

<https://publicservices.international/resources/news/10-years-of-the-kampala-convention-uphold-human-rights-of-idps?id=10374&lang=en> (accessed 25 July 2020).

periods of conflict.³²⁹ Domesticating and implementing the Additional Protocols would help ensure access by women and girls in conflict situations to abortion services.

4.2.3 Sustainable development goals

The Sustainable Development Goals (SDGs) adopted by all United Nations member states in 2015 is a universal call to action to end poverty, protect the planet and ensure that all people enjoy peace and prosperity by 2030.³³⁰ The goals which are 17 in number were born at the United Nations Conference on Sustainable Development held in Rio de Janeiro in 2012.³³¹ Under the goals, Goal 3 is focused on ensuring healthy lives and promoting well-being for all at all ages.³³² Some targets under this goal which apply specifically to women and girls include:

- i. Target 3.1 – reduce global maternal mortality ratio to less than 70 per 100,000 live births.
- ii. Target 3.7 – ensure universal access to sexual and reproductive health-care services, including family planning, information and education and the integration of reproductive health into national strategies and programmes.
- iii. Target 3.8 - achieve universal health coverage, including financial risk protection, access to quality essential healthcare services and access to safe, effective, quality and affordable essential medicines and vaccines for all.

These targets are also linked with Goal 5 of the SDGs focused on achieving gender equality and empowering women and girls and ensuring universal access to sexual and reproductive health and rights.³³³ Whilst Goal 10 is focused on reducing inequality within and among countries and targets amongst others the elimination of discriminatory laws, policies and practices.³³⁴

³²⁹ Center for Reproductive Rights *Shadow report submitted following the call for submissions by the Special Rapporteur on Violence Against Women, its causes and consequences on mistreatment and violence against women during reproductive care with a focus on childbirth* (2018) 7.

³³⁰ UNDP *Sustainable development goals*, <https://www.undp.org/content/undp/en/home/sustainable-development-goals.html>

³³¹ United Nations Development Programme *Sustainable development goals: Background on the goals*, <https://www.undp.org/content/undp/en/home/sustainable-development-goals/background.html> (accessed 27 July 2020).

³³² K Shettima 'Commentary - Achieving the Sustainable Development Goals in Africa: Call for a paradigm shift' (2016) 20(3) *African Journal of Reproductive Health* 19-21.

UN *Sustainable development goals: Knowledge platform*, <https://sustainabledevelopment.un.org/topics/sustainabledevelopmentgoals> (accessed 26 July 2020).

³³³ UN Women *SDG 5: Achieve gender equality and empower all women and girls*, <https://www.unwomen.org/en/news/in-focus/women-and-the-sdgs/sdg-5-gender-equality> (accessed 9 January 2021).

³³⁴ UN Women *SDG 10: Reduce inequality within and among countries*, <https://www.unwomen.org/en/news/in-focus/women-and-the-sdgs/sdg-10-reduced-inequalities#:~:text=By%202030%2C%20empower%20and%20promote,or%20economic%20or%20other%20st> [atus](#) (accessed 9 January 2021).

Although Nigeria has demonstrated commitment towards the attainment of the SDGs,³³⁵ progress has been slow due to limited financial resources, weak public sector institutional capacities, prolonged humanitarian crises in the Northeast, inadequate data information and lack of skilled manpower which challenges have been further exacerbated by the onset of the COVID-19 pandemic.³³⁶ To address these challenges, there is need for reform that would include instituting new legal arrangements for improved health care delivery and enacting legislations that ensure accountability in health systems amongst others.³³⁷

4.2.4 Strengthened health systems

The World Health Organization in its 2004 World Health Report following the assessment of the performance of the health systems of its 191 member states in terms of responsiveness, legislations, overall goal attainment, level of health expenditure per capita, impact on health and overall performance found Nigeria wanting.³³⁸ Nigeria had scores near the bottom of the 191 countries for every single one of these indicators.³³⁹

A review of Nigeria's performance on the World Health Organization's Global Health Observatory Data Repository more than ten years after shows slight improvements.³⁴⁰ There have been remarkable improvements in government health financing, maternal mortality ratio reduced slightly and the Multiple Indicator Cluster Survey for 2016-2017 indicated a reduction in adolescent birth rate.³⁴¹

³³⁵ UNDP *Sustainable Development Goals*, <https://www.ng.undp.org/content/nigeria/en/home/sustainable-development-goals.html> (accessed 11 January 2021).

³³⁶ Office of the Senior Special Assistant to the President on the Sustainable Development Goals *Nigeria's voluntary national review on the implementation of the 2030 Agenda and SDGs*, Presentation made to a United Nations High Level Political Forum at the UN headquarters by Princess Adejoke Orelupe-Adefulire, Senior Special Assistant to the President on Sustainable Development Goals on 18 July 2017,

https://sustainabledevelopment.un.org/content/documents/25541NIGERIA_VNR_PPT_Presentation.pdf&ved=2ahUKEwio5L_hwvDqAhWPilwKHRgWCU0QFjAKegQlAxAC&usq=AOvVaw3aHo9h4ncOO2OrM-B4AG_F (accessed 27 July 2020).

R Jaiyesimi 'The challenge of implementing the Sustainable Development Goals in Africa: The way forward (2016) 20(3) *African Journal of Reproductive Health* 13-18.

³³⁷ African Union *Maputo Plan of Action 2016-2030 for the operationalisation of the continental policy framework for sexual and reproductive health and rights* 6-8.

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³³⁸ World Health Organisation *World Health Report 2004: Changing History*, <https://www.who.int/whr/2004/en/> (accessed 27 July 2020).

³³⁹ Banjul Charter Enforcement Act, 2004.

The Working Group – National Strategic Health Development Plan/Health Sector Development Team *National Strategic Health Development Plan Framework (2009-2015)*, 2009.

³³⁹ World Health Organization *Global Health Observatory Data Repository: Health systems 2014*, <https://apps.who.int/gho/data/node.main.475?lang=en> (accessed 28 July 2020).

³⁴⁰ World Health Organization (n 338).

³⁴¹ World Health Organization *Global Health Observatory Country Views: Nigeria Statistics Summary (2002 to 2015)*, <https://apps.who.int/gho/data/node.country.country-NGA?lang=en> (accessed 28 July 2020).

Whilst the progresses made indicate capacity and willingness by the government to ensure attainment of the SDGs, more work remains however.

Currently, there are other costs that prevent women from seeking healthcare.³⁴² These include poverty, lack of access to or control over resources and costs attached to accessing available services. Also, lack of high quality country data makes the tracking of changes difficult.³⁴³ For example, the World Health Organization's 2020 World Health Statistics indicates that although maternal mortality has declined, progress is uneven across regions.³⁴⁴ Strategies for strengthening the health system would include more investments in the health sector, protection and promotion of human security, ensuring social cohesion and the promotion of innovation and diversification.

4.3 Recent developments in some jurisdictions within the African Continent

In recent years there has been a decline in the incidence of unsafe abortion in developed countries due to legal reforms. Since 2000, about 28 countries have reviewed their laws with all but one of them expanding the legal grounds permitting abortion.³⁴⁵ Within the African continent, 13 countries have reviewed their restrictive abortion laws to permit abortion for the purpose of either protecting the life or physical health of the woman or in some cases to in addition to the aforementioned, preserve the mental health of the woman.³⁴⁶ Some countries with reviewed laws include Mali, Somalia, Benin Republic, Central African Republic, Chad, Lesotho, Niger Republic, Togo, Kenya, Ethiopia, Eritrea, Mozambique, Mauritius and Swaziland.³⁴⁷ Burkina Faso had as early as 1996 following the ICPD reformed its restrictive abortion laws.³⁴⁸ Under its revised laws, abortion is permitted for the purpose of saving the woman's life and to protect her health as well as in cases of rape, incest or fetal impairment.³⁴⁹ Apart from Burkina Faso, other countries including Botswana, Cameroon, Ghana, Mozambique, Namibia, Seychelles and South Africa have provisions permitting abortion in cases of rape or incest.³⁵⁰ Below is a brief outline of recent developments in Ethiopia and Mozambique:

³⁴² These include transport, accommodation, drugs as well as informal or under the table fees that health staff impose.

³⁴³ World Health Organization *World Health Statistics 2020: Monitoring health for the SDGs* (2020) 19-24.

³⁴⁴ World Health Organization (n 343) 6.

³⁴⁵ S Singh and others 'Abortion Worldwide 2017: Uneven progress and unequal access' (2017) *Guttmacher Institute* 1-67.

³⁴⁶ Singh and others (n 343) 1-19.

³⁴⁷ Singh and others (n 343).

³⁴⁸ Center for Reproductive Rights *Briefing paper – Abortion worldwide: 20 years of reform* (2014) 8-16.

Art 317 & 328 of the Penal Code of Burkina Faso, 1984.

³⁴⁹ Art 383 & 387 of the Penal Code of Burkina Faso, 1996.

³⁵⁰ C Onyemelukwe 'Medico-legal abortion law in Nigeria' (2018) 2 *Beyhealth Quarterly* 34-38.

4.3.1 Ethiopia

The Ethiopian parliament in 2005 amended its restrictive penal provisions to expand the circumstances under which abortion is legal.³⁵¹ Under the amended law women are permitted to terminate pregnancies in cases of sexual violence, mental impairment, etc.³⁵² Prior to this time abortion was only permitted to save a pregnant woman from grave and permanent danger to life or health.³⁵³ This position which was influenced by the deeply religious nature of the country was reviewed following the turn of the century and the high placement of maternal mortality reduction on the global agenda.³⁵⁴ The negotiations leading to the amendment of its abortion law were carried out in a strongly anti-abortion cultural and religious environment.³⁵⁵ Studies conducted more than ten years after the law was amended reveal a significant reduction in maternal deaths in Ethiopia.³⁵⁶

4.3.2 Mozambique

In 2014, the government of Mozambique reviewed its abortion law to permit the procedure to save the life of a woman,³⁵⁷ permit abortions up to the 12th week of pregnancy³⁵⁸ and in rape cases up to the 16th week.³⁵⁹ Prior to the review of the law unsafe abortions accounted for an estimated 5,000 deaths yearly.³⁶⁰ Furthermore an estimated 14,000 women received medical care for complications resulting from unsafe abortion on a yearly basis.³⁶¹

³⁵¹ Moore and others 'The estimated incidence of induced abortion in Ethiopia, 2014: Changes in the provision of services since 2008' (2016) 42(3) *International Perspectives on Sexual Reproductive Health* 111-120.

³⁵² Art 552 of the Criminal Code of the Federal Democratic Republic of Ethiopia, 2004.

³⁵³ Art 534 of the Penal Code of Ethiopia, 1957.

T Wada 'Abortion law in Ethiopia: A comparative perspective' (2008) 2(1) *Mizan Law Review* 1-32.

³⁵⁴ G Tadele and others 'An uneasy compromise: Strategies and dilemmas in realizing a permissive abortion law in Ethiopia' (2019) 18 *International Journal for Equity in Health* 1-13.

³⁵⁵ A Blystad and others 'The access paradox: abortion law, policy and practice in Ethiopia, Tanzania and Zambia' (2019) 18 *International Journal for Equity and Health* 1-15.

³⁵⁶ A Tessema and others 'Trends and causes of maternal mortality in Ethiopia during 1990-2013: findings from the Global Burden of Diseases Study 2013' (2017) 17 *BMC Public Health* 1-8.

³⁵⁷ *Mail & Guardian* Mozambique decriminalises abortion to curb maternal deaths <https://mg.co.za/article/2014-12-19-mozambique-legalises-abortion-to-curb-maternal-deaths/> (accessed 28 July 2020).

Ipas Africa Alliance *Making change happen: A review of progressive abortion policy change in Africa* (2016) 4-16.

³⁵⁸ Penal Code 2013 signed into law in December 2014.

World Health Organisation Human Reproduction Programme *Global Abortion Policies Database – Country profile: Mozambique*, <http://abortion-policies.srhr.org/country/mozambique/> (accessed 30 July 2020).

³⁵⁹ *Aljazeera* Mozambique loosens anti-abortion laws, <https://www.aljazeera.com/indepth/features/2015/01/mozambique-loosens-anti-abortion-laws-150120081246992.html> (accessed 30 July 2020).

³⁶⁰ M Costumado and others 'Women's access to sexual reproductive health and rights services in Mozambique: Advocacy strategies to address barriers' (2015) 4 *Ubuntu: Journal of Conflict and Social Transformation* 55-83.

M Gallo & C Bique 'An assessment of abortion services in public health facilities in Mozambique: Women's and providers' perspectives' (2004) 12(24) *Reproductive Health Matters* 218-226.

³⁶¹ ISGlobal *Mozambique may legalize abortion to protect mothers*, <https://www.isglobal.org/healthisglobal/-/custom-blog-porlet/mozambique-podria-legalizer-el-aborto-para-proteger-a-las-madres/90352/0> (accessed 30 July 2020).

4.4 Conclusion

From it foregoing, the necessity of broadening the abortion laws to meet with laid down human rights standards is evident. Rights conferred by international humanitarian law standards supersedes the provisions of domestic abortion laws and must be given due consideration. Hence the need to reconsider the enactment of a National Law on Reproductive Health.

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

5.1 Brief Summary

This study is structured to respond to three fundamental questions. Firstly, what is the scope of Nigeria's obligations to ensure protection of the human rights relating to abortion of women and girls in conflict situations? Secondly, how does the restrictive penal provisions on abortion impact women and girls in such situations? Thirdly, can the expansive interpretation of its extant laws in this regard offer some form of respite? This chapter brief summarises the discussions in the previous chapters and makes general conclusions.

This study is designed to justify the argument for broadening the limited exception permitting abortion under the penal laws to include victims of sexual violence in conflict and post conflict situations in the Northeast and Middle Belt regions of Nigeria given the prolonged crisis in the regions and its consequences for women and girls.

5.2 Conclusion

This study has highlighted the human rights situation of women and girls in conflict and post-conflict situations in the Northeast and Middle Belt regions of Nigeria. The impact of the restrictive abortion laws on their lives despite state obligations under international and regional human rights and humanitarian law standards are highlighted in the discussions justifying the argument for broadening the exceptions to permit abortion in such situations.

The study in chapter two directed itself to examine the scope of Nigeria's obligation to ensure full protection of the human rights of women and girls in conflict and post-conflict situations in relation to abortion access under international and regional human rights norms and standards. It examined the provisions of the Constitution and criticised its inherent weaknesses which have negative implications for the human rights relating to reproductive health.

In addition, the human rights situation of women and girls in conflict and post-conflict situations in the Northeast and Middle-Belt region particularly within the context of sexual violence is analysed. The analysis shows the implications of the extant penal provisions on abortion for victims of sexual violence in conflict situations.

The study makes a case for broadening the exception permitting abortion under the penal laws to include women and girls in conflict and post-conflict situations in the Northeast and Middle Belt region. It is the author's view that rethinking the current exception permitting abortion only for the purpose of saving the life of a woman as contained in the penal laws would have lasting health and human rights implications for women and girls. The recognition of state obligations to ensure human rights protection for women and girls under international human rights and humanitarian law standards serves as justification for the argument.

In this study, various available data sources have been employed for the purpose of assessment. Laws and decisions of international and regional human rights bodies as well as the recommendations of international and regional treaty monitoring bodies have been looked into. In addition, related guidelines and recommendations have been analysed albeit briefly. Despite Nigeria's commitments in this regard its restrictive penal provisions on abortion continue to derogate from its obligations.

This study sought to justify the argument for broadening the exception permitting abortion to include victims of sexual violence in conflict and post-conflict situations in the Northeast and Middle Belt regions. On the basis of the facts presented, the need for rethinking the exception permitting abortion to include such persons is established. The author highlights considerations for broadening the exception and briefly discusses recent developments in select jurisdictions within the African continent.

5.3 Recommendations

In order for the Nigerian government to ensure fulfilment of its obligations in this regard as guaranteed under international and regional human rights standards and norms in conflict and post-conflict situations in the Northeast and Middle-Belt region there is need to have a rethink of the limited exception permitting abortion under the extant laws. Broadening the exception in this regard would go a long way in ensuring the progressive realisation of the reproductive health and rights of women and girls in conflict and post-conflict situations in the affected regions.

This recommendation is particularly in view of the interpretive guidance which the African Commission has laid down in General Comment No. 2 on article 14 (1)(a), (b), (c) and (f) and article 14(2)(a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa which comment highlights state obligations to ensure the domestication and implementation of article 14 of the Maputo Protocol. Moreover, the African Commission on Human and Peoples' Rights following its review of the situation in Nigeria in 2008 recommended in its concluding observations that the government amongst others takes positive measures to introduce appropriate policies with the

aim of addressing incidences of maternal and infant mortality, especially in the Northern parts of the country.³⁶²

Also, government's commitment to ensuring the fulfilment of its international humanitarian law obligations can be strengthened by taking positive actions related to the protection of women and girls in armed conflict situations.

Furthermore, the time has come for the government to move beyond the practice of ratifying human rights instruments without incorporating them into national legislation. This is because such actions do not yield any impact. Taking action to ensure that restrictive abortion laws which impact the lives of women and girls in conflict situations are reviewed as well as ensuring that government-partnered humanitarian assistance programs comply with international humanitarian law standards would help to ensure the fulfilment of governmental obligations.

Also, the government must commit to implementing these provisions to ensure lasting change. Incorporating the right to abortion for victims of sexual violence in conflict and in post-conflict situations in the North-East and Middle Belt regions into state humanitarian response action plans as well as ensuring implementation by humanitarian actors would go a long way in ensuring reproductive health and rights protection.

Government must take steps to ensure that abortion access is guaranteed in all medical response protocols in humanitarian settings across country. In addition, humanitarian responders must be trained to provide necessary information for rape victims who present for examination and treatment.

Whilst the disclosure relating to state commitments to ensure protection of economic, social and cultural rights within the African continent at the 66th Ordinary Session of the African Commission on Human and People's Rights is worrisome, the Nigerian government can rise to the occasion by taking action to ensure fulfilment of its obligations in this regard.

³⁶² African Commission on Human and Peoples' Rights *Concluding observations and recommendations on Nigeria* adopted at the 44th ordinary session held in Abuja from 10 to 24 November, 2008.

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