

The Case for Reform: Criminal Law and Sexual Violence in Zimbabwe

A Briefing Paper

Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952 and active on the five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.

® The Case for Reform: Criminal Law and Sexual Violence in Zimbabwe

© Copyright International Commission of Jurists, October 2020

The International Commission of Jurists (ICJ) permits free reproduction of extracts from any of its publications provided that due acknowledgment is given and a copy of the publication carrying the extract is sent to its headquarters at the following address:

International Commission of Jurists
P.O. Box 91
Rue des Bains 33
Geneva
Switzerland

This publication has been produced with the financial support of the European Union. The contents of this publication are the sole responsibility of the ICJ and can in no way be taken to reflect the views of the European Union.



The Case for Reform: Criminal Law and Sexual Violence in Zimbabwe

TABLE OF CONTENTS

1. Executive Summary	3
2. Defining Sexual and Gender-based Violence	3
3. Overview Of Zimbabwe’s Sexual Offences Legal Framework ..	6
4. Section 65	6
4.1 The Gendered Description of Rape under section 65(1)	8
4.2 The limited Scope of Section 65(1)	9
5. Section 66 “Aggravated Indecent Assault”	11
6. Section 67 – “Indecent Assault”	12
7. Section 68 – Unavailable defences to section 65, section 66 and section 67 crimes	13
8. Section 69 – Consent	14
9. Section 70 – Failure To Acknowledge Adolescents’ Sexual Autonomy	17
10. Section 71– Sexual Crimes Committed against Young Or Mentally Incompetent Persons Outside Zimbabwe & Conspiracy To Commit Such Crimes	18
11. Conclusion and Recommendations	20

This brief was developed through research from Kudakwashe Chitsike and review by Elizabeth Mangenje and Emerlynne Gil. Final review was conducted by Livio Zilli.

1. EXECUTIVE SUMMARY

In November 2015 ICJ published a reflection paper titled: **“Sexual and Gender Based Violence, Fair Trial Rights and the Rights of Victims - Challenges in Using Law and Justice Systems Faced by Women Human Rights Defenders”**, which compiled information gathered from a regional colloquium held by the ICJ in Swaziland in July 2015.¹ This paper highlighted a gap in the protection guaranteed to victims of sexual offences by the criminal law in Zimbabwe. Among other things, the authors noted that certain provisions relating to sexual crimes in the Criminal Law Codification and Reform Act, Chapter [9:23] (Criminal Code) offer limited protection to victims/survivors of such offences.

2019 statistics by Zimbabwe National Statistics Agency (Zimstats)² show an increase in the incidence of rape over the last five years. The Zimbabwe Gender Commission³ reports that 22 women are raped daily, one every 75 minutes. On average, 646 women⁴ are sexually abused monthly, with one in three girls raped or sexually assaulted before they reach the age of 18.⁵ The vast majority of sexual offences are committed by men against women, children and other men.

This legal brief critically examines sexual crimes provided under sections 65 -72 in the Zimbabwean Criminal Code in light of the country’s obligations under international human rights law and standards; its analysis is also informed by regionally and internationally recommended practices emerging from sexual offences legislation. It highlights shortcomings in the Criminal Code’s definition of rape resulting in violations of the rights to dignity, equality and non-discrimination, as well as to equality before the law and equal protection of the law, guaranteed in the Constitution of Zimbabwe Amendment (No. 20) Act, 2013 (the Constitution). The present brief also highlights, on the one hand, the lack of adequate protection of children against sexual exploitation, while, on the other, the failure to recognize the sexual autonomy of adolescents engaged in non-exploitative, consensual sexual activity with a peer.

2. DEFINING SEXUAL AND GENDER-BASED VIOLENCE

Zimbabwe is a State party to various regional and international instruments that are relevant to sexual and gender based violence (SGBV). In terms of international obligations, for example, CEDAW obliges Zimbabwe to enact and reform national laws, policies and administrative processes to achieve the purpose of the treaty, which includes protecting victims/survivors of SGBV. Furthermore, Zimbabwe should comply with the recommendations issued by the CEDAW Committee;⁶ these recommendations comprise those directly addressed to the State party in the context of the reviews of Zimbabwe’s implementation of and compliance with the provisions

¹ The Reflection Paper is available at: <https://www.icj.org/africa-sexual-and-gender-based-violence-fair-trial-rights-and-the-rights-of-victims/>

² ZimStats (2019) Quarterly Digest of Statistics http://www.zimstat.co.zw/sites/default/files/img/publications/Digest/Q_1_2019_Final.pdf (Accessed 19 March 2020)

³ ZimFacts(2019) Yes, 22 women are raped in Zimbabwe daily <https://zimfact.org/are-22-women-raped-in-zimbabwe-daily/> (Accessed 19 March 2020)

⁴ In this document women includes girls

⁵ Simbarashe Sithole, 22 “Women raped daily – Gender Commission” NewsDay November 22 2019 <https://www.newsday.co.zw/2019/11/22-women-raped-daily-gender-commission/> (Accessed 1 May 2020)

⁶ The Committee on the Elimination of Discrimination against Women (CEDAW) is the body of [independent experts](#) that monitors implementation of the [Convention on the Elimination of All Forms of Discrimination against Women](#).

of the Convention,⁷ as well as the authoritative interpretations of the same that the CEDAW Committee puts forward through its General Recommendations.⁸ These recommendations give a fuller interpretation of the provisions of the CEDAW treaty to assist State parties in fulfilling their obligations. The CEDAW Committee General Recommendation No. 19 on violence against women defines gender-based violence as “violence which is directed against a woman because she is a woman or that affects women disproportionately”. “It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.”⁹ The CEDAW Committee General Recommendation No. 35 directs states parties to, “Ensure that all forms of gender-based violence against women in all spheres, which amount to a violation of their physical, sexual, or psychological integrity, are criminalized and introduced, without delay, or strengthen legal sanctions commensurate with the gravity of the offence as well as civil remedies.”¹⁰

The CEDAW Committee has emphasized that rape is to be understood as violating a woman’s right to ‘personal security and bodily integrity’.¹¹ Rape affects women disproportionately,¹² has a disparate impact upon the lives of women, and occurs mostly against women. While it is true that men also experience rape, they do not suffer the same impact faced by women, such as the possibility of pregnancy, or being pressured by police or magistrates to forgive or even marry the perpetrator.

In addition to Zimbabwe’s obligations under CEDAW, the authorities should also have regard to the provisions of the UN Declaration on the Elimination of Violence against Women (DEVAW). The DEVAW was hailed as the first international instrument that provided an international framework recommending specific action at the domestic level to address gender based violence.¹³ The DEVAW defines violence against women as ‘any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women...’¹⁴, and which is a “manifestation of historically unequal power relations between men and women”.¹⁵ This type of violence does not just happen to women, but is motivated by gender, and is an assertion of male power and control or enforcement of gender roles. The DEVAW directs States to “Exercise due diligence to prevent, investigate and, in accordance

⁷ The most recent set of CEDAW [Concluding observations on Zimbabwe were issued by the Committee in March 2020 following its examination of the country’s sixth periodic report, see, \(2020\) CEDAW/C/ZWE/CO/6](https://www.unhcr.org/refugees-and-asylum-seekers/2020/03/cedaw-concluding-observations-zimbabwe)

⁸ For all the General Recommendations adopted by the CEDAW Committee, see <https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Recommendations.aspx>

⁹ CEDAW, General Recommendation No. 19: Violence against Women, UN Doc. A/47/38 1992 para 6 See also CEDAW Committee, General Recommendation No. 35: Gender-based violence against women, updating General Recommendation No. 19, CEDAW/C/GC/35 (2017), para.1.

¹⁰ CEDAW Committee, General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, UN Doc. CEDAW/C/GC/35, 2017, para. 29.

¹¹ *Vertido v. The Philippines*, Communication No. 18/2008, 1 September 2010 (UN Doc. CEDAW/C/46/18/2008)

¹² CEDAW, General Recommendation No. 19: Violence against Women, UN Doc. A/47/38 1992 para 6

¹³ UNWomen, “Global Norms and Standards: Ending Violence against women”, Available at: <https://www.unwomen.org/en/what-we-do/ending-violence-against-women/global-norms-and-standards>

¹⁴ UNGA Resolution 48/104, Declaration on the Elimination of Violence against Women, 20 December 1993, Article 1.

¹⁵ *Ibid*, preamble.

with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons”.¹⁶

Regionally, Article 3 of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Maputo Protocol) guarantees every woman’s right to dignity, “to respect as a person” and to protection from all forms of violence, including sexual violence. The African Union (AU) “Guidelines on Combatting Sexual Violence and its consequences in Africa” define sexual violence, including rape, as, “...any non-consensual sexual act, a threat or attempt to perform such an act, or compelling someone else to perform such an act on a third person.”¹⁷ The AU Guidelines clarify that acts are considered non-consensual when “...they involve violence, the threat of violence, or coercion... or someone taking advantage of a coercive environment.”¹⁸ At the sub-regional level, Article 20 (3) of the Southern African Development Community (SADC) Protocol on Gender and Development (SADC Gender Protocol) directs member States to review and reform their criminal laws and procedures applicable to sexual offences and gender based violence to eliminate gender bias and ensure justice and fairness for victims.

Notwithstanding the various regional and international standards outlined above, including, in particular, those setting out legal obligations binding on Zimbabwe, the country’s criminal law on sexual violence still fails to comply with them. As will be shown in this brief, in Zimbabwe, the criminal law embodies harmful gender stereotypes, for example, in the way in which certain sexual offences, e.g., rape, are defined. With respect to this, in 2020 the CEDAW Committee expressed concern over Zimbabwe’s narrow definition of domestic violence perpetrators in the Domestic Violence Act [Chapter 5:16], and at the persistence of discriminatory gender stereotypes and harmful practices, e.g. polygamy, child marriage and virginity testing.¹⁹ Regionally, the AU definition of sexual violence applies irrespective of the sex or gender of the victim and the perpetrator.²⁰ The SADC Gender Protocol also states that criminal laws should eliminate gender bias. “Stereotyping and gender bias in the justice system have far-reaching consequences on women’s full enjoyment of their human rights. They impede women’s access to justice in all areas of law, and may particularly impact on women victims and survivors of violence.”²¹ It is important that the legislature in Zimbabwe take immediate action to reform the criminal law provisions identified in this brief in accordance with the recommendations given.

¹⁶ UNGA Resolution 48/104, Declaration on the Elimination of Violence against Women, 20 December 1993, Article 4 (c).

¹⁷ African Union, “Guidelines on Combatting Sexual Violence and its consequences in Africa”, p 14. 2017 Available at: https://www.achpr.org/public/Document/file/English/achpr_eng_guidelines_on_combating_sexual_violence_and_its_consequences.pdf (Accessed 20 March 2020)

¹⁸ African Union, “Guidelines on Combatting Sexual Violence and its consequences in Africa”, p 14. 2017 Available at: https://www.achpr.org/public/Document/file/English/achpr_eng_guidelines_on_combating_sexual_violence_and_its_consequences.pdf (Accessed 20 March 2020)

¹⁹ CEDAW Committee, Concluding Observations, Zimbabwe, 2020. CEDAW/C/ZWE/CO/6 Para.25.

²⁰ African Union, “Guidelines on Combatting Sexual Violence and its consequences in Africa”, p 14. 2017 Available at: https://www.achpr.org/public/Document/file/English/achpr_eng_guidelines_on_combating_sexual_violence_and_its_consequences.pdf (Accessed 22 March 2020)

²¹ CEDAW Committee, General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, UN Doc. CEDAW/C/CG/35, 2017

3. Overview Of Zimbabwe's Sexual Offences Legal Framework

In Zimbabwe, legislation relating to sexual offences includes: the Constitution of Zimbabwe Amendment (No.20) Act 2013²² (The Constitution); the Criminal Code;²³ and the Domestic Violence Act [Chapter 5:16].²⁴ In addition to this legislative framework, there exists a National Protocol on the Multi Sectoral Management of Sexual Abuse and Violence, a National Action Plan on Rape and Sexual Abuse, and a National Programme on GBV Prevention and the Victim Friendly Court System.²⁵

Despite being party to numerous regional and international instruments,²⁶ Zimbabwe's legislative framework fails to adequately capture the scope and key elements of sexual and gender-based violence in its domestic laws, in a manner consistent with the country's obligations under those instruments. Section 61 (1) (b) of the Criminal Code defines unlawful sexual conduct as, "...any act the commission of which constitutes the crime of rape, aggravated indecent assault, indecent assault, sexual intercourse or performing an indecent act with a young person or sodomy..."

This brief will focus on:

- i. Rape, section 65.
- ii. Indecent assault, section 67.
- iii. Aggravated indecent assault, section 66.
- iv. Sexual intercourse with or performing "indecent acts" on "young persons", section 70.
- v. "Sexual crimes committed against young or mentally incompetent persons outside Zimbabwe", section 71.
- vi. "Prevention of conspiracy or incitement abroad to commit sexual crimes against young or mentally incompetent persons in Zimbabwe", section 72.

4. SECTION 65

Among other things, section 65(1)²⁷ defines rape as a crime where a male person has vaginal or anal intercourse with a female person without her consent.

²² The Constitution of Zimbabwe guarantees the rights to, freedom from discrimination and equality(section56), freedom from torture,cruel,inhumane and degrading treatment or punishment(section53), human dignity and personal security , which are at the heart of violations of a sexual nature.Hence, the Constitution is the principal domestic law protecting sexual autonomy.

²³ The Criminal Law (Codification and Reform) Act [Chapter 9:23] Section 65(1)

²⁴ The Domestic Violence Act [Chapter 5:16]

²⁵ Chihambakwe, W, et al (2016) An Assessment of the Effectiveness of the Victim Friendly Legal System in Zimbabwe: A Case Study of Harare Metropolitan Province, Zimbabwe, The International Journal of Humanities and Social Studies Volume 4, Issue 10 October

²⁶ Zimbabwe signed and ratified CEDAW in 1991 and 1997 respectively, ratified the Maputo Protocol in April 2008 and signed the SADC Gender Protocol in 2008 and ratified it in 2009.

²⁷ See the Criminal Law Codification & Reform Act (Chapter 9:23), section 65 (1).

Offences of sexual assault, including rape, may be perpetrated by and against anyone, regardless of their gender. Women, as well as men, may be perpetrators, as well as survivors/victims of sexual offences. The failure of many national laws to be gender neutral, for example, by failing to cater for the eventuality that men and boys may be victims of sexual offences, is a discriminatory practice. Under international human rights law and standards and under international criminal law, sexual crimes are defined in gender neutral terms.²⁸ Sexual assault is a particularly heinous form of brutality. It includes rape and any other attack of a sexual nature, physical or mental, perpetrated against anybody, women, girls, men or boys.²⁹ Its consequences may include acute physical and psychological repercussions for survivors and other witnesses.

International human rights bodies have clarified that in determining whether an act amounts to rape the most important aspect is the lack of consent of the victim and whether consent may have been vitiated by circumstances in which it took place, including, for example, circumstances that may be described as coercive, whether or not such circumstances involved acts or threats of physical violence [CEDAW Committee Communication No.18 2008]. The Treaty Bodies jurisprudence confirms that violence or force are not necessary to prove the commission of sexual offences, including rape. It is the lack of consent that counts, and there should be no presumption that simply because the perpetrator did not resort to force or violence, that the complainant/survivor must have consented. The CEDAW Committee has clarified repeatedly that rape constitutes a violation of women's right to personal security and bodily integrity, and that its essential element is lack of consent [Karen Tayag Vertido v. Philippines, 22 September 2010, CEDAW/C/46/D/18/2008, para. 8.7]. Violence or the use of physical force may be instrumental in demonstrating the absence of consent. Consent entails a decision freely made without force, threat of force, coercion, or taking advantage of a coercive environment. Where evidence of force, threat of force or coercion or coercive circumstances are present then lack of consent is made out.

Rape, regardless of where it occurs constitutes a form of torture if perpetrated by State actors, such as members of the army or police officers [Aydin v. Turkey, ECtHR (Grand Chamber), Application No. 23178/94, Judgment of 27 September 1997, paras. 74-86]. Rape and other forms of sexual assault may also constitute crimes against humanity and war crimes [The International Protocol on the Documentation and Investigation of Sexual Violence in Conflict (2017) Preventing Sexual Violence in Conflict Initiative: London].

Two distinct concerns arise with respect to the above description of rape under section 65(1); they are that:

- i. Rape is defined in strict gendered terms, as a crime perpetrated solely by men and exclusively against women.³⁰
- ii. It is limited in scope, failing to recognize and proscribe other invasive sexual acts, such as oral rape and the use of objects to perpetrate rape, both of which have been found to constitute rape under international law.

²⁸ See, for example, the Elements of Crimes with respect to the Statute of the International Criminal Court, including the "Crime against humanity of rape" in Article 7(1)(g)-1 of the Statute.

²⁹ E.g., rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity, according to articles 7(1)(g), 8(2)(b)(xxii), and 8(2)(e)(vi) of the Rome Statute of the ICC, may constitute crimes against humanity and war crimes.

³⁰ Under international human rights standards and under international criminal law, sexual crimes are defined in gender neutral terms. See footnote 25 above. See also, Weare, S (2018) "Oh you're a guy, how could you be raped by a woman, that makes no sense": towards a case for legally recognising and labelling 'forced-to-penetrate' cases as rape", International Journal of Law in Context, Vol 14, Issue 1, March 2018, pp. 110-131. Available at: <https://doi.org/10.1017/S1744552317000179> (Accessed 20 March 2020)

4.1 The Gendered Description of Rape under section 65(1)

Under section 65(1), only a man can be a perpetrator of rape and only a woman can be the victim/survivor. This definition embodies the traditional male-on-female paradigm, which fails to characterize rape as a non-consensual, invasive sexual act that may be perpetrated against anybody, regardless of sex or gender, for instance, against men and boys and against other at-risk individuals, such as transgender women. This limited definition is inconsistent with Zimbabwe's international law obligations, and fails to offer adequate protection to victims/survivors of rape regardless of their gender/sex. Both women and men may be either perpetrators or survivors/victims of sexual offences. The failure of many national laws to be gender neutral is a discriminatory practice under international human rights law and international criminal law standards; as such it fails to provide adequate protection of the law and access to justice and effective remedies to victims/survivors of rape in a manner consistent with the right of everyone to equality before the law and equal protection of the law without discrimination.

Zimbabwe's criminal law binary approach to rape (i.e., penile penetration of the vagina or anus of a female by a male perpetrator) violates other survivors' rights to protection against rape, which, in turn, violates their sexual autonomy and human dignity.³¹ In addition their rights to equality before the law and equal protection of the law are undermined.³² Section 51 of the Constitution of Zimbabwe provides that, "Every person has inherent dignity in their private and public life, and the right to have that dignity respected and protected."³³

The non-inclusive nature of section 65(1) may be remedied by re-framing the provisions in gender neutral language. The examples below from other jurisdictions offer ways in which the framing of rape criminal law provisions has been made gender neutral:

i. Sierra Leone's Sexual Offences Amendment Act (2019) states, "A person who intentionally commits an act of sexual penetration on another person without the consent of that other person commits the offence of rape and is liable on conviction to a term of imprisonment not less than 15 years to life imprisonment."

ii. South Africa's 2007 Amendment Act, defines rape as a situation where, "Any person ("A") who unlawfully and intentionally commits an act of sexual penetration with a complainant ("B"), without the consent of B, is guilty of the offence of rape."

iii. Namibia's Combating of Rape Act (CRA) defines rape in section 2 as, situations where any person, "...who intentionally under coercive circumstances -(a) commits or continues to commit a sexual act with another person; or (b) causes another person to commit a sexual act with the perpetrator or with a third person..."

Using gender-neutral language in criminal legislation proscribing sexual violence, including criminal law provisions concerning rape, allows for broadening the scope, and thus protection, to all victims/survivors of rape. Additionally, it allows a "...broader understanding of sexuality

³¹ Zimbabwe Constitution 2013, Section 51.

³² Zimbabwe Constitution 2013, section 56.

³³ Zimbabwe Constitution 2013, Section 51.

and of sexual injury than the older common law³⁴ binary approach of penile penetration by a male perpetrator.

However, the exclusive use of gender neutral language may result, even unwittingly, in the “...explicit denial that rape is a gendered crime which serves power-political aims such as gender and sexual domination...”³⁵ In this context, a gender neutral definition alone may obscure the fact that women and girls are overwhelmingly the victims of rape perpetrated by men. CEDAW General Recommendation No. 28 advocates for examining gender-neutral laws and policies to ensure that they do not create or perpetuate existing inequalities, and for their repeal or amendment when they do so.³⁶ In 2018 the then CEDAW Vice President, Prof. Ruth Halperin-Kaddari, expressed concern that gender-neutral legislation, policies and programmes are bringing challenges to the achievement of equality between men and women, as gender neutrality then obscures the fact that women are overwhelmingly the victims of gender based violence.³⁷ To prevent this unintended negative consequence, UN Women proposes a balanced approach, which they argue can be achieved by including both gender-neutral and gender-specific provisions in legislation, so as to reflect the needs and rights of female victims, and protect male victims and sexual minorities.³⁸

Section 65 should be amended to include both gender-neutral and female specific language. This will bring it into alignment with section 56(1) of the Constitution, which provides for equality before the law and protects the right to “...equal protection and benefit of the law’, while also protecting women from the unequal power disparities arising from the highly patriarchal Zimbabwean society.

4.2 The limited Scope of Section 65(1)

As already mentioned above, the scope of protection that section 65(1) offers is severely restricted as it fails to proscribe other non-consensual invasive sexual acts that amount to rape, such as:

- i. Non-consensual oral penetration of another person with a penis.
- ii. Non-consensual vaginal, anal or oral penetration of a sexual nature of another person with objects or body parts other than the penis.³⁹
- iii. Same-sex rape, that is, men who rape other men, and women who rape other women.

³⁴ du Toit, L (2012) Sexual specificity, rape law reform and the feminist quest for justice, *South African Journal of Philosophy*, 31:3, 465-483, DOI: [10.1080/02580136.2012.10751788](https://doi.org/10.1080/02580136.2012.10751788)

³⁵ Ibid

³⁶ N Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 16 December 2010, CEDAW/C/GC/28, para 16. Available at: <https://www.refworld.org/docid/4d467ea72.html>

³⁷ CEDAW(2018) New Challenges to Gender Equality and Empowerment from the CEDAW Perspective October 2018 Geneva https://www.unece.org/fileadmin/DAM/pau/age/Icpd/ICPD-25/Presentations/Session-3/1_-_3rd-thematic-session-presentation-Ruth-Halperin-Kaddari-CEDAW.pdf

³⁸ UNWomen (2012) *Handbook for Legislation on Violence against Women*. United Nations Entity for Gender Equality and the Empowerment of Women; 2012, p 24; available at: <https://www.un.org/womenwatch/daw/vaw/handbook/Handbook%20for%20legislation%20on%20violence%20against%20women.pdf> (Accessed 19 March 2020)

³⁹ See, among others, the definition in article 36(a) of the 2011 Council of Europe Convention on preventing and combating violence against women and domestic violence (otherwise known as the Istanbul Convention), the first comprehensive treaty-based framework dedicated to combatting violence against women. It defines sexual violence and rape as “engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object.” Istanbul Convention, article 36(1)(a). This may include “causing another person to engage in non-consensual acts of a sexual nature with a third person” under article 36(1)(c).

- iv. Non-consensual, invasive sexual assault constituting rape of sexual minorities, such as gender non-conforming individuals, including transgender persons.

Section 65 excludes non-consensual oral penile penetration or non-consensual vaginal, anal or oral penetration of a sexual nature of another person with objects or body parts other than a penis. This means some victims of different forms of non-consensual penetration, other than penile penetration of a vagina or anuse, are excluded from the protection of section 65. Instead, these acts are omitted from the rape definition and relegated to the lesser offence of aggravated "indecent assault", which, on the one hand, mischaracterizes the offence, framing it as a crime against decency and, on the other, fails to attract the appropriate societal condemnation that rape in all its forms deserves.

The International Criminal Tribunal of Yugoslavia (ICTY) in the Furundzija⁴⁰ case recognized forced oral sex by a detainee amounted to rape. Currently, certain acts of "forced oral sex", which, according to relevant international standards, may properly be characterized as rape, would fall under section 67 (see below) as indecent assault, and would not be recognized as rape.

The CEDAW Committee has held that States parties "...have an obligation to take steps to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women", and make sure the criminal laws provide adequate protection.⁴¹ Including non-consensual oral penile penetration and other forms of non-consensual sexual penetration within an amended definition of rape would bring the Criminal Code in line with the definition of rape in international law, including under the African Union's Guidelines on Combating Sexual Violence and its Consequences in Africa.⁴² In doing so, it would offer access to justice and effective remedies to the victims/survivors of those offences on the basis of equality before the law and afford them equal protection of the law without discrimination.

From an examination of the international jurisprudence on the crime of rape, the language of section 65 of the Criminal Code should include a revised definition of rape in the following manner:

- Non-consensual oral penile penetration and non-consensual vaginal, anal and oral penetration of a sexual nature of another person with any object or body part other than a penis.

These suggested changes would uphold the goal of rape laws worldwide and under international law, which is, to penalize the violation of an individual's sexual autonomy, of their right to physical and bodily integrity, to dignity, to security of person, to freedom from discrimination and from torture or other prohibited ill-treatment, as well as their right to access to justice and effective remedies for offences of sexual and gender-based violence.

⁴⁰ Prosecutor v. Anto Furundzija (Appeal Judgement), IT-95-17/1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 21 July 2000, para 182-183. Available at: <https://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf>

⁴¹ V.P.P. v Bulgaria, UN Doc. Communication No. 31/2011, CEDAW/C/53/D/31/2011 (24 November 2012) Para 9.4 – 9.5

⁴² Adopted at the 61st Ordinary Session of the African Commission of Human and Peoples Rights, on November 15, 2017 in Banjul, The Gambia.

5. SECTION 66 "AGGRAVATED INDECENT ASSAULT"

Section 66 (1) defines the crime of "aggravated indecent assault" as non-consensual assault of a sexual nature committed by either male or female perpetrators, against male or female victims/survivors. It does so by proscribing it as a crime when a male person:

- "(i) commits upon a female person any act, other than sexual intercourse or anal sexual intercourse, involving the penetration of any part of the female person's body or of his own body; or
- (ii) commits upon a male person anal sexual intercourse or any other act involving the penetration of any part of the other male person's body or of his own body".

Section 66 (1) also defines and proscribes "aggravated indecent assault" in relation to female perpetrators; the crime occurs when a female:

- "(i) has sexual intercourse with or commits upon a male person any other act involving the penetration of any part of the male person's body or of her own body; or
- (ii) commits upon a female person any act involving the penetration of any part of the other female person's body or of her own body".

For all intent and purposes, the acts described in section 66 actually constitute rape according to the international standards discussed under section 4 of this brief. Similarly, regional examples from peer jurisdictions indicate that non-consensual penetration of a sexual nature by any part of the body, however slight, constitutes rape. For example, in the case of *Monomono v S*,⁴³ where the appellant lodged an appeal against a prior conviction of rape, he argued that his conviction should be set aside because, "...the respondent had not proven penetration beyond a reasonable doubt and that he was not guilty of rape, but of indecent assault..." The evidence before the court disclosed bruising of the para-urethral fort which is found on the female genital organ when the labia majora and the labia minora are pushed away.⁴⁴ The court held that, 'Both the labia majora and labia minora form part of the female genital organ and therefore the offence fell within the definition of a prohibited sexual act amounting to rape as defined by the Namibian CRA'. The court satisfied itself that "the appellant in fact inserted his finger although not deep enough into the complainant's vagina to cause substantial injuries or bruises, but certainly deep enough to constitute insertion into her genital organ and enough to cause redness on her genital organ", and the "appellant was thus correctly convicted of rape in terms of the Act".⁴⁵

Section 66 1(b) states that if a person commits any of the above-mentioned acts "with indecent intent and knowing that the other person has not consented to it or realising that there is a real risk or possibility that the other person may not have consented to it, shall be guilty of aggravated indecent assault and liable to the same penalty as is provided for rape."

The definition and proscription of the criminal acts in section 66, as well as the liability upon conviction to the imposition of the same penalty as provided for the crime of rape, demonstrate the need to repeal this section, and incorporate those offences into a comprehensive revised definition of rape in section 65. In addition there is a clear need to proscribe more broadly other forms of sexual assault that do not constitute rape.

⁴³ *Monomono v S* (CA 108-2016) [2017] NAHCMD 111 (7 April 2017). Available at; <https://namiblii.org/na/judgment/high-court-main-division/2017/111>

⁴⁴ Ibid, para 13.

⁴⁵ Ibid, para 21 and 24.

Additionally, the use of the word 'indecent' in describing the section 66 offences makes "morality" a factor, contrary to international standards that provide that crimes of a sexual nature are not against honour, decency or morality,⁴⁶ but offences against a person's right to mental and physical integrity, dignity, sexual autonomy, security of person, and freedom from discrimination and from prohibited ill-treatment.

Further, the binary language used in section 66 fails to cater for bodily diversity, thereby excluding intersex persons, as well as gender non-conforming people, such as transgender persons.

6. SECTION 67 – "INDECENT ASSAULT"

Section 67 (1) (a) and (b) criminalizes "...any act involving physical contact that would be regarded by a reasonable person to be an indecent act, other than sexual intercourse or anal sexual intercourse or other act involving the penetration of any part of the..." body. Section 67 (1)(a) proscribes the offence when committed by a male perpetrator against a female or against another male; section 67(1)(b) proscribes the crime when committed by a female perpetrator against a male or against another female.

Section 67 provides that if a person commits any of the above-mentioned acts "with indecent intent and knowing that the other person has not consented to it or realising that there is a real risk or possibility that the other person may not have consented to it, shall be guilty of indecent assault and liable to a fine not exceeding level seven or imprisonment for a period not exceeding two years or both."

The language in section 67 would include non-consensual cunnilingus, which is the stimulation of female genitalia either using the tongue or lips, as a lesser offence of "indecent assault", rather than as a crime of rape or aggravated sexual assault (in circumstance when cunnilingus does not entail actual penetration, however slight).⁴⁷

To classify sexual offences as a lesser crime of "indecent assault" denies the seriousness of these acts and allows perpetrators to get away with a fine or short-term imprisonment. Non-penetrative, sexual acts committed against another person without that person's consent must be properly defined and proscribed by the criminal law since they constitute a serious infringement of that person's right to mental and physical integrity, dignity, sexual autonomy, security of person, and freedom from discrimination and from prohibited ill-treatment. Therefore, they are not crimes against decency, morality and honour. In light of this, sections 67 offences should be renamed and redefined doing away with decency from both the title of the offence and its definition.

Any type of sexual assault short of rape should be referred to as a sexual assault: in addition, where there are certain features that make the assault particularly more serious and damaging, for example, because of the manner in which it was committed, and/or because of its impact on the victim, such assault should be defined and proscribed as the crime of aggravated assault.

Section 67 should also be amended to make it gender neutral. However, as mentioned above with respect to rape, gender-neutral language should be accompanied by gender-specific provisions so as to reflect the needs and rights of female victims, and protect male victims and sexual minorities. In turn, gender specific language would reflect the fact that sexual assault,

⁴⁶ Equality Now (2017) *The World's Shame: Global Rape Endemic: How Laws Around the World are Failing to Protect Women and Girls*. Produced by Equality Now. May 2018. New York

⁴⁷ Note: Cunnilingus may include penetration, in which case the recommendation under section 66 to include such acts of penetration under rape applies. Where the act of cunnilingus does not include penetration it should be classified as sexual assault or aggravated sexual assault depending on the circumstances.

as it is the case with rape, is mainly committed by male perpetrators against predominantly women and girls, as well as against other men and boys.

7. SECTION 68 – UNAVAILABLE DEFENCES TO SECTION 65, SECTION 66 AND SECTION 67 CRIMES

Section 68 states that it shall not be a defence to a charge of rape, aggravated indecent assault or indecent assault that the female person was the spouse of the accused person at the time of any sexual intercourse or other act that forms the subject of the charge. It however contains a proviso that makes prosecution subject to the consent of the Prosecutor General. Section 68(a) does not comply with international human rights law and standards guaranteeing the right to equality before the law and equal protection of the law without discrimination,⁴⁸ and is also unconstitutional as it limits protections for survivors of marital rape; and discriminates against male survivors of sexual violence in marriage.

Section 68 (a) provides that marriage shall not be a defence to the crime of rape and other sexual offences listed in section 66 and section 67 of the Criminal Code. In this way, the provision appears to be in line with UN recommendations that “no marriage or other relationship shall constitute a defence to a charge of sexual assault...”⁴⁹ However, the proviso in section 68 means that a husband cannot be prosecuted for sexual offences, including rape, committed against his wife without the authorization of the Prosecutor General. This requirement is problematic in that it limits protections for married female survivors of sexual assault, including the crime of rape, by adding an additional unnecessary barrier to access to justice and effective remedies for female victims who at the time of the offences were married to the perpetrator. Additionally, this obstacle discriminates against married women by denying them equal access to and protection of the law and of the criminal judicial system in cases of sexual violence, compared to their unmarried counterparts. The Committee on CEDAW has noted that when countries limit a woman's legal capacity by their laws, they are denying women their rights to equality.⁵⁰

In addition, as discussed under section 4 of this brief, gendered language in sexual violence crimes unfairly discriminates with respect to access to justice for male, transgender and other victims, and section 68 does so with respect to male survivors of sexual violence in marriage.

⁴⁸ By accepting CEDAW States must ensure that they incorporate the principle of equality of men and women in their legal system. Article 2 (c) of CEDAW states, “States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;... (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination...”

⁴⁹ UN Women, “Handbook on Legislation on Violence Against Women”, 2012, p 24. Available at: <https://www.un.org/womenwatch/daw/vaw/handbook/Handbook%20for%20legislation%20on%20violence%20against%20women.pdf> (Accessed 19 March 2020)

⁵⁰ General Comment 21 of CEDAW

8. SECTION 69 – CONSENT

Section 69 of the Criminal Code provides that a person shall not be deemed to have given consent to sexual intercourse in various circumstances. The relevant circumstances are defined as follows:

“where the person charged with the crime--

- (a) uses violence or threats of violence or intimidation or unlawful pressure to induce the other person to submit; or
- (b) by means of a fraudulent misrepresentation induces the other person to believe that something other than sexual intercourse or an indecent act, as the case may be, is taking place; or
- (c) induces the other person to have sexual intercourse or to submit to the performance of the indecent act, as the case may be, by impersonating that other person’s spouse, or lover; or
- (d) has sexual intercourse or performs an indecent act upon the other person while that other person is asleep, and that other person has not consented to the sexual intercourse or the performance of the act before falling asleep; or
- (e) has sexual intercourse or performs an indecent act upon the other person while that other person is hypnotized or intoxicated from the consumption of drugs or alcohol so as to be incapable of giving consent to the sexual intercourse or the performance of the act, and that other person has not consented to the sexual intercourse or the performance of the act before becoming so hypnotized or intoxicated.”

Some of these factors may place undue pressure on the survivor to conform to myths and stereotypes about the “ideal” survivor, including whether violence was used and how they resisted.⁵¹

Underlying section 69 is the presumption that force persists as a key element of the crime of rape. In Zimbabwe the analysis of coercive circumstances by the court has not been applied uniformly or as a matter of legally expected practice. In some cases, judges have focused on coercive circumstances to infer lack of consent. For example, in the case of *S v Chiguma*⁵² the appeals court ruled that “the previous concession to sexual intercourse by a complainant cannot be said to have been given for future un contemplated violation”. In the *Chiguma* case, the complainant and appellant were formerly married but had since separated. When complainant visited appellant’s house to collect a debt owed to her, the appellant raped her. The appellant argued that the complainant had given consent for the sexual encounter. The court was satisfied that the complainant did not consent to the sexual act, and she expressed this through body conduct, verbally and by reporting the rape to the police and family members.

Unfortunately, there have been several cases decided by courts where a coercive environment was not taken into account, including social and economic circumstances that are exacerbated by gendered expectations. In *S v Mugomba*,⁵³ the complainant, a house maid accused her employer’s husband of raping her and the court did not take into account the power dynamics between the victim and the perpetrator in adjudicating the case.

⁵¹ Dowds E, (2018) “Conceptualizing the role of consent in the definition of rape at the international criminal court: a norm transfer perspective”, *International Feminist Journal of Politics*, 20:4, 624-643, p 629. Available at: <https://doi.org/10.1080/14616742.2018.1447311> (Accessed 20 March 2020)

⁵² *S v Chiguma*⁵² (HMT 28-20, CA 86/19 Ref CRB RSPR 123/19) [2020] ZWMTHC 28 (05 February 2020)

⁵³ Prosper Dembedza “Judge’ s hubby acquitted of raping maid” *The Herald* 28 September 2019 <https://www.herald.co.zw/judges-hubby-acquitted-of-raping-maid/> Accessed 25 August 2020)

In the case of *S v Chimanihire*,⁵⁴ on appeal, the Court quashed the rape conviction as the evidence led by the State did not rebut the possibility of consensual sexual intercourse having taken place between the parties. Counsel for the appellant stated that the conviction should not stand because the complainant did not raise any alarm at the time of the sexual encounter, even though other persons were passing nearby. Moreover, there was no sign of any struggle at the scene of the alleged rape. Through this decision the court made physical resistance a requirement to prove rape when in fact victims respond differently to attacks of a sexual nature. The approach by the court goes against findings on how a victim may react as noted in the case *M.C. v Bulgaria* where the European Court of Human Rights (ECHR), which relied on expert psychiatric evidence that had found that there were "...two patterns of response by rape survivors to their attacker...violent physical resistance and "frozen fright" (also known as "traumatic psychological infantilism syndrome")",⁵⁵ demonstrating that the lack of resistance is not indicative of consent of the victim. The ECHR held that "any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual's sexual autonomy".⁵⁶ Echoing the ECHR, the Special Court of Sierra Leone (SCSL) reiterated that, "...force is not an element per se of rape and there are factors other than force which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim. This is necessarily a contextual assessment",⁵⁷ adding that, "...continuous resistance of the victim and physical force or even threat of force by the perpetrator are not required to establish coercion..."⁵⁸

In *Karen Vertido v. the Philippines*,⁵⁹ the CEDAW Committee recommended that States should remove any requirement in legislation that sexual assault be committed by force or violence. CEDAW recommended that States should enact a definition of sexual assault that is premised on a notion of consent that:

- (a) requires the existence of unequivocal and voluntary agreement to the sexual act/s in question, requiring, in turn, proof by the accused of steps taken to ascertain whether the complainant/victim was consenting to such acts; or
- (b) is negated when the act take place in coercive circumstances (and includes a broad range of coercive circumstances).

This was the approach taken in the *Gacumbitsi* judgment of the International Criminal Tribunal of Rwanda (ICTR) which held that:

"The prosecution can prove non-consent beyond a reasonable doubt by proving the existence of coercive circumstances under which meaningful consent is not possible. But it is not necessary as a legal matter, for the Prosecutor to introduce evidence concerning the words or conduct of the victim or the victim's relationship to the perpetrator. Nor need it introduce evidence of force. Rather, the Trial Chamber is free to infer non-consent from the background circumstances...."⁶⁰

⁵⁴ *S v Chimanihire* (ca 4/06) [2006] zwhhc 72 (04 July 2006)

⁵⁵ *M.C. v. Bulgaria*, Appl. No. 39272/98, Council of Europe: European Court of Human Rights, December 3, 2003, para 70. Available at: <https://www.refworld.org/cases,ECHR,47b19f492.html> (Accessed 22 March 2020)

⁵⁶ *M.C v Bulgaria*, para 166.

⁵⁷ *Prosecutor v Alex Tamba Brima, Brima Bazzy Kama, Santigie Borbor Kanu*, Special Court of Sierra Leone, SCSL-04-16-T, June 20, 2007, para 694. Available at: <http://www.rscsl.org/Documents/Decisions/AFRC/613/SCSL-04-16-T-613s.pdf> Accessed 22 March 2020)

⁵⁸ *Ibid.*

⁵⁹ CEDAW/C/51/D/28/2010, 22 September 2010

⁶⁰ *Prosecutor v. Gacumbitsi*, Judgment, Case No. ICTR-2001-64-A, July 7, 2006, para.153

The International Criminal Tribunal of the Former Yugoslavia (ICTY) stated, the overarching spirit of rape legislation worldwide is to penalize "...violations of sexual autonomy", that is, criminalizing situations where victims of sexual violence are rendered helpless.⁶¹ The Special Court of Sierra Leone (SCSL) in the *RUF* case argued that rape can be committed under coercive circumstances, "...such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or another person or by taking advantage of a coercive environment."⁶²

Rule 70 (Principles of evidence in cases of sexual violence) of the Rules of Procedure and Evidence of the ICC, codifies the current international law on consent, adding that, the credibility, character or predisposition to sexual availability of a victim cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim.⁶³

The disparity in Zimbabwean jurisprudence on assessment of coercive circumstances demonstrates the need to train police and prosecutors in the investigative and prosecutorial process, so that they are alive to the presence of coercive circumstances in the commission of the offences. This will help police to conduct sound investigations and gather the necessary evidence on coercive circumstances that can be used by the prosecutor when making submissions in court. There may also be a need to legislate so as to require judges and magistrates presiding over sexual assault cases, including instances of rape, to take into account the possibility that coercive circumstances may have existed at the relevant time.

Furthermore, section 69(1)(d) and section 69(1)(e) envisage circumstances in which lawful consent to the relevant sexual acts may be given prior to falling asleep, becoming hypnotised or intoxicated. It should generally be presumed by a court that when someone is either asleep, intoxicated, hypnotized and otherwise incapacitated, they are incapable of providing consent, or consensually engaging in an ongoing sexual act. The fact that they may have been capable of lawfully consenting to the said sexual act/s before falling asleep, becoming intoxicated, being hypnotized or becoming incapacitated in any other way is totally irrelevant. The provision denies the sexual autonomy of a victim by failing to recognize that an incapacitated person being subjected to sexual act while unconscious or in an altered state of mind is incapable of providing consent.

⁶¹ Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Trial Judgment), IT-96-23-T & IT-96-23/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), February 22, 2001, para 440-441. Available at: <https://www.refworld.org/cases,ICTY,3ae6b7560.html> (Accessed 22 March 2020)

See also: UN Women, "Handbook on Legislation on Violence Against Women", 2012, p 24. Available at: <https://www.un.org/womenwatch/daw/vaw/handbook/Handbook%20for%20legislation%20on%20violence%20against%20women.pdf> (Accessed 19 March 2020)

⁶² Prosecutor v. Sesay, Kallon & Gbao, Case No. SCSL-04-15-T, Trial Chamber I, Judgement, para 144-45 (Mar. 2, 2009). The full elements of the crime of rape were stated thus by the Court: "i. The Accused invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the Accused with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body;

ii. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or another person or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent;

iii. The Accused intended to effect the sexual penetration or acted in the reasonable knowledge that this was likely to occur; and

iv. The Accused knew or had reason to know that the victim did not consent."

⁶³ International Criminal Court Rules of Procedure and Evidence, Second edition 2013, The Hague, available at: www.iccpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf (Accessed 19 March 2020)

9. SECTION 70 – Failure To Acknowledge Adolescents’ Sexual Autonomy

Section 70 criminalizes sexual acts committed by anyone (including children) against a “young person”, defined in Section 61 as anyone below the age of 16.⁶⁴ Section 70 reads as follows:

- “1) Subject to subsection (2), any person who—
- (a) has extra-marital sexual intercourse with a young person; or
 - (b) commits upon a young person any act involving physical contact that would be regarded by a reasonable person to be an indecent act; or
 - (c) solicits or entices a young person to have extra-marital sexual intercourse with him or her or to commit any act with him or her involving physical contact that would be regarded by a reasonable person to be an indecent act;

shall be guilty of sexual intercourse or performing an indecent act with a young person, as the case may be, and liable to a fine not exceeding level twelve or imprisonment for a period not exceeding ten years or both.”

Since “any person” -- namely, any person aged 16 and older -- may be charged under section 70 means that children, defined by the Zimbabwe Constitution as those under the age of 18, may be criminally prosecuted under section 70. This interpretation is supported by the case of *S v Masuku*,⁶⁵ where a 17-year-old boy was accused of contravening section 70 after he had unprotected sexual intercourse with his 15 year old girlfriend who subsequently fell pregnant. The matter was on appeal before the High Court, after Masuku had been convicted in the Magistrates’ Court and sentenced to 24 months’ imprisonment. On appeal, in her judgment Judge Tsanga stated, “Perpetrators of the crime of sex with a young person under s 70 often constitute the predatory male adult who preys on a young girl albeit with her consent. However, in addition to adult males as predominant perpetrators, those who have equally fallen foul of the provision are adolescent boys over the age of 16 but still children under the Constitution in terms of s 81(1). They are not young persons as defined by s 70 of the Criminal Code.”⁶⁶ Judge Tsanga pointed out the challenge of criminalizing sexual conduct between two children, opining, “Ignoring the reality of consensual sex among teenagers and adopting an overly formalistic approach to the crime can result not only in an unnecessarily punitive sentence, but also a criminal record and stigmatisation as a sex offender.”⁶⁷ Ultimately, the accused teen’s conviction was upheld, however, his sentence was reduced to community service.

Section 70 of the Criminal Code has the unintended consequence of criminalizing consensual non-exploitative sex between two young persons, for example between a 15-year-old and 16-year-old in a romantic relationship. This violates section 81 of the Constitution which provides that every child has the right— “(a) to equal treatment before the law...” The Committee on the Rights of the Child (CRC Committee) argues: “States should avoid criminalizing adolescents of similar ages for factually consensual and non-exploitative sexual activity.”⁶⁸ This point was best stated by Judge Tsanga in the *Masuku* case, that, “Sex among peers is a reality of adolescent sexuality. It does not justify a suspended imprisonment term for the teen male offender who has had sex as part of a romantic relationship with a peer.”⁶⁹ Section 70 should

⁶⁴ Criminal Law Codification Reform Act (Chapter 9:23), Section 61.

⁶⁵ *State v Brian Masuku*, HH 106-15, High Court of Zimbabwe, February 5, 2015. Available at: <https://uniteforreprorights.org/wp-content/uploads/2017/10/s-v-brian.pdf>

⁶⁶ *Ibid*, page 2.

⁶⁷ *Ibid*, page 2

⁶⁸ UN Committee on the Rights of the Child (CRC), General comment No. 20 (2016) on the implementation of the rights of the child during adolescence, December 6, 2016, CRC/C/GC/20, para 40. Available at: <https://www.refworld.org/docid/589dad3d4.html> (Accessed 22 March 2020)

⁶⁹ *State v B. Masuku*, [2015] ZWHHC 106, CRB B467/14 (High Court of Zimbabwe)

be amended to reflect the recommendation of the CRC Committee and "... recognize adolescents as having an evolving capacity for sexual agency...", while also protecting them from exploitative sexual conduct."⁷⁰

The Constitutional Court of South Africa ruled that the criminalization of adolescent sex was unconstitutional, stating, "Sexual experiences during adolescence, in the context of some form of intimate relationship, are not only developmentally significant, they are also developmentally normative."⁷¹ South Africa passed a "close-in-age defence" to protect adolescents against criminal sanctions, and "...exempted minors aged 12 -16 years from prosecution once it was established that their sexual conduct was consensual."⁷² Within the region, "... Namibia also does not prosecute adolescents in circumstances where the younger adolescent is below the age of 14 years and the older adolescent is no more than 3 years older".⁷³

While Section 70(2) provides that consent of the young person is not a defence to the charge, a perpetrator might have a defence if they are able to satisfy the court that he or she believed the young person was 16 years or older when she/he consented. Section 70 (3) provides that, "...the apparent physical maturity of the young person concerned shall not, on its own, constitute a reasonable cause..." to believe that the young person was 16 years or older.⁷⁴ This complies with the United Nations Population Fund (UNFPA) recommendation that discourages arguing a child's older physical appearance, as a defence to sexual crimes.⁷⁵ The UNFPA states that clarifying the age of consent for sexual activity "...provides further options for an adolescent or young person to make safe decisions about their health."⁷⁶

10. SECTION 71– SEXUAL CRIMES COMMITTED AGAINST YOUNG OR MENTALLY INCOMPETENT PERSONS OUTSIDE ZIMBABWE & CONSPIRACY TO COMMIT SUCH CRIMES

Section 71 reads: " (1) Any person who is a citizen of Zimbabwe or ordinarily resident therein and who does anything outside Zimbabwe to, with or against a young or mentally incompetent adult person which, if it were done in Zimbabwe, would constitute—

⁷⁰ Kangaude, G and Skelton A, "(De)Criminalizing Adolescent Sex: A Rights-Based Assessment of Age of Consent Laws in Eastern and Southern Africa", *Reproductive Health in Sub-Saharan Africa-Original Research*, December 2018, p 10 -11. Available at: <https://journals.sagepub.com/doi/pdf/10.1177/2158244018806036> (Accessed 17 March 2020)

⁷¹ The Teddy Bear Clinic for Abused Children Case and RAPCAN and Others v. Minister of Justice and National Director of Public Prosecutions 2013 12 CCT 13 ZACC (S. Afr.) available at <http://www.saflii.org/za/cases/ZACC/2013/35.html> para. 46. (Accessed 12 May 2020)

⁷² Center for Reproductive Rights, "Criminalizing Adolescence A Call to Reform the Sexual Offences Act", page 19. Available at: <https://reproductiverights.org/sites/default/files/documents/Designed%20Long%20Version%20of%20Briefing%20Paper%20on%20Adolescent%20SRHR-Covers1.pdf> (Accessed 12 May 2020)

⁷³ Kangaude G, and Skelton, A, "(De)Criminalizing Adolescent Sex: A Rights-Based Assessment of Age of Consent Laws in Eastern and Southern Africa", *Reproductive Health in Sub-Saharan Africa-Original Research*, December 2018, p 6. Available at: <https://journals.sagepub.com/doi/pdf/10.1177/2158244018806036> (Accessed 17 March 2020)

⁷⁴ Criminal Law Codification Reform Act (Chapter 9:23), section 70(3).

⁷⁵ UNFPA, "Harmonizing the Legal Environment for Adolescent Sexual and Reproductive Health and Rights: A review of 23 countries in East and Southern Africa", UNFPA, 2017, p 8. Available at: https://esaro.unfpa.org/sites/default/files/pub-pdf/2017-08-Laws%20and%20Policies-Digital_0.pdf (Accessed 23 March 2020)

⁷⁶ UNFPA, "Harmonizing the Legal Environment for Adolescent Sexual and Reproductive Health and Rights: A review of 23 countries in East and Southern Africa", UNFPA, 2017, p 8. Available at: https://esaro.unfpa.org/sites/default/files/pub-pdf/2017-08-Laws%20and%20Policies-Digital_0.pdf (Accessed 22 March 2020)

(a) the crime of rape, aggravated indecent assault, indecent assault, sexual intercourse or performing an indecent act with a young person or sodomy; or

(b) an attempt, conspiracy or incitement to commit a crime referred to in paragraph (a);

shall be guilty of the appropriate crime referred to in paragraph (a) or (b) and liable to be sentenced accordingly.

(2) Any person who, in Zimbabwe, conspires with or incites another person to do anything outside Zimbabwe to, with or against a young or mentally incompetent adult person which, if it were done in Zimbabwe, would constitute the crime of rape, aggravated indecent assault, indecent assault, sexual intercourse or performing an indecent act with a young person or sodomy, shall be guilty of conspiracy or incitement, as the case may be, to commit the appropriate crime and liable to be sentenced accordingly.

(3) Subsections (1) and (2) shall apply whether or not the act which the person is alleged to have committed or which was the subject of his or her alleged conspiracy or incitement, as the case may be, was a crime in the place where it was committed.”

Through section 71, the Criminal Code provides jurisdiction over Zimbabweans and persons who ordinarily reside in the country who are involved in the commission or conspiracy to commit sexual crimes against “ against a young or mentally incompetent adult person” no matter where the said crimes occur in the world. Section 71 is unique in that it contributes to the global goal of ending sexual exploitation.

However, section 71 does not proscribe the failure to report to the authorities sexual crimes against children or against people with mental disabilities. On the other hand, in South Africa,⁷⁷ for example, failure to report sexual crimes against children or persons with mental disabilities carries a penalty of fine or imprisonment not exceeding five years, or both.

⁷⁷ Criminal Law (Sexual Offences and Related Matters) Amendment Act, No 32 of 2007. Section 54 reads;” 1) (a) A person who has knowledge that a sexual offence has been committed against a child must report such knowledge immediately to a police official. (b) A person who fails to report such knowledge as contemplated in paragraph (a), is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment.”

11. CONCLUSION AND RECOMMENDATIONS

In light of the above analysis, the ICJ makes the following recommendations to the Zimbabwean authorities:

Recommendations to Parliament

1. Enact Stand-alone Sexual Offences Legislation

This legislation should follow regional and international recommended practices; it should allow for the inclusion of a wider range of sexual offences, and create coherence in the administration of the law on sexual violence. This will go some way towards ensuring equitable access to justice and effective remedies for survivors of sexual offences.

2. Reform the language in section 65 defining rape to meet international standards.

The language in section 65 should be amended so as to proscribe the following:

- Non-consensual oral penetration of another person with a penis.
- Non-consensual vaginal, anal or oral penetration of a sexual nature of another person with objects or body parts other than the penis.
- Same-sex rape, that is, men who rape other men, and women who rape other women.
- Non-consensual, invasive sexual assault constituting rape of sexual minorities, such as gender non-conforming individuals, including transgender persons.

3. Amend sections 66 and 67

These sections should be completely overhauled and renamed aggravated sexual assault and sexual assault respectively. The word “indecent” should be removed from the titles and from the definitions of the offences. The offences should be defined using gender neutral formulations, while acknowledging the gender specificity of sexual assault offences in general. The offences should proscribe instances of sexual assault short of rape, that is, sexual assault that does not entail non-consensual penetration of a sexual nature however slight; its aggravated form (aggravated sexual assault) should comprise all the elements of the offence of sexual assault simpliciter, as well as aggravating features.

4. Expunge the Section 68 requirement for Attorney General authorization

The requirement for married women to obtain authorization from the Attorney General for prosecution should be expunged. The language should be amended to become gender neutral so that the provisions afford both parties in the marriage equal protection of the law as provided by section 56(1) of the Constitution and in keeping with international human rights law.

5. Amend language in section 69 to cater for “coercive circumstances” as negating consent

The wording in section 65 and 69(1) must be amended to add explicit language of “coercive circumstances” in which sexual offences may occur.

In addition, section 69 should be amended to make it clear that the fact that someone may have been capable of lawfully consenting to sexual activity before falling asleep, becoming intoxicated, being hypnotized or becoming incapacitated in any other way is totally irrelevant.

6. Reform section 70 to decriminalize non-exploitative, consensual adolescent sexual conduct between peers.

7. Reform section 71 to:

- add language that criminalizes failure to report sexual offences against children and mentally disabled persons.
- remove the derogatory term “mentally incompetent” and replaced it with mentally disabled, intellectually disabled or developmentally disabled.

Recommendations to the Judicial Service Commission (JSC) and the National Prosecuting Authority (NPA)

Invest in training the judiciary and prosecutorial staff who are presiding over and prosecuting sexual offences respectively on:

- (i) Current regional and international standards relevant to the prosecution of sexual offences

Recommendations to the Ministry of Justice, Legal and Parliamentary Affairs

Invest in public education with the aim of addressing harmful gender stereotypes and societal practices and beliefs that encourage, justify, excuse, minimise or belittle the seriousness of sexual offences particularly against women and children.

Recommendations to Civil Society

Civil society should lobby for reform of sexual offence laws in Zimbabwe and push for a stand-alone comprehensive law, and challenge harmful practices in prosecution.

Bibliography

Articles

1. Conaghan, J., & Russell, Y. (2014). "Rape Myths, Law, and Feminist Research: Myths About Myths"? *Feminist Legal Studies*, 22 (1), p 26. Available at <https://doi.org/10.1007/s10691-014-9259-z> (Accessed on 19 March 2020)
2. Chihambakwe, W, et al (2016) "An Assessment of the Effectiveness of the Victim Friendly Legal System in Zimbabwe: A Case Study of Harare Metropolitan Province, Zimbabwe", *The International Journal of Humanities and Social Studies* Volume 4, Issue 10 October 2016
3. Dowds, E (2018) "Conceptualizing the role of consent in the definition of rape at the international criminal court: a norm transfer perspective", *International Feminist Journal of Politics*, 20:4, 624-643, p 629 Available at <https://doi.org/10.1080/14616742.2018.1447311> (Accessed 20 March 2020)
4. Kangaude, G and Skelton, A, "(De)Criminalizing Adolescent Sex: A Rights-Based Assessment of Age of Consent Laws in Eastern and Southern Africa", *Reproductive Health in Sub-Saharan Africa-Original Research*, December 2018 Available at: <https://journals.sagepub.com/doi/pdf/10.1177/2158244018806036> (Accessed 17 March 2020)
5. Josse, E(2010) "They came to two guns' The Consequences of sexual violence for the mental health of women in armed conflict" *International Review of the Red Cross* Volume 92: Number 877: March 2010
6. Sellers, P(2007) "The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretation" (Office of the High Commissioner of Human Rights 14, 2007), http://www2.ohchr.org/english/issues/women/docs/Paper_Prosecution_of_Sexual_Violence.pdf (Accessed 17 March 2020)
7. Weare , S, (2018) "Oh you're a guy, how could you be raped by a woman, that makes no sense': towards a case for legally recognising and labelling 'forced-to-penetrate' cases as rape", *International Journal of Law in Context*, Vol 14, Issue 1, March 2018 , pp. 110-131. Available at: <https://doi.org/10.1017/S1744552317000179> (Accessed 20 March 2020)

Reports

8. Amnesty International (2018) *Right to be free from rape: Overview of legislation and state of play in Europe and international human rights standards*: Amnesty International. November 2018. London
9. Equality Now (2017) *The World's Shame: Global Rape Endemic: How Laws Around the World are Failing to Protect Women and Girls*. Produced by Equality Now. May 2018. New York
10. ICJ (2019) *Accountability Through the Specialized Criminal Chambers: The Adjudication of Crimes Under Tunisian and International law* December 2019. Geneva

UN Documents

11. X. and Y. Communication 100/2016. Committee for CEDAW, para 9.5. Available at: <https://juris.ohchr.org/Search/Details/2658> (Accessed 20 March 2020)
12. UN Committee on the Rights of the Child(CRC) General Comment No.20 (2016) on the implementation of the rights of the child during adolescence. December 6, 2016. CRC/C/GC/20, para 40. Available at <https://www.refworld.org/docid/589dad3d4.html> (Accessed 22 March 2020)
13. CEDAW Committee, General Recommendation No. 19 CEDAW/C/CG/19 1992
14. CEDAW Committee, General Recommendation No. 28 CEDAW/C/CG/28, 2010
15. CEDAW Committee, General Recommendation No. 35 on gender-based violence against women, updating General Recommendation No. 19, UN Doc. CEDAW/C/CG/35, 2017

16. CEDAW(2018) New Challenges to Gender Equality and Empowerment from the CEDAW Perspective October 2018 Geneva
https://www.unece.org/fileadmin/DAM/pau/age/Icpd/ICPD-25/Presentations/Session-3/1_-_3rd-thematic-session-presentation-Ruth-Halperin-Kaddari-CEDAW.pdf
17. UNFPA, "Harmonizing the Legal Environment for Adolescent Sexual and Reproductive Health and Rights: A review of 23 countries in East and Southern Africa", UNFPA, 2017 Available at https://esaro.unfpa.org/sites/default/files/pub-pdf/2017-08-Laws%20and%20Policies-Digital_0.pdf (Accessed 23 March 2020)
18. UN Women Handbook for Legislation on Violence against Women. United Nations Entity for Gender Equality and the Empowerment of Women; December 2012 Available at <https://www.un.org/womenwatch/daw/vaw/handbook/Handbook%20for%20legislation%20on%20violence%20against%20women.pdf> (Accessed 19 March 2020)
19. World Health Organization, "Violence against women fact sheet," November 2016. Available at <http://www.who.int/mediacentre/factsheets/fs239/en/> (18 March 2020)

Regional and International Instruments

20. African Union, "Guidelines on Combatting Sexual Violence and its consequences in Africa", p 14. Available at: https://www.achpr.org/public/Document/file/English/achpr_eng_guidelines_on_combatting_sexual_violence_and_its_consequences.pdf (Accessed 22 March 2020)
21. International Criminal Court Rules of Procedure and Evidence, Second edition 2013, The Hague, available at: www.iccpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf (Accessed 19 March 2020)
22. Interagency Working Group on Sexual Exploitation of Children. (2016). Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse, Adopted by the Interagency Working Group in Luxembourg, January 28, 2016. Bangkok: ECPAT, p 7 -8. Available at: <http://luxembourgguidelines.org/english-version/> (Accessed 22 March 2020)
23. *African Organisation of African Unity(OAU) (1990) Charter on the Rights and Welfare of the Child*, July 11, 1990, CAB/LEG/24.9/49 Article 27. Available at <https://www.refworld.org/docid/3ae6b38c18.html> (Accessed 20 March 2020)
24. Resolution on the Right to a Remedy and Reparation for Women and Girls Victims of Sexual Violence – ACHPR/Res.11(XXXII)07 Available at <https://www.achpr.org/sessions/resolutions?id=163>
25. https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=195&Lang=EN (Accessed 18 March 2020)
26. SADC Gender and Development Protocol (2008)

Case Law

27. *Aydin v. Turkey*, ECtHR (Grand Chamber), Application No. 23178/94, 27 September 1997, paras. 74-86
28. *V.P.P. v Bulgaria*, UN Doc. Communication No. 31/2011, CEDAW/C/53/D/31/2011 (24 November 2012) Para 10 (2)(a)
29. *M.C. v. Bulgaria*, Appl. No. 39272/98, Council of Europe: European Court of Human Rights, December 3, 2003, para 70.
30. *ICTY TJ, Prosecutor v. Anto Furundzija* Case No IT-95-17/1-T, 10 December 1998, para. 184.
31. *Prosecutor v. Gacumbitsi*, Judgment, Case No. ICTR-2001-64-A, July 7, 2006, para.153
32. *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (Trial Judgment) IT-96-23-T&IT93-23/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), February 22, 2001, para 440-441
33. *Prosecutor v. Sesay, Kallon & Gbao*, Case No. SCSL-04-15-T, Trial Chamber I, Judgement, para 144-45 Mar. 2, 2009
34. *Prosecutor v Alex Tamba Brima, Brima Bazzy Kama, Santigie Borbor Kanu*, Special Court of Sierra Leone, SCSL-04-16-T, June 20, 2007, para 694.

35. State v. CF (A Juvenile), HH 143-11, CRB 5,320/10. High Court of Zimbabwe.
36. State v B. Masuku, [2015] ZWHHC 106, CRB B467/14 High Court of Zimbabwe
37. Stave v Chimankire (CA 4/06) [2006] ZWHHC 72
38. State v Chiguma (HMT 28-20, CA 86/19 Ref CRB RSPR 123/19) High Court of Zimbabwe
39. State v Gariseb Stephanous Hendrick Ruba, (SA 36/2017) [2019] NASC 4, para 16, April 1, 2019
40. The Teddy Bear Clinic for Abused Children Case and RAPCAN and Others v. Minister of Justice and National Director of Public Prosecutions 2013 12 CCT 13 ZACC (S. Afr.)
41. Karen Vertido v. the Philippines CEDAW/C/51/D/28/2010, 22 September 2010
42. Monomono v S (CA 108-2016) [2017] NAHCMD 111 (7 April 2017).

Legislation

43. Constitution (2013) - Zimbabwe
44. The Criminal Law (Codification and Reform) Act [Chapter 9:23] – Zimbabwe
45. The Domestic Violence Act [Chapter 5:16] – Zimbabwe
46. Combating Rape Act (Act 8 of 2000) – Namibia
47. Criminal law (sexual offences and related matters) Amendment Act (2007) – South Africa
48. Sexual Violence Legislation Bill (2019) – New Zealand
49. Penal Code (2013) – Estonia
50. Sexual Offences against Children Act (2017) – Malaysia
51. Statute of the Special Court of Sierra Leone,
52. Sexual Offences Amendment Act (2019) – Sierra Leone

Newspaper articles

53. "Female rapists resurface" NewsDay April, 01, 2012 <https://www.newsday.co.zw/2012/01/2012-01-04-female-rapists-resurface/> (Accessed 22 March 2020)
54. Fungai Lupande, "JSC launches revised protocol of sexual abuse" The Herald November 9, 2019 <https://www.herald.co.zw/jsc-launches-revised-protocol-on-sexual-abuse/> (Accessed 18 March 2020)
55. Steve Vickers, "Zimbabwe women accused of raping men 'for rituals'", *BBC News*, November 28, 2011. Available at: <https://www.bbc.com/news/world-africa-15876968> Accessed (22 March 2020)
56. Erin Conway-Smith, "Zimbabwe female rapists accused semen harvesting strike again" PRI January 5, 2012. Available at: <https://www.pri.org/stories/2012-01-05/zimbabwes-female-rapists-accused-semen-harvesting-strike-again> (Accessed 22 March 2020)
57. Prosper Dembedza "Judge' s hubby acquitted of raping maid" The Herald 28 September 2019 <https://www.herald.co.zw/judges-hubby-acquitted-of-raping-maid/> Accessed 25 August 2020)

Weblinks

58. [https://www.academia.edu/32519780/Advantages and Disadvantages of Adversarial System.Lecture 20 By Md.Avi Alam](https://www.academia.edu/32519780/Advantages_and_Disadvantages_of_Adversarial_System.Lecture_20_By_Md.Avi_Alam) (Accessed 19 March 2020)
http://www.zimstat.co.zw/sites/default/files/img/publications/Digest/Q_1_2019_Final.pdf (Accessed 19 March 2020)
59. <https://zimfact.org/are-22-women-raped-in-zimbabwe-daily/> Accessed (19 March 2020)
60. <http://www.veritaszim.net/node/3750> (Accessed 19 March 2020)

Commission Members

October 2020 (for an updated list, please visit www.icj.org/commission)

President:

Prof. Robert Goldman, United States

Vice-Presidents:

Prof. Carlos Ayala, Venezuela

Justice Radmila Dragicevic-Dicic, Serbia

Executive Committee:

Justice Sir Nicolas Bratza, UK

Dame Silvia Cartwright, New Zealand

(Chair) Ms Roberta Clarke, Barbados-Canada

Mr. Shawan Jabarin, Palestine

Ms Hina Jilani, Pakistan

Justice Sanji Monageng, Botswana

Mr Belisário dos Santos Júnior, Brazil

Other Commission Members:

Professor Kyong-Wahn Ahn, Republic of Korea

Justice Chinara Aidarbekova, Kyrgyzstan

Justice Adolfo Azcuna, Philippines

Ms Hadeel Abdel Aziz, Jordan

Mr Reed Brody, United States

Justice Azhar Cachalia, South Africa

Prof. Miguel Carbonell, Mexico

Justice Moses Chinhengo, Zimbabwe

Prof. Sarah Cleveland, United States

Justice Martine Comte, France

Mr Marzen Darwish, Syria

Mr Gamal Eid, Egypt

Mr Roberto Garretón, Chile

Ms Nahla Haidar El Addal, Lebanon

Prof. Michelo Hansungule, Zambia

Ms Gulnora Ishankanova, Uzbekistan

Ms Imrana Jalal, Fiji

Justice Kalthoum Kennou, Tunisia

Ms Jamesina Essie L. King, Sierra Leone

Prof. César Landa, Peru

Justice Ketil Lund, Norway

Justice Qinisile Mabuza, Swaziland

Justice José Antonio Martín Pallín, Spain

Prof. Juan Méndez, Argentina

Justice Charles Mkandawire, Malawi

Justice Yvonne Mokgoro, South Africa

Justice Tamara Morschakova, Russia

Justice Willly Mutunga, Kenya

Justice Egbert Myjer, Netherlands

Justice John Lawrence O'Meally, Australia

Ms Mikiko Otani, Japan

Justice Fatsah Ouguergouz, Algeria

Dr Jarna Petman, Finland

Prof. Mónica Pinto, Argentina

Prof. Victor Rodriguez Rescia, Costa Rica

Mr Alejandro Salinas Rivera, Chile

Mr Michael Sfard, Israel

Prof. Marco Sassoli, Italy-Switzerland

Justice Ajit Prakash Shah, India

Justice Kalyan Shrestha, Nepal

Ms Ambiga Sreenevasan, Malaysia

Justice Marwan Tashani, Libya

Mr Wilder Tayler, Uruguay

Justice Philippe Texier, France

Justice Lillian Tibatemwa-Ekirikubinza, Uganda

Justice Stefan Trechsel, Switzerland

Prof. Rodrigo Uprimny Yepes, Colombia



**International
Commission
of Jurists**

P.O. Box 91
Rue des Bains 33
CH 1211 Geneva 8
Switzerland

t +41 22 979 38 00

f +41 22 979 38 01

www.icj.org