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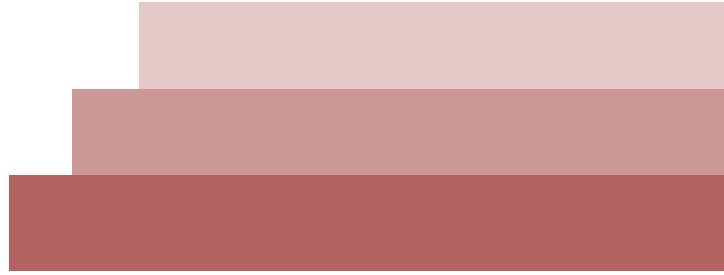
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# Contributors



## Contributors

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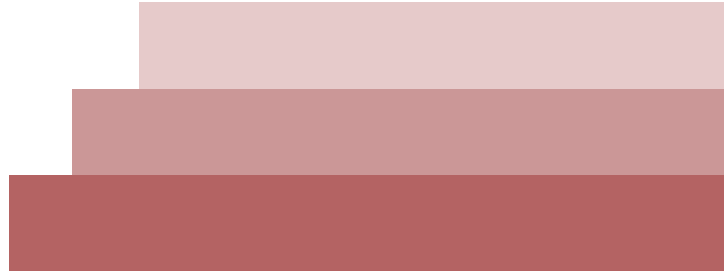
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# Introduction



*Violence against women is a form of discrimination and a violation of human rights. It causes untold misery, cutting short lives and leaving countless women living in pain and fear in every country of the world. It harms families across the generations, impoverishes communities and reinforces other forms of violence throughout societies. Violence against women stops them from fulfilling their potential, restricts economic growth and undermines development. The scope and extent of violence against women are a reflection of the degree and persistence of discrimination that women continue to face. It can only be eliminated, therefore, by addressing discrimination, promoting women's equality and empowerment, and ensuring that women's human rights are fulfilled.*

*All of humanity could benefit from an end to this violence, and there has been considerable progress in creating the international framework for achieving this. However, new forms of violence have emerged and in some countries, advances towards equality and freedom from violence previously made by women have been eroded or are under threat. The continued prevalence of violence against women is testimony to the fact that states have yet to tackle it with the necessary political commitment, visibility and resources.<sup>1</sup>*

Inspired by the intensification of efforts at the United Nations (UN), African regional and sub-regional levels to eliminate gender-based violence, this publication wishes to contribute to awareness raising and deepening of the debate regarding gender-based violence in Africa.

We make brief reference to exciting new developments at the UN, African regional and sub-regional levels before considering a number of issues of particular relevance to the elimination of gender-based violence in Africa.

There is no shortage of innovative international, regional and sub-regional legislative and policy frameworks aimed at eliminating gender-based violence. We hope to make these frameworks more accessible by including a range of relevant legal and policy instruments in this publication.

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1. Study of the Secretary-General of the United Nations 'Ending violence against women: from words to action' 9 October 2006 available at <http://www.un.org/womenwatch/daw/vaw/launch/english/v.a.w-exeE-use.pdf> (accessed 25 June 2007).



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## Intensification of efforts at the United Nations level to eliminate gender-based violence

### Report of the Secretary-General on the In-depth Study on All Forms of Violence Against Women

In December 2003, signalling the importance that member states of the UN attach to addressing violence against women, the UN General Assembly mandated the preparation of an in-depth study on all forms and manifestations of violence against women.<sup>2</sup>

The aims of the study included:

- highlighting the persistence and unacceptability of all forms of violence against women;
- strengthening the political commitment and joint efforts of all stakeholders to prevent and eliminate violence against women;
- identifying ways and means to ensure more sustained and effective implementation of state obligations to address all forms of violence against women; and
- increasing state accountability.

The Secretary-General's Report on an In-depth Study on All Forms of Violence Against Women (Secretary-General's Report on Violence Against Women) was launched on 9 October 2006.<sup>3</sup> Findings of the Secretary-General's Report on Violence Against Women revealed that:<sup>4</sup>

- Violence against women is severe and pervasive throughout the world;
- Many women are subjected to sexual, psychological and emotional violence by an intimate partner;
- More than 130 million girls have been subjected to female gender mutilation/cutting;
- Women experience sexual harassment throughout their lives;

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2. UN General Assembly Resolution 58/185.

3. Report of the Secretary-General 'In-depth study on all forms of violence against women' A/61/122/Add 1 (6 July 2006) <http://www.springtideresources.net/resources/show.cfm?id=161> (accessed 3 July 2007). In line with the requirements of Resolution 58/185, this report provides a historical overview of the development and awareness of violence against women, sets out the broad context within which violence against women occurs, synthesises the knowledge regarding the extent and prevalence of different forms and manifestations of violence against women, discusses the gaps and challenges in the availability of data, highlights state responsibility and provides examples of promising practices in the areas of law, service provision and prevention.

4. As above.

- The majority of the hundreds of thousands of people trafficked annually are women and children;
- Violence against women in armed conflict frequently includes sexual violence;
- Women who are subjected to violence are more likely to suffer physical, mental and reproductive health problems;
- Domestic violence and rape account for 5 per cent of the total disease burden for women aged 15-44 in developing countries;
- Violence before and during pregnancy has serious health consequences for mother and child;
- Women who have experienced violence are at a higher risk of contracting HIV;
- Violence against women may prevent women from full economic participation and may hinder employment opportunities;
- Girls who have experienced violence are less likely to complete their education; and
- The direct and indirect costs of violence against women are extremely high.

### **United Nations General Assembly Resolution on the Intensification of Efforts to Eliminate All Forms of Violence Against Women**

On 30 January 2007, taking note of the report of the UN Secretary-General on the in-depth study on all forms of violence against women, the UN General Assembly adopted a far-reaching resolution for the intensification of efforts to eliminate all forms of violence against women.<sup>5</sup>

Stressing that states have the obligation to promote and protect all human rights and fundamental freedoms of women and girls, the UN General Assembly Resolution urges states to take action to eliminate all forms of violence against women by systematic and comprehensive approach.

To this end, states are urged to:<sup>6</sup>

- Ensure that all human rights and fundamental freedoms are respected and protected;
- Review, revise, amend or abolish all laws, policies, practices and customs that discriminate against women;
- Exercise leadership to end all forms of violence against women and support advocacy in this regard;
- Empower women, especially poor women;

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5. Resolution adopted by the General Assembly 'Intensification of efforts to eliminate all forms of violence against women' A/RES/61/143 [http://www.iccnw.org/documents/GA61\\_ViolenceAgainstWomen\\_19Dec06.pdf](http://www.iccnw.org/documents/GA61_ViolenceAgainstWomen_19Dec06.pdf) (accessed on 2 July 2007).

6. n 5 above, para 5.

- Take positive measures to address structural causes of violence against women;
- Ensure, in order to eradicate all forms of violence against women, the development of diverse strategies that take into account the intersection of gender with other factors;
- Exercise due diligence to prevent violence against women;
- Recognise that gender inequalities and all forms of violence against women and girls increase their vulnerability to HIV/AIDS;
- Provide training and capacity-building on gender equality and women's rights;
- Protect women and girls in situations of armed conflict, post-conflict settings and refugee and internally displaced persons settings;
- Integrate a gender perspective into national plans of action on the elimination of violence against women; and
- Allocate adequate resources to promote gender equality and to prevent and redress all forms and manifestations of violence against women.

## **Intensification of efforts at the African Union level to eliminate gender-based violence**

### **Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa**

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Protocol on Women) was adopted in Maputo on 11 July 2003 and entered into force on 25 November 2005.<sup>7</sup>

The Protocol on Women contains a broad definition of 'violence against women', covering all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to commit such acts.<sup>8</sup>

A number of articles in the Protocol on Women are relevant to gender-based violence in Africa. For instance, article 4 provides that every woman is entitled to respect for her life and the integrity and security of her person.<sup>9</sup> State parties are obliged to enact and enforce laws to prohibit all forms of violence against women, including unwanted or forced sex, whether the violence takes place in private or

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7. See <http://www.africa-union.org/root/au/Documents/Treaties/treaties.html> (accessed 2 July 2007).

8. Art 1(j) Protocol on Women.

9. Art 4(1) Protocol on Women.

public.<sup>10</sup> State parties should also take appropriate and effective measures to identify the causes and consequences of violence against women,<sup>11</sup> punish the perpetrators of violence against women and implement rehabilitation programmes for women victims of violence.<sup>12</sup> Trafficking in women should be prevented and condemned and measures should be put in place to protect those women most at risk of being trafficked. Perpetrators of trafficking must be punished.<sup>13</sup> In an innovative provision, state parties are obliged to provide adequate budgetary and other resources for the implementation and monitoring of efforts aimed at preventing and eradicating violence against women.<sup>14</sup>

Article 5 places an obligation on state parties to prohibit and condemn all forms of harmful practices<sup>15</sup> which affect the human rights of women and are contrary to international recognised standards. Furthermore, state parties should create public awareness in all sectors of society regarding harmful practices.<sup>16</sup> Of specific significance is the obligation on state parties to prohibit, through legislative measures backed by sanctions, all forms of female genital mutilation.<sup>17</sup>

Article 11 provides for the protection of women in armed conflicts and emphasises the obligations incumbent upon state parties in terms of international humanitarian law.<sup>18</sup>

### **Solemn Declaration on Gender Equality in Africa**

The Heads of State and Government of member states of the African Union (AU Heads of State and Government), meeting in the third ordinary session of the Assembly in Addis Ababa, Ethiopia, adopted the Solemn Declaration on Gender Equality in Africa (Solemn Declaration) on 6 July 2004.

On this occasion, the AU Heads of State and Government recognised that major challenges and obstacles to gender equality still remain and that these require concerted and collective leadership and efforts.

Deep concern was expressed about the status of women and the negative impacts on women of issues such as the high incidence of HIV/AIDS among girls and women, conflict, poverty, harmful traditional practices, high population of refugee women and internally displaced women and violence against women.

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10. Art 4(2) Protocol on Women.

11. Art 4(c) Protocol on Women.

12. Art 4(e) Protocol on Women.

13. Art 4(g) Protocol on Women.

14. Art 4(i) Protocol on Women.

15. See art 1(g) Protocol on Women for a definition of 'harmful practices'.

16. Art 5(a) Protocol on Women.

17. Art 5(b) Protocol on Women.

18. Art 11 (1) &(2) Protocol on Women.

Against this background, the AU Heads of State and Government committed themselves to accelerate the implementation of gender specific economic, social, and legal measures aimed at combating the HIV/AIDS pandemic and effectively implement both Abuja and Maputo Declarations on Malaria, HIV/AIDS, Tuberculosis and Other Related Infectious Disease.<sup>19</sup> Furthermore, they undertook to ensure the launch, within one year, a campaign for systematic prohibition of the recruitment of child soldiers and abuse of girl children as wives and sex slaves in violation of their rights as enshrined in the African Charter on Rights and Welfare of the Child (African Children's Charter).<sup>20</sup>

AU Heads of State and Government also committed themselves to initiate, launch and engage within two years sustained public campaigns against gender based violence as well as the problem of trafficking in women and girls. In addition, they undertook to reinforce legal mechanisms that will protect women at the national level and end impunity of crimes committed against women in a manner that will change and positively alter the attitude and behaviour of the African society.<sup>21</sup>

Some efforts have been made to ensure that the commitments contained in the Solemn Declaration are honoured. So, for instance, guidelines for reporting have been developed and a few countries have submitted reports as envisaged in terms of the Solemn Declaration.<sup>22</sup>

### **Intensification of efforts at the Southern Africa Development Community (SADC) level to eliminate gender-based violence**

The SADC Protocol on Gender and Development (draft SADC Protocol) is in the process of being drafted.<sup>23</sup> The SADC Protocol, which is to be presented at the 2007 SADC Heads of State summit, seeks to elevate the SADC Declaration on Gender and Development (1997) to a protocol. The SADC Protocol aims to encompass and enhance all existing regional and international commitments for achieving gender equality.

Article 8 of the initial draft of the SADC Protocol (Draft 1 SADC Protocol) contains comprehensive provisions regarding gender-based violence. For instance,

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19. Par 1 Solemn Declaration.

20. Par 3 Solemn Declaration.

21. Par 4 Solemn Declaration.

22. Country reports and other relevant documents may be viewed at <http://www.africa-union.org>.

23. The discussion that follows is based on the first draft of this Protocol. See <http://www.sadc.int>. For updates also see <http://www.genderlinks.org.za>

it is provided that member states of SADC shall enact and enforce legislation prohibiting all forms of gender-based violence by 2010. Measures should be taken to enforce deterrent sanctions in respect of violations and to ensure that perpetrators of domestic violence, marital rape, femicide, and other forms of gender-based violence are brought to justice by a court of competent jurisdiction.<sup>24</sup>

Furthermore, member states of SADC are expected to take measures to ensure the protection of women, men, girls and boys against HIV/AIDS infection and other sexually transmitted infections contracted as a result of any sexual violation, and to ensure that all health facilities in their territories administer post exposure prophylaxis to prevent the onset of infection.<sup>25</sup>

Criminal laws and procedures applicable to cases of sexual offences and gender based violence should be reviewed and amended to eliminate gender bias and ensure justice and fairness to both survivors and perpetrators of gender based violence.<sup>26</sup>

Furthermore, member states of SADC shall introduce legal and administrative mechanisms for women and children subjected to gender based violence<sup>27</sup> and provide resources and mechanisms for the social and psychological rehabilitation of perpetrators of gender based violence.<sup>28</sup>

Member states shall eradicate traditional norms, including social, economic, cultural and political practices and religious beliefs which legitimise and exacerbate the persistence and tolerance of gender based violence.<sup>29</sup> SADC member states shall adopt and implement all necessary legislative and other measures to eliminate all practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education or physical integrity.<sup>30</sup> With regard to sexual harassment, states shall enact legislative provisions and adopt and enforce policies, strategies and programmes which define and prohibit sexual harassment in all spheres, and provide deterrent sanctions for perpetrators of sexual harassment.<sup>31</sup>

In an effort to combat human trafficking, states shall enact and adopt specific legislative provisions by 2010 to prevent human trafficking.<sup>32</sup> Accessible, effective and responsive police, prosecutorial, health, social welfare and other

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24. Art 8(1) Draft 1 SADC Protocol.

25. Art 8(2) Draft 1 SADC Protocol.

26. Art 8(3) Draft 1 SADC Protocol.

27. Art 8(4) Draft 1 SADC Protocol.

28. Art 8(5) Draft 1 SADC Protocol.

29. Art 8(6) Draft 1 SADC Protocol.

30. Art 8(9) Draft 1 SADC Protocol.

31. Art 8(10) Draft 1 SADC Protocol.

32. Art 8(11) Draft 1 SADC Protocol.

services should be provided to redress cases of gender based violence.<sup>33</sup> SADC member states shall provide places of shelter, safety and rehabilitation for survivors and perpetrators of gender based violence.<sup>34</sup> SADC member states shall introduce and promote the gender sensitisation of all service providers who are involved in the administration of justice, welfare, education and health services.<sup>35</sup>

## Focus on issues relevant to the elimination of gender-based violence in Africa

In *'Gender-based violence and the Convention on the Elimination of All Forms of Discrimination Against Women'*, Boogie Khutsoane introduces gender-based violence as a human rights issue and then focuses on the efforts of the Committee on the Elimination of All forms of Discrimination Against Women to address gender-based violence. The provisions of the Vienna Declaration and the Declaration on Violence against Women are considered and the mandate and activities of the United Nations Special Rapporteur on Violence against Women are highlighted.

In *'The African regional response to gender-based violence'*, Karen Stefiszyn provides an overview of the structures of the African Union (AU), before referring to the standards set by the Protocol on Women and the Solemn Declaration on Gender Equality in Africa. The author points out that each organ of the AU has a role in realising the objectives of the overall body. In other words, each could respond to gender-based violence within their individual mandates. However, for the purposes of this chapter, the Peace and Security Council, the African Commission on Human and Peoples' Rights and the African Peer Review Mechanism are highlighted based on their potential to most directly respond to gender-based violence.

In *'SADC initiatives aimed at combating gender-based violence'*, Christine M Warioba and Amy Grace Luhanga sketch the historical context before examining recent initiatives such as the Addendum on the Prevention and Eradication of Violence against Women and Children. While recognising the achievements of SADC in dealing with gender-based violence, clear reference is made to the challenges that persist.

In *'The "appeal" of sexual violence: The Akayesu/Gacumbitsi cases'*, Patricia Viseur Sellers considers the development and characterisation in the international criminal justice system of sexual assault as an element of crime, or as an

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33. Art 8(14) Draft 1 SADC Protocol.

34. Art 8(16) Draft 1 SADC Protocol

35. Art 8(18) Draft 1 SADC Protocol.

international crime in its on right. Drawing from a survey of the ICTR appellate jurisprudence on cases of genocide and crimes against humanity with an element of sexual violence, she argues that such cases are a clear demonstration of the realisation of the right of access to justice by women and girls who were victims of rampant sexual violence. The author points to the existence of a tension between the ICTR and ICTY jurisprudence with regards to whether lack of consent is an essential element of the crime of rape and the modalities relating which party should discharge such onus during trial. However, this jurisprudence on sexual violence cases has already made an indelible mark in international criminal justice system as it influenced the characterisation of crimes in the Elements of Crimes document of the International Criminal Court (ICC). This jurisprudence should gradually find its way into the domestic criminal justice systems thereby creating harmony between the two systems.

In '*Arenas of anguish – tracking multiple, perpetuating trauma in HIV/AIDS and gender-based violence intersections*', Julie Stewart considers the interconnected implications of gender-based violence and HIV and AIDS at the personal, family, community, local and national levels. She advocates a rights-based approach to the challenges of gender-based violence and HIV/AIDS and suggests appropriate tools of engagement.

In '*Female genital mutilation as a manifestation of gender-based violence in Africa*', Laura Nyirinkindi examines a phenomenon that is a cultural practice to some, and a human rights violation to others. After setting out the manifestations of, and motivations for, female genital mutilation and cutting (FGM/C), the human rights implications of this practice are considered. In conclusion, strategies and interventions for the elimination of FGM/C are suggested.

In '*State response to trafficking in women and children in Africa - The Nigerian experience*', Bisi Olateru-Olagbegi generally defines human trafficking before examining the character of trafficking in women and children in Nigeria. She provides a general profile of trafficked persons and traffickers and then elaborates on the forms and nature of human trafficking in Nigeria. The author makes brief reference to the international response to human trafficking before focusing on the Nigerian national response to this phenomenon.

I wish to thank the following persons for their assistance in this publication: Martin Nsibirwa (as editor); Joshua Cohen; Solomon Ebobrah; Hye Young Lim; Tarisai Mutangi and Lizette Besaans. We gratefully acknowledge the financial support of the Ford Foundation.

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# **Gender-based violence and the Convention on the Elimination of All Forms of Discrimination Against Women**

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*Boogie S N Khutsoane*

## **1 Introduction**

The promotion of women and girl-children's human rights forms an integral part of the United Nations (UN) human rights activities. These rights are considered by the UN as an inalienable, integral and indivisible part of universal human rights.<sup>1</sup> The drafting and the adoption of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) attests to such a commitment.<sup>2</sup> One of the general thrusts of CEDAW aims at enlarging the understanding of the concept of human rights by recognising women's rights as human rights as well as addressing situations that affect women in particular.

This article examines the latest developments towards the protection of women against gender-based violence will be examined within the UN Framework. These include the work of the Committee on the Elimination of all Forms of Discrimination Against Women (the Committee); the adoption of the Declaration on the Elimination of Violence Against Women (Declaration on Elimination of Violence), and the appointment of a Special Rapporteur on Violence Against Women Including its Causes and Consequences (Special Rapporteur on Violence Against Women).

## **2 Gender-based violence as a human rights issue**

Gender-based violence may take several forms and particularly affects women. The Committee which is the monitoring body of CEDAW defines gender-based violence in the following terms:

... a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men.<sup>3</sup>

Equality being at the centre of any approach to human rights, the eradication of all forms of discrimination on the grounds of sex, including gender-based violence constitutes a priority objective for the international community.

CEDAW does not explicitly mention the expression 'gender-based violence'. However, in the past sixteen years, there have been important developments at the international level to acknowledge the many forms of violence against women. New standards and procedures to address violence against women were adopted

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1. Report of the Secretary-General 'Report of the World Conference on Human Rights' A/CONF.157/24 13 October 1993 [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.24+\(PART+I\).En?OpenDocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.24+(PART+I).En?OpenDocument) (accessed 12 June 2007).
  2. Art 27(1) CEDAW, adopted by the United Nations General Assembly on 18 December 1979, entered into force on 3 September 1981.
  3. Para 1 General Recommendation 19 of the Committee on Elimination of All Forms of Discrimination Against Women.

to complement the efforts geared towards employing already existing standards and procedures for that purpose. Of particular importance in that regard have been the work of the Committee; the adoption by the UN General Assembly of the Declaration on Elimination of Violence, and the appointment of a Special Rapporteur on Violence Against Women by the UN Commission on Human Rights.

The above developments share the common understanding that violence against women is a *human rights* issue and not merely a question of criminal justice or family law. Within the human rights discourse, the right for women to be free from violation of their physical and mental integrity are the starting-point for analysis and need for action in addressing violence against women. Furthermore gender-based violence in its myriad forms is a form of discrimination against women, and a violation of their substantive rights, including the right to life, the right to liberty and security of the person, the right to be free from torture and the right to health.<sup>4</sup>

CEDAW is the first international human rights instrument that formally acknowledges the influence of culture and tradition in restricting women's enjoyment of their fundamental rights. Cultures and traditions take shape in stereotypes, customs and norms which, in turn, give rise to a multitude of legal, political and economic constraints on the advancement of women. As a matter of fact, traditional attitudes viewing women as subordinate to men or as fulfilling stereotyped roles perpetuate widespread practices involving violence, of which domestic violence and female circumcision are examples.

Prejudices and practices harmful to women are traditionally used to justify gender-based violence as a form of protection or control of women. Violence – whether physical or mental – has the effect of depriving women of their equal enjoyment and exercise of human rights and fundamental freedoms. Furthermore, gender-based violence, whether by intention or by effect, perpetuates male power and control over women. A culture of silence and denial of the seriousness of the health consequences of abuse contributes to sustaining and even further entrenching these perceptions and attitudes. The effects of gender-based violence not only harm women in their individuality but also exact a social toll and place a heavy burden on health services.

Noting the adverse impact of harmful cultural practices and traditions on the status of women, the preamble of CEDAW rightly points to the following:

... a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality of men and women.<sup>5</sup>

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4. A Byrnes (1999) 'The Convention on the Elimination of all forms of Discrimination Against Women and violence against women: implications for Hong Kong' <http://www.hku.hk/ccpl/pub/occasionalpapers/paper1/paper1.html> (accessed 12 June 2007).

5. Para 14 Preamble of CEDAW.

Therefore, CEDAW strongly targets cultural patterns that define roles for sexes especially in the provisions affirming the equal rights and equal responsibilities of both sexes in family life.<sup>6</sup> In this respect, state parties to CEDAW have the obligation to endeavour towards the modification of social and cultural patterns of individual conduct in order to eliminate:

prejudices and customs and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles form.<sup>7</sup>

Despite the above and as mentioned earlier, CEDAW does not explicitly include the expression ‘violence against women’. This is a reflection of the fact that at the time CEDAW was drafted,<sup>8</sup> the issue of violence against women was not regarded as a significant issue on the international agenda. It was through the Committee’s General Recommendations 12 and 19, respectively dated 1989 and 1992, that this omission was corrected. Therefore, the Committee recommended that state parties should adopt measures addressing gender-based violence as well as report on such measures. Nevertheless, CEDAW provides a comprehensive framework for challenging the various forces that have created and sustained discrimination based upon sex, therefore indirectly providing a framework for addressing gender-based violence.

### **3 The work of the Committee on the Elimination of All Forms of Discrimination Against Women on gender-based violence**

Despite the omission of the term ‘gender-based violence’ in CEDAW, the issue of violence against women has been one of the major concerns of the Committee. The Committee was set up to monitor state parties’ compliance with the provisions of CEDAW.<sup>9</sup> As such, the Committee is responsible for the examination of state reports. CEDAW requires state parties to report to the Committee every four years or whenever the Committee so requests, the reports cover the legislative, judicial, administrative or other measures the states have adopted to comply with the provisions of CEDAW.<sup>10</sup> In this respect, the Committee has consistently requested states to provide information on the different measures adopted to address the various forms of violence against women. Furthermore, it has often referred to the subject in its *concluding comments* on individual state reports.

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6. Art 16 CEDAW.

7. Art 5(a) CEDAW.

8. The drafting process of CEDAW took place between 1974 and 1979.

9. Art 17(1) CEDAW.

10. Art 18(1) CEDAW.

The Committee takes the view that gender-based violence against women is a form of discrimination against women. Article 1 of CEDAW defines ‘discrimination against women’ in the following terms:

... any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.<sup>11</sup>

In these terms, ‘discrimination against women’ includes violence that is directed at a woman because she is a woman or violence that affects women disproportionately as well as acts or threats of acts that would inflict physical, mental or sexual harm or suffering, coercion and other deprivations of liberty.<sup>12</sup> Violence against women may therefore involve discrimination against women in relation to the rights expressly mentioned in CEDAW,<sup>13</sup> or other rights not specifically mentioned in CEDAW but incorporated into it by reference.<sup>14</sup> The Committee also recognises that gender-based violence, including domestic violence, is a ‘form of discrimination which seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men.’<sup>15</sup> As a matter of fact, most abused women are not able to freely enjoy their human rights and fundamental freedoms on equal footing with men. In many cultures women are regarded as minors and as such liable to control by their male partners.

State parties to CEDAW have the obligation to ensure that both at the state level and in their private capacities, individuals do not engage in gender-based violence against women. The requirement to take steps to prevent, punish and remedy acts of violence committed by non-state actors is, in many instances, crucial. Gender-based violence committed by private individuals within the domestic sphere is more predominant and usually remains unaddressed because domestic violence is generally considered as an internal family matter.<sup>16</sup>

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11. Art 1 CEDAW.

12. See also UN Declaration on the Elimination of Violence Against Women <http://www.un.org/documents/ga/res/48/a48r104.htm> (accessed 12 June 2007).

13. For instance the right to health in art 12 and the right to equality before the law in art 3.

14. Art 1 of CEDAW explicitly refers to the recognition, enjoyment or exercise by women, of *human rights and fundamental freedoms*. These rights include the right to life, the right to liberty and security of the person, the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment; the right to equal protection according to humanitarian norms in time of conflict; the right to equal protection under the law; the right to equality in the family and the right to the highest standard attainable of physical and mental health.

15. See General Recommendation 19.

16. A Byrnes (n 4 above).

In addition to the examination of state reports, the Committee is mandated to make suggestions and general recommendations based on the examination of state reports and information received from state parties.<sup>17</sup> The Committee's general recommendations deal with issues related to specific provisions of CEDAW that have been noted as a concern during the examination of state reports. Most of these recommendations outline matters that the Committee wishes to see described in state reports. The first general recommendation to address issues of gender-based violence is General Recommendation 12, which was adopted by the Committee in 1989. It was later amended by General Recommendation 19, which was adopted by the Committee in 1992.

### **3.1 General Recommendation 12 (1989) of Committee on the Elimination of All Forms of Discrimination Against Women**

In General Recommendation 12, the Committee recommended that state parties should include the following information in their periodic reports under CEDAW:

1. The legislation in force to protect women against the incidence of all kinds of violence, including sexual violence, family abuses sexual harassment etc;
2. Any other measures adopted to eradicate violence;
3. Support services available for women who are victims of abuse and;
4. Statistical data on the incidence of violence against women.<sup>18</sup>

The significance of General Recommendation 12 is that state parties could no longer ignore their obligation to report on violence against women on the account that the matter was not addressed by any substantive provision in CEDAW. General recommendations adopted during the Committee's first ten years were short and modest. At its tenth session in 1991, the Committee decided to adopt a practice of issuing general recommendations on specific provisions of CEDAW and on the relationship between the provisions of CEDAW and what the Committee described as 'cross-cutting issues'.<sup>19</sup> Following this decision, the Committee issued two detailed and comprehensive general recommendations which offer state parties clear guidelines on the application of CEDAW in specific situations.<sup>20</sup> One of these is General Recommendation 19.

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17. Art 21 of CEDAW.

18. General Recommendation 12 (eighth session, 1989), <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm> (accessed 12 June 2007).

19. Division for the Advancement of Women 'Gender recommendations' <http://www.un.org/womenwatch/daw/cedaw/recommendations/index.html> (accessed 12 June 2007).

20. International Women's Rights Action Watch 'Assessing the Status of Women: A Guide to Reporting Under the Convention on the Elimination of all Forms of Discrimination Against Women' <http://iwrw.igc.org/publications/assessing/englishoptions.htm> (accessed 12 June 2007).

### 3.2 General Recommendation 19 (1992) of Committee on the Elimination of All Forms of Discrimination Against Women

In General Recommendation 19, the Committee uses the expression ‘gender-based violence’ instead of ‘violence against women’ to emphasise the notion of ‘gender’, thus conceptualising violence in broader terms. Consequently, understanding gender is key to developing strategies of personal and social transformation to end violence and to achieve related development goals. Gender-based violence encompasses other descriptions of violence although it is framed in broader terms and with the understanding that the causes and solutions to violence may be personal, political and structural.

The UN International Institute for Research and Training (INSTRAW) distinguishes gender-based violence from other types of violence in the following terms:

Gender-based violence is distinguished from other types of violence in that it is rooted in prescribed behaviours, norms and attitudes based upon gender and sexuality. In other words, it is rooted in the gender discourses of masculinity and femininity (prescribed norms and definitions of what it means to be a man or a woman) - and how men and women are positioned *vis à vis* one another and other groups of men and women. These gender discourses allow for or encourage violent behaviour within a context of assumed privilege and hierarchical power for certain groups of men. Gender-based violence is an articulation of, or an enforcement of, power hierarchies and structural inequalities that are informed by belief systems, cultural norms and socialisation processes.<sup>21</sup>

As indicated above, the definition of discrimination against women contained in article 1 of CEDAW highlights basic acts such as distinction, exclusion or restriction, which are perpetrated on the basis of sex. In most cases of violence, restriction would be the most common. Restriction or limitation becomes discriminatory if it has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women of their rights.

The Committee examines violence against women under various provisions of CEDAW. However, central to all of them is the understanding that customary and traditional attitudes contribute, sometimes in an almost invisible manner to many forms of violence. The obligation contained in article 5 of CEDAW to address such traditional attitudes is, therefore, central to confronting violence.<sup>22</sup> The Committee regards gender-based violence as a cross cutting issue. It has integrated it in other parts of the substantive provisions of CEDAW. The Committee

21. International Research and Training Institute for the Advancement of Women (YEAR) ‘Ending Men’s Violence’ <http://www.un-instraw.org/en/index.php?option=content&task=view&id=909&Itemid=182> (accessed 12 June 2007).

22. A Byrnes (n 4 above).

further recommends that the following articles be interpreted to have an element of gender-based violence:

- Articles 2 and 3 require state parties to eliminate discrimination in all its forms. In this respect, states have the obligation to enact laws that protect women against violence and all its causes and consequences.
- Article 6 (on women trafficking and prostitution) requires state parties to take measures to suppress all forms of women trafficking, exploitation and prostitution of women, mainly through laws. In particular, the Committee links poverty and unemployment to women trafficking and prostitution, which expose women to risks of violence and abuse.
- Article 11 (on employment) should include sexual harassment in the workplace, which is characterised as a form of violence against women. Sexual harassment against women is discriminatory when the victim has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, promotion, or when it creates a hostile work environment.
- Article 12 (on the right to health) links violence to women's health and life. The Committee acknowledges that harmful traditional practices perpetuated by culture and tradition are detrimental to the health of women and girls.
- Article 14 (on rural women) links traditional attitudes regarding the subordinate role of women prevalent in rural areas to increased risks of gender-based violence.
- Article 16 (on family life) highlights violence in the family, including battering, rape, different forms of sexual assault, mental and other forms of violence. These all put women's health at risk and impair their ability to participate in family and public life on a basis of equality with men.

As Gallagher notes:

The Committee affirmed that violence against a woman constitutes a violation of her internationally recognised human rights, regardless of whether the perpetrator is a public official or a private person and made detailed recommendations of the steps that it considers states parties should take in order to fulfil their obligations under the Convention in relation to violence.

By defining gender-based violence – irrespective of the perpetrator – as sex discrimination, the Committee defines the responsibility of state parties under the Convention to include an obligation to ensure its elimination. This means that the responsibility of states parties extends to eliminating gender-based discrimination by any person, organisation or enterprise. State responsibility may therefore be invoked not only when a government official is involved in an act of gender-based violence, but also when the state fails to act with due



diligence to prevent violations of rights committed by private persons or to investigate and punish such acts of violence, and to provide compensation.<sup>23</sup>

The measures recommended by the Committee fall into four broad categories: *preventive, punitive, protective, and remedial*. Such measures would include not only legal sanctions, civil remedies and avenues for compensation, but also preventive measures such as public information and educational programmes, as well as protective measures, including support services for victims of violence. The following gives an overview of the types of measures the Committee recommends in General Recommendation 19.

General Recommendation 24 on the right to health:<sup>24</sup>

- Compilation of statistics and research;
- Adequate laws and effective enforcement of those laws;
- Education of those involved in the legal and related processes who are responsible for working with victims/survivors of violence;
- Provision of appropriate protective and support services;
- Public education to address traditional attitudes that perpetuate violence against women;
- Specific preventive and punitive measures in relation to trafficking and sexual exploitation;
- Effective complaints procedures and remedies, including compensation;
- Services for victims of family violence, rape, sexual assault and other forms of gender-based violence, including refugees, specially trained health workers, rehabilitation and counselling;<sup>25</sup>
- Effective measures be taken to ensure that the media respect and promote respect for women;
- State parties to include in their reports, information on sexual harassment, measures taken to protect women from sexual harassment and other forms of violence or coercion in the workplace;
- Measures that are necessary to overcome family violence should include criminal penalties and civil remedies where necessary; relevant legislation; services to ensure safety and security of victims; rehabilitation programmes for perpetrators; support services for families where incest or sexual abuse has occurred;

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23. A Gallagher (2005) 'Violence against and trafficking in women as symptoms of discrimination: The potential of CEDAW as an antidote' <http://www.unescap.org/.../17/CEDAW%20discussion%20paper%20no.%2017%20-%20revised%2023%20March%202006.pdf> (accessed 21 June 2007).

24. Committee on the Elimination of All Forms of Discrimination Against Women's General Recommendation 24 (20th session, 1999) on art 12: Women and Health <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm> (accessed 12 June 2007).

25. A Byrnes (n 4 above).

- Reports of state parties to include all forms of gender-based violence, all available data on the incidence of each form of violence, including its effects on women.

Overall, General Recommendation 19 illustrates the two principal basis of state responsibility for domestic violence: *due diligence* and *equal protection*. States are not only under the obligation to refrain from committing violations themselves, but are also responsible for ‘private’ acts if they fail to fulfil their duty to prevent and punish such acts. Consequently, when the state fails to ensure that its criminal and civil laws adequately protect women and consistently hold abusers accountable, or fails to ensure that its agents, for example law enforcement agents and prosecutors, implement the laws that protect victims of domestic violence, it has not acted with due diligence to prevent, investigate and punish violations of women’s rights. Furthermore states are required under international law to provide all citizens with equal protection of the law. If a state fails to provide individuals who are harmed by an intimate partner with the same protection it provides to those harmed by strangers, it has failed to live up to its obligation.<sup>26</sup>

On women trafficking in particular, the Committee allocated part of its eleventh session in 1992 to a discussion and study on article 6 and other provisions of CEDAW addressing the exploitation of women. The subject was chosen in anticipation of the 1993 World Conference on Human Rights, which resulted in the adoption of the Vienna Declaration on Human Rights (the Vienna Declaration). Gender-based violence and sexual exploitation of women are intertwined issues. Women’s vulnerability to violence increases their exposure to HIV/AIDS and the pandemic has introduced further gender-based violence in different ways. Some HIV positive women or perceived to be HIV positive are subjected to discriminatory treatment, abandoned and shunned by their families and communities, dismissed from employment, assaulted and even killed. Furthermore, violence and the fear of violence may intimidate women from trying to negotiate safer sex, discussing fidelity with partners or leaving risky and abusive relationships. In addition, the sexual exploitation of women and girls increases the likelihood of infection with HIV. Vulnerability is extremely high in coercive situations such as trafficking for prostitution, where women have little power to insist on condom use. Finally, women, rather than men, are most likely to be blamed as vectors of the pandemic and stigmatised as promiscuous for contracting HIV. CEDAW directs measures to combat these problems in particular through articles 6 and 11 and General Recommendations 12 and 19.

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<sup>26.</sup> See also R Coomaraswamy ‘Combating domestic violence: Obligations of the state’ 6 (2000) *Innocenti Digest* 10.

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### **3.3 The communication procedure before the Committee on Elimination of All Forms of Discrimination Against Women**

In addition to the examination of state reports and the formulation of general recommendations, the Committee is mandated to hear communications under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (the CEDAW Optional Protocol). The CEDAW Optional Protocol was adopted by the General Assembly of the UN in 1999. It is an instrument which provides access to justice and allows women who have been denied such access at the national level to have their claims reviewed by the Committee. It further allows for investigation of substantial abuses of women's human rights by the Committee. The CEDAW Optional Protocol allows either individuals or groups to submit complaints to the Committee. Communications may also be submitted on behalf of individuals or groups, with their consent, unless it can be shown why that consent was not received. However, such a communication will only be considered by the Committee if it concerns a country that is a party to the Protocol. The communication must be submitted in writing, with the names of the persons submitting it.<sup>27</sup>

Before a complaint is considered, the Committee must make sure that all available domestic remedies have been exhausted and the complaint has not already been examined by the Committee and has not been or is being examined under another procedure of international investigation or settlement. In addition, a complaint will only be admissible provided it is compatible with provisions of CEDAW. After receipt of a communication and prior to its final decision, the Committee has the option of contacting the state party with an urgent request that the latter take steps to protect the alleged victim/s from irreparable harm.

The Committee examines and considers all information provided by a complainant in closed meetings. The Committee's views and recommendations are then transmitted to the state party concerned. The state party against which the complaint was lodged is given six months to consider the views of the Committee and provide a written response, including an account of the remedial steps taken. The Committee may request further information from the state party.

### **3.4 The inquiry procedure of the Committee on Elimination of All Forms of Discrimination Against Women**

The inquiry procedure allows the Committee to initiate a confidential investigation by one or more of its members where it has received reliable information of grave or systematic violations by a state party of rights enshrined

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<sup>27.</sup> In other words, the communication should not be anonymous.

in CEDAW. However, when ratifying the CEDAW Optional Protocol, a state party has the option of refusing to recognise the competence of the Committee to initiate and conduct an inquiry as established in the CEDAW Optional Protocol.<sup>28</sup> Where warranted and with the consent of the state party concerned, the Committee may visit the latter's territory. Any findings, comments or recommendations will be transmitted to the state party concerned, to which it may respond within six months. After the six month period, the state party may be invited to provide the Committee with details of any remedial efforts taken following an inquiry. Details may also be provided in the state party's report to the Committee under article 18 of CEDAW. Such an inquiry is conducted confidentially and the state party concerned is required to be cooperative at all stages of the proceedings.

## **4 The Vienna Declaration on Human Rights**

The Vienna Declaration laid extensive groundwork for eliminating violence against women. Governments declared that the UN system and member states should work towards the elimination of violence against women in all spheres of life, including public and private life; and further eliminate all forms of sexual harassment, exploitation and trafficking in women. Governments committed to eliminate gender bias in the administration of justice and deal appropriately with any conflicts arising between the rights of women and the harmful effects of certain traditional or customary practices, cultural prejudices and religious extremism. Further, the Vienna Declaration provides for the following:

In particular, the World Conference on Human Rights stresses the importance of working towards the elimination of violence against women in public and private life, the elimination of all forms of sexual harassment, exploitation and trafficking in women, the elimination of gender bias in the administration of justice and the eradication of any conflicts which may arise between the rights of women and the harmful effects of certain traditional or customary practices, cultural prejudices and religious extremism. The World Conference on Human Rights calls upon the General Assembly to adopt the draft declaration on violence against women and urges States to combat violence against women in accordance with its provisions. Violations of the human rights of women in situations of armed conflict are violations of the fundamental principles of international human rights and humanitarian law. All violations of this kind, including in particular murder, systematic rape, sexual slavery, and forced pregnancy, require a particularly effective response.<sup>29</sup>

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<sup>28.</sup> Art 10 CEDAW Optional Protocol.

<sup>29.</sup> Para 38 (Part II B) Vienna Declaration on Human Rights.

The Vienna Declaration also declared that ‘violations of the human rights of women in situations of armed conflicts are violations of the fundamental principles of international human rights and humanitarian law.’<sup>30</sup> Furthermore, these violations, including murder, systematic rape, sexual slavery and forced pregnancy, ‘require a particularly effective response.’<sup>31</sup> Violence against women has been referred to as ‘the most pervasive yet least recognised human rights abuse in the world.’<sup>32</sup> Accordingly, the Vienna Human Rights Conference and the Fourth World Conference on Women gave priority to the issue of violence against women. In particular, the provisions in the Vienna Declaration paved the way for the adoption of the Declaration on Elimination of Violence by the UN General Assembly in December 1993.

## 5 The Declaration on the Elimination of Violence Against Women (1993)

In its preamble, the Declaration on Elimination of Violence acknowledges that the effective implementation of CEDAW would contribute to the elimination of violence against women and that its contribution will strengthen and complement that process. The Declaration on Elimination of Violence strengthens the implementation of CEDAW in a number of ways. Articles 1 and 2 of the Declaration provide a comprehensive definition of violence against women in the following terms:

Violence against women means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.<sup>33</sup>

The Declaration on Elimination of Violence recognises that physical, sexual and psychological violence can occur in the family (domestic violence, dowry related violence, incest, marital rape, harmful traditional practices), the community (rape, sexual harassment, trafficking, forced prostitution) and by the state (custodial violence, rape in armed conflicts).

Article 3 of the Declaration on Elimination of Violence stresses the right to equal enjoyment and protection of all human rights and fundamental freedoms. The article continues to elaborate on the fundamental freedoms mentioned in article 1 of CEDAW as including the right to life; the right to equality; the right to

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30. As above.

31. As above.

32. UNFPA Report (1997) ‘The right to choose: reproductive rights and reproductive health’ <http://www.unfpa.org/swp/1997/summary.htm> (accessed 22 June 2007).

33. Art 1 Declaration on the Elimination of Violence.

liberty and security of person; the right to equal protection under the law; the right to be free from all forms of discrimination; the right to the highest attainable standard of physical and mental health; the right to just and favourable conditions of work; and the right not to be subjected to torture, or other cruel, inhuman or degrading treatment or punishment.

Recognising that many forms of violence against women are culturally condoned, the Declaration, in article 4, forbids states from invoking any customary tradition or religious consideration to avoid their obligation to eliminate violence against women. State parties also have an obligation to develop policies and laws that protect women against violence and, provide adequate resources for their activities related to the elimination of violence against women.

## **6 The United Nations Special Rapporteur on Violence Against Women, including its Causes and Consequences**

The UN Commission on Human Rights has created a number of special rapporteurs, among them, the Special Rapporteur on Violence Against Women, including its Causes and Consequences (Special Rapporteur on Violence Against Women). This is one of the mechanisms which have been very effective in bringing urgent human rights issues to the attention of the UN and the international community.

The mandate of the Special Rapporteur on Violence Against Women, began in 1994 when the first Rapporteur was appointed by the UN Commission on Human Rights. The Special Rapporteur on Violence Against Women uses General Recommendations 12 and 19 together with the Declaration as guidelines to assess the manner in which state parties address the issues of gender-based violence. The Special Rapporteur on Violence Against Women collects and analyses data on violence against women in order to recommend measures to be taken at the international, regional and national level. The mandate of the Special Rapporteur on Violence Against Women has three elements:

- Collection of information on violence against women and its causes and consequences from a variety of sources, including government and inter-governmental organisations, specialised agencies and non-governmental organisations (NGOs);
- Recommendation of measures at the international, regional and national levels to eliminate violence against women;
- Cooperation with other special rapporteurs, working groups and experts of the Commission on Human Rights.

Radhika Coomaraswamy, was the first Special Rapporteur on Violence Against Women. In her report, she made a strong argument for state accountability for violence against women, on the basis that the root causes of women's subordination lies in the institutions of the state and society.<sup>34</sup> She also noted that economic and social forces which exploit women's labour and women's bodies are a contributing factor to the historical power relations responsible for violence against women.<sup>35</sup> She noted that, economically disadvantaged women are more vulnerable to sexual harassment, trafficking and sexual slavery.<sup>36</sup> Therefore, she argued that the state has an obligation of due diligence to prevent, investigate and punish acts of violence against women committed either by the state or by private actors.<sup>37</sup>

## 7 Conclusion

Gender-based violence and all forms of sexual harassment and exploitation, including those resulting from cultural prejudice and human trafficking are incompatible with the dignity and worth of the human person. It is on this account that gender-based violence has drawn much concern at the international level in the past sixteen years. This article focused on the framework provided under the UN system for fighting gender-based violence.

CEDAW provides a broad framework for addressing gender-based violence in terms of discrimination against women. The work of the Committee has sensibly improved CEDAW's potentials to fight gender-based violence, its causes, manifestations and effects on women and on society. The adoption of the Declaration on Elimination of Violence as well as the appointment of the Special Rapporteur on Violence Against Women also constitute major achievements towards the elimination of gender-based violence in state parties to CEDAW as well as in member states of the UN.

However, CEDAW has not been ratified by all African countries, Sudan and Somalia are yet to ratify it. In addition, the 'opt out clause' of the Optional Protocol to the CEDAW may limit the efficacy of the Committee in addressing grave or systematic violations of women's rights although it is arguable that local NGOs may assist the Committee in its work.

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34. R Coomaraswamy 'Integration of the human rights of women and the gender perspective: Violence against women' [http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/a9c6321593428acfc1256cef0038513e/\\$FILE/G0311304.doc](http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/a9c6321593428acfc1256cef0038513e/$FILE/G0311304.doc) (accessed 21 June 2007)

35. As above.

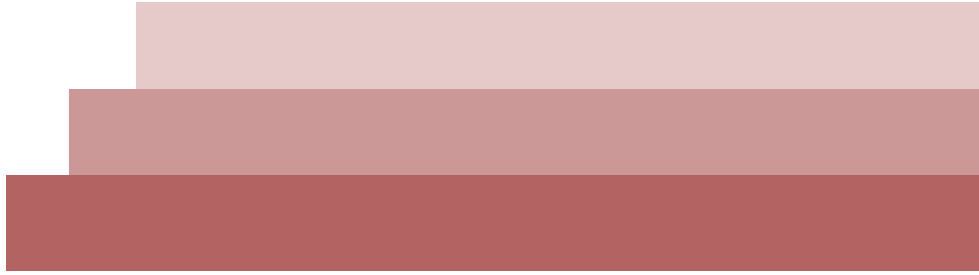
36. As above.

37. As above.





# 2



## The African regional response to gender-based violence

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*Karen Stefiszyn*

## 1 Introduction

Gender based violence in Africa requires a regional response concurrent with national and international efforts towards its eradication. Implicit in its constituted commitment to gender equality,<sup>1</sup> and explicit in other regional women's rights policy initiatives such as the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Protocol on Women) and the Solemn Declaration on Gender Equality in Africa (Solemn Declaration), the African Union (AU) and its various mechanisms are resolved to address gender-based violence. Addressing gender-based violence requires prioritisation on the regional agenda, not only because it is a human rights violation, and the promotion and protection of human rights is a stated objective of the AU, but also because of its link with other continental crises such as HIV/AIDS, conflict, and under-development.

The United Nations Committee on the Elimination of Discrimination Against Women defines gender-based violence as a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men.<sup>2</sup> It further notes that it is violence directed against a woman because she is a woman or that affects women disproportionately.<sup>3</sup> Examples of manifestations of gender-based violence prevalent in Africa, although not exclusive to Africa, are domestic violence, sexual violence including rape, femicide, child marriage, harmful traditional practices such as female genital mutilation (FGM) and human trafficking. Moreover, in a continent rife with conflict, women experience a heightened prevalence of gender-based violence including murder, rape, sexual slavery, and forced pregnancy. Amidst all these violations women are more at risk of contracting HIV/AIDS than men, the feminisation of poverty is perpetuated, and gender equality is unattainable.

At an institutional level, the primary responsibility for the eradication of gender-based violence is on individual governments through implementation of international and regional human rights standards. However, the regional institutions have an important role to play in setting and promoting the standards, as well as monitoring implementation. For the purposes of this chapter, regional institutions are limited to the AU and its organs. The response of the sub-regional institutions will not be examined herein although a chapter on gender-based violence and the Southern African Development Community (SADC) is included in this publication. After providing a brief overview of the regional institutional human rights framework, this chapter will look at the regional standards in relation to gender-based violence and then at the roles and responses of the AU

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1. Art 4(l) Constitutive Act of the African Union (Constitutive Act) CAB/LEG/23.15 (26 May 2001).
  2. CEDAW General Recommendation 19 para 1 UN Doc A/47/38.
  3. As above para 6.

and its associated mechanisms – the African Commission on Human and Peoples’ Rights (African Commission), the African Court on Human and Peoples’ Rights (African Court), and the African Peer Review Mechanism (APRM) of the New Partnership for Africa’s Development (NEPAD) in implementing the standards.

## 2 A brief overview of the structure of the African Union

The AU replaced the Organisation of African Unity (OAU) in 2001 with a commitment to human rights being one of the most striking diversions from its predecessor. One of its objectives is to ‘promote and protect human and peoples’ rights in accordance with the African Charter on Human and Peoples’ Rights and other relevant human rights instruments.’<sup>4</sup> Furthermore, the AU is supposed to function in accordance with the principle of the promotion of gender equality.<sup>5</sup> The objectives and principles of the AU apply to the organs of the AU: the Assembly of the Union (AU Assembly), the Executive Council, the Pan-African Parliament (PAP), the Court of Justice, the AU Commission, the Permanent Representatives Committee, the Specialised Technical Committees, the Economic, Social and Cultural Council, the Financial Institutions and the Peace and Security Council (PSC). The African Commission and NEPAD, including the APRM are not listed in the Constitutive Act as organs of the AU but are accepted as such.

Adhering to its stated principle of the promotion of gender equality, the AU has ensured gender parity within the AU Commission whereby 5 out of 10 Commissioners are women rendering the AU the most progressive regional organisation in the world in terms of gender equality. Given that gender-based violence is a result of unequal power relations between men and women this is a significant step. While gender parity within the AU Commission does not alone balance power relations it dispels common notions of women as occupiers of the private sphere and through the provision of role models it contributes to the promotion of gender equality. Furthermore, although not guaranteed, it is hoped that gender parity within the AU, particularly if instituted in all the organs, will amplify women’s needs, which are most often unarticulated in male dominated structures of power.

Within the AU Commission is the Directorate for Women, Gender and Development (Gender Directorate) whose functions include monitoring, gender mainstreaming, advocacy, performance tracking, gender training, capacity building, research, communication, and networking. The women’s human rights division has activities around gender-based violence, namely advocacy under the Protocol on Women and gender-based violence in relation to HIV/AIDS, for which a Pan-African campaign is in the process of being initiated. Partnerships are also

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4. Art 3(h) Constitutive Act.

5. Art 4(l) Constitutive Act.

being developed with other organisations that work on specific aspects of gender-based violence, such as with United Nations Children’s Fund (UNICEF), United Nations Development Fund for Women (UNIFEM), World Health Organization (WHO), United Nations High Commission for Refugees (UNHCR), and civil society organisations. The AU Commission, largely through the Gender Directorate, is responsible for gender mainstreaming in all programmes and activities of the AU and implementation of the organs’ decisions and therefore, can significantly influence the response to gender-based violence on the continent.

The scourge of gender-based violence on the continent is an impediment to the promotion and protection of human rights and the principle of gender equality and necessitates a strong response if the AU is to adhere to its commitments. Beyond the promotion and protection of human rights generally, and gender equality, the AU has explicitly articulated, in detail, its commitments to a broad spectrum of women’s rights through the adoption of the Protocol on Women and the Solemn Declaration.

### **3 Standard setting: the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa and the Solemn Declaration on Gender Equality in Africa**

#### **3.1 The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa**

The most significant step taken by the AU, although initiated under the OAU, towards the fulfilment of its commitment to gender equality, and its most concrete response to gender-based violence, has been the drafting and adoption of the Protocol on Women. The idea of a protocol to the African Charter to address women’s rights was based on the African Charter’s inadequacy in providing for women’s rights. While gender equality and non-discrimination were included in the African Charter, provisions relating to specific rights of particular concern to women in Africa were not. Recognition of gender-based violence was one such oversight. Leading non-governmental organisations (NGOs),<sup>6</sup> in collaboration with the African Commission, organised a seminar in 1995 on the Protocol on Women the culmination of which was a decision to draft the Protocol on Women. With the endorsement of the OAU, the drafting of the Protocol on Women was undertaken by a working group convened by the Special Rapporteur on the Rights of Women in Africa (Special Rapporteur on Women), appointed in 1996, and two Commissioners

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<sup>6.</sup> Women in Law and Development in Africa (WILDAF), the African Centre for Democracy and Human Rights (ADCHRS), and the International Commission of Jurists (ICJ).

of the African Commission and included government experts. Contributions to the drafting process were also received from civil society and the then OAU Women's Unit. The draft underwent several revisions, and several compromises due to certain contentious provisions, in many cases perceived as threatening to tradition and culture. For example, a provision in one of the drafts prohibited polygamy yet by the final text the same provision had evolved to state that monogamy was only a preference.

After strategic and successful lobbying by women's rights advocates, the Heads of State and Government comprising the AU Assembly adopted the Protocol on Women in July 2003, indicating a commitment by African leaders to women's rights in Africa, and as it is a reoccurring thread throughout the Protocol on Women, a commitment to the elimination of gender-based violence. The Protocol on Women leaves no room to question that violations of women's rights are both a cause and consequence of gender-based violence and that the realisation of women's rights is essential to its eradication. Twenty-one individual states have ratified the Protocol on Women, which entered into force on 25 November 2005.<sup>7</sup> The Protocol on Women addresses gender-based violence comprehensively and includes provisions on the elimination of discrimination against women, the right to dignity, the rights to life, integrity and security of the person, trafficking in women, the prohibition of harmful practices, protection of women in armed conflict, sexual harassment, pornography, reproductive rights, and protection from violence including sexual abuse for elderly women and women with disabilities.

Measures prescribed to combat the above violations are also holistic including legislative, economic, public education and awareness raising. The latter provision of article 2, for example, notes the need to 'modify the social and cultural patterns of conduct of women and men.' If ratified by all states and implemented, the Protocol on Women has enormous potential to alleviate gender-based violence in Africa. Given that is a tall order, one must not underestimate its significance in the meantime. It is indicative of an increased level of awareness of the gravity of the issue and its impact on the enjoyment by women of their human rights. Furthermore, it can act as a powerful tool for advocacy whereby, organisations involved in the struggle against gender-based violence can popularise the commitments of state parties, particularly with respect to gender-based violence, and lobby for their accountability. The Protocol on Women also presents the opportunity for strengthening of the African Commission's response to women's rights generally, and gender-based violence, in particular. The role of the African Commission will be discussed further in this chapter.

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7. As of 15 June 2007 the following countries have ratified the Protocol on Women: Benin, Burkina Faso, Cape Verde, Comoros, Djibouti, Gambia, Libya, Lesotho, Mali, Malawi, Mozambique, Mauritania, Namibia, Nigeria, Rwanda, South Africa, Senegal, Seychelles, Tanzania, Togo, and Zambia <http://www.africa-union.org> (accessed 20 June 2007).

### 3.2 The Solemn Declaration on Gender Equality in Africa

Another milestone in the realisation of gender equality was the adoption by the AU of the Solemn Declaration in July 2004. Considering that ‘violence against women is a manifestation of the historically unequal power relations between men and women, which have led to the domination over and discrimination against women by men and to the prevention of women’s advancement’,<sup>8</sup> gender equality is the key to eradicating gender-based violence.

The Solemn Declaration recognises the numerous impediments to gender equality and implications of gender inequality, including gender-based violence. Its preamble expresses deep concern about the status of women and the negative impact on women and girls of issues such as HIV/AIDS, conflict, harmful traditional practices, and violence against women. Within the Solemn Declaration, Heads of State and Government agree to:

Initiate, launch and engage within two years sustained public campaigns against gender based violence as well as the problem of trafficking in women and girls; reinforce legal mechanisms that will protect women at the national level and end impunity of crimes committed against women in a manner that will change and positively alter the attitude and behaviour of the African society.<sup>9</sup>

The Implementation Framework of the Solemn Declaration on Gender Equality in Africa (Framework)<sup>10</sup> provides guidance regarding implementation of the Solemn Declaration. With respect to the above commitment, the actions required according to the Framework are, to enact and/or strengthen existing legislation on gender-based violence, deepen the understanding of the problem, formulate and adopt an African protocol to prevent, eliminate and punish trafficking in women and children and, adopt laws that outlaw the practice of FGM and other harmful practices. The targets are the elimination of gender-based violence, trafficking in women and girls, and FGM and other harmful practices by 2015. Implementation is monitored through state reports<sup>11</sup> submitted at the AU Ordinary Summits. All submitted reports are available on the AU website<sup>12</sup> and civil society

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8. Beijing Declaration and Platform for Action Fourth World Conference on Women A/CONF/77/20 and A/CONF/77/20/Add1 (1995) (Beijing Platform for Action).

9. Solemn Declaration on Gender Equality in Africa (Solemn Declaration) Assembly/AU/Decl 12 (III) rev 1 (2004).

10. AU Doc AU/MIN/CONF/WG/3 (I), adopted at the first African Union Conference of Ministers Responsible for Women and Gender Dakar, Senegal (October 2005).

11. Para 12 Solemn Declaration.

12. See <http://www.africa-union.org>

organisations are encouraged to comment on the reports. An annual progress report of the Chairperson of the AU Commission (AU Chairperson) is submitted to the same forum. The latest Chairperson's report on the implementation of the Solemn Declaration<sup>13</sup> notes that with respect to article 4 measures are in place to develop or revise laws so that they specifically address issues of violence against women both in the private and in public. Furthermore, measures aimed at addressing violence against women have also sought to strengthen the institutional mechanisms for coordinating violence against women and enforcing the rights of victims and survivors. It also notes that several states have dedicated resources for public education and awareness raising on issues of gender-based violence, and finally, that not many states have gone far in addressing trafficking in women. While the report of the AU Chairperson in this respect is general, it does highlight the placement of gender-based violence and other issues related to gender equality on the agenda of the AU Summits, which demonstrates, to an extent, responsiveness on a regional level.

While it is up to individual states to implement the Protocol on Women and the Solemn Declaration, the AU has gone further than any other regional body in standard-setting in relation to gender equality and women's rights. The AU Assembly now has a further role to play in monitoring the implementation of these instruments as well as ensuring compliance by member states.<sup>14</sup> This is where the challenge lies and the commitment will be tested.

## 4 Implementation

Each organ of the AU has a role in realising the objectives of the overall body. In other words, each could respond to gender-based violence within their individual mandates. However, for the purposes of this chapter, the PSC, the African Commission and the APRM will be highlighted based on their potential to most directly respond to gender-based violence.

### 4.1 The Peace and Security Council

Given that during conflict gross violations of women's rights occur, particularly those concerning, life, security and dignity, the PSC has a significant role to play

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13. AU Doc EX.CL/306 (X).

14. Art 9 Constitutive Act.

in addressing gender-based violence. In this respect however, its role has been grossly under-realised. The PSC was established as a standing decision-making organ for the prevention, management and resolution of conflicts.<sup>15</sup> As Africa is rife with conflict and conflict provides fertile ground for gender-based violence, the PSC needs to address gender-based violence. Articles 10 and 11 of the Protocol on Women address the right to peace and the protection of women in armed conflicts respectively. The PSC is well situated to promote implementation, at the regional level, of these provisions. Furthermore, it can play a role in the eradication of gender-based violence in a number of ways, consistent with its objectives. For example, in promoting peace, security and stability in Africa,<sup>16</sup> the PSC must do so in broad terms to include positive peace by addressing the structural causes of conflicts including gender-based violence. In doing so, it will also more effectively fulfil its objective of anticipating and preventing conflicts.<sup>17</sup> The promotion and implementation of peace-building and post-conflict reconstruction activities to consolidate peace and prevent the resurgence of violence<sup>18</sup> must include women in the process, must mainstream gender, and must include measures responsive to gender-based violence, such as legislation, health services, and access to justice. Finally, the PSC must include women's rights in the promotion and encouragement of democratic practices, good governance, the rule of law, and human rights as part of their efforts for preventing conflicts.<sup>19</sup>

Notably, the PSC has responded positively to allegations of sexual misconduct by personnel of the African Union Mission in Sudan (AMIS) by supporting the AU Commission in establishing an Independent Commission of Enquiry, illustrative of an intolerance of gender-based violence, which is a recent development likely resulting from increased awareness and commitments such as the Protocol on Women and the Solemn Declaration. Winnie Byanyima, former Director of the Women, Gender and Development Directorate of the AU Commission, stated at the inauguration of the Committee of Enquiry to Investigate Allegations of Sexual Misconduct against Members of the AU Forces in Darfur:

... our mandate goes beyond identifying whether or not a crime of a sexual nature took place and if so, to identify and propose sanctions for the culprits. We will examine the institutional framework in place for dealing with rape and other forms of gender-based violence with a view to strengthening it, if necessary.<sup>20</sup>

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15. Art 2(l) Protocol Relating to the Establishment of the Peace and Security Council of the African Union (Peace and Security Protocol) (2002).
  16. Art 3(a) Peace and Security Protocol.
  17. Art 3(b) Peace and Security Protocol.
  18. Art 3(c) Peace and Security Protocol.
  19. Art 3(f) Peace and Security Protocol.
  20. 'AU inaugurates inquiry panel on allegations of sexual abuse in Darfur' Sudan Tribune [http://www.sudantribune.com/article.php3?id\\_article=15092](http://www.sudantribune.com/article.php3?id_article=15092) (accessed 17 April 2006)



Measures such as this show promise in terms of gains with regard to prioritisation of gender-based violence, although a greater indication of commitment is still required concerning victims of gender-based violence in Darfur, not only of abuse by AU personnel, but also by the perpetrators of the conflict. In responding to Darfur, the PSC and the AU overall, have failed to respond to gender-based violence, especially in light of the well-documented<sup>21</sup> extent of related crimes. Technically, the AU could have intervened long before it actually did, on the basis of article 4(h) of the Constitutive Act whereby the right to intervene in a member state exists in respect of *inter alia*, crimes against humanity, in this case rape and other sexually violent crimes.<sup>22</sup> However, such is still idealistic thinking for women's rights activists.

Aside from Darfur, there are many other conflicts in Africa whereby incidences of gender-based violence may receive mention but are never prioritised in regional responses during the respective conflict and during post-conflict reconstruction efforts, which provide fertile ground to address gender justice, for example. It is an unfortunate under-estimation on the part of the PSC and the AU of the link between gender-based violence and peace.

## 5 The African Commission on Human and Peoples' Rights and gender-based violence

The African Commission is arguably the most important regional body for responding to gender-based violence. To date however, it has been ineffective in this respect. As the implementing mechanism for the African Charter and the Protocol on Women it is mandated to promote and protect human rights through the consideration of individual communications, the adoption of resolutions, the appointment of special rapporteurs and the receipt and deliberation of state reports. Each of these protective and promotional measures can respond to gender-based violence but for a myriad of factors, with the exception, to an extent, of the Special Rapporteur on Women, it has failed to effectively address the issue. As the provisions of the African Charter do not address gender-based violence, presumably, the entry into force of the Protocol on Women, will motivate the African Commission to take a more active role towards the elimination of gender-based violence regionally, although the previous absence of

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21. See for example, United Nations Commission on Human Rights 'Report of the United Nations High Commissioner for Human Rights and Follow-up to the World Conference on Human Rights' (7 May 2004) UN Doc E/CN.4/2005/3 and Amnesty International 'Darfur: Rape as a Weapon of War: Sexual Violence and its Consequences' (19 July 2004) AI Index: AFR 54/076/2004.

22. According to art 7 of the Statute of the ICC, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity are all crimes against humanity.

the Protocol on Women does not explain or excuse their relative silence on gender-based violence to date. For example, there have been no resolutions, devoted to gender-based violence, despite its gravity and prevalence.<sup>23</sup>

With respect to state reporting, states are required under the African Charter to include measures taken towards the realisation of women's rights in their periodic reports to the African Commission,<sup>24</sup> an obligation reinforced by the Protocol on Women.<sup>25</sup> Due to combined factors such as non-adherence to reporting guidelines and deadlines, this has not proven to be an effective mechanism through which to respond to gender-based violence despite its potential through engagement with individual states on the issue and through concluding observations that could emerge from the dialogue if initiated through reporting. For example, in South Africa's first periodic report to the African Commission, only legislation relating to women's rights, albeit in compliance with provisions of the African Charter, were listed and described, without recognition by the authors of the report of the severity of gender-based violence in South Africa. In its concluding observations the African Commission did note the efforts of South Africa to implement such legislation but stated that it 'remains concerned at the high incidence of sexual violence against women and children'.<sup>26</sup> There were no recommendations offered. While this is evidence of dialogue between a state and the African Commission on the issue, the substance of the dialogue is not relative to the urgency required.

Gender-based violence could also be addressed through the individual communications procedure although to date this has proven to be another lost opportunity. This can be partly explained by the silence of the African Charter on gender-based violence and therefore, it is hoped that the adoption of the Protocol on Women will be followed by the submission of communications related to gender-based violence. Women's rights advocates must begin seizing this opportunity. The development of respective jurisprudence would increase the profile of gender-based violence and send a message to states that measures must be taken to address it in order to comply with their human rights obligations.

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23. At the 35th ordinary session of the African Commission in 2004, the African Commission adopted a resolution on women and children in Africa, which mentioned *inter alia* harmful traditional practices, widespread poverty, and the need for states to ratify the Protocol on Women. See Resolution on the Situation of Women in Africa [http://www.chpr.org/english/\\_doc\\_target/documentation.html?../resolutions/resolution71\\_en.html](http://www.chpr.org/english/_doc_target/documentation.html?../resolutions/resolution71_en.html) (accessed 2 July 2007).
  24. Guidelines for National Periodic Reports Under the African Charter [http://www.chr.up.ac.za/hr\\_docs/african/docs/achpr/achpr4.doc](http://www.chr.up.ac.za/hr_docs/african/docs/achpr/achpr4.doc) (accessed 2 July 2007) para 5.
  25. Art 26 Protocol on Women. The Special Rapporteur on Women is currently working on separate reporting guidelines for the Protocol on Women.
  26. African Commission's Concluding observations and recommendations on the First Periodic Report of the Republic of South Africa available at <http://www.chr.up.ac.za> (accessed 20 June 2007).

It is through the Special Rapporteur on Women that the African Commission has responded to gender-based violence. The Special Rapporteur on Women is one of six thematic rapporteurs of the African Commission.<sup>27</sup> The decision in 1994, to appoint a special rapporteur on the rights of women in Africa, especially in light of the limited number of themes for which this mechanism exists, indicates a notable recognition of the need to emphasise the promotion of women's rights on the continent

According to the Report on Intersession Activities of the Special Rapporteur on Women<sup>28</sup> submitted at the 39th ordinary session of the African Commission, the activities of the Special Rapporteur on Women during this period were almost entirely devoted to promoting ratification and implementation of the Protocol on Women. As the Protocol on Women is the main regional instrument towards the elimination of gender-based violence, its prioritisation by the Special Rapporteur on Women is an effective strategy in responding to gender-based violence.

In relation to gender-based violence explicitly, the Special Rapporteur on Women participated in a Strategic Planning Workshop for the Economic Community of West African States (ECOWAS) region on violence against women in Abuja, Nigeria. In March 2006 and the following month, she participated in a national meeting in Mozambique on the adoption of the Domestic Violence Bill and made observations on the Bill. The Special Rapporteur on Women has led a study, in collaboration with the International Centre for the Legal Protection of Human Rights (INTERIGHTS), on violence against women in six African countries: Cote d'Ivoire, Guinea, Democratic Republic of Congo, Rwanda, Sierra Leone, and South Africa. The report is pending adoption by the African Commission. Internationally, the Special Rapporteur on Women also served as a member of the Experts Advisory Committee on the United Nation's Secretary-General's Study on Violence Against Women.

The Special Rapporteur on Women has a primary role to play in the regional response to gender-based violence. Through her reports to the African Commission at each of its ordinary sessions, which are subsequently communicated to the AU Assembly at its annual summits, she is able to raise awareness of the extent of gender-based violence on the continent, highlight measures required to address it, and ideally, render its elimination a regional priority.

Finally, mention must be made of the African Court established by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Protocol of African Court) which entered into force on 15 January 2004. The African Court is

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27. The other five are, extra-judicial, summary or arbitrary executions, freedom of expression, human rights defenders, prisons and conditions of detention, and refugees and internally displaced persons.

28. Report of activities from and inclusive of the 38th ordinary session of the African Commission (November 2006) to the 39th ordinary session (11-25 May 2006), on file with author.

intended to complement the protective mandate of the African Commission, and while, in theory it can contribute to the regional response to gender-based violence it is unlikely to have an impact in this respect. While the African Court has the potential to strengthen protection for human rights, not least through its binding judgments, it is not yet functioning three years after the Protocol of African Court's entry into force. Given the absence of communications before the African Commission with respect to gender-based violence, one can assume the first cases to be heard before the African Court, will not be related to gender-based violence, especially given that direct access to the African Court by individuals or NGOs is dependant on a state's accepting the competence of the Court to receive individual communications.

The African Commission is the most relevant regional mechanism for the response to gender-based violence. However, despite the massive scale of violations, gender-based violence has been insufficiently addressed by the African Commission, especially through resolutions, state reporting and respective concluding observations, and individual communications. It is hoped the Protocol on Women will promote greater prominence of gender-based violence in the activities of the African Commission.

## **6 The African Peer Review Mechanism**

The APRM, established through the NEPAD Declaration on Democracy, Political, Economic, and Corporate Governance (NEPAD Declaration) has the potential to respond to gender-based violence and has indeed done so. The APRM is a self-monitoring mechanism voluntarily acceded to by member states of the AU whereby, after a period of self-assessment in consultation with stakeholders, states agree to periodic peer reviews overseen by a Panel of Eminent Persons (APR Panel) which will assess their performance in areas of political and economic governance.

The APRM Questionnaire, a self-assessment tool, distributed to stakeholders in participating countries, requires details on the promotion and protection of the rights of women, namely with respect to measures to promote and protect the rights of women in the country in question and measures to enhance the participation of women in society.<sup>29</sup> Issues related to gender based violence can emerge here.

For example, in the Country Review Report of Ghana, the self-assessment revealed that 'domestic violence continues to be one of the more common human rights abuses in Ghana' and 'other common forms of violence against women are

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<sup>29</sup>. APRM Questionnaire 37.

sexual harassment at home and the workplace, and female circumcision.’ After extensive consultations with diverse stakeholders, the County Review Mission (CRM)<sup>30</sup> found that:

while stakeholders condemn domestic violence against women, immediate and urgent legislation is needed to criminalise this major assault on the rights of women. Stakeholders are disappointed that an attempt in this regard, in the form of the Domestic Violence Bill, has come up against much opposition, principally on account of the clause that seeks to criminalise ‘spousal rape’.<sup>31</sup>

The CRM recommended, *inter alia*, to the Government of Ghana, with respect to gender-based violence, ‘to take additional measures to enforce the law against abusers of women’s rights, and speed up efforts to enact the Domestic Violence Bill.’<sup>32</sup> The CRM also noted that Ghana has yet to ratify the Protocol on Women and recommended that it do so within a binding time-frame to be adopted by the government.<sup>33</sup>

The impact of the peer review process generally, and with respect to gender-based violence, will naturally increase as more states accede to the NEPAD Declaration and as the number of country reviews increases accordingly.

## 7 Other AU initiatives

### 7.1 The Maputo Plan of Action for the Operationalisation of the Continental Policy Framework for Sexual and Reproductive Health and Rights (2007 - 2010)

The Special Session of the AU Conference of Ministers of Health in Maputo Mozambique, 18 - 22 September 2006 produced the Maputo Plan of Action for the Operationalisation of the Continental Policy Framework for Sexual and Reproductive Health and Rights 2007 - 2010 (Maputo Plan of Action) which provides a framework strategy for member states to model. The Maputo Plan of Action recognises the link between gender-based violence and sexual and reproductive health and accordingly the reduction of gender-based violence is one of the premises on which the Maputo Plan of Action is based.<sup>34</sup> The first of 8 outputs, that of integration of HIV, sexually transmitted illnesses, malaria, sexual and reproductive health and rights services into primary health care, requires the

30. The CRM consists of 16 members, reflecting 12 African nationalities, including experts from the APRM secretariat, partner institutions, and independent consultants.

31. African Peer Review Mechanism Country Review Report of the Republic of Ghana (2005) 37.

32. As above.

33. As above.

34. AU Doc Sp/MIN/CAMH/5(I) para 5.

development and/or implementation of strategies to address gender-based violence in collaboration with relevant stakeholders.<sup>35</sup> It further requires the incorporation of health management of gender-based violence in the training curricula of health workers and providers of legal services<sup>36</sup> and ensuring access to services that address gender-based violence including management of sexual abuse, emergency contraception and HIV post-exposure prophylaxis and sexually transmitted illnesses treatment in an integrated and co-ordinated manner.<sup>37</sup>

The Maputo Plan of Action is a positive example of the need to respond to gender-based violence holistically and at various levels of cooperation. As with the other regional initiatives, its success is dependant on effective implementation.

## **8 Conclusion**

African regional institutions are responding to gender-based violence, in some cases indirectly, through the promotion of gender equality, and in other cases, directly, through the adoption of the Protocol on Women whereby numerous specific measures are articulated towards addressing gender-based violence. The issue has gained prominence in recent years, largely due to successful and committed regional advocacy efforts. Commitment to the issue has subsequently been articulated. However, as is the case with the promotion and protection of human rights generally, the challenge remains in implementation of the various commitments. In this respect the region has a role to play in promoting and monitoring implementation but ultimately the responsibility to effectively address gender-based violence rests with individual governments. In the case of gender-based violence and women's rights generally, the challenge is even greater to implement regional commitments as it involves more than legislative measures but a change of mindset for a great part of the population. There has been increasing legislation around gender-based violence in many African countries, yet there has not been a corresponding decrease in incidences of gender-based violence.

The Protocol on Women recognises the imperative of other measures such as public education. It is therefore through promoting universal ratification of the Protocol on Women and subsequently, monitoring implementation thereof that the region can most effectively respond to gender-based violence while concurrently adhering to its commitment to gender equality which will ultimately address the imbalance of power between men and women which accounts for the numerous manifestations of gender-based violence in Africa.

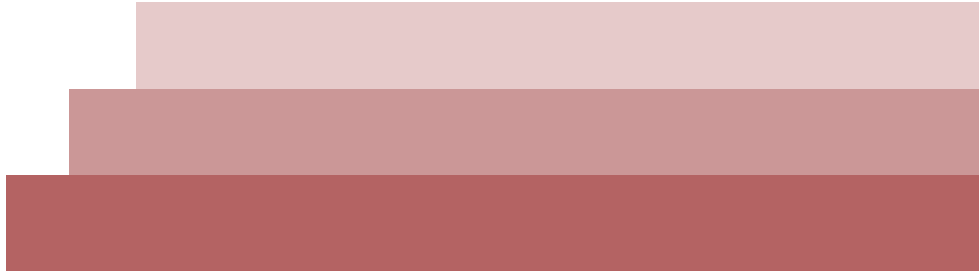
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35. As above output 1.1.3a and 1.1.4a.

36. As above output 1.1.5a.

37. As above output 1.3.

# 3



## **SADC initiatives aimed at combating gender-based violence**

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*Christine M Warioba and Amy G Luhanga*

## 1 Historical background

The declaration creating the Southern African Development Co-ordination Conference (SADCC) was adopted on 1 April 1980 in Lusaka, Zambia.<sup>1</sup> The main objective of SADCC was to forge links between the member states to reduce dependence on apartheid South Africa. The SADCC Programme of Action identified various social and economic sectors, and each member state was assigned with the responsibility of coordinating one or two of the sectors through the national Sector Coordinating Units (SCUs).<sup>2</sup>

By 1992 Southern Africa was changing. Namibia had attained independence. Concerted efforts were being made in a number of independent countries to end internal conflicts and civil strife. South Africa was in the process of ending the inhuman system of apartheid and bringing about a constitutional dispensation acceptable to the people of the country as a whole. These developments were taking the region out of an era of conflict and confrontation and into one of cooperation, peace, security and stability – prerequisites for development. On 17 August 1992 the SADCC member states adopted the Windhoek Declaration and the Treaty for the Establishment of the Southern African Development Community (SADC Treaty).<sup>3</sup>

## 2 SADC objectives

In trying to establish ‘a shared future’ for the region and become a serious player in international relations, SADC member states realised the need to unite in order to strengthen themselves economically and politically and to promote peace and security in the region.

Addressing these concerns, member states adopted a framework of cooperation by way of establishing protocols in the following areas:<sup>4</sup>

1. Southern Africa: Towards Economic Liberation. A Declaration by the Governments of Independent States of Southern Africa Made at Lusaka on the 1 April 1980. The Declaration was signed by Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe. The SADCC Secretariat was established in Gaborone, Botswana.
2. Progress Report on the Implementation of Beijing Platform for Action by SADC Region, submitted by SADC Secretariat at the African Regional Decade Review Meeting on the Implementation of the Beijing Platform for Action (Beijing +10), Addis Ababa, Ethiopia, 11 - 15 October 2005 [http://www.uneca.org/beijingplus10/SADC\\_Report.doc](http://www.uneca.org/beijingplus10/SADC_Report.doc) (accessed 9 June 2007) para 1.3.
3. SADC has 14 member states: Angola, Botswana, Democratic Republic of the Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.
4. SADC Treaty art 21(3).



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- (a) food security, land and agriculture;
  - (b) infrastructure and services;
  - (c) industry, trade, investment and finance;
  - (d) human resources development, science and technology;
  - (e) natural resources and environment;
  - (f) social welfare, information and culture; and
  - (g) politics, diplomacy, international relations, peace and security.

In giving effect to the goals, SADC and its member states are governed by the following principles:<sup>5</sup>

- (a) sovereign equality of all member states;
- (b) solidarity, peace and security;
- (c) human rights, democracy, and the rule of law;
- (d) equity, balance and mutual benefit; and
- (e) peaceful settlement of disputes.

Article 5 of the SADC Treaty sets out the following objectives, the last three of which were added in 2001:

- (a) promote sustainable and equitable growth and socio-economic development that will ensure poverty alleviation with the ultimate objective of its eradication, enhance the standard and quality of life of the peoples of Southern Africa and support the socially disadvantaged through regional integration;
- (b) promote common political values, systems and other shared values which are transmitted through institutions which are democratic, legitimate and effective;
- (c) consolidate, defend and maintain democracy, peace, security and stability;
- (d) promote self-sustaining development on the basis of collective self-reliance, and the interdependence of member states;
- (e) achieve complementarity between national and regional strategies and programmes;
- (f) promote and maximise productive employment and utilisation of resources of the region;
- (g) achieve sustainable utilisation of natural resources and effective protection of the environment;
- (h) strengthen and consolidate the long-standing historical, social and cultural affinities and links among the peoples of the region;
- (i) combat HIV/AIDS and other deadly or communicable diseases;

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<sup>5</sup>. SADC Treaty art 4.

- (j) ensure that poverty eradication is addressed in all SADC activities and programmes
- (k) mainstream gender in the process of community building.

The inclusion of the final objective marked the first time that gender issues had received attention in the SADC institutional and operational framework. The revised SADC Treaty also provided for major changes in the SADC structure. By 2001, there were 21 sectors coordinated by SADC, with various protocols adopted to accelerate community-building initiatives and implemented within the framework of the SADC Programme of Action.<sup>6</sup> Through the amended SADC Treaty, sector functions were transferred from member state SCUs to the Secretariat.<sup>7</sup> The 21 sectors were transformed into four clusters constituting the Directorates of SADC, namely: Trade, Industry, Finance and Investment; Food Agriculture and Natural Resources; Social and Human Development; Special Programmes and Infrastructure and Services.<sup>8</sup> A Department of Strategic Planning, Gender and Development and Policy Harmonisation was established.<sup>9</sup>

The revised treaty also established SADC National Committees (SNCs), consisting of members from government, private and civil society sectors, including ministries as well as non-governmental organisations (NGOs).<sup>10</sup>

### **3 Gender issues**

#### **3.1 SADCC (1980 - 1992)**

Gender issues were not an integral part of SADCC policies and programmes. Emphasis was put on issues such as regional equitable economic development, use of natural resources, regional solidarity and security. There were limited attempts to analyse the disparities between women and men in the region. Consequently, there were limited plans for interventions to enhance equal participation that would benefit both men and women.

In 1985 all SADCC member states were represented at the World Conference on Women held in Nairobi, Kenya. In 1987, following the Nairobi Conference, the SADCC Council of Ministers recommended that all member states should enhance the effectiveness of the structures established to improve the status of women, and requested that the SCUs and national institutions ensure that the interests of

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6. n 2 above, para 1.5.  
7. Art 9(h) SADC Treaty as read with art 16A.  
8. n 2 above, para 1.6.  
9. As above.  
10. Art 14 SADC Treaty as read with art 23.

women were fully taken into account in the development of all SADCC Programmes of Action.

In 1989, with technical assistance from the United Nations Development Fund for Women (UNIFEM), SADCC developed a Women in Development Programme, with the intention to make it part of the SADCC Programme of Action. Although this intention did not materialise, several SCUs in member states implemented the programme.<sup>11</sup>

After recognising the crucial role that women play in their communities and society as a whole, in 1990 the Council of Ministers mandated the SADCC Secretariat to explore the best strategies to incorporate gender issues in the SADCC mandate and Programme of Action. As a result of this intervention, an Eminent Persons Group was created in 1991 to undertake a study on gender issues.<sup>12</sup>

### 3.2 SADC

SADC continued SADCC's measures to address gender issues. SADC member states reviewed and assessed the implementation of the resolutions of the Nairobi World Conference on Women, as part of the global initiatives coordinated by the United Nations. Most stakeholders were given the opportunity to participate in the exercise through meetings, resource mobilisation, research studies, and compilation and validation of country reports that were later presented at the regional and global meetings. NGOs and ministries responsible for gender or women's affairs conducted the exercise.

At the SADC regional level, preparatory workshops for the African Conference on Women in Dakar in 1994 and the World Conference on Women in Beijing in 1995 were organised. National experts on gender from governments and NGOs of member states attended regional meetings in Namibia in 1994 and Zambia in 1995.<sup>13</sup>

After the World Conference on Women in Beijing, member states of SADC again organised national consultative workshops to identify the critical areas of concern that required priority in planning, resource allocation and implementation. Meanwhile, at the regional level, workshops were held where member states shared the post-Beijing strategies, drew up a strategy for networking, and developed a coalition on women's issues. The first draft on the Regional Plan of Action for the Implementation of the Beijing Platform for Action was adopted in 1996.

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11. N Manzini 'The experience of working with SADC sectors in gender issues' in *Into the Future: Gender and SADC* (1997).

12. n 2 above, para 1.7.1.

13. n 2 above, para 1.7.2.

In March 1996, at a SADC Conference on Social Development, held in Mbabane, Swaziland, it was recommended to the Council of Ministers that the SADC Secretariat should coordinate gender issues at the sub-regional level. This recommendation was approved by the Council of Ministers during its meeting held in Maseru, Lesotho, in August 1996.<sup>14</sup> In February 1997, at its meeting in Windhoek, Namibia, the Council of Ministers adopted a Policy and Institutional Framework for Mainstreaming Gender in SADC.<sup>15</sup> The institutional framework comprised four components: the Standing Committee of Ministers Responsible for Gender/Women's Affairs; the Regional Advisory Committee, consisting of one senior government official and one representative of NGOs and civil society organisations; Gender Focal Points from the SADC member states' SCUs; and the Gender Unit established at the SADC Secretariat.

Member states affirmed their commitment to place gender issues high on their agenda by adopting the Declaration on Gender and Development (Declaration on Gender) at the Summit in Blantyre, Malawi on 8 September 1997. Article H of the Declaration on Gender commits Heads of State and their respective countries to, *inter alia*:

- (i) Placing gender firmly on the agenda of the SADC Programme of Action and Community Building Initiative;
- (ii) Ensuring equal representation of women and men in the decision-making structures at national level and SADC structures and the achievement of at least 30 percent target of women in political and decision-making structures by year 2005;
- (iii) Promoting women's full access to, and control over productive resources such as land, livestock, markets, credit, modern technology, formal employment, and a good quality of life in order to reduce the level of poverty among women;
- (iv) Repealing and reforming all laws, amending Constitutions and changing social practices which still subject women to discrimination, and enacting empowering gender-sensitive laws;
- (v) Enhancing access to quality education by women and men, and removing gender stereotyping in the curriculum, career choices and professions;
- (vi) Making quality reproductive and other health services more accessible to women and men;
- (vii) Protecting and promoting the human rights of women and children;
- (viii) Recognising, protecting and promoting the reproductive and sexual rights of women and the girl child;
- (ix) Taking urgent measures to prevent and deal with the increasing levels of violence against women; and

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14. Report on SADC Conference on Social Development held in Mbabane Swaziland, 1996.

15. n 11 above.

- (x) Encouraging the media to disseminate information and materials in respect of the human rights of women and children.

The SADC Plan of Action for Gender<sup>16</sup> spells out the terms of reference and roles for the different players to achieve complementarity and avoid duplication and overlap. Governments are vested with the primary responsibility for implementing the SADC Plan of Action for Gender, and they are required to take a leading role in coordinating, monitoring and advancing the status of women, whilst taking into account the active support and participation of a broad and diverse range of other institutional sectors. NGOs are encouraged to consider themselves as key players and ought to play an influential role in the implementation, monitoring and evaluation of the SADC Plan of Action for Gender, as they did for the regional and international conferences on women.

Following the restructuring of SADC institutions, the Secretariat was mandated to facilitate the formulation of the Regional Indicative Strategic Development Plan (RISDP). A team comprising experts from various fields, including gender, was formed to facilitate the development of the RISDP. After intensive consultations with stakeholders, SADC adopted the RISDP in 2001. The objective of RISDP, among others, is to provide strategic direction on the key priority issues that SADC should address in the next 15 years. Gender is identified as one of the critical crosscutting issues to achieving poverty reduction, as are the improvement of living standards for the majority of the citizens of the region and the prevention and eradication of HIV/AIDS and regional integration. The major areas addressed in the RISDP, which at the regional level will contribute to the achievement of the overall objectives of SADC, include:

- Mainstreaming gender in all sectoral policies, programmes and activities at national and sub-regional levels;
- Development of an explicit Regional Gender Policy and Implementation Framework of the policy;
- Women's human rights through adherence to the international, regional and national gender equality instruments, constitutional and legal reforms, establishment/strengthening of institutions and enforcement mechanisms;
- Reduction and eradication of violence against women and children;
- Promote women's access to ownership and control over productive resources in SADC Region;
- Achievement of equality between women and men through participation in political and decision-making structures and positions;
- Review of legal frameworks and enactment of gender sensitive laws;
- Review of national constitutions so that they incorporate gender equality clauses;

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<sup>16</sup>. Adopted by the SADC Council of Ministers in August 1999.

- Establishment/strengthening law enforcement institutions to be receptive and gender sensitive to victims of violence against women and children;
- Increased service delivery in areas such as access to justice for victims of violent acts;
- Increased awareness rising educational and training programmes for women and men on human rights, prevention of violence against women and children, laws that protect women and children from violent acts.

The RISDP has set a target of reduction by at least 50 percent of all acts of violence and abuse of women and children by 2007. A second target is the eradication of all forms of violence against women and children by 2015.

## **4 SADC initiatives against gender-based violence**

### **4.1 The Addendum on the Prevention and Eradication of Violence against Women and Children**

After adopting the Declaration on Gender, SADC ministers of justice, experts on gender/women affairs, legislators, government officials and representatives of NGOs convened a conference from 5 - 8 March 1998 to address the prevalence of violence against women and children. The conference condemned all forms of violence against women and children and recommended that member states adopt certain measures for the prevention and eradication of violence against women and children.<sup>17</sup> Member states reaffirmed their commitment to the prevention and eradication of violence against women and children by adopting an addendum to the Declaration on Gender, which was called The Prevention and Eradication of Violence against Women and Children (Addendum).<sup>18</sup>

The Addendum mandates member states to formulate, monitor and implement policies and mechanisms to enhance the security and empowerment of women and children at both the national and regional levels.<sup>19</sup> By adopting the Addendum, member states committed themselves to ensuring that violence against women is addressed in their countries and in the region as a whole.

The Addendum contains a number of measures, which, if implemented, would contribute to the prevention and eradication of violence against women and children. These measures cover the following areas:

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17. Preamble to the Addendum to the 1997 Declaration on Gender and Development.

18. Adopted at Grand Baie, Mauritius on 14 September 1998 [http://www.sardc.net/widsaa/sgm/1999/sgm\\_eradvio.html](http://www.sardc.net/widsaa/sgm/1999/sgm_eradvio.html) (accessed 14 June 2007).

19. Art 25 Addendum.

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**Legal<sup>20</sup>**

Member states are required to enact or amend laws, and put in place appropriate mechanisms that:

- Criminalise various forms of violence against women and children;
- Enable easier enforcement of the law;
- Eradicate discrimination based on gender;
- Empower women;
- Promote justice; and
- Provide effective remedies to victims of violence.

***Social, economic, cultural and political<sup>21</sup>***

Since most violence against women and children is based on traditional norms, religious beliefs, practices and stereotypes, member states are required to:

- Promote the eradication of such elements;
- Embark on public awareness; and
- Encourage the media to play a constructive role by adopting appropriate guidelines in fighting the scourge.

***Services<sup>22</sup>***

Member states acknowledged that having laws in place is not enough to eradicate violence against women, unless certain services are readily available to the public. Such services include:

- Information on services available for various categories of victims;
- Accessibility to effective and responsive law enforcement agencies, as well as health and social welfare services;
- Accessible, affordable and specialised legal services including legal aid.

***Education, training and awareness-building<sup>23</sup>***

In many instances, ignorance causes different types of problems, including misunderstandings and poor delivery. Member states are therefore required to:

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20. Arts 8-12 Addendum.

21. Arts 13-15 Addendum.

22. Arts 16-19 Addendum.

23. Arts 20-22 Addendum.

- Promote gender sensitisation and training of service providers, including legal officers, law enforcement officers, as well as social welfare and health officials;
- Undertake research and share all information on violence against women and children; and
- Encourage the exchange of best practices, regionally and globally, for the eradication of violence against women and children.

### ***Integrated approaches<sup>24</sup>***

In order for member states to be able to successfully oppose violence against women and children, they are required to ensure that all the above-mentioned measures are combined in the plans of action and in their implementation.

### ***Budgetary allocations<sup>25</sup>***

In most SADC member states, gender concerns, specifically concerns on violence against women and children, have not been integrated into macro-economic policy decisions with specific reference to national budgetary policies and procedures.<sup>26</sup> Member states are therefore required to take necessary steps to mainstream gender into their respective national macro-economic policy frameworks. They should ensure that adequate funds are allocated for the implementation and sustainability of the programmes on the prevention and eradication of violence against women and children.

### ***The region's adoption of policies, programmes and mechanisms that enhance the security and empowerment of women and children.<sup>27</sup>***

Although interventions have been made on women's economic empowerment to increase their access to credit through special schemes, training and poverty alleviation projects, most of the interventions are temporary and only treat symptoms, not causes. The SADC Secretariat is therefore required to strengthen the regional projects by adopting constructive policies, programmes and mechanisms that enhance the security and empowerment of women and children.<sup>28</sup>

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24. Art 23 Addendum.

25. Art 24 Addendum.

26. Southern African Research and Documentation Centre (SARDC) *Beyond inequalities: Women in Southern Africa* (2000).

27. Art 25 Addendum.

28. n 26 above.



### ***Adoption of legally binding instruments<sup>29</sup>***

Unlike protocols that SADC member states have ratified, the Declaration on Gender is not legally binding. There is a need to transform the Declaration on Gender into a binding protocol to enable domestication of the instrument into national laws, not only to ensure that commitments are translated into tangible actions,<sup>30</sup> but also to ensure that member states can be held accountable for non-action.<sup>31</sup>

The process of transforming the Declaration on Gender into a protocol has been initiated, under the coordination of the SADC Secretariat and in collaboration with civil society organisations. A task force has been set up to lead and guide the process of development of the draft protocol, and consultations among stakeholders have taken place. After consultations, the final draft of the protocol will be presented to SADC decision-making structures for adoption. Issues on prevention and eradication of violence against women and children will be among the issues contained in this instrument. A SADC protocol on gender and development would complement and reinforce efforts undertaken at the continental level, such as the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Protocol on Women).<sup>32</sup> The aim of the Protocol on Women is, among other things, to protect African women from gender-based violence.<sup>33</sup> The Protocol on Women binds state parties to conform to the standards and requirements contained therein.<sup>34</sup>

## **4.2 Civil society initiatives**

Civil society organisations operating at the regional level play a critical role in the prevention and eradication of violence against women. Among these organisations are the Women in Law and Development in Africa (WiLDAF), which has network offices in all SADC member states. WiLDAF has developed training materials and training manuals and has conducted training programmes on issues of violence against women at regional and national levels. WiLDAF's national networks are involved in raising awareness and training on issues of violence against women.<sup>35</sup>

Gender Links, together with Gender and Media Southern Africa Network (GEMSA), have been very active in targeting media institutions on issues of

29. Art 26 Addendum.

30. As above.

31. n 26 above.

32. Adopted in Maputo, Mozambique on 17 July 2003.

33. Art 4 Protocol on Women.

34. Only 6 SADC member states have ratified the Protocol on Women which entered into force in November 2005: Lesotho, Malawi, Mozambique, Namibia, South Africa and Zambia.

35. See <http://www.wildaf.org.zw> (accessed 9 June 2007).

violence against women. This activity enables the media to report on issues of violence against women with objectivity. These organisations have also undertaken research on violence against women in the SADC region. Furthermore, they have developed training materials and have undertaken training, particularly of media practitioners on the subject matter.

Gender Links and GEMSA have also been at the forefront in informing on the various activities that member states have undertaken on the 16 Days of Activism, a campaign to stop violence against women and children. They also have organised online discussions and debates on issues related to violence against women, thereby providing a forum for public debate.<sup>36</sup>

Service provision centres for victims of violence exist in all SADC countries. These centres are mostly operated by NGOs. However, they are mostly in urban areas, which limits rural women's access to such services.

### **4.3 Legislation and other initiatives by member states**

To a large extent, attitudes, patriarchal structures and culture perpetuate acts of violence against women and the girl child. Violent acts against women are reported to police stations and other justice delivery institutions in each country on a daily basis. Media institutions (both print and electronic) also play a major role in reporting and informing the public on incidences of violence against women and children.

Forms of violence against women range from domestic violence, including wife battering and psychological abuse; various forms of sexual abuse, including rape, female genital mutilation, the denial of wives' inheritance after their husbands' deaths, property grabbing during divorce or upon the death of a spouse; and death cleansing ceremonies, where the wife is forced into sexual intercourse with another man after the death of her husband. Recently, the trafficking of girls and boys for the sex industry has increased.

According to the Report on the Implementation of the Beijing Platform for Action +10, Mauritius is one of the countries that is using an integrated model to combat violence against women and children. All institutions including the justice delivery institutions, NGOs and other government departments are coordinating on issues of violence against women.

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<sup>36</sup>. See <http://www.genderlinks.org.za> and see also <http://www.gemsa.org.za> (accessed 9 June 2007).

Many SADC countries are in the process of enacting additional laws to strengthen the legal framework to protect victims of violence. Mauritius,<sup>37</sup> Namibia,<sup>38</sup> and South Africa<sup>39</sup> have enacted laws to protect women against violence. Tanzania has reviewed its Penal Code and adopted legislation to deal with sexual offences against women and children.<sup>40</sup> Malawi is in the process of developing the Domestic Violence Bill.

Namibia, South Africa, Zambia and Zimbabwe have established gender violence tribunals as a measure to sensitise the public, policy-makers and law enforcement agents about the adverse effects of domestic violence on the advancement of women and society as a whole. Gender violence tribunals in Zambia have established a victim friendly environment for abused women through a programme between the police force and the Young Women's Christian Association (YWCA). In Namibia, the Women in Law Committee of the Ministry of Justice holds regular public hearings on violence against women and children.

Member states are at different levels of implementing socio-economic programmes that are meant to support and empower women socially and economically and enable them to rise above a subordinate status.

### 4.4 Monitoring

In 1999, a Plan of Action for Gender in SADC was developed and adopted by ministers responsible for gender/women's affairs. The ministers also adopted the Framework for Progress Report on the Implementation of the 1998 SADC Addendum to the Declaration on Gender and Development 1997 (Framework).<sup>41</sup> This prescribes a matrix as a tool for monitoring progress on the implementation of the addendum. The Framework was designed to:

- Provide a reporting mechanism;
- Facilitate accountability by various institutions and ensure coordination of their respective activities; and
- Facilitate the sharing of information including qualitative and quantitative indicators.

The Framework also prescribes a monitoring matrix for the implementation of article H(iv) of the Declaration on Gender on '[r]epealing and reforming all laws, amending constitutions and changing social practices which still subject women to

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37. Domestic Violence Act 1997 and Sexual Offences (Miscellaneous) Provisions Act 2003.

38. Combating Rape Act 8 of 2000 and Combating of Domestic Violence Act 4 of 2003.

39. Domestic Violence Act 116 of 1998.

40. Sexual Offences (Special Provisions Act) of 1998.

41. The Framework for Progress Report on the Implementation of the 1997 SADC Declaration on Gender and Development.

discrimination, and enacting empowering gender sensitive laws', which could include laws promoting prevention and eradication of violence against women and children.

In accordance with article 27 of the Addendum, a conference to review member states' progress on the implementation of the measures and recommendations of the Addendum was held from 11 - 16 December 2000. The SADC Secretariat mobilised financial resources to support the preparation of national reports, to report validation workshops, as well as to support the regional review conference. During this process SADC collaborated with Women in Law and Development in Africa (WiLDAF), which is a regional NGO.

All member states have either enacted new laws dealing with issues such as domestic violence, sexual abuse, rape, and other forms of violence or reviewed existing laws, such as penal codes, to address the various forms of violence. However, although laws are in place to protect women, the majority of rural women are not aware that they can use such legal instruments to assert their legal rights.

Services provided to support the victims of violence, especially poor women and children are in most cases offered by NGOs which get funding from international donors. Such services include crisis centres, provision of counseling, and legal aid clinics. However, most of these services are only available in urban areas.

The conference noted that an integrated approach to combat violence against women and children is not yet fully operational in most member states. At the time of the conference, only Botswana was reported to have demonstrated the best practices in using a coordinated approach of the integrated model in addressing issues of violence against women.

More effort is required to ensure member states' implementation of the integrated approach in combating violence against women and children. Increased budgetary allocations by governments is needed to enable women and children who are victims of violence to become familiar with the available legal instruments, and to access support services and social and economic facilities and services. These services should also be extended to the rural areas to enable all women and children to access them.

As a follow-up to the review conference, SADC negotiated with the Commonwealth Secretariat to support member states in the development of national action plans using the integrated approach model. Most member states received technical support from the Commonwealth Secretariat to develop national plans to combat violence against women.<sup>42</sup>

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<sup>42.</sup> n 2 above.

The SADC Secretariat is expected to develop, among other programmes, regional programmes on women's human rights and on the prevention and reduction of violence against women. The programmes will aim to coordinate efforts undertaken at national levels, facilitate sharing of best practices, and monitor progress in the implementation of the planned activities.<sup>43</sup>

## 4.6 SADC achievements

A number of achievements have been recorded. These include:

- Violence against women is no longer a private issue. It is a human rights issue, as well as a public issue that requires public attention;
- Instruments, policies and legislation on violence against women have been adopted;
- Operationalising targets on gender based violence in the RISDP, a framework that will guide the regional integration and cooperation agenda for SADC up to 2016;
- A process to adopt a binding protocol on gender has been initiated;
- The Addendum on the Prevention and Eradication of Violence against Women and Children has been a useful advocacy and lobbying tool.

## 4.7 Challenges

The formulation of specific policies, legislation and measures to address gender-based violence indicate that there has been notable progress in the SADC region since the adoption of the Addendum in 1998. Regrettably, domestic and other forms of violence continue to be a menace and a serious violation of the human rights of many women and children.

According to Lopi, at least one in every five women is beaten, coerced into sex, or abused by an intimate partner or family member.<sup>44</sup> The following have been identified as challenges that contribute to gender-based violence and consequently require intervention:

### *Resources*

Due to competing priorities, national and local level planning and budgeting processes do not prioritise issues of violence against women. In most cases, civil

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43. SADC Gender Unit – Work Plan 2005-2009.

44. B Lopi 'Is gender-based violence adequately addressed in SADC?' <http://www.sardc.net/editorial/NewsFeature/gender.htm> (accessed 9 June 2007).

society organisations that run programmes on violence against women are funded by international donors. Limited human and financial resources hinder proper facilitation, coordination and monitoring on progress made to address this problem.

### ***Coordination***

There is limited international coordination among the stakeholders who are addressing issues of violence against women. While it is appreciated that each organisation or government department has its own agenda, mandate and partners who support them, efforts to develop and apply an integrated approach model to combat violence against women have not been fruitful. An effective approach requires cooperation, collaboration and trust-building among stakeholders.

The training of justice delivery institutions, the sharing of information among organisations working on the same thematic issues, the coordination between all stakeholders and the increase of resources for an integrated model to combat violence against women are critical measures to address the problem. Furthermore, a coordinated approach will improve delivery of output and outcomes.

### ***Gender relations***

Unequal power and gender relations coupled with poverty, place women and girls in a subordinate social and economic status. A number of strategies should be employed to address the challenge of eradicating this subordinate status. Among them are:

- Provision of quality education and training which will transform the self image of girls and women, raise self-motivation, and self-confidence to refuse acts of violence.
- Provision of quality education and training that will enable women to engage in meaningful and sustainable employment.
- Creation of employment opportunities and economic empowerment opportunities for women that will facilitate improved social and economic status.

Such circumstances will enable women to be confident and assert themselves in the face of abuse.

### ***Illiteracy***

The majority of rural women are illiterate. Limited support services to rural areas deny a high proportion of women access to services that would empower them and free them from various forms of abuse.

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### ***Inadequate legislation***

In most SADC member states, there have been either insufficient or no efforts at all to introduce specific legislation for addressing domestic violence or sexual offenses. This means that in most cases domestic violence is dealt with under laws such as those dealing with common assault, which are inadequate for dealing with complex violations of women's rights.

### ***Traditional norms***

Whilst NGOs are doing work in their countries to eradicate beliefs, practices and stereotypes that exacerbate violence against women, there has been very little state involvement in measures to combat these traditional norms.

Lopi notes that 'many law enforcement officers consider physical [violence against women] by spouses or partners as a family and private affair for the affected family to deal with'.<sup>45</sup> Law enforcement officers are not only expected to be more knowledgeable, but they are also expected to educate and inform the public on the position of the law and means of justice. Their failure to be instruments for change confirms Lopi's statement that 'a lot of cultural practices in the region still condone or tolerate [violence against women]',<sup>46</sup> and that the '[j]ustification for violence stems from gender norms – distorted views about the roles and responsibilities of men and women in relationships.'<sup>47</sup>

### ***Lack of legal aid***

In all countries surveyed, the bulk of legal aid for women and children is provided by NGOs, which often rely on foreign donors.

### ***Places of safety***

Only one country (Mauritius) has adequate places of safety that are partly funded by the government. Some countries have no places of safety other than police stations, and other countries have places that are run by NGOs that have limited funds.

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45. As above.

46. As above.

47. As above.

### ***Limited effective regional monitoring of the Addendum***

The Addendum provides for a review of its implementation to take place every two years, but the SADC Secretariat has limited capacity to follow up at the national level and monitor implementation.

### ***Limited male involvement***

Women champion most initiatives towards eradication and prevention of gender-based violence in many societies in the sub-region. This is a flaw in the strategies towards eradication and prevention of gender-based violence, because men can play the important role of educating other men on the need to eradicate violence against women.

### ***Structural causes***

Measures to combat this problem should target its causes at all levels, including the structural, underlying and immediate causes of violence against women. Structural causes include:

- The patriarchal systems and structures where male dominance and female subordination systems are still predominant in almost all rural areas of SADC member states.
- Unequal power and gender relations that lead to limited access and control over productive resources by the majority of women.
- The burden of poverty that women carry.
- Dual legal systems, where customary law and national law are used concurrently, but with customary law often discriminating against women. Member states are urged to formulate gender-friendly laws in line with regional and international standards.

Underlying causes include women's limited access to education and training and other such facilities; high illiteracy rates for women; limited facilities and services in the justice delivery system; and limited gender sensitivity.

## **5 Conclusion**

Violence against women is still rampant in SADC member states despite the efforts that are being undertaken. Nevertheless, member states share a desire to address gender based violence. The adoption of the Addendum, together with the Framework on its Implementation, demonstrates that desire. This desire is further supported by the implementation, within the SADC Secretariat and individual



member states, of basic structures vested with the responsibility of ensuring that plans are carried through.



# 4



## The ‘appeal’ of sexual violence: *Akayesu/Gacumbitsi* cases

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*Patricia V Sellers*

## 1 Introduction

Genocides have nasty habits of searing ghoulish images into the collective conscious. From 6 April 1994 to at least 30 June 1994, the perpetrators of the Rwanda genocide unleashed relentless killings and rampant acts of sexual violence aimed to destroy in whole or part Rwandan Tutsi, Twa and moderate Hutus. Rapes collided with the butchery. Mutilations such as impaling women through their vaginas, or slicing off their breasts led to indeterminable deaths. The *Gacumbitsi* Trial Chamber lamented that the ‘genocide and extermination campaign in Rwanda was characterised in significant part by neighbours killing and raping neighbours’.<sup>1</sup> So, to the images of Nazi Germany’s horrific gas chambers and the dreaded Cambodian ‘killing fields,’ now, add ‘slaughter by machetes’ and the unfathomable sexual terror of the Rwandan genocide.

The *viva voce* testimony detailing this ‘sexualised’ genocide was submitted before the International Criminal Tribunal for Rwanda (ICTR).<sup>2</sup> Witnesses, many of whom were themselves survivors of the sexual terror, recounted horrors that the trial chambers legally distilled into judgments and that the appeals chambers reviewed and delivered in final, appellate decisions. The recourse to the appellate process at the ICTR forged the appellant jurisprudence on sexual assault. This article examines and comments upon the ICTR appellate decisions in the *Akayesu*,<sup>3</sup> *Musema*<sup>4</sup>, *Semanza*<sup>5</sup> and *Gacumbitsi*<sup>6</sup> cases. At trial each accused was convicted of genocide and crimes against humanity, based, in part, upon proof of sexual violence and in each appeal against the trial chambers’ legal and factual findings resulted in significant appellate jurisprudence based on the sexual assault evidence.

1. *Prosecutor v Gacumbitsi*, Judgment, Case No ICTR-2001-64-T, 17 June 2004 (*Gacumbitsi* Judgment).
2. Statute of the International Criminal Tribunal for Rwanda, *attached to* Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighboring States between 1 January 1994 and 31 December 1994, SC Res 955, Annex, 8 November 1994, *reprinted in* 33 *ILM* 1598 (1994), (ICTR Statute).
3. *Prosecutor v Jean-Paul Akayesu*, Judgment, Case No ICTR-96-4-T, 2 September 1998 (*Akayesu* Judgment); *Prosecutor v Jean-Paul Akayesu*, Judgment, Case No ICTR-96-4-A, 1 June 2001 (*Akayesu* Appeal Judgment).
4. *Prosecutor v Alfred Musema*, Judgment, Case No ICTR-96-13-T, 27 January 2000 (*Musema* Judgment); *Prosecutor v Alfred Musema*, Judgment, Case No ICTR-96-13-A, 16 November 2001 (*Musema* Appeal Judgment).
5. *Prosecutor v Laurent Semanza*, Judgment and Sentence, Case No ICTR-97-20-T, 15 May 2003 (*Semanza* Judgment); *Prosecutor v Laurent Semanza*, Judgment and Sentence, Case No ICTR-97-20-A, 20 May 2005 (*Semanza* Appeal Judgment).
6. *Gacumbitsi* Judgment; *Gacumbitsi v Prosecutor*, Judgment, Case No ICTR-2001-64-A, 7 July 2006 (*Gacumbitsi* Appeal Judgment).

First, a brief summary of the legal bases and standards of review of the ICTR appellate jurisdiction will be outlined. Secondly, selective aspects of the trial and appeal chambers' decisions in *Akayesu*, *Musema*, *Semanza* and *Gacumbitsi* will be described and comments offered. Emphasis will be accorded to the *Akayesu* case, the first appeal from a full trial at the ICTR, and to the *Gacumbitsi* case, among the most recent ICTR appellate decisions. Together they exemplify the intricate evolution of solid sexual assault appellate jurisprudence. In particular, *Gacumbitsi* is an important appellate attempt to judicially realign certain sexual assault precepts, even though, one must ask whether the *Gacumbitsi* Appeals Chamber shrunk from using the precision appellate tools it possessed? Thirdly, a conclusion will summarise and encourage vigilant oversight of appellate level sexual assault jurisprudence.

## 2 The appellate process

The right to appeal from a trial verdict or sentence, is an engrained principle of national judicial systems, has only recently put down institutional roots in the international legal system. Neither the London Charter<sup>7</sup> nor the Tokyo Charter<sup>8</sup> provided the major Axis war criminals the opportunity to seek appellate level review of the guilty verdicts handed down by the international military tribunals. The Nuremberg Principles<sup>9</sup> did not enshrine a party's recourse to appeal and during the ensuing decades after, the right to an appellate review of international crimes stood as an even more remote fantasy than the creation of international criminal tribunals.

A legal watershed commenced with the advent of the ICTR and the International Criminal Tribunal for the former Yugoslavia (ICTY),<sup>10</sup> and continues to evolve with the burgeoning establishments of international courts, tribunals, special panels or mixed-chambers that, now, routinely incorporate the recourse to appellate jurisdiction for international crimes in their founding instruments. Frankly, any international tribunal, court or special war chambers erected today

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7. Charter of the International Military Tribunal, annexed to the London Agreement, 8 August 1945, art 26, 82 UNTS 280, 59 Stat 1544, 8 AS No 472 (London Charter).
  8. Charter of the International Military Tribunal for the Far East, Tokyo, 19 January 1946, art 17T IAS 1589, as amended, 26 April 1946 (Tokyo Charter).
  9. Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, adopted at Geneva 29 July 1950, UN GAOR, 5th Sess, Supp No 12, at 11 UN Doc A/1316 (1950), reprinted in (1950) *American Journal of International Law* 126.
  10. Security Council Res 827, 25 May 1993, (establishing the International Criminal Tribunal for the former Yugoslavia (ICTY)); Statute of the International Criminal Tribunal for the former Yugoslavia, attached to the Secretary-General's Report Pursuant to para 2 of the Security Council Resolution 808, UN Doc S/25704, annex (1993), reprinted in 32 *International Legal Materials* 1159 (1993).

would fall foul of due process guarantees and international legitimacy if it omitted to provide for the appellate review of its initial judicial decisions within its statute.

The recognition of appellate review by authorised appellate chambers is a stunning, contemporary accomplishment of the international legal system. This *de novo* norm assures an accused at the post-trial stage, due process rights that complement the due process safeguards long contemplated at the pre-trial and trial stages. The Report of the United Nations Secretary-General (Secretary-General's Report) that preceded the creation of the ICTY envisaged that:<sup>11</sup>

(T)he right of appeal should be provided for under the Statute. Such a right is a fundamental element of individual civil and political rights and has *inter alia*, been incorporated in the International Covenant on Civil and Political Rights. For this reason, the Secretary-General has proposed that there should be an Appeals Chamber.

Upon the creation of the ICTR, the Secretary-General's Report mandated that the *ad hoc* Tribunals would enjoy a joint appeals chambers.<sup>12</sup> The appeals chamber hear an appeal from an accused or from the prosecutor,<sup>13</sup> arising from a matter of law or fact, based upon a trial chamber's decision to convict, acquit or impose a sentence. Either party may request the appeals chamber, post-trial judgment, to decide a question on a matter of law that is of general interest to international law and that was relevant to the trial chamber's holdings.

The standards of appellate review as prescribed in article 24(1)(a) and (b) of the ICTR Statute permits an appeal to be heard on an error of law that would invalidate a trial chamber's decision or on an error of fact that has occasioned a miscarriage of justice. Article 24(2) of the ICTR Statute grants the Appeals Chamber the ability to affirm a factual finding or legal holding, uphold decisions or to reverse or revise the decisions of a trial chambers.

A party that alleges an error of fact, must show how no reasonable trier of fact could have reached the same factual finding as that of the trial chamber. When an error of fact is raised, the appeals chamber's examination extends great deference to the trial chamber's factual finding, especially if it entails the credibility of witness testimony since the trial chamber had the benefit of in-court observations of a witness's comportment. Even if the appeals chamber finds that the trial chamber erred factually, only if the error resulted in a miscarriage of

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11. Secretary-General's Report, para 16.

12. Art 10(a) of the ICTR Statute provides that the Chambers shall comprise, 'three Trial Chambers and an Appeals Chamber'. Art 13(4) provides that, the members of the Appeals Chamber of the ICTY shall also serve as the members of the Appeals Chamber of the ICTR. The ICTR and the ICTY are often referred to collectively as the *ad hoc* Tribunals.

13. Art 24(1) of the ICTR Statute provides that, '[t]he Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor ...'.

justice will the appeals chamber holding lead to a revocation or revision of a decision.<sup>14</sup>

A party that alleges an error of law must ‘identify the alleged error of law, present arguments in support of its claim and explain how the alleged error invalidates the decision.’<sup>15</sup> When a party’s arguments in respect of an error of law are insufficient or without merit, the appeals chamber, may, nevertheless, conclude, based upon another legal rationale, that an error of law exists that would invalidate a decision.<sup>16</sup>

The determination of a legal or a factual error of a trial chamber’s decision, could require the appeals chamber to wear the mantel of the trier of fact, and to apply a corrected legal standard to the trial chamber’s factual holdings, or the original legal standard to a corrected understanding of the facts. The ICTY Appeals Chamber exercised such appellate purvey in *Stakic*, stating:<sup>17</sup>

Where the Appeals Chamber finds an error of law in the Trial Judgment arising from the application of the wrong legal standard by the Trial Chamber, the Appeals Chamber will articulate the correct legal standard and review the relevant factual findings of the Trial Chamber accordingly. In so doing, the Appeals Chamber not only corrects the legal error, but applies the correct legal standard to the evidence contained in the trial record, where necessary and determines whether it is itself convinced beyond a reasonable doubt as to the factual finding challenged by the Defence before that finding is confirmed on appeal.

An appeals chamber, thus, possesses the authority to determine errors of law and to formulate the correct standard, then substitute their holding for the erroneous holding of the trial chamber. Upon substitution of the corrected standard, and after applying the ‘beyond a reasonable doubt’ standard of proof to the facts and

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14. *Prosecutor v Eliezer Niyitegeka*, Judgment, Case No ICTR-96-14-A, 9 July 2004 (*Niyitegeka* Appeal Judgment) para 8.

15. *Prosecutor v Stakic*, Judgment, Case No IT-97-24-A, 22 March 2006 (*Stakic* Appeal Judgment) para 8.

16. *Semanza* Appeal Judgment, (n 5 above) para 7.

17. n 15 above, para 9.

to the legal elements, an appeals chamber can determine whether any part of a trial chambers' decision must be invalidated.<sup>18</sup>

Moreover, the appeals chamber has the authority to determine if a trial chamber has exceeded its discretion, in particular in matters of sentencing. In order to override a trial chamber's imposition of sentence, an appellant must show that the trial chamber committed a discernible error in violation of the sentencing principles to the extent that the violation had an impact upon the length of the sentence imposed.<sup>19</sup>

In addition to the appellate standards of review, it is crucial to understand what binding force appellate decisions exert and how the ultimate weight attributed to the appellate jurisprudence assists in the daily functioning and the long term legitimacy of the *ad hoc* jurisprudence.

The trial chambers of both *ad hoc* Tribunals tend to cite to each other's supportive rulings, even though technically, a trial chamber is not legally bound by the decisions of another trial chamber. By way of contrast, the trial chambers of both *ad hoc* Tribunals are bound by the principle of *stare decisis* to appellate decisions, meaning that adherence to the relevant pronouncements by an appeals chamber are obligatory. The *Aleksovski* Appeal Judgment articulated the standards of appellate authority, stating:<sup>20</sup>

The Statute establishes a hierarchical structure in which the Appeals Chamber is given the function of settling definitively certain questions of law and fact arising from decisions of the Trial Chambers. Under article 25, the Appeals Chamber hears an appeal on the ground of an error on a question of law invalidating a Trial Chamber's decision or on the ground of an error of fact which has occasioned a miscarriage of justice, and its decisions are final; the fundamental mandate of the Tribunal to prosecute persons responsible for serious violations of international humanitarian law cannot be achieved if the accused and the Prosecution do not have the assurance of certainty and predictability in the application of the applicable law; and (iii) the right of appeal is, as the Chamber has stated before, a component of the fair trial

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18. The Appeal Chamber can apply the 'beyond reasonable doubt' standard after the determination of a legal or factual evidence erroneously ruled upon by the Trial Chamber. This exercise is different from the provisions in art 25 of the ICTR Statute that provides for the appellate review of proceedings based upon the finding of a new fact by the Prosecutor or accused that could not have been known at the time of the trial proceedings and that could have been a decisive factor in Trial Chamber's final decision. In those circumstances, the Appeal Chamber can review the new evidence and evaluate its probative value, much like a Trial Chamber and decide if the facts were believed beyond a reasonable doubt whether it would necessitate an alteration in the judicial outcome of the acquittal, conviction or sentencing. It can then act in the place of the Trial Chamber and decide to acquit, convict or alter a sentence or impose a sentence.

19. n 15 above, para 428; see also *Prosecutor v Zlato Aleksovski*, Judgment, Case No IT-95-14/1-A, 24 March 2000 (*Aleksovski* Appeal Judgment) para 187.

20. n 19 above, para 113.



requirement, which is itself a rule of customary international law and gives rise to the right of the accused to have like cases treated alike. This will not be achieved if each Trial Chamber is free to disregard decisions of law made by the Appeals Chamber, and to decide the law as it sees fit.

The *Aleksovski* Appeal Judgment further concluded that:

[T]he need for coherence is particularly acute in the context in which the tribunal operates, where the norms of international humanitarian law and international criminal law are developing, and where, therefore, the need for those appearing before the Tribunal, the accused and the Prosecution, to be certain of the regime in which cases are tried is even more pronounced.<sup>21</sup>

Accordingly, trial chambers at the ICTR, as well as the ICTY are bound to the interpretations of substantive and procedural law handed down as a result of appellate review. The trial chambers are bound not only by the appellate decisions issued specifically in their cases, but by all appellate pronouncements and decisions relevant to matters in their respective cases. As such, the *ad hoc* Tribunals' reliance on the principle of *stare decisis* harmonises the trial chambers approach to international criminal law and acts as a due process safeguard, providing assurances of certainty and predictability of the law and the interpretation of material facts for both parties.<sup>22</sup>

Two other aspects of the doctrine of *stare decisis* critical to the appellate process reside in whether an appellant chamber is bound by the rulings of another appellate chamber and whether and under what circumstances an appellate chamber can depart from such rulings. Again, the *Aleksovski* Appeal Judgment addressed this matter and held that:<sup>23</sup>

... a proper construction of the Statute, taking into account its text and purpose, yields the conclusion that in the interests of certainty and predictability, the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice.

Appellate chambers are generally required to follow the decisions and holdings of the other appellant chambers. Judges interpreting international law, encompassed in a statute that is derived from conventions and treaties and not from traditional penal codes, must provide a mechanism, grounded in reason, that allows for a gradual or, at times, an abrupt departure from previous holdings. The *Aleksovski* Appeal Judgment observed:<sup>24</sup>

21. *Aleksovski* Appeal Judgment (n 19 above) para 113.

22. The requirement that an appellant chamber or trial chamber is bound by the doctrine of *stare decisis* is to be adhered to when cases are similar or substantially similar, not in cases that are unlike or that can be readily distinguished from each other since such an application would lead to an unjust conclusion. See n 19 above, paras 110-111.

23. n 19 above, para 107.

24. As above, paras 108-111.

Instances of situations where cogent reasons in the interest of justice require a departure from a previous decision include cases where the previous decision has been decided on the basis of a wrong legal principle or cases where a previous decision has been given *per incuriam*, that is a judicial decision that has been wrongly decided, usually because the judge or judges were ill-informed about the applicable law.

...

The Appeals Chamber will only depart from a previous decision after the most careful consideration has been given to it, both as to the law, including the authorities cited and the facts.

...

...

Where in a case before it, the Appeals Chamber is faced with previous decisions that are conflicting, it is obliged to determine which decision it will follow, or whether to depart from both decisions for cogent reasons in the interest of justice.

To summarise the appellate process, an appeals chamber is mandated under the ICTR Statute to hear appeals that allege errors of law that could invalidate a judgment or errors of fact that could lead to a miscarriage of justice. An appeals chamber also has the authority to hear allegations asserting a trial chamber's discernable errors in the imposition of sentence. In addition to these basic grounds of appeal, an appeal chamber possesses the discretion to address questions of law that are of 'general significance' for the tribunal jurisprudence. As a result of appellate review, an appeals chamber may conclude that it will reverse or revise the decision of a trial chamber.

Moreover the doctrine of *stare decisis* underlies the appellate process. A trial chamber, while not bound by the rulings of other trial chambers, must follow the holdings and interpretation of law of the appeals chamber, which are in turn bound by appellate pronouncements. An appeals chamber may depart from an appellant holding if that decision is based on cogent reasons and is in accordance with the interests of justice. All recourse to appeals are final. As such, there is no right to appeal from an appeals chamber.

Lastly, with regard to the staffing of the *ad hoc* Tribunals' appeal chambers, a permanent core of seven judges are appointed to the respective body.<sup>25</sup> Five of the seven permanent members are appointed to the ICTY appeals chamber and two are appointed to the ICTR appeals chamber. A final appeal is heard by a five-member panel. When oral arguments are heard or final judgments delivered on matters that originate from an ICTY Trial Chamber, the body is called the ICTY

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25. Art 12(3) of the ICTR Statute further provides that '[s]even of the permanent judges shall be members of the Appeals Chamber. The Appeals Chamber shall, for each appeal, be composed of five of its members.' The seven judges sitting on the appeals bench in the summer of 2006 were Judge Pocar (President of the ICTY) and Judges Meron, Shahabbudeen, Gurney, Vaz, Schomberg and Daquan.

Appeals Chamber and sits in The Hague, the Netherlands. Conversely, when hearing oral arguments and when delivering a final ruling on matters that originate from an ICTR Trial Chamber, the body is called the ICTR Appeals Chamber and sits in Arusha, Tanzania.

### 3 Aspects of ICTR appellate jurisprudence on sexual violence

The crimes of genocide and crimes against humanity received ‘top billing’ under articles 2 and 3, respectively of the ICTR Statute. As anticipated, these crimes are the bases for the majority of charges alleged against the accused, for the overwhelming pronouncements in the trial chambers judgments, and, of course, constitute the greatest percentage of the grounds of appeal. Consequently, the appellate jurisprudence of the ICTR comprises a wealth of legal holdings on the crimes of genocide and crimes against humanity. That jurisprudence has assessed not only the legal and procedural prerequisites of these crimes, but also the viability of applying different modes of individual responsibility doctrines to these substantive crimes. The appellate jurisprudence on sexual violence rest squarely within this context.

Prior to dealing with an examination of the sexual assault appellant jurisprudence of the ICTR, one ought to acknowledge three glaring omissions from this jurisprudence. It entails sexual assault evidence that unfortunately never reached the appeals process and that cast an uneasy shadow over the accomplishments of the developing jurisprudence.

The first glaring omission concerns the sentencing and appellant decisions of Jean Kambanda, the former Prime Minister of Rwanda who pleaded guilty to the crime of genocide and was sentenced to life in prison.<sup>26</sup> The factual basis of his guilty plea, while admitting to killings and exterminations of the Rwandan Tutsi population, did not acknowledge nor admit guilt for any criminal responsibility, either directly or indirectly, for the countless rapes and sexual mutilations inflicted during the Rwandan genocide. This absence of ultimate responsibility is disturbing, given the pervasive instigation of and condoning of sexual terror by politicians during the genocide. The top Rwandan politician bears no guilt for the sexualised genocide, neither at the guilty plea level nor at the appellate level.<sup>27</sup> Was this an opportunity forfeited by the Prosecution’s acceptance of a limited guilty and by an accused’s denial of full liability?

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26. *Prosecutor v Kambanda*, Judgment and Sentence, Case No ICTR 97-23-S, 4 September 1998.

27. *Prosecutor v Kambanda*, Judgment, Case No ICTR 97-23-A, 19 October 2000.

The second, two pronged glaring omission entails the Kajelijeli case.<sup>28</sup> In their judgment, the Trial Chamber confirmed the occurrence of rampant sexual violence, yet diverged, along gender lines, as to whether the accused, Juvenal Kajelijeli was liable for the sexual assaults. Judge Ramaroson's vociferous dissent unambiguously memorialised the judicial split.<sup>29</sup> However, the second, gripping omission was the Prosecution's procedural error in filing an untimely notice of appeal that was declined by the Appeals Chamber, even when pleaded in the interest of justice.<sup>30</sup> A sharply split Trial Chamber's approach to liability for proven sexual violence fell prey to the Prosecution's mistakes and the Appeals Chamber's undue procedural strictness on a matter of general interest to international law that was decisive and divisive to the Trial Chamber's holdings.<sup>31</sup>

The third glaring omission was the potential sexual violence evidence that is missed, ignored or improperly investigated or processed resulting in voices of sexual violence that never entered into the indictments, the testimony, the trial chamber judgments, and the appeal process. Granted, this absence of appellate jurisprudence might seem diffuse and intangible in a judicial institution that relies on culling hard evidence, but such absence re-enforces the invisibility of the crimes and the invisibility of the mainly female victims or survivors of the sexual violence. It obstructs and reduces their access to justice and distorts the legal images of the Rwandan genocide. Such investigative or prosecutorial precedents should not be followed, but discarded.<sup>32</sup>

With these unfettered lessons in mind, the following examination of the development of appellant sexual assault jurisprudence can be gravely respected for its existence, but serve as a reminder that there have been inexcusable losses of opportunities that could have nourished a fuller justice.

### **3.1 Prosecutor v Akayesu**

Jean Paul Akayesu (Akayesu), was the first suspect to be tried at the ICTR. On 6 April 1994, the aeroplane transporting President Juvenal Habyarimana of Rwanda and President Cyprien Ntaryamira of Burundi from Arusha Tanzania was shot down. Shortly thereafter, widespread massacres of Rwandan Tutsis and politically

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28. *Prosecutor v Kajelijeli*, Judgment and Sentence, Case No ICTR 98-44A-T, 1 December 2003 (*Kajelijeli Judgment*).

29. *Kajelijeli Judgment*, Dissenting Opinion of Judge Ramaroson, paras 1-100.

30. *Prosecutor v Kajelijeli*, Notice of Appeal, Case No ICTR 98-44A-T, 5 January 2004. See also, *Prosecutor v Kamuhanda*, Judgment, Case No ICTR-99-54, 22 January 2004. Prosecution does not appeal the acquittals of sexual violence in the Trial Chamber's judgment.

31. See B Noworojee, 'Your Justice is too Slow' Will the ICTR Fail Rwanda's Rape Victim? Occasional Paper 10, United Nations Research Institute for Social Development <http://www.unrisd.org/publication/opgp10> (accessed 26 June 2007) pp 18-19.

32. As above.

moderate Hutus started in Kigali and quickly engulfed the rest of the country. The Gitarama prefecture in Rwanda first experienced an initial period of calm. However, with the spreading of the killings throughout Rwanda, Gitarama, including the Taba commune, were not spared. As burgomaster of the Taba commune, Akayesu was its highest political official and held paramount responsibility for maintaining order and security. At the outbreak of the killings in Gitarama, political meetings were called by local officials to implement security measures. Akayesu's message at these meetings exhorted the Hutu population to join together, put aside their differences and kill the Tutsis.<sup>33</sup>

It is on record that in the Taba commune, the Tutsi intellectuals were the first victims of the massacres perpetrated in cohorts by the Hutus and the political militia group called the *Interahamwe*.<sup>34</sup> The target spread out to include other Tutsis,<sup>35</sup> especially male Tutsis.<sup>36</sup> The remaining displaced Tutsis composed of mainly women and children, streamed into the Taba Municipal Offices where Akayesu worked, seeking refuge from the massacres.

The indictment against Akayesu alleged that at least 2000 Tutsis were killed in Taba between 7 April 2004 and the end of June of the same year and that such killings were openly committed and so widespread that Akayesu ought to have known about them.<sup>37</sup> Akayesu was charged with genocide under article 2(3)(a),<sup>38</sup> complicity in genocide under article 2(3)(e), direct and public incitement to

33. Witness Z, RT 23/1/97 10 149.

34. The initial targeting and killing of so called intellectuals, men and women considered literate and potentially able to politically resist the interim government, was reported as a common feature throughout Rwanda during the genocide. See De Forges, RT 18/2/97 expert testimony in the *Akayesu* case on the history of the genocide. See also witness J, RT 23/1/97 106; witness K, RT 31/10/97 21-28.

35. Witness K, RT 31/10/97 34-35.

36. Witness NN, 3/11/97 64.

37. *Prosecutor v Jean Paul Akayesu*, Indictment, ICTR-96-4-1, para 12.

38. The substantive crimes punishable under art 2 of the ICTR Statute are:

- (a) genocide;
- (b) conspiracy to commit genocide;
- (c) direct and public incitement to commit genocide;
- (d) complicity in genocide.

To understand what acts are intended under the crime genocide, reference to Art. 2(2) of the ICTR Statute is necessary. It states:

Genocide means any of the following acts committed with the intent to destroy , in whole or part, a national , ethnical, racial or religious group, as such:

- (a) killing members of the group;
- (b) causing serious bodily or mental harm to members of the group;
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or part;
- (d) imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

commit genocide under article 2(3)(c). With regard to crimes against humanity,<sup>39</sup> Akayesu was indicted for extermination under article 3(b), three counts of murder under article 3(c), and torture under article 3(f). Akayesu was further indicted for war crimes under article 4(a) of the ICTR Statute<sup>40</sup> for three counts of murder and one count of cruel treatment.

It must be noted that the original indictment did not accuse Akayesu of sexual violence. However, midway through the Prosecution case, two witnesses testified about acts of sexual violence in the Taba commune. For instance, witness J testified that members of the *Interahamwe* militia had raped her six-year-old daughter.<sup>41</sup> Witness H testified that she had seen the *Interahamwe* rape women near Akayesu's office and that she herself had been raped in a field near those municipal offices.<sup>42</sup> Prompted by witness H's testimony, the Prosecutor requested

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39. Art 3 of the ICTR Statute, the crimes against humanity provision reads:  
The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as a part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:  
(a) Murder;  
(b) Extermination;  
(c) Enslavement;  
(d) Deportation;  
(e) Imprisonment;  
(f) Torture;  
(g) Rape;  
(h) Persecutions on political, racial, and religious grounds;  
(i) Other inhumane acts.
40. Art 4 of the ICTR Statute, *inter alia*, reads:  
The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of art 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:  
violence to life, health and physical or mental well-being of persons in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;  
...  
(e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
41. n 3 above, para 416.
42. As above.

and was granted a stay of the proceedings to conduct an investigation into the sexual assaults described by witness H that were committed near Akayesu's offices. Three months later, the Prosecution filed an amended indictment<sup>43</sup> that further charged Akayesu with rape as a crime against humanity under article 3(g) of the ICTR Statute and inhumane acts under article 3(i), respectively. In addition, the amended indictment levied a count of outrages upon personal dignity under article 4(e). In particular, the charges were for engaging in humiliating and degrading treatment. Moreover, the indictment alleged that Akayesu knew about the acts of sexual violence because he actually ordered some of those acts.

The amended indictment also expanded Akayesu's criminal conduct in respect of the genocide charges under article 2(3)(a)-(c) of the ICTR Statute. It alleged in paragraph 12A that:<sup>44</sup>

... (W)hilst seeking refuge, females were 'regularly taken by armed local militia and/or communal police and subjected to sexual violence, and/or beaten on or near the bureau communal premises...[M]any women were forced to endure multiple acts of sexual violence which were at times committed by more than one assailant. These acts of sexual violence were generally accompanied by explicit threats of death or bodily harm. The female displaced civilians lived in constant fear and their physical and psychological health deteriorated as a result of the sexual violence and beatings and killings.

The Prosecution argued that Akayesu knew that the acts of sexual violence, beatings and murders were being committed and was at times present during their commission. Akayesu facilitated the commission of the sexual violence, beatings and murders by allowing the sexual violence, beatings and murders to occur near the bureau communal premises. By virtue of his presence during the commission of the sexual violence, beatings and murders and by failing to prevent the sexual violence, beatings and murders, Akayesu encouraged these activities.

The sexual violence in question comprised of part of the criminal conduct charged under article 2(b), namely causing serious bodily or mental harm to members of the group. In other words, sexual violence was charged as a component of the substantive crime of genocide. In addition to the *de novo* allegations that rapes and other sexual violence fulfilled article 2(b) criteria, the *Akayesu* case presented for the first time, an opportunity in the *ad hoc* Tribunals for a trial chamber to make a ruling on the normative content of the crime of genocide under genocide provisions. Similarly, for the first time in the

43. The Trial Chamber acknowledged the justified public concern over the historical neglect of the investigation and prosecution of sexual violence at the international level, but understood that the amendment of the indictment 'resulted from the spontaneous testimony of sexual violence by witness J and witness H during the course of the trial and the subsequent investigation of the prosecution, rather than from public pressure'. n 3 above, para 417.

44. n 37 above, paras 12A and 12B.

jurisprudence of international criminal justice system, rape was found to be an element of crimes against humanity.

The Trial Chamber ultimately found Akayesu guilty of genocide, direct incitement to commit genocide, torture, murder, rape and inhumane acts such as crimes against humanity. He was acquitted of complicity in genocide. Likewise, he was not found guilty of war crimes pursuant to article 4 charges due to insufficient evidence to sustain the essential element of war crimes, namely that the atrocities were committed in the context of an armed conflict.

In finding Akayesu guilty of genocide, the Trial Chamber held that article 2(2)(b) of the ICTR Statute was, ‘without limiting itself thereto, to mean acts of torture, be they bodily or mental, inhumane or degrading treatment (or) persecution’.<sup>45</sup> The Trial Chamber found that the allegations in paragraph 12(A) and 12(B) of the amended indictment amounted to serious bodily or mental harm, emphasising that, ‘in its opinion, they (rapes and sexual violence) constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group targeted as such.’ The Trial Chamber made a finding of fact to the effect that sexual violence satisfied the legal pre-requisites of article 2(2)(b) of the ICTR Statute<sup>46</sup> Taken conjunctively with killings, they (sexual violence and killings) constituted the underlying acts of the substantive crime of genocide.

The Trial Chamber also found Akayesu guilty of rape and inhumane acts as crimes against humanity under article 3(g) and (i) of the ICTR Statute, respectively. The Trial Chamber prefaced its definition of the elements of rape by recognising that there existed no universally accepted definition of rape under international law. It made a pronouncement that rape should be defined to include acts tantamount to ‘a physical invasion of a sexual nature, committed on a person under circumstances which are coercive,’ and held sexual violence to be, ‘any act of a sexual nature which is committed on a person under circumstances which are coercive.’<sup>47</sup> The Trial Chamber then listed seven incidences of rape and multiple rapes that Akayesu was guilty of under article 3(g), and three other instances of sexual violence, exclusive of rape, that attracted Akayesu’s criminal responsibility under article 3(i). In sentencing Akayesu, the Trial Chamber imposed several consecutive ten year prison terms. Akayesu is now serving a life sentence.

### ***3.1.1 Prosecutor v Akayesu – appeal judgment***

Akayesu appealed against his conviction and sentence in the judgment of the Trial Chamber. He claimed that the Trial Chamber fundamentally erred in fact and law,

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45. *Akayesu* Judgment (n 3 above) para 504.

46. *Akayesu* Judgment (n 3 above) para 731.

47. *Akayesu* Judgment (n 3 above) para 598.



and that the errors, taken individually or cumulatively, should result in ‘a complete stay of proceedings and his immediate release’.<sup>48</sup> The majority of Akayesu’s grounds of appeal lay in the procedural errors that allegedly violated his right to fair trial. For example, Akayesu claimed that he had been denied the right to be defended by a competent counsel of his choice. Akayesu also claimed that the ICTR, as a whole, was a biased and partisan institution.

The grounds of appeal against conviction for sexual violence were largely procedural. Akayesu argued that the amendment of the indictment mid-way through the trial violated his right to a fair trial. Among other things, Akayesu claimed that the timing of the amendment virtually eliminated his right to cross-examine witnesses.<sup>49</sup> Furthermore, he submitted that he suffered substantial prejudice as he was deprived of adequate time to prepare for cross examination. In particular, he was unable to cross-examine witnesses H and J after the amendment was confirmed, and that the Trial Chamber erred in blaming him for failing to cross-examine the witnesses on their testimony of sexual violence.<sup>50</sup>

Akayesu also claimed that the amended indictment was ‘completely new’ in the sense that the counts alleging sexual violence took place up to the end of June, which time span fell out of the period of the original indictment.<sup>51</sup> Moreover, Akayesu raised the 19 month gap between the time he was arrested and the time when the indictment was amended. He claimed that the time lag showed that the Prosecutor had not been diligent and should have brought the counts of sexual violence much earlier in the proceedings.<sup>52</sup> Akayesu concluded that the amended indictment caused ‘serious prejudice’ and could only be redressed by setting aside his conviction regarding sexual violence.<sup>53</sup>

On appeal, the Appeals Chamber however, ruled that the added charges of sexual violence did not render the indictment ‘completely new’ because the acts took place in the Taba commune, specifically at the *bureau communal* and coincided with the relevant time period in the original indictment. The new counts reflected more accurately Akayesu’s actual responsibility;<sup>54</sup> hence, neither the factual nor the chronological scope of the amended indictment was objectionable.<sup>55</sup> Furthermore, the Appeals Chamber confirmed that the timing of

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48. *Akayesu* Appeal Judgment (n 3 above) paras 29-33 .

49. *Akayesu* Appeal Judgment (n 3 above) para 103.

50. *Akayesu* Appeal Judgment (n 3 above) para 104. Therein, The Appeals Chamber cited para 453 of the *Akayesu* Judgment and observed that the ‘the Defence did not question the testimony of witness J or H on rape at all, although the Chamber itself questioned both witnesses on this testimony’.

51. As above.

52. *Akayesu* Appeal Judgment (n 3 above) para 105.

53. *Akayesu* Appeal Judgment (n 3 above) para 106.

54. *Akayesu* Appeal Judgment (n 3 above) para 119.

55. As above .

the amendment did not *per se* violate the appellant's right to a fair trial.<sup>56</sup> A trial chamber could grant leave to amend an indictment during the trial, whenever the Prosecutor filed sufficient supporting materials, albeit belatedly.<sup>57</sup> The Appeals Chamber ruled that the Trial Chamber, therefore, did not err when it granted the Prosecution leave to amend the indictment.

Likewise, the Appeals Chamber examined whether Akayesu was denied the right to conduct a cross examination of witnesses J and H about sexual violence. It observed that the Defence Counsel had the opportunity to cross-examine either witness on two occasions: Either when each witness originally testified or, if the Defence had so decided, either or both witnesses, could have been recalled after the indictment was amended. The Appeals Chamber reckoned that the Defence Counsel consciously chose not to cross-examine witness J and H about their sexual assault evidence. As such, the Trial Chamber's factual finding that the Defence Counsel exercised a choice not to cross-examine the witnesses did not rise to the level of error. Consequently, all the grounds of appeal raised by Akayesu regarding the amendment of the original indictment were accordingly rejected.<sup>58</sup>

Akayesu's additional grounds of appeal in respect of sexual violence challenged the Trial Chamber's specific factual findings in respect of the allegations in paragraphs 12A<sup>59</sup> and 12B<sup>60</sup> of the amended indictment. Akayesu claimed that the French and English versions of the judgment resulted in a different meaning and that the French version should be held to be the 'official' judgment. The French version, Akayesu submitted, accurately demonstrated that the Trial Chamber did not know what to make of his testimony about the sexual violence,<sup>61</sup> and was thus unable to assure itself of his culpability. Akayesu concluded that the Trial Chamber erred by not following the more favourable version of the French version of the judgment.<sup>62</sup> To examine the validity of his argument, the Appeals Chamber reviewed paragraph 460 of the judgment that stated:

Faced with first-hand personal accounts from women who experienced and witnessed sexual violence in Taba and at the bureau communal, and who swore under oath that the Accused was present and saw what was happening, the Chamber does not accept the statement made by the accused. The

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56. As above.

57. *Akayesu* Appeal Judgment (n 3 above) para 120. The Appeal Chamber recalled that the Prosecution chronicled the investigations undertaken to collect sexual assault evidence and the prior inability to gather evidence that implicated the criminal responsibility of the accused. The Prosecution also informed the Trial Chamber of the heightened security alert that Rwanda was under during the time that necessitated that investigators be accompanied by UN escorts that dissuaded the collection of the sexual assault evidence.

58. *Akayesu* Appeal Judgment (n 3 above) para 123.

59. Text accompanying footnotes 44 & 45.

60. As above.

61. *Akayesu* Appeal Judgment (n 3 above) paras 181-183.

62. As above.

Accused insists that the charges are fabricated, but the defence has offered the Chamber no evidence to support this assertion. There is overwhelming evidence to the contrary, and the Chamber does not accept the testimony of the accused. The findings of the Chamber are based on the evidence which has been presented in this trial. As the accused flatly denies the occurrence of sexual violence at the bureau communal, he does not allow for the possibility that the sexual violence may have occurred but that he was unaware of it.

The Appeals Chamber found the Trial Chamber to have been hesitant in comprehending Akayesu's testimony. It then noted that a difference in meaning existed between the English and French versions. However, it found that paragraph 460 'serves, in fact, as a kind of epilogue to the Trial Chamber's factual finding on sexual crimes'.<sup>63</sup> The Trial Chamber had ostensibly compared Akayesu's testimony to that of the 'first hand personal accounts of women who witnessed the acts of sexual violence',<sup>64</sup> and plainly rejected it. The Appeals Chamber's evaluation led to the conclusion that this ground of appeal was void of merit.<sup>65</sup>

Parallel to the linguistic challenges in paragraph 460 of the Trial Chamber judgment, Akayesu raised another ground of appeal. He claimed that he had never denied that the sexual violence happened. On that basis therefore, the Trial Chamber erred when they made a finding of fact as contained in paragraph 460.<sup>66</sup> The Appeals Chamber rejected the ground off-hand citing Akayesu's contrary testimony and decided that the Trial Chamber committed no error in the factual findings contained in paragraph 460.<sup>67</sup>

Another ground of appeal in the merits raised was that of the impartiality of Judge Pillay and Judge Kama.<sup>68</sup> The allegation had its basis in the comments made by the two judges in relation to sexual assault evidence. Akayesu alleged that even before witness J appeared before the Trial Chamber in January 1997, Judge Pillay had questioned the prosecution witness Zacharias if he knew anything about incidences of rape. Akayesu asserted that Judge Pillay's questions exhibited a pre-disposition or bias to the eventual evidence of rapes which she, at the time of

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63. *Akayesu* Appeal Judgment (n 3 above) para 187.

64. As above.

65. As above.

66. *Akayesu* Appeal Judgment (n 3 above) para 189.

67. Akayesu had testified: '... believe me in the name of God, Almighty God, in fact this accusation; this charge is just made up. I never saw – I never heard from my policemen at least – I was not all the time at the bureau communal – I never heard that a woman, any woman was raped at the bureau communal, never...' *Akayesu* Appeal Judgment (n 3 above) para 191 - 192.

68. Judge Kama (Senegal) presided over the *Akayesu* Trial Chamber. Judge Pillay (South Africa) was elected to be President of the ICTR and currently sits as a judge on the International Criminal Court.

questioning witness Zacharias, had no prior notice. The French transcript was the basis of Akayesu's assertion.<sup>69</sup>

The Appeals Chamber examined the trial transcript of witness Zacharias and held that the English version, that reflected the spoken language of Judge Pillay, showed no bias. Judge Pillay had asked the question in a neutral tone and had referred to rapes in general.<sup>70</sup> With similar tone and importance, her questions to Zacharias were consistent with other questions Judge Pillay put to him about his knowledge of other offences under crimes against humanity, such as murder, and torture, before proceeding to inquire about rape.<sup>71</sup> The Appeals Chamber accordingly dismissed Akayesu's claim that Judge Pillay exhibited bias.

With respect to Judge Kama, the appellant pointed to an instance where Judge Kama interrupted the Defence Counsel's cross-examination of witness JJ. The Defence Counsel wanted to elicit from witness JJ concerning the precise number of times she had been raped. Judge Kama interrupted the Defence Counsel, asking, 'Is it important? ... She was raped so frequently that she can no longer remember how often it was; 4,5,6,7 times ...'.<sup>72</sup> That interruption, Akayesu argued, showed that Judge Kama already found witness JJ to be credible before the Defence presented their case to the Trial Chamber,<sup>73</sup> and more importantly, even before the judges retired to deliberate upon the evidence submitted at the trial as a whole. To decide the merits of this ground of appeal, the Appeals Chamber reviewed the applicable legal standards of impartiality of the judiciary.

First, it identified the obligation of judges to be free from bias as set forth in the Statute and Rules<sup>74</sup> and then applied the test developed in the jurisprudence that requires that a judge should not exhibit actual bias or the unacceptable appearance of bias.<sup>75</sup> The Appeals Chamber determined that the Akayesu failed to substantively show that Judge Kama had already decided to

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69. *Akayesu* Appeal Judgment (n 3 above) para 197.

70. *Akayesu* Appeal Judgment (n 3 above) paras 198 -200.

71. *Akayesu* Appeal Judgment (n 3 above) para 198.

72. *Akayesu* Appeal Judgment (n 3 above) para 201.

73. As above.

74. Art 12(A) of the Statute, reads, in part, that: 'The judges shall be persons of high moral character, impartiality and integrity..' and rule 15(A) reads, in part, that: 'A judge may not sit at a trial or appeal in any case in which he has a personal interest or concerning which he has or has had any association that might affect his impartiality'.

75. *Furundzija* Appeal Judgment, para 189. Interestingly, the appellant Furundzija also attempted to overturn convictions based upon rape and torture, by asserting that Judge Mumba of Zambia was biased. She, apparently found the appellant guilty of rape because, in the early 1990's, prior to her election as a judge, she represented Zambia on CEDAW, the UN treaty body that drafted the preliminary guidelines for the 1995 Beijing Platform for Action. The Beijing Platform called for the application and enforcement of humanitarian law with regard to war crimes committed against women, in particular rape. The appellant ground was dismissed. *Furundzija* Appeal Judgment, para 215.

believe witness JJ in advance. Due to lacking further support evidence, the Appeals Chamber declined to address the allegation of bias.<sup>76</sup>

Secondly, the Appeals Chamber recalled that earlier in the cross-examination of witness JJ, when the Defence Counsel's questions failed to elicit a clear answer, Judge Kama asked her how many times she had been raped. The witness remembered being raped seven times 'leaving aside the other cases of rapes she could not remember'.<sup>77</sup> Judge Kama's subsequent intervention came after the Defence Counsel had continued its cross-examination, asking witness JJ about the use of condoms during the rapes. At this point, Judge Kama told the Defence Counsel to 'make some progress'.<sup>78</sup> When the Defence Counsel returned to the question about the number of incidences of rape, Judge Kama demanded to know from the Defence Counsel the relevance of asking yet again about the number of rapes witness JJ endured, especially having testified previously that she could no longer remember the 'exact number of times', which was impliedly beyond six.<sup>79</sup> The alleged impartial intervention arose within the context of an apparently drawn out cross-examination.

In order to determine whether Judge Kama's intervention might be deemed to be an error that could reverse the conviction, the Appeals Chamber referred to Rule 90(F) of the ICTR that gives the judges, and impliedly the Presiding Judge, a duty to exercise control over the manner of the cross-examination of witnesses.<sup>80</sup> Judge Kama's interruption was upheld as a correct exercise of the duty sanctioned by Rule 90(F) in that he first assisted the Defence Counsel to elicit a response from witness JJ and later, he curtailed further inquiry into 'superfluous details' of that response.<sup>81</sup> Accordingly, the Appeals Chamber did not find any error on the part of the Trial Chamber<sup>82</sup> emanating from Judge Kama's intervention and comments.

Akayesu's last challenge against his conviction and sentencing on charges of sexual violence dealt with linguistics. He asserted that witness Mathias Ruzindana's testimony that had interpreted certain Kinyarwanda words and phrases to the Trial Chamber did not include the Kinyarwanda word or phrase for rape. As such, the court could not have relied upon Ruzindana's testimony to confirm whether sexual assault witnesses testified about the act of rape *per se*. As part of this ground of appeal, Akayesu raised as error the Trial Chamber's *propria motu* consultation with the Tribunal interpreters, present in the courtroom, about the terms used for rape. Akayesu asserted that the verbal information from the interpreters did not constitute 'evidence' and was not placed on the record, and

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76. Akayesu Appeal Judgment (n 3 above) para 204.

77. Akayesu Appeal Judgment (n 3 above) para 205.

78. As above.

79. As above.

80. Rule 90(F) reads, in part, that: 'The Trial Chamber *shall* exercise control over the mode and order of interrogating witnesses and presenting evidence ...'

81. Akayesu Appeal Judgment (n 3 above) para 206.

82. Akayesu Appeal Judgment (n 3 above) para 207.

hence, he was unable to respond to the interpreters' responses to the Judges questions. The Appeals Chamber held both arguments to be void of merit, pointing out that, 'at no time ... did Akayesu raise the issue of a misuse of any term in Kinyarwanda or suggest that the witnesses were not referring to rape'.<sup>83</sup> The Appeals Chamber ruled that the Trial Chamber did not err in law.

### **3.1.2 Comments**

The *Akayesu* appeal case is a landmark decision since it stands out as the first case in modern legal history that has examined the facts and evidence of genocide at an international tribunal. However, the most salient feature of Akayesu's appeal in respect to sexual violence evidence lies on two grounds of appeal that he could have raised. Incredulously, in this the first full adjudication of the provisions of the Genocide Convention<sup>84</sup> as incorporated into the ICTR Statute, the Appeals Chamber was not invited to determine whether the Trial Chamber's ruling that rape and other acts of sexual violence satisfied the substantive requirements for article 2(2)(b) of the ICTR Statute, that provides for 'causing serious bodily or mental harm to members of the group' was an error of law.

Akayesu could have certainly raised the ground that the plain language of article 2(2) and in particular article 2(2)(b) of the ICTR Statute makes no reference to rape or sexual assault. Similarly, he could have argued that the intention of the drafters of the Genocide Convention, as evidenced in the drafting history of the said treaty, did not consider rape and the forms of sexual violence alleged at the trial as acts of genocide. Similarly, neither commentaries nor any other contemporary literature prepared subsequent to the drafting of the Convention indicate such an interpretation. Furthermore, Akayesu could have attempted to advance an argument that rape was not recognised under customary international law in 1994 as an *actus reus* of article 2(2)(b) of the ICTR Statute.<sup>85</sup>

Furthermore, the Appeals Chamber was not asked to consider the interpretation of article 2(2)(b). As a result, the Trial Chamber's interpretation of article 2(2)(b) became and remains good law. What is not subsumed into a ground

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83. *Akayesu* Appeal Judgment (n 3 above) para 212.

84. Convention on the Prevention and Punishment of the Crime of Genocide, adopted on 9 December 1948, 78, UNTS 277, entered into force 12 January 1951 (Genocide Convention).

85. The Trial Chamber was required to satisfy itself that in 1994, customary law as applied to the Genocide Convention permitted the inclusion of rape and sexual violence under art II (b) that was incorporated verbatim under art 2(2)(b) of the ICTR Statute. In 1949 N Robinson who wrote a commentary about the Genocide Convention remarked that, 'the five acts enumerated in Art II raise a number of difficulties of interpretation. ... (W)hat is 'serious' harm is already a matter of interpretation to be decided in each instance on the basis of the intent and the possibility of implementing this intent by the harm done.' There was no reference to rapes. In his 1960 commentary, Robinson reiterated the same observation. See Robinson Commentary (1949) 18; Robinson Commentary (1960) 163.

of appeal from the trial judgment stands as good ‘law’ and even ‘good’ *obiter dicta* until subsequent appellate review reverses it. For the reason that this component of genocide was not remitted for an appellate challenge, the literal and legal characterisation of a sexualised genocide whereby ‘sexual violence was an integral part of the process of destruction specifically targeting Tutsi women and contributing to the destruction of the Tutsi group as a whole’ survived impeachment.<sup>86</sup>

Undoubtedly, the jurisprudence of the *Akayesu* Trial Chamber and the *dicta* of the Appeals Chamber influenced the Elements of Crimes of the Rome Statute (Elements of Crimes) of the International Criminal Court (ICC). Under the Rome Statute, declarative law shows the possibility, if not the intent of the drafters, to interpret the genocide provisions in a manner similar to that of the *Akayesu* jurisprudence. Under article 6(b), it is explained that the ‘conduct may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhumane or degrading treatment.’<sup>87</sup> Article 2(2)(b) of the ICTR, as interpreted by the *Akayesu* Trial Chamber, as confirmed by the Appeals Chamber, sent out legal shots that can viably take root in the ICC jurisprudence.

In the same manner, Akayesu could have procedurally challenged the Trial Chamber’s error of law for the late imposition of the definition of rape. Relying on the grounds of well settled due process principles, he could have asserted that he, as a suspect, was obliged to defend himself of a crime that was vague, and undefined under international law not only at the time when his indictment was issued, but throughout his prosecution and up to the time the judgment was rendered. In other words, Akayesu could have challenged the violation of the principles of legality on grounds of undue vagueness of the definition of a crime or especially that the conviction rested upon a retroactive or *ex post facto* law, in that it was defined after his prosecution.<sup>88</sup>

In addition, Akayesu, irrespective of the alleged procedural error in the due process, could have substantively challenged the Trial Chamber’s eventual definition, alleging that it discarded the general principles of national law, and substituted an arbitrary conceptual definition of rape.<sup>89</sup> The Appeals Chamber was not requested to undertake any review caused by errors, procedural or substantive errors of law in respect of the definition of rape given by the *Akayesu* Trial Chamber. Hence the *Akayesu* Trial Chamber’s definition of rape was followed in the *Musema* case at the ICTR and the *Celebici* case at the ICTY. The *Akayesu*

86. *Akayesu* Appeal Judgment (n 3 above) para 731.

87. Art 6(b), Elements of Crimes, UN Doc PCNICC/2000/1/Add.2 (2000). (Elements of Crime).

88. See R Haveman ‘Rape and Fair Trial in Supranational Criminal Law’ (2002) 9 *Maastricht Journal of European and Comparative Law* 263 - 278.

89. As above.

definition remained intact, at the ICTR, until the ICTY jurisprudence on sexual assault overturned its legal sway.<sup>90</sup>

### 3.2 *Prosecutor v Musema* – trial judgment

In *Prosecutor v Musema*, the second case to be tried before the ICTR, the accused, Musema, the then Director of the Gisovu Tea Factory, was indicted for crimes that occurred in the Bisesero area in the prefecture of Kibuye, throughout April, May and June of 1994. Musema was charged with genocide under article 2(3)(a) and extermination as a crime against humanity. Like the *Akayesu* case, the *Musema* indictment was amended to include allegations of sexual violence both as criminal conduct that contributed to the charge of genocide, rape as a crime against humanity under article 3(g), as well as a war crime under article 4(e) of the ICTR Statute.<sup>91</sup>

In the course of the trial, testimony was tendered which confirmed that the *Interahamwe* frequently perpetrated frightening rape and sexual mutilations in the Bisesero area. Witnesses testified that Immaculee Mukankuzi and other women were raped. In particular, witness I testified to the rape and resultant death of Annunciata Mujawyesu by sexual mutilation and witness N testified especially about the rape of Nyiramusugi.<sup>92</sup>

The Trial Chamber found Musema guilty of one count of genocide, charged under article 2(3)(a), and based in part on evidence of sexual violence and one count each of extermination and rape as crimes against humanity.<sup>93</sup> The rape of Immaculee Mukankuzi, Annunciata Mujawyesu and other women neither comprised part of the guilty findings underpinning the genocide, nor crimes against humanity convictions. Musema was acquitted in respect of these charges.

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90. In December 1998, four months after the *Akayesu* Judgment, an ICTY Trial Chamber issued their decision in the *Prosecutor v Anton Furundzija*, Judgment, Case No IT-95-17/1-T, 10 December 1998 (*Furundzija* Judgment). The *Furundzija* Trial Chamber convicted a special forces commander for the rape and torture of a woman, designated as witness A. It held, in paragraph 180, that the elements of rape were:

(i) the sexual penetration, however slight:

of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or

of the mouth of the victim by the penis of the perpetrator;

(ii) by coercion or force or threat of force against the victim or a third person.

91. *Musema* Judgment (n 4 above) para 7-8.

92. *Musema* Judgment (n 4 above) paras 909 & 966 - 968.

93. *Musema* Judgment (n 4 above) paras 167 & 967.



However, the evidence of witness N that concerned the rape of Nyiramasugi constituted the basis of the conviction. The Trial Chamber<sup>94</sup> concurred with the *Akayesu* Trial Chamber and reiterated that the elements of rape were a ‘physical invasion of a sexual nature’<sup>95</sup> even though concurrently, the Trial Chamber at the ICTY had delivered another definition of rape under international law<sup>96</sup> in the *Furundzija* case.<sup>97</sup> Meanwhile Musema was sentenced to a single sentence of life imprisonment. He lodged an appeal against his conviction and the sentence and raised several grounds in relation to the evidence of sexual violence.

### 3.2.1 Prosecutor v Musema – appeal judgment

Musema appealed against conviction for the rape of Nyiramasugi. He advanced the argument that the Trial Chamber had erred in finding that the testimony of witness N was ‘clear and consistent’<sup>98</sup> Musema contested the veracity of witness N’s testimony by submitting new evidence in the form of out-of-court statements of witnesses CB and EB. Such evidence so tendered ultimately contradicted witness N’s evidence. Upon deliberation, the Appeals Chamber held that if the testimony of witnesses CB and EB had been presented to the Trial Chamber, such testimony would have raised a reasonable doubt<sup>99</sup> as to the guilt of Musema for Nyiramasugi’s rape. Taking upon itself the hat of the trier of fact, the Appeals Chamber weighed the testimony of witnesses CB and EB and ruled that the Trial Chamber’s factual

94. The *Musema* bench was identical to that of the *Akayesu* bench, being composed of Judges Pillay, Kama and Aspegren, the judges that wrote the *Akayesu* judgment. It is no wonder that they would reiterate the *Akayesu* definition of rape as the prevailing legal standard in *Musema*.

95. *Musema* Judgment (n 4 above) paras 226-227. It is from this discussion in the *Musema* judgment that the often repeated description of the *Furundzija* elements of rape as ‘mechanical’ comes. In contrasting the *Akayesu* and *Furundzija* standards, the *Musema* Trial Chamber said:

... The definition of rape as set forth in the *Akayesu* Judgment clearly encompasses all the conduct described in the definition as set forth in *Furundzija* ... the Chamber considers that a conceptual definition is preferable to a mechanical definition of rape.’

96. It is noteworthy that a few weeks after delivery of the *Akayesu* judgment, and before the judgment in *Furundzija*, another ICTY case, *Prosecutor v Delic et al*, commonly called the *Celebici* case, concurred in their judgment, albeit in *obiter dicta*, with the definition of rape that the *Akayesu* judgment had pronounced. See *Prosecutor v Delic et al* paras 478-479.

97. In *Furundzija*, the Trial Chamber, paid explicit attention to the legality ‘principle of specificity’ and that a crime had to be defined. *Furundzija* Judgment, para 177.

98. *Musema* Appeal Judgment (n 4 above) para 172.

99. The Appeals Chamber held that, ‘... the test to be applied by the Appeals Chamber in deciding whether or not to uphold a conviction where additional evidence has been admitted before the Chamber is: has the appellant established that no reasonable tribunal of fact could have reached a conclusion of guilt based upon the evidence before the Trial Chamber together with the additional evidence admitted during the appellate proceedings.’ *Musema* Appeal Judgment (n 4 above) para 185.

and legal findings in relation to the rape of Nyiramusugi were incorrect to the extent of having occasioned a miscarriage of justice.<sup>100</sup> Accordingly, the Appeals Chamber quashed the conviction for rape as a crime against humanity under article 3(g) of the ICTR Statute.

Musema, in a strange legal twist appealed against the veracity of the testimony of witness I, claiming that it contained serious inconsistencies. He averred that the Trial Chamber had erred in law and fact in finding him guilty of the rapes inflicted upon Annuciata Mujawyesu. The Appeals Chamber duly noted that the majority of the Trial Chamber<sup>101</sup> factually found, that, ‘ ... it had been established beyond a reasonable doubt that Musema ordered the rape of Annuciata Mujawyesu and the cutting off of her breast to be fed to her son’.<sup>102</sup> However, the Appeals Chamber clarified to the appellant that the Trial Chamber ruling did not affect Musema’s guilt relating to both his conviction and sentence. It explained that the Trial Chamber, nevertheless, had refrained from finding him guilty because:<sup>103</sup>

... (E)ven if it is proven that Musema ordered that she and her son be killed, such order, by and of itself, does not suffice for him to incur individual criminal responsibility, given that no evidence has been adduced to show that the order was executed to produce such result, namely the rape of Annuciata. Nor has it been proven that Musema ordered that she and her son be killed.

Thus, the Appeals Chamber dismissed Musema’s arguments that challenged the incriminating testimony about the rape and death of Annuciata Mujawyesu’s and its impact on his sentence as ‘misplaced’.<sup>104</sup> The Appeals Chamber upheld the genocide conviction under article 2(3)(a) for acts of killings. Musema’s criminal liability for sexual violence however, terminated in a complete reversal.

### **3.2.2 Comments**

A quick examination of the post-appeal findings confirms a denuded landscape of sexual violence contrary to that alleged in the amended indictment,<sup>105</sup> in respect

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100. *Musema* Appeal Judgment (n 4 above) para 193.

101. *Musema* Appeal Judgment (n 4 above) Judge Aspegren Dissenting Opinion, paras 42-43, p 313.

102. *Musema* Appeal Judgment (n 4 above) para 828.

103. *Musema* Appeal Judgment (n 4 above) para 167, quoting the *Musema* Judgment at para 889.

104. *Musema* Appeal Judgment (n 4 above) para 168.

105. *Musema* raised other appeal grounds directly related to errors in law because of the leave granted to the Prosecutor to amend the indictment, to include allegations of rape, and because of the violation of due process owed to the late filing of the amendment. The Appeals Chamber ruled that both grounds were deemed unnecessary to rule upon in view of the quashing of Count 7, rape as a crime against humanity. *Musema* Appeal Judgment (n 4 above) paras 342-345.

of what was legally attributed to Musema. It is important to note that the definition of rape as delivered by the Trial Chamber devolved into *obiter dicta*, but remained good 'law'. The acquittal of Musema for sexual violence neither erased the reality of sexual violence committed during the genocide, nor diminished the prevalence of sexual violence in the Bisesero area during the genocide. It only, as a matter of law, exonerated Musema as an author of those acts.

### 3.3 Prosecutor v Laurent Semanza – trial judgment

Laurent Semanza (Semanza) was the burgomaster of the Bicumbi commune between 1973 and 1993. In 1994 he was nominated to the National Assembly as a representative of the National and Democratic Republican Movement (MRND), the party of the then President of Rwanda, Juvenal Habyarimana. As the Rwandan genocide ensnared the country, Semanza participated in several genocide-related activities, including events in the Gikoro commune. He was indicted for genocide and complicity in genocide under article 2(3)a and article 2(3)e, and under several provisions under article 3 in relation to crimes against humanity, which included extermination, murder, torture, rape and for that same conduct under the article 4, which prescribes murder, torture and rape as war crimes.

In respect of sexual violence, the indictment alleged in the enumerated paragraphs that:

3.14 The massacres referred to in paragraphs 3.8 through 3.13 above, included killing and causing serious bodily and mental harm, including rape and other forms of sexual violence, to members of the Tutsi ethnic group. Laurent Semanza intended these massacres to be part of the non-international armed conflict against the RPF because he believed the Tutsi refugees to be enemies of the Government and/or accomplices of the RPF as stated in paragraph 3.4.2 and 3.4.3

3.15 Between 6 April and 30 April, 1994, in Bicumbi and Gikoro Communes, Laurent Semanza instigated, ordered and encouraged militiamen, in particular *Interahamwe*, and other persons to rape Tutsi women or commit other outrages upon the personal dignity of Tutsi women, and such people did rape Tutsi women or commit other outrages upon the personal dignity of Tutsi women in response to the instigation, orders and encouragement of Semanza.

3.16 Between 6 and 30 April, 1994, in Bicumbi and Gikoro Communes, Laurent Semanza had *de facto* and/or *de jure* authority and control over militiamen, in particular *Interahamwe*, and other persons, including members of the Rwandan Armed Forces (FAR), communal police and other government agents, and he knew or had reason to know that such persons were about to commit acts of rape or other outrages against the personal dignity of Tutsi women, and he failed to take necessary and reasonable measures to prevent such acts, which were subsequently committed. Laurent Semanza intended the acts described in paragraphs 3.15 and 3.16 to be part of the non-international armed conflict against the RPF as stated in subparagraphs 3.4.2 and 3.4.3

3.17 Between 7 and 30 April 1994, Laurent Semanza spoke to a small group of men in Gikoro Commune. He told them that they had killed Tutsi women but that they must also rape them before killing them. In response to Semanza's words the same men immediately went to where two Tutsi women, victim A and victim B had taken refuge. One of the men raped victim A and two men raped and murdered victim B. Laurent Semanza intended the acts described in this paragraph to be part of the non-international armed conflict against the RPF as stated in subparagraphs 3.4.2 and 3.4.3

Semanza was subsequently convicted of complicity in genocide, extermination and murder as crimes against humanity. The conviction was also based on torture and the crime of rape, both as crimes against humanity. However, the sexual violence alleged in the indictment did not, in its entirety, contribute to Semanza's conviction. Under Count eight of the indictment, rape was characterised as a crime against humanity and relied upon the allegations in paragraphs 3.15 and 3.16. The court deemed the descriptive paragraphs to be 'impermissibly vague,'<sup>106</sup> and ruled that:<sup>107</sup>

These paragraphs refer broadly to the Accused's responsibility as a superior and as an accomplice to the direct perpetrators' unspecified rapes and other acts of sexual violence which allegedly occurred in Bicumbi and Gikoro 'between 6 and 30 April'. This date range is problematic in particular because these paragraphs fail to identify any specific criminal act, particularise the location where the acts occurred, or specify the accused's conduct or his relationship with any known principal perpetrator

Prosecutor had not obtained any particular and specific information or evidence regarding these allegations. Under such circumstances, the accused cannot possibly be expected to effectively prepare a defence.

The Trial Chamber found that because Semanza could not adequately defend himself against these allegations, the judgment would not entertain any legal or factual findings leading to a conviction on Count eight. Other allegations of rape failed to translate into a conviction due to lack of evidence,<sup>108</sup> and for reason of the legal technicalities of cumulative convictions.<sup>109</sup>

Semanza was, nonetheless, convicted of sexual violence under Counts 10 and 11 in that he instigated the rape and torture of victim A and B as had been alleged under paragraph 3.17 of the indictment. The conviction for rape as a crime against humanity required that the Trial Chamber be articulate in its findings with regard to the elements of rape. The Trial Chamber departed from the conceptual

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106. *Semanza* Judgment (n 5 above) para 51.

107. *Semanza* Judgment (n 5 above) para 52.

108. *Semanza* Judgment (n 5 above) paras 538-539, that refers to Count 9 wherein the Prosecution failed to introduce any evidence of rapes or sexual violence that had been alleged indictment at the Musha Church and the Mabare Mosque.

109. The sexual violence alleged in Counts 7 and 13 were held in concurrence with convictions for the same conduct under Counts 10, 11 & 3.

definition proposed by Akayesu, and followed by Musema due to the intervening appellate jurisprudence from the ICTY in *Kunarac* case that upheld the elements of rape to be:<sup>110</sup>

The sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such penetration occurs without the consent of the victim. Consent for this purpose, must be consent given voluntarily, as a result of the victim's free will, assessed in the contents of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.

The *Semanza* Trial Chamber was bound by the doctrine of *stare decisis*. Appellate rulings and interpretations cannot be diverted from, but must be followed by a trial chamber. Accordingly, the *Semanza* Trial Chamber applied the definition of rape sanctioned in the *Kunarac* Appeal Judgment.<sup>111</sup> The Trial Chamber sentenced Semanza, consecutively, to seven years imprisonment for instigating rape under Count ten, and ten years for instigating rape as torture under Count 11. The prison terms were to run concurrently and consecutively with other sentences that totalled 25 years.

### 3.3.1 Prosecutor v Laurent Semanza – appeal judgment

Semanza appealed against his conviction in respect of the sexual violence. He raised several grounds of appeal. By way of illustration, he contended that the Trial Chamber's conviction for rape and torture through instigation was an error indicating that the crimes were underway when he arrived at those locations. The Appeals Chamber refuted his claim and held that Semanza instigated the rape of Victim A and Victim B both of which took place immediately after he gave his

110. *Prosecutor v Dragoljub Kunarac et al*, Judgment, Case No IT-96-23 & IT-96-23/1-A, 12 June 2002 (*Kunarac* Appeal Judgment) para 128. The *Kunarac* Appeal Judgment was delivered a year and a half after the *Musema* Appeal Judgment and about a year earlier than the *Semanza* Judgment. Neither the *Akayesu* Appeal Judgment nor the *Musema* Appeal Judgment directly challenged the definition of rape. Their respective appellate chambers did not, *proprio muto*, review the Trial Chamber's elements of rape as a matter of general significance. These two factors paved the judicial leeway for the *Kunarac* Appeal Judgment to deliver the first appellate ruling on the elements of rape and resulted in binding law for both *ad hoc* Tribunals.

111. The *Kunarac* definition is at times called the *Furundzija/Kunarac* definition, since almost its entirety is the *Furundzija* Trial Chamber's definition of the crime of rape except for its reliance upon coercion, force, or the threat of force to the victim or a third person instead of the concept of consent. The *Kunarac* definition removes sub-section (ii) from the *Furundzija* definition. See *Kunarac* Appeal Judgment, para 128.

speech of 13 April 1994. The Appeals Chamber found that the Trial Chamber did not err.<sup>112</sup>

Semanza further argued that the Trial Chamber erred in convicting him of rape, torture and the murders that took place because the words he allegedly used to encourage the *Interahamwe* militia, were never produced verbatim in the trial proceedings, nor cited in the indictment.<sup>113</sup> The Appeals Chamber dismissed this argument and stated that the Trial Chamber was not required to replicate the ‘exact’ instigating language and that paragraph 13.7 of the indictment ‘sufficiently described’ the contents of Semanza’s speech.<sup>114</sup> Another related ground of appeal alleged that his criminal responsibility of instigation was baseless because his speech of 13 April 1994 did not instigate the crimes of murder and rape, but rather it ‘incited’ those crimes. The Appeals Chamber recalled that Semanza’s words had been acted upon, and thus the Trial Chamber did not err in its finding of instigation.<sup>115</sup>

Semanza also questioned whether the Trial Chamber had not erred when it ‘lumped together’<sup>116</sup> the testimony of the rape of victims A, B and C since these acts were committed at two different locations and that he only appeared at those locations after unidentified perpetrators had committed the rape in question.<sup>117</sup> The Appeals Chamber quickly opined that no error occurred in either instance. With regard to victims A, B, and C, it held that the Trial Chamber dealt with the events separately, noting only that they happened on the same day.<sup>118</sup>

Likewise, Semanza argued that the error occurred when the Trial Chamber held that the rape of witness VV happened ‘contemporaneously’<sup>119</sup> with the murderous attacks at the Musha Church. The Appeals Chamber also held that factual findings of the rape of witness VV and the killings at the Musha Church were reasonable, since the killings happened after Semanza instigated a group of men to rape Tutsi women before killing them. On his instigation the men went to the Musha Church and committed the acts of sexual violence and murder. Witness VV’s rape was ‘contemporaneous’ in that it happened on the same day as killings were taking place at the Musha Church.<sup>120</sup>

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112. *Semanza Appeal Judgment* (n 5 above) para 285.

113. *Semanza Appeal Judgment* (n 5 above) para 289.

114. As above.

115. *Semanza Appeal Judgment* (n 5 above) para 290.

116. *Semanza Appeal Judgment* (n 5 above) para 282.

117. *Semanza Appeal Judgment* (n 5 above) para 282.

118. *Semanza Appeal Judgment* (n 5 above) para 283.

119. *Semanza Appeal Judgment* (n 5 above) para 288.

120. *Semanza Appeal Judgment* (n 5 above) para 288.

The Prosecution counter-appealed and argued *inter alia* that the seven-year sentence for rape was ‘manifestly inadequate’ and ‘outside the acceptable range of sentences imposed by the Tribunal for serious sexual offences’.<sup>121</sup> The Appeals Chamber, in order to evaluate the adequacy of the imposed sentence, referred to the legal standard, namely whether the Trial Chamber ‘committed a discernable error in exercising its discretion, or failed to follow applicable law.’<sup>122</sup> The Appeals Chamber recalled that as a general principle, other cases that related to the same crime committed under similar circumstances could provide guidance in matters of sentencing. However, it emphasised that the length of sentence in any given case was ultimately discretionary. The Prosecution was relying on a relatively few other rape convictions in which sentences of between 12 and 15 years had been handed down. Such cases were deemed unconvincing as the Prosecution failed to demonstrate a discernible error on the part of the Trial Chamber.

The Appeals Chamber granted two further grounds of appeal by the Prosecution resulting in the reversal of some acquittals. It reversed Semanza’s acquittal for genocide under article 2(3)(a) and recognised that the accused had ordered the extermination, as a crime against humanity under article 3(a), of Tutsis at the Musha Church.<sup>123</sup> It likewise reversed Semanza’s acquittal for Count 13 for instigating the rape and torture of Victim A and the murder of victim B at the Musha Church.<sup>124</sup> Finally, because of the reversed acquittals, the Appeals Chamber quashed the Trial Chamber’s sentence of twenty-five years and held that Semanza be sentenced to a new term of 35 years of imprisonment. Neither side challenged the definition of the rape as a ground of appeal.

### 3.4 The *Gacumbitsi* trial judgment

By April 1994, Sylvestre Gacumbitsi (Gacumbitsi), a Hutu, had been the burgomaster of the Rusumo commune in the Kibungo prefecture of Rwanda for 11 years. As burgomaster, Gacumbitsi was the highest ranking official in the commune and enjoyed the trust and respect of his constituents, and was said to have had ‘good’ relations with the Tutsi population. The genocide in Rusumo commune only started on 14 April 1994. Gacumbitsi, within this context, organised a campaign against his Tutsi constituents and publicly incited Hutus to separate themselves from the Tutsi and to kill them. Thousands were killed as a result and the accused himself ‘killed persons by his own hand, ordered killings by subordinates, and led attacks under circumstances where he knew or should have known that civilians were, or would be, killed by persons acting under his

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121. *Semanza* Appeal Judgment (n 5 above) para 391.

122. *Semanza* Appeal Judgment (n 5 above) para 392.

123. *Semanza* Appeal Judgment (n 5 above) paras 354-355.

124. *Semanza* Appeal Judgment (n 5 above) paras 367-371.

authority.’<sup>125</sup> Sexual violence unleashed in Rusumo commune was pivotal to the genocide, as alleged repeatedly in the indictment:<sup>126</sup>

Sexual violence against Tutsi women was systematically incorporated in the generalised attacks against the Tutsi. In leading, ordering and encouraging the campaign of extermination in Rusumo commune, Sylvestre Gacumbitsi knew, or should have known that sexual violence against civilian Tutsi was, or would be, widespread or systematic, and that the perpetrators would include his subordinates or those that committed such acts in response to his generalised orders and instructions to exterminate the Tutsi.

The accused ‘drove around Rusumo commune calling for Tutsi women to be raped and sexually degraded. It was alleged that on or about 17 April 1994 he exhorted the population along the Nyarubuye road to ‘rape Tutsi girls that had always refused to sleep with Hutu and to ‘search in the bushes. Do not save a single snake ...’. Attacks and rapes of Tutsi women immediately followed.<sup>127</sup>

By virtue of his positions of leadership of the MRND and the Interahamwe, particularly as derived from his status as burgomaster of Rusumo, Sylvestre Gacumbitsi ordered or directed or otherwise authorised government armed forces, civilian militias and civilians to persecute rape and kill or facilitate the killing of civilian Tutsi ...<sup>128</sup>

During April, May, and June 1994, there were widespread or systematic rapes and sexual violence of Tutsi women. The sexual assaults were often a prelude to murder, and were sometimes the cause of death of a number of civilian Tutsi.<sup>129</sup>

On or about 17 April 1994, the accused ‘lured Tutsi women to a certain location by announcing over a megaphone that Tutsi women would be spared, and that only Tutsi men would be killed’. When a number of Tutsi women gathered in response to his exhortations, they were surrounded by several attackers, raped, and then killed. Attackers also sexually degraded a number of Tutsi women by inserting objects in their genitals.<sup>130</sup>

On or about 17 April 1994, the accused travelled along a road in a caravan of vehicles and shouted with a megaphone words such as: ‘Tutsi girls that have always refused to sleep with Hutu should be raped and sticks placed in their genitals.’ Afterwards a group of men attacked Tutsi women that were hiding nearby and raped several of them. One of the women WJS killed and a stick was stuck in her genitals.<sup>131</sup>

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125. For detailed information on his actions, see pages 2-6 of the S Gacumbitsi Indictment.

126. *Prosecutor v Sylvestre Gacumbitsi*, Indictment, ICTR-2001-64-T, 20 June 2001 (*Gacumbitsi Indictment*) para 20.

127. n 126 above, para 21.

128. n 126 above, para 24.

129. n 126 above, para 33.

130. n 126 above, para 38.

131. n 126 above, para 38.



Gacumbitsi was charged with genocide under article 2(3)(a) and, alternatively, with complicity to commit genocide under article 2(3)(e) of the ICTR Statute. He was indicted for extermination, murder and for instigating rape as crimes against humanity as stipulated under article 3(a), 3(b) and 3(g), respectively.

During the trial, several witnesses gave evidence in which they established the sexual violence allegations. Witness TAQ, recalled her own rape and that of seven Tutsi females, ranging between 12 and 25 years old and a separate case of an elderly woman. The 25-year-old woman was named Chantal. TAQ was pregnant at the time. She told the Trial Chamber that on the morning of 17 April 1994, as she hid under a bridge, she heard people saying that Tutsi girls who had refused to get married to the Hutu should be hunted down and raped. If they resisted, they were to be killed in an ‘atrocious manner’.<sup>132</sup> Among the voices she heard urging that Tutsi women who resisted be killed was burgomaster Gacumbitsi.<sup>133</sup>

Immediately after hearing this ranting, witness TAQ and the seven other females hiding with her were discovered by the attackers who told them to either undress or die. The attackers raped each of them, including the girls and the elderly woman. TAQ’s attacker also threatened to rip apart her womb to prevent a male Tutsi from being born. That evening, TAQ bore the child prematurely. On the following day, TAQ learnt that three of the females who had hid with her had gone to the counsellor’s house, where they were raped and then killed.<sup>134</sup> Subsequently, TAQ went to the area near the counsellor’s house and saw Chantal whose body was in a ditch. Chantal had been ‘quartered’ and had a stick protruding from her vagina. Nearby, TAQ witnessed three other girls being taken away by the attackers and forced to become their sexual partners.<sup>135</sup> The Trial Chamber was satisfied that TAQ’s testimony was truthful and that Gacumbitsi’s words, directed at this group of attackers, constituted an incitement to rape Tutsi women.<sup>136</sup>

The other sources of credible testimony on, sexual assault were witnesses TAS (a Hutu woman married to a Tutsi), TAO (the husband of a Tutsi woman who suffered multiple rapes and was killed by one of her assailants) and TAP (who testified about the thirty attackers who raped and bayoneted her mother). Witness TAP was also raped. Collectively, these witnesses established pertinent accounts of incidents of the sexual violence committed in the Rusumo commune during the genocide.<sup>137</sup>

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132. n 126 above, para 200.

133. n 126 above, para 201.

134. n 126 above, para 217.

135. n 126 above, paras 201-204.

136. n 1 above, para 215.

137. n 1 above, paras 216-222 & 226.

The Trial Chamber applied the appellate jurisprudence and sanctioned the *Kunarac* definition of rape that consisted of ‘any penetration of the victim’s vagina by the rapist with his genitalia or with any object’. The Trial Chamber opined that the rapist ‘either penetrated each victim’s vagina with their genitalia or inserted sticks into them,’<sup>138</sup> thus satisfying the definition. The Trial Chamber also held that the element of lack of consent was satisfied because ‘under such circumstances, the utterances made by the Accused to the effect that in case of resistance the victims should be killed in an atrocious manner, and the fact that the rape victims were attempting to flee from their attackers, adequately established the victims’ lack of consent to the rapes’.<sup>139</sup>

The Trial Chamber convicted Gacumbitsi of genocide. The genocide count covered the killings and sexual violence instigated by Gacumbitsi and inflicted upon TAQ. These sexual assaults constituted acts that caused serious bodily or mental harm to members of the Tutsi population as indicated in article 2(2)(b).<sup>140</sup> The Trial Chamber also held him criminally liable for rape as a crime against humanity, and similarly for genocide, it based the conviction upon the evidence of TAQ. To the contrary, even though witnesses TAS, TAO and TAP indicated that more than 50 acts of sexual violence took place, the Trial Chamber did not subsume that conduct under the conviction for genocide nor the conviction for crimes against humanity. It held that notwithstanding the infliction of sexual violence, it did not find, beyond a reasonable doubt, that those acts were committed at Gacumbitsi’s exhortations.<sup>141</sup> Accordingly, Gacumbitsi was found guilty of extermination<sup>142</sup> yet acquitted of murder as a crime against humanity under article 3<sup>143</sup> and had the alternative count of complicity in genocide<sup>144</sup> duly dismissed. The Trial Chamber sentenced Gacumbitsi to thirty years imprisonment.<sup>145</sup>

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138. n 1 above, para 321.

139. n 1 above, para 325. See ALM de Brouwer Supranational criminal prosecution of sexual violence: The ICC and the practice of the ICTY and the ICTR (2005) 115-120, for an excellent discussion on the legal dialogue between the *ad hoc* Tribunals on the element of ‘lack of consent’ prior to the *Gacumbitsi* Appeals Decision.

140. n 1 above, para 292.

141. n 1 above, para 329. The Trial Chamber nevertheless held that the rapes established by TAS, TAO and TAP constituted evidence of the widespread and systematic attack against the Tutsi civilian population, a jurisdictional element of crimes against humanity under art 3 of the Statute.

142. n 1 above, paras 316, 333 & 334.

143. n 1 above, para 334.

144. n 1 above, para 29.

145. n 1 above, para 356.

### 3.4.1 The Gacumbitsi appeal judgment

Gacumbitsi and the Prosecution cross-appealed on several aspects of the legal and factual findings of the Trial Chamber with regard to evidence on sexual assault. The Appeals Chamber's various dispositions of the grounds for appeal are significant within the body of sexual assault jurisprudence as set at the international level.

Gacumbitsi appealed against conviction for genocide alleging that the Trial Chamber incorrectly assessed the *mens rea* of genocide and *dolus specialus*.<sup>146</sup> He asserted that the Trial Chamber erred legally because it relied upon circumstantial evidence and not direct evidence of specific intent. Gacumbitsi's ground of appeal permitted the Appeals Chamber to reiterate how to evaluate evidence of a perpetrator's intent to commit genocide. It indicated that:<sup>147</sup>

The Tribunal's jurisprudence conclusively establishes that genocidal intent can be proven through inference from the facts and circumstances of a case. By its nature, intent is not usually susceptible to direct proof. Only the accused himself has first-hand knowledge of his own mental state, and he is unlikely to testify to his own genocidal intent. Intent must usually be inferred.

It is noteworthy, that the Appeals Chamber held that the inferential evidence relied upon by the Trial Chamber, such as Gacumbitsi's repeated urging of the Hutu population to kill the Tutsi, and in particular his instigation of the rape of Tutsi women on 17 April 1994,<sup>148</sup> supported the finding of the requisite intention to commit genocide. The Appeals Chamber saw no other reasonable inference to be drawn from Gacumbitsi's utterances or actions other than that it was his intention to commit genocide.<sup>149</sup> Hence, the Appeals Chamber reconfirmed that, the unleashing of sexual violence against the Tutsi population, by verbal instigation was evidence of the genocidal intent. It was further held that the Trial Chamber's approach was appropriate and consistent with the Tribunal jurisprudence and therefore, free from fatal errors.

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146. The crime of genocide requires, as a jurisdictional element, the specific intent or *dolus specialis*, to 'destroy in whole or part a national, ethnical, racial or religious group, as such' which the prosecutor must prove beyond a reasonable doubt.

147. n 1 above, para 40.

148. n 1 above, para 4.

149. n 1 above, para 43.

Gacumbitsi, within a broader ground of appeal that contested the reasonableness of the Trial Chamber's inclusion of the rape recounted by TAQ as part of a widespread or systematic attack, raised several other sub-grounds. He invoked several clichéd misconceptions of rape. First he argued that the term 'systematic'<sup>150</sup> within the crimes against humanity prerequisite of 'widespread or systematic' required that the rapes could only be considered a crime against humanity if there is proof that the commission of the rape was planned in the preparatory meetings. In this regard, the Appeals Chamber observed the Trial Chamber's application of the settled jurisprudence on the meaning of 'systematic,' noting that:<sup>151</sup>

The concept of systematic attack within the meaning of Article 3 of the Statute, refers to a deliberate pattern of conduct, but does not necessarily include the idea of a plan. The existence of a policy or plan may be evidentially relevant ... (h)owever, the existence of such plan or policy is not a separate legal element of the crime

Therefore, the averment that rapes and or sexual violence were required to be planned in preparatory meetings, anymore than killings, beatings or mutilations must be specifically planned is clearly not a prerequisite under article 3 even though such evidence would, if it existed, be relevant. Gacumbitsi did not, on this aspect of appeal, demonstrate any error on the part of the Trial Chamber.

Another basis raised by Gacumbitsi concerned whether rape as a provision of crimes against humanity needed to be 'of a collective nature,' inferring that only numerous or widespread rapes were actionable under article 3. He argued that by contrast, the rapes that led to his conviction comprised isolated and individual incidents. Prior to addressing this issue, the Appeals Chamber abruptly corrected the seminal error detected in the appellants claim, this was that 'at the outset it bears noting that it is not rape *per se* that must be shown to be widespread or systematic, but rather the attack itself (of which rapes form a part),'<sup>152</sup> essentially reminding Gacumbitsi that neither the existence of systematic nor widespread rapes is a prerequisite to a finding of guilt for rape as a crime against humanity. The Appeals Chamber satisfied itself that the Trial Chamber had correctly found that there existed an attack against the civilian population in Rusumo commune and that the rapes attributed to Gacumbitsi were part of the attack against the Tutsi population.<sup>153</sup>

Furthermore, in relation to the above, the Appeals Chamber examined the factual claim that TAQ's rape was an isolated incident because she had known her assailant. TAQ testified she knew the attacker because her sister had previously

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150. The ICTR Statute requires that the jurisdictional element of crimes against humanity satisfy that the widespread or systematic attack against the civilian population, attack be committed on discriminatory grounds.

151. n 6 above, para 101, citing the *Gacumbitsi* Judgment (n 1 above) para 299.

152. n 1 above, para 102.

153. As above.

refused to marry him. Gacumbitsi saw the refusal of marriage as the genesis of the assailant's personal motivation for committing the rape, thus transforming the rape into an isolated incident that differed from the acts assumed within the widespread and systematic attack against the Tutsi. The Appeals Chamber, in response to Gacumbitsi's thesis, refuted a popular misconception, and set forth a correct antithesis.

The Appeals Chamber turned to settled jurisprudence to the effect that even if, 'personal motivations can be identified in the defendants carrying out of an act (it) does not necessarily follow that the required nexus with the attack on a civilian population must inevitably be lacking.'<sup>154</sup> Whether the assailant and victim knew each other or whether they were strangers is not pivotal to the inquiry. Proof of prior acquaintance does not automatically render the sexual infliction an isolated or an incidental act of violence. The logical fallacy of this evidentiary proposition was keenly honed by the Appeal Chamber's observation that, 'indeed the genocide and extermination campaign in Rwanda was characterised in significant part by neighbours killing and raping neighbours.'<sup>155</sup> Integral to the commission of genocide was sexual violence, and that sexual violence was perpetually committed by perpetrators who knew their victims.

Consequently, the Appeals Chamber held that it was the totality of the evidence that could establish whether the rapes were part of the widespread and systematic attack. The Trial Chamber was correct not to have relied upon the existence of a plan, or on the misconstrued aspects of isolated incidences, especially when premised upon the prior acquaintance of the perpetrator and victim, or the misconceived nature of the genocide and extermination campaign, to identify whether the rapes were isolated incidents or part of the attack under crimes against humanity. To that extent, the Trial Chamber committed no error of fact or law.

Lastly, Gacumbitsi raised a ground of appeal that asserted the existence of no link between his statements and the rape of the eight women. He argued that no reasonable trial chamber would have relied upon the evidence given by TAQ, who had heard the words through a megaphone and recognised his voice. He contested the reasonableness of this evidence being able to establish a factual link between his speech and the rapes of the females.<sup>156</sup>

In response, the Appeals Chamber recalled that the Trial Chamber found TAQ to be a credible witness. It also discarded as unworthy, any residue from the misconception that her assailant's personal motivation was of legal consequence to a finding of guilt for rape, as settled appellate jurisprudence. The remaining issue was whether Gacumbitsi's statements instigated the rapes by making a

<sup>154.</sup> n 1 above, para 103, citing the holding regarding personal motives of perpetrators in *Prosecutor v Dusko Tadic*, Judgment, Case No IT-94-1 A, 15 July 1999, para 252.

<sup>155.</sup> n 1 above, para 103.

<sup>156.</sup> n 1 above, para 106.

substantial contribution to their commission. The Appeal Chamber returned to the factual finding about the rapes, noting that they were committed ‘immediately after the utterance’ of Gacumbitsi. It, therefore, concluded that Gacumbitsi’s words had substantially contributed to those rapes,<sup>157</sup> and that the Trial Chamber’s finding was reasonable. This ground of appeal was dismissed.

The Prosecution also appealed certain legal and factual holdings that related to sexual violence in the Gacumbitsi judgment. The Prosecution challenged the Trial Chamber’s failure to enter a conviction for the rapes established by witnesses TAS, TAP and TAO, asserting that alternative types of individual liability were available to the Trial Chamber to arrive at a conviction for the sexual assaults. It submitted that the Trial Chamber erred in law by not finding that Gacumbitsi instigated, ordered, committed under joint criminal enterprise<sup>158</sup> or aided and abetted the sexual violence or was responsible for those acts under superior responsibility. In failing to find that Gacumbitsi instigated those sexual assaults, the Prosecution asserted that it could be inferred from the factual findings, that the Trial Chamber incorrectly applied a *sine qua non* test to verify the existence of a link between Gacumbitsi’s words and the commission of the rapes testified about by TAS, TAP and TAO. The argument went further to aver that the Trial Chamber ought to have applied the ‘substantially contributed’ test to verify if such a culpable link existed.<sup>159</sup>

The Appeals Chamber addressed this ground and acknowledged that the Trial Chamber did not enunciate the phrase ‘substantially contributed’ when examining the rape testimony of TAS, TAO and TAP and Gacumbitsi’s liability. Irrespective of the terminology, it found that the Trial Chamber essentially made the correct inquiry to verify the presence or absence of a ‘link’ between Gacumbitsi’s words and the sexual violence. The Trial Chamber found that there was no link, ‘substantial or otherwise’. Even though the Trial Chamber’s examination eluded the traditional wording of the test for instigation, the Appeals Chamber held that their application of the law was without error.<sup>160</sup>

As an alternative to whether there was correct application of the law to establish Gacumbitsi’s liability for instigation, the Prosecution alleged error on the part of the Trial Chamber for ignoring the totality of the evidence of the sexual violence. The Prosecution submitted that testimony about the rapes in mid-April must be considered together with Gacumbitsi’s speech of 17 April 1994 in which he urged Hutus to rape and kill Tutsi women. This must be considered with the other facts, such as his authority as burgomaster and his participation in the

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157. As above.

158. Joint Criminal Enterprise is a mode of individual liability subsumed under the term ‘committing’ in art 6(1) of the Statute. For the evolution of the doctrine and jurisprudence and its application to sexual assault evidence, see PV Sellers ‘Individual’s Collective Liability for Sexual Violence’ in K Knop (ed) *Gender and Human Rights* (2004).

159. n 1 above, para 129.

160. n 1 above, para 130.

genocide. The Prosecution argued that if the Trial Chamber had considered the totality of this evidence, it would have reached the reasonable conclusion that Gacumbitsi instigated all of the rapes.<sup>161</sup>

The Appeals Chamber reviewed these factual bases. It confirmed the rapes established by TAS and TAP. However, it also underscored that these acts were committed before the speech by Gacumbitsi. By situating the rapes earlier in April, it affirmed the Trial Chamber's factual conclusion that Gacumbitsi's instigation to rape and kill was not a substantially contributing factor for those rapes.<sup>162</sup>

The Appeal Chamber adhered to its rationale that acts committed before 17 April 1994 could not have been instigated by Gacumbitsi. Curiously, and in contrast to its examination of the TAS and TAP's evidence, it held that the rapes inflicted upon TAO after the 17 April 1994 also were not attributable to Gacumbitsi since it was speculative that his words were the *only* reasonable cause of rapes of TAO's wife. To the Appeals Chamber, the rapes endured by TAO's wife and Gacumbitsi's utterances were not linked, substantially or otherwise. Accordingly the Appeals Chamber found that the Trial Chamber did not err.<sup>163</sup>

The Appeals Chamber dismissed the Prosecution's sub-ground that Gacumbitsi ordered or planned the rapes in question, citing that the Prosecution's argument lacked any attempt to explain the *actus reus* or acts of planning and ordering the commission of acts.<sup>164</sup> It declined to consider whether Gacumbitsi's words were an order. Likewise, it dismissed the sub-ground that Gacumbitsi's liability could have been attributed to aiding and abetting, which required that his words have a 'substantial effect' on the commission of the crime. The Appeals Chamber reiterated its previous holding that the evidence was insufficient to prove that Gacumbitsi's words had 'any' effect on those rapes.<sup>165</sup>

The Prosecution further asserted in another sub-ground that Gacumbitsi, as the burgomaster of Rusumo commune, had superior responsibility over the perpetrators of crimes, notably the counsellors, soldiers, gendarmes and the *Interahamwe* militia in the commune, and therefore, was responsible for their sexual offences. The Prosecutor argued that the Trial Chamber did not evaluate Gacumbitsi's effective control over the perpetrators. The Trial Chamber had held that Gacumbitsi's status as burgomaster was inconsequential. In fact, their examination confined itself to his formal status and whether he could be considered a superior, holding that:<sup>166</sup>

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161. n 1 above, para 131.

162. n 1 above, paras 133-134.

163. n 1 above, para 136.

164. n 1 above, para 139.

165. As above.

166. n 1 above, para 142.

... the Chamber cannot find that the Accused had superior authority over the counsellors, gendarmes, soldiers, and Interahamwe that were in his commune at the time of the events under consideration ... The law did not *per se*, place him in such a position. Although his responsibilities regarding the maintenance of law and order afforded him the power to legal measures that would be binding on everyone in the commune, the Prosecution has not produced evidence that would place him *ipso facto*, in a position of a superior within a formal administrative hierarchy ... With the persons mentioned above.

The Appeals Chamber observed that the Trial Chamber's ambit was too confined, both factually and legally and recalled that Gacumbitsi's conviction for sexual violence was confined to the acts recounted by TAQ. It correctly observed that Gacumbitsi's formal responsibility as a superior should not have been pursued in relation to TAQ because his conviction, as an instigator,<sup>167</sup> obviated any further legal finding.

Gacumbitsi, exonerated as an instigator of the rapes recounted by TAS, TAO and TAP, could have been pursued under the legal liability theory of superior responsibility. Without disturbing the Trial Chamber's holding that formal *per se* superior responsibility did not *ipso facto* create liability, the Appeals Chamber found the Trial Chamber remiss for not undertaking an inquiry into Gacumbitsi's *de facto* superior responsibility over the perpetrators of the sexual assaults.<sup>168</sup>

The Appeals Chamber pursued this inquiry and held that Gacumbitsi's was a *de facto* superior authority over the perpetrators. Notwithstanding that ruling, the Appeals Chamber finalised their analysis and held that Gacumbitsi's possession of *de facto* superior authority did not mean that he exercised the prerequisite control over the counsellors, gendarmeries, *Interahamwe* and soldiers.<sup>169</sup> Despite the evidentiary finding of effective control and the confirmation of Gacumbitsi's *de facto* position as a superior, this sub-ground of appeal of the Prosecution's argument failed.<sup>170</sup>

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167. The settled appellate jurisprudence does not recognise the simultaneous convictions.

168. n 1 above, para 143.

169. n 1 above, para 145.

170. n 1 above, para 146.



The Prosecutor's last ground of appeal urged the appellate chamber to resolve what could only be a crucial legal dialogue between the *ad hoc* Tribunals about the elements of rape.<sup>171</sup> The Prosecutor challenged two issues related to non-consent as an element of rape. Specifically, the Appeals Chamber was called upon to decide whether the non-consent of the victim and the perpetrator's knowledge of the victim's non-consent were legitimate elements of the crime of rape under international law. The Prosecution submitted that the non-consent of the victim was not an element, and that consent, was a defence to the crime of rape. The prosecution supported its position by reference to an accused ability to

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<sup>171.</sup> Since the *Semanza* Judgment, all Trial Chambers followed the *Kunarac* appellate definition of rape, although certain Trial Chambers endeavoured to formulate a practical congruency that reconciles the conceptual *Akayesu* definition and the mechanical *Kunarac* elements of rape. In *Prosecution v Muhimana*, Judgment, Case No ICTR-95-1B-T, 25 April 2005, the Trial Chamber stated:

The Chamber considers that *Furundzija* and *Kunarac*, which sometimes have been construed as departing from the *Akayesu* definition of rape – as was done in *Semanza* – actually are substantially aligned to this definition and provide additional details on the constituent elements of rape.

The Chamber takes the view that the *Akayesu* definition and the *Kunarac* elements are not incompatible or substantially different in their application. Whereas *Akayesu* broadly referred to a 'physical invasion of a sexual nature' *Kunarac* went on to articulate the parameters of what would constitute a physical invasion of a sexual nature amounting to rape.

On the basis of the foregoing analysis, the Chamber endorses the conceptual definition of rape established in *Akayesu*, which encompasses the elements set out in *Kunarac*.

However prior to the Prosecutor's appellate ground in *Gacumbitsi*, no other ICTR appellate ground had been raised questioning the elements of rape. For excellent discussions on the evolution of the definition of rape and the use of consent, see de Brouwer (n 159 above), C McKinnon, 'Defining Rape Internationally: A Comment on *Akayesu*' (2006) *Columbia Journal of International Law* 941.

raise a defence of consent as foreseen under rule 96(ii)<sup>172</sup> of the Rules of Procedure and Evidence.<sup>173</sup>

The Appeals Chamber agreed to hear this appellate ground, not because of any error committed by the Trial Chamber, or because its resolution would materially alter Gacumbitsi's convictions or sentence, but it was because the elucidation of the questions raised was a matter of 'general significance' for the Tribunal jurisprudence. Beyond the issue of 'general significance', the Appeals Chamber would have to invoke the rules of *stare decisis* as applied to one appeals chamber reviewing the findings of another appeal chamber, being able to depart from a previous holding only if cogent reasons, supported by the interest of justice, so demanded.

The incidental questions to the enquiry included whether the lack of consent is a legitimate element of the crime of rape and evidence of consent an affirmative defense to rape under international law. Which party bore the burden of proof? What facts satisfied the burden of production? Whether lack of consent was an element of rape to be proven by the Prosecution, or whether it was a defence to the crime. The interplay between the elements of rape and rule 96 also needed further enunciation within the jurisprudence of the *ad hoc* Tribunals.

For example, the *Akayesu* and *Musema* definition, instead of imposing a prerequisite of lack of consent as an element of rape, acknowledged that the crime must take place under circumstances which are coercive. Examination of the circumstances prevailed. The *Celebici* Trial Chamber, concurring with *Akayesu* in

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172. Rule 96 reads:

In cases of sexual assault:

(i) Notwithstanding Rule 90 (C), no corroboration of the victim's testimony shall be required;

(ii) Consent shall not be allowed as a defence if the victim:

(a) Has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression; or

(b) Reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear.

(iii) Before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber *in camera* that the evidence is relevant and credible;

(iv) Prior sexual conduct of the victim shall not be admitted in evidence or as defence.

On the face of it, Rule 96 governs all cases of sexual assault before the ICTR. It is normally, albeit incorrectly, interpreted as the procedural 'rape rule'. This inaccurate assessment is most probably owed the pre-eminence that rape had in the drafters' mind, and because the rule qualifies the admission of the evidence of a victim's consent, a common factor in domestic rape laws. That Rule 96 could govern all cases of sexual assault belies logic. The category of sexual assaults comprises acts such as sexual mutilations or forced nudity or sexual slavery, wherein any attendant victim's consent or evidence of the physical or mental constraints are immaterial to the commission of the crime or the liability of the perpetrator. This article, however, does not dwell upon the inexactitude of Rule 96, but deals with its provisions as the Appeals Chamber intends, as a rule related to the crime rape.

173. n 1 above, para 147.

its *obiter dicta* opinion retained the pre-eminence of circumstances. The *Furundzija* Trial Chamber, similarly disallowed a ‘lack of consent’ element into their definition of rape whenever there existed coercion or force or threat of force against the victim or a third person. It expressly held, after finding the factual circumstances in which witness A was raped, surrounded by armed soldiers in their barracks, that ‘detention vitiated consent’. The vitiated consent that the *Furundzija* Trial Chamber presumably referred to, was neither a specific verbal consent nor a constructed or implied consent from the victim, but rather, a reference to the defence’s legal inability to find recourse in rule 96(ii) that explicitly listed detention as a circumstance that obliterated consent. Collectively, the *Akayesu*, *Musema*, *Furundzija* approach, together with rule 96 consistently turned upon whether the circumstances lent credence to consent.

In the light of the above, the *Kunarac* case did not signal a reversal of the approach to international law that the *Gacumbitsi* case had attempted to untangle.<sup>174</sup> The *Kunarac* case mandated a two-pronged lack-of-consent requirement, namely consent that is given voluntarily as a result of the victim’s free will, and the perpetrator’s knowledge that penetration occurs without consent. The *Kunarac* Trial Chamber’s definition plainly stated that consent must be assessed in view of the surrounding circumstances. If the retreat to a moderated notion of traditional consent terminology overshadowed the circumstantial approach, the *Kunarac* Appeals Chamber underscored the Trial Chamber’s stress on the importance of the victims’ surroundings.<sup>175</sup>

The circumstances giving rise to the instant prevail in most and that prevail in most cases charged as either war crimes or crimes against humanity will be almost universally coercive. That is to say, true consent will not be possible.

The Prosecution’s ground of appeal required the *Gacumbitsi* Appeals Chamber to consider actual circumstances in which rape was envisioned under the jurisdiction of the ICTR Statute. Rape, it asserted, came within the Tribunal’s jurisdiction only with the concomitant existence of genocide, an armed conflict or during the occurrence of crimes against humanity. The contextual circumstance, it submitted, removed the possibility of genuine consent and therefore should obviate the victim’s lack of consent as an element.

<sup>174.</sup> The *Kunarac* Trial Chamber consisted of Judges Mumba from Zambia, Hunt from Australia and Pocar from Italy. Judge Mumba, as part of the *Furundzija* bench, delivered the first definition of rape at the ICTY. At the time of *Kunarac* Judgment, she was the judge who sat in the two ICTY cases that concentrated on allegations were sexual violence and the definition of rape under international law. Why did she append the ‘lack of consent,’ without a dissenting or separate opinion? The *Furundzija* definition had not been challenged nor reversed on appeal. Did the challenge to her judicial impartiality, because of her past appointment to CEDAW, make her adhere to a more traditionalist view with her new colleagues, even though the appeals chamber ultimately found her not to have been biased nor have given the appearance of bias?

<sup>175.</sup> n 1 above, para 151 citing the *Kunarac* Appeal Judgment, (n 110 above) para 130.

The *Gacumbitsi* Appeals Chamber fashioned their response by building upon the *Kunarac* Appeals Chamber's emphasis on circumstances. Firstly, it reconfirmed that non-consent, and the perpetrator's knowledge of such non-consent, were indeed elements of the crime of rape that the Prosecutor, not the accused, must prove beyond a reasonable doubt.<sup>176</sup> Secondly, the Appeals Chamber reiterated that rule 96 does not redefine rape. It neither removes the element of lack of consent from the crime nor shifts the burden to the defence. An accused bears no burden of proof, irrespective of rule 96's non-technical language about consent as a defence to sexual assaults.

Having clarified which party bore the burden of proof for the lack of consent element, the Appeals Chamber then turned to the second inquiry. What type of evidence satisfied the burden of lack of consent? Are the verbal utterances or the behaviour of a victim germane to the proof? The Appeals Chamber held.<sup>177</sup>

The Prosecution can prove non-consent beyond a reasonable doubt by proving the existence of coercive circumstances under which meaningful consent is not possible. As with every element of any offence, the Trial Chamber will consider all the relevant and admissible evidence in determining whether, under the circumstances of the case, it is appropriate to conclude that non-consent is proven beyond reasonable doubt. But is it 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, such as an on-going genocide campaign or the detention of the victim. Indeed, the Trial Chamber did so in this case.

Thus, it is not always required for the prosecution to submit evidence of the victim's words, conduct or relationship to a perpetrator. Proving background circumstances is sufficient. The Appeals Chamber holding appears to realign *Gacumbitsi* with the *Akayesu* and *Furundzija* approach to consent since the production of evidence to show the words or the conduct of the victim to manifest lack of consent is not required. Furthermore, reminiscent of its stance with regard to the rape of TAQ by an assailant known to her, the Appeals Chamber affirmed that the relationship between the sexual assault victim and the perpetrator is irrelevant.

The Appeals Chamber then acknowledged the defence's ability to counter the prosecution's evidence of lack of consent based on the circumstances by presenting proof of the victim's specific consent. What satisfies proof of specific consent? Such a defence would arise if the circumstances, as portrayed by the prosecution, were inaccurate or not probative. It would also arise if despite the circumstances, the victim's assertions or actions were contrary to lack of consent. In essence, the defence would now avail itself with evidence of the victim's verbal utterances or conduct to rebut the inferences of non-consent from the background

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<sup>176.</sup> n 1 above, para 153.

<sup>177.</sup> As above.

circumstances. The burden did not shift, but the evidentiary use of the victims' words or conduct shifted to the other party.

The Appeals Chamber, however, noted that in most instances such evidence by the defence concerning the victim's specific consent would be inadmissible, because pursuant to Rule 96(ii) of the Rules, such evidence is inadmissible if the victim:<sup>178</sup>

(a) has been subjected to or threatened with or has had reason to fear violence, duress detention or psychological oppression; or,

(b) Reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear.

The specific consent of the victim is inadmissible if the conditions in rule 96(ii) are met. Rule 96(ii) situations are examples of what a sexual assault victim could experience, although they are not an exhaustive list given that the Appeals Chamber took note of an on-going genocide as an additional factor. Nevertheless, in real trial practice, the Appeals Chamber's supposed clarification would haunt the prosecution. In anticipation that the defence will attempt to rebut the lack of consent element irrespective of proof of the background circumstances, the prosecution must be prepared to present the victim's utterances or the conduct. If such evidence is led pre-emptively in the prosecution case, then *Gacumbitsi* is the same as *Kunarac* and the difference to the victim and witness is wholly negligible.

The *Gacumbitsi* Appeals Chamber elucidated a third pertinent factor. It held that a Trial Chamber is free, even *after* the admission of evidence of specific consent presumably offered by the Defence, to disregard that evidence, if 'under the circumstances it was not genuinely voluntary.'<sup>179</sup> The question that arises is: Does genuine voluntary consent vary from the *Kunarac* definition which indicated that 'consent for this purpose must be consent given voluntary'? If so, how? Likewise, does a reflection on the circumstances in which the consent was given, differ from the *Kunarac* definition of 'the victim's free will, assessed in the context of the surrounding circumstances'? If so, to what extent?

Finally, the Appeals Chamber addressed the element of the accused knowledge of the absence of consent of the victim. This element is satisfied if the prosecution can prove beyond a reasonable doubt that the accused 'was aware or had reason to be aware' of the background circumstances that were coercive and robbed the victim of the ability to genuinely consent. The primary inquiry and object of proof are the background circumstances that the accused, once aware of, cannot contend that he was ignorant of a victim's lack of consent. The question

178. n 1 above, para 156. Rule 96 (iii) further qualifies the admission of evidence of consent by requiring the accused to satisfy the Trial Chamber *in camera* that such evidence is relevant and credible, However, the Defence's very argument would be that the victim's utterances or conduct were relevant and probative despite the circumstances.

179. As above.

is why the defence's ability to submit evidence to show that despite the accused's awareness of the circumstances, the victim exhibited specific consent not override this element too?

The legal steps may be as follows: The prosecution can prove the lack of consent by inferences garnered from the broader background circumstances and the defence's awareness of these circumstances. The defence, irrespective of those inferences, can submit pertinent and relevant evidence of specific consent, albeit such evidence would be inadmissible if rule 96(ii) circumstances exist. Moreover, if the evidence of specific consent were admissible, meaning that the prosecution's proof of the background circumstances and rule 96(ii) conditions were insufficient or absent, the Trial Chamber in weighing the evidence retains the discretion to disregard the defence's proof of specific consent, if it lacked genuine consent.

All in all, as a result of the reversal of acquittals and the discernable error on the part of the Trial Chamber to reflect the gravity<sup>180</sup> of the crimes, including the sexual violence<sup>181</sup> attributed to *Gacumbitsi*, the Appeals Chamber altered *Gacumbitsi*'s sentence to one of life imprisonment.

### **3.4.2 Comment**

The *Gacumbitsi* evidence of a sexualised genocide *via* the trial testimony girths the factual and legal conclusions of the appellate jurisprudence. On appeal, *Gacumbitsi* confirmed and continued to direct the interpretation of aspects of international criminal law, such as the legal requirements for liability under of instigation. *Gacumbitsi* readily affirmed that sexual violence satisfies evidence of intent to commit genocide as well as the substantive acts of article 2(2)(b) and, dismissed, ill-founded legal positions which stated that rapes must be systematic or widespread to be charged under crimes against humanity or that a victim's previous acquaintance with a perpetrator reduces a rape to a single isolated event.

The continued normalisation of appellate sexual assault jurisprudence as couched in the *Gacumbitsi* Appeal Judgment is positive. The question, however, is whether the *Gacumbitsi* rulings on the definition of the lack of consent element, clarify, conclude or misdirect the evolution of the crime of rape under international law?

The *Gacumbitsi* Appeals Chamber, should have used this opportunity to construct the legally viable departure from the *Kunarac* Appeal Judgment definition of rape. This would have demonstrated a rare instance when reversal is

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<sup>180.</sup> n 1 above, para 202.

<sup>181.</sup> n 1 above, para 204.

appropriately warranted. The *Aleksovski* standard reckoned that *stare decisis*, was not infallible. Departure from appellate decisions were foreseen whenever:

... a proper construction of the Statute, taking into account its text and purpose, yields the conclusion that in the interests of certainty and predictability, the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice.<sup>182</sup>

...

The Appeals Chamber will only depart from a previous decision after the most careful consideration has been given to it, both as to the law, including authorities cited, and the facts.<sup>183</sup>

The *Gacumbitsi* Appeals Chamber regrettably refrained from evaluating any cogent reasons of why it should break from its *stare decisis* position on this element of rape in the ‘interest of justice’ and unfortunately did not examine whether the *Kunarac* appellate approach was *per incuriam*. Clearly, *Gacumbitsi* reconfirms an evidentiary shift away from the legal relevancy of a victim’s verbal utterances. However, it could be seen as a mere re-iteration of the *Kunarac* Trial Chamber’s formulation that, ‘consent for this purpose must be given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances.’<sup>184</sup> When underscoring the last part of the phrase ‘assessed in the content of the surrounding circumstances’, the *Gacumbitsi* Appeals Chamber seems to strengthen the *Kunarac* approach.

The *Gacumbitsi* Appeals Chamber evaluation should have more studiously re-assessed the relevancy and applicability of the municipal law governing prison rape to the definition of rape under international law. That re-assessment should have guided the selection of general principals of municipal law that the ICTR and ICTY trial and appellate chambers invoked when repeatedly examining the definition of the crime rape. Why? Firstly, the sharply unequal positions between the domestic prisoner as victim and the guard as perpetrator mirrors the circumstances between the wartime or crimes against humanity victim and the perpetrator. The circumstances inherent in the ‘international element’<sup>185</sup> combine with the specific physical and or psychological situation of the victim to produce a power imbalance. Secondly, the prison guard’s knowledge of the institutional environment and of the victims’ status obviate the value, implied or specific, of the prisoner’s consent, whatsoever. The municipal law’s response to sexual contact between guards and prisoners do not acknowledge inquires into the victim’s consent.

182. *Aleksovski* Appeal Judgment (n 19 above) para 107.

183. *Aleksovski* Appeal Judgment (n 19 above) paras 109.

184. *Kunarac* Judgment, para 460.

185. See W Schomburg & I Petersen ‘Notes and Comments Genuine Consent To Sexual Violence Under International Criminal Law’ (2007) 101 *American Journal of International Law* 128.

The *Kunarac* Appeals Chamber, when surveying national laws, hastily acknowledged the potential similarity in the legal rationale, but incorrectly dismissed its relevance:<sup>186</sup>

... German substantive law contains a section penalising sexual acts with prisoners and persons in custody of public authority. *The absence of consent is not an element of the crime*. Increasingly the state and national laws of the United States – designed for circumstances far removed from war context – support this line of reasoning. For example, it is a federal offence for a prison guard to have sex with an inmate, *whether or not the inmate consents*. Most states have similar prohibitions in their criminal codes. In *State of New Jersey v Martin*, the Appellate Division of the New Jersey Superior Court commented on the purpose of such protections: ‘(the legislature) reasonably recognised the unequal positions of power and the inherent coerciveness of the situation which could not be overcome by evidence of apparent consent.’ And in some jurisdictions, spurred by the revelations of pervasive sexual abuse of women prisoners, sexual contact between an inmate and a correctional officer is a felony. That such jurisdictions have established these strict liability provisions to protect prisoners who enjoy substantive legal protections, including access to counsel and the expectation of release after a specified period, highlights the need to *presume non-consent*. (emphasis added)

Situations of unequal positions of power are ideal for coerciveness. Contrary to the observation of the *Kunarac* Appeals Chamber, the circumstances of prison rape are *not* far removed from the war context, especially in the face of arrests, detention or sequestration as occurred with Chantal and the other females that were chased from under the bridge or that ended up in the counsellor’s house.<sup>187</sup> If anything, the factual circumstances, were inherently more coercive than those scenarios envisioned and protected by municipal prison laws. Owing to these considerations, the irrelevance of lack of consent, as recognised in domestic prison laws, should have served the *Gacumbitsi* Appeal Chamber as a legal guideline.

The *Gacumbitsi* Appeals Chamber, should have further reviewed domestic municipal prison statutes, or municipal law that governs persons institutionalised in places such as mental health facilities, hospitals, and schools, whereby unequal positions of power exist. The Appeal Chamber then could have re-oriented the examination of the definition of rape. A more correct legal approach to the general principles of law would reveal that the *Kunarac*’s hasty dismissal of prisoner related laws created and perpetuated an unwise reliance upon common domestic rape laws. This *per incuriam* error led to the affirmation, rather than a

<sup>186.</sup> *Kunarac* Appeal Judgment, para 131.

<sup>187.</sup> Recall that the *Gacumbitsi* Trial Chamber finding that ‘under such circumstances, the utterances made by the Accused to the effect that in case of resistance the victims should be killed in an atrocious manner, and the fact that the rape victims were fleeing those they were fleeing from, adequately establish the victims lack of consent to the rapes’, if anything, evaluated circumstances more inherently coercive than that those protected by municipal prison laws. The prison laws should have served as the baseline. n 1 above, para 325.



dismissal of the lack of consent element in the crime of rape in *Gacumbitsi* and by extension to the future *ad hoc* Tribunal jurisprudence.

Moreover, if the *Gacumbitsi* Appeals Chamber overturned the *Kunarac* definition based upon a *per incuriam* error, it could have benefited from the support of other relevant provisions of the then existing and the emerging international law on the crime rape, or sexual assault inclusive of rape. For example, at the time that the judges delivered the *Gacumbitsi* Appeal Judgment, the International Criminal Court had drafted the Elements of Crimes to supplement the legal basis of the crimes in the Rome Statute. It had set forth the crime of rape as having the following elements:

- (1) The perpetrator 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 perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any part of the body.
- (2) The invasion was committed by force, or by threat of force or coercion, such as caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such a 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.<sup>188</sup>

The elements of rape to govern the ICC judicial proceedings, reneges on any legal prerequisite to establish the lack of consent. Concomitant to the appellate evolution of the elements of rape at the ICTR/ICTY, the ICC, weighed in and completely opted to eliminate the equivalent of specific consent or determination of victim's willingness and to instead give weight to the circumstances, coercive environment or a person's inability to give consent as a result of status. These ICC recognised elements of rape under international law, formulated in 2000 offer a parallel perspective that actually predate the 2002 *Kunarac* Appeal Judgment and as well as the 2001 *Kunarac* Trial Chamber Judgment. The *Gacumbitsi* Appeals Chamber was in a good position to incorporate, into their deliberation the evolving international law, especially when the ICC definition and is essentially the combined wording of *Akayesu/Furundzija* and portions of Rule 96. While the Elements of Crimes to the Rome Statute do not pretend to evince customary law as of 1994, they indicate what many states considered, in 2000, to be the definition of wartime rape or rape in situations of crimes against humanity . The ICC formulation whose language originates from the *ad hoc* Tribunal jurisprudence provide persuasive *in per curiam* support for the *Gacumbitsi* Appeals Chamber to decided to depart from the *Kunarac* definition of rape.

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<sup>188.</sup> Art 8(2)(b)(xxii)-1, Elements of Crimes.

Before the *Gacumbitsi* Appeal Judgment, the position of consent was also addressed by the UN through the Protocol to Trafficking in Persons,<sup>189</sup> which in article 3(a-d) clearly articulates a lucid position on the victim's consent in respect of the international crime of trafficking in person. It reads:

For the purposes of this Protocol:

(a) 'Trafficking in persons' shall mean the recruitment, transportation, transfer, harboring or receipts of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

(b) The consent of the victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

(c) The recruitment, transportation, transfer, harbouring or receipts of a child for the purpose of exploitation shall be considered 'trafficking in persons' even if this does not involve any of the means set forth in subparagraph (a) of this article;

(d) 'Child' shall mean any person under eighteen years of age.<sup>190</sup>

The drafters of the Trafficking Protocol contemplated the specific, individual circumstances, and refrained from a separate or aggregate analysis of the 'international element' and the individual circumstances, to determine when lack of consent could be *per se* refuted. The phrase 'abuse of power or a position of vulnerability' in article 3(a) is reminiscent of the municipal law rationale to dismiss inquiry into a prisoner's consent or lack thereof in prison rape.

The Trafficking Protocol's elimination of consent consideration is even stricter whenever children are the subject of trafficking. In those instances, irrespective of the individual circumstances and even in the absence of coercive circumstances, consent or lack of consent is totally immaterial. Just as the domestic prisoner, the mere status of being a minor vitiates any consent to trafficking. International criminal law, outside of the armed conflict or crimes against humanity recognises the status of a child, so as to impose a prohibition on acts relevant such as trafficking and sexual abuse.<sup>191</sup> There is a two-tiered

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189. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organised Crime, GA Res 25 annex II, UN GAOR, 55th Sess, Supp No 49, at 60, UN Doc A/45/49 (Vol I) (2001), *entered into force* 9 September 2003 (Trafficking Protocol).

190. Art 3(a-d) Trafficking Protocol, .

191. Schomburg (n 185 above) 139. According to the international element, irrespective of the individual circumstances or status of the victim, suffices to 'replace the notion of consent'.

approach to consent in the Trafficking Protocol, dependant upon whether the victim is a child or whether the victim is an adult, and the specific circumstances of that adult. This resonates with the ICC distinction between a person under coercion or a person who irrespective of the circumstances, is unable to genuinely consent.

The *Gacumbitsi* Appeal Chamber should have incorporated into their analysis the Trafficking Protocol's principles about the immateriality of a victim's consent. These two international criminal law approaches, the ICC's Elements of the Crime in supplement to the Rome Statute and the Trafficking Protocol's provide a legal framework that could have contributed to evaluation of the *in per curiam* tools available to the chamber when formulating a cogent rationale to depart from the *stare decisis* doctrine that engulfs the *Kunarac* definition.

At the very least, the *Gacumbitsi* Appeals Chamber could have clearly departed from the *Kunarac* Appeals Chamber when it concerned the rape of children. Given the facts before them of the 12-year-old girl who was hiding with TAQ and was raped, especially in view of the explicit provisions of the Trafficking Protocol and the thrust of the 'genuine consent' provision of the ICC's definition in the Elements of the Crimes. The Appeals Chamber could have declared that if the victim is a child as stated under international law,<sup>192</sup> this renders consent immaterial under any circumstances. The *Gacumbitsi* Appeals Chamber failure to depart from the *Kunarac* definition, would have been consistent with the interests of justice under of international law.

The *Gacumbitsi* Appeals Chamber certainly could have re-examined the rationale that prompted the first two definitions of rape under international law to forego lack of consent as an element. The *Akayesu* and the *Furundzija* Trial Chambers harbored no illusion that their definition of rape under international law was a *de novo* determination, including whether lack of consent should be considered an element. The similarity of the *Akayesu* and *Furundzija* elements of rape was the lack of consent requirement, however they differed in the construction of the other elements. As trial chamber judgments, they were not binding on each other nor on any other trial chambers.

Since *Akayesu* and *Furundzija* were never challenged at trial or on appeal with regard to the lack of consent element, the *Gacumbitsi* Appeals Chamber might have contemplated that definitions of rape under international law had foregone any inclusion of lack of consent as an element. It is impossible, to speculate what appellate jurisprudence *Akayesu* or *Furundzija*, would have generated given their two differing approaches. Irrespective of the silence of *Akayesu* or *Furundzija* on the lack of consent requirement, *Gacumbitsi* could have considered the trial chamber rationales as illustrative of sources of international law, especially in light of the multiple ICTR trial chambers non-binding adherence

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<sup>192.</sup> See art 1 Convention on the Rights of the Child, GAOR 44th Sess, Res 25.

to the *Akayesu* definition. The *Akayesu* and *Furundzija* definition presaged the approach of both the Rome Statute and Trafficking Protocol.

The cogent reasons in the *Kunarac* Appeal Judgment are clear. General principles from domestic law of prison rape, supported by the international law consensus of states, as inserted into treaty law or the interpretation of relevant treaty law, indicate, that under humanitarian law and crimes against humanity, the crime of rape does not entail lack of consent as an element of rape. If the international element, the circumstances endemic to war, crimes against humanity and the individual circumstances<sup>193</sup> cited under rule 96(ii) are tantamount to vitiating consent, the Appeals Chamber should state that they *indeed* vitiate consent and therefore, in the interest of justice remove the lack of consent element from rape under international criminal law. As Schomburg stresses, ‘consent cannot be considered the nub of crimes of sexual violence within the framework of international criminal law’.<sup>194</sup>

At its best, *Gacumbitsi* heralds a back-to-the-future attitude, meaning that it reverberates with *Akayesu*’s requirement of ‘under coercive circumstance’ or *Furundzija*’s requirement of ‘coercion or force or threat of force’ by equating non-consent with the establishment of the background circumstances.<sup>195</sup> When, however, the emphasis appeared to reside upon the phrase ‘given voluntarily, as a result of the victim’s free will,’ *Gacumbitsi*’s declaration is retrogressive and if not Victorian in its approach. Although *Gacumbitsi* intends, in spirit, for the prosecutor not to explore the victim’s verbal utterances or the victim’s conduct, it remains a half-way measure, in practice, leaving the tendency for such exploration by the prosecution as a prophylactic measure or by the defence as a cross-examination or rebuttal strategy.

The *Gacumbitsi* Appeals Chamber’s ultimate retention of the *Kunarac* approach is caught in an obviously circular perplexity<sup>196</sup> that can only be resolved

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193. Cole also interprets the inquiry into the relevant circumstances to encompass jurisdictional elements and the individual facts, stating, ‘The foundation evidence for rape testimony should therefore focus on the coercive circumstances of the attack in which the rape took place and the victims own description of events which will demonstrate the manner in which the act was against her or his will’. Cole, *Gacumbitsi*, p 22.

194. *Schomburg* (n 185 above) 138.

195. See A Cole *Gacumbitsi*, wherein the author advances the view that while the sexual autonomy and agency of the victim are a prerequisite to the evaluation of consent in the domestic content, such examination is inappropriate in the international law context since the factual proof to establish the legal jurisdiction of the international crimes, ie war crimes or crimes against humanity, and supposedly genocide, would presupposes non-consent. ‘In other words, the determination of jurisdiction amounts to a determination that the sexual act took place in a context in which sexual autonomy was absent ... (I)t is hard to think of a case where consent would be a successful defence for a person accused of engaging in sexual intercourse *as part of* an attack against the victim’s population’ p 18.

196. See K Engle ‘Feminism and Its (Dis)Contents: Criminalising Rape in Bosnia and Herzegovina’, 99 (2005) 778 *American Journal of International Law* 408.

by a cogent departure and not a further endorsement of *Kunarac*. Part of Gacumbitsi's circuitous rationale is rooted in an eroding, but seminal context – patriarchy. The *Gacumbitsi* Appeals Chamber's inability to completely concede that lack of consent is indivisible from the 'international element' in war and crimes against humanity, and the Rule 96-like circumstances, is beholding to its refusal to retreat from the patriarchal infused definition of rape sanctioned under *Kunarac*. From society's subconscious protrudes a laden query demanding proof of the (female) victim's lack of consent. This query, when displaced or rather misplaced to the international arena cannot be divorced from its patriarchal societal sub-text, even when the pervasive stereotype of wartime rape consists of marauding or victorious soldiers who haul off struggling enemy women. From those images, how could inquiries spring up about 'her' willingness?

However if the wartime stereotypes centered on the rape of the male prisoner-of-war by the male guard, the societal subtext would not only presume non-consent, but not countenance and be repulsed by attempts at inserting consent elements in to definitions of rape or such evidence into trials. In such masculine scenarios, lack of consent would be deemed legally irrelevant, because of the prison environment, the gender of the prisoner, and patriarchy's anathema to condition prison rape, especially male guards subjugating male prisoners to rape, upon utterances of willingness.

The *Gacumbitsi* Appeals Chamber refrained from assailing the patriarchal retentions. If the chamber had used the precise appellate review tools placed at its disposal, more than likely than not, it would have prompted a correction by eliminating the word 'consent and not just a re-interpretation/clarification of the contentious concept'. Gacumbitsi's reasoning would have ceased. Rule 96 would have finally benefit from a coherent reading of the elements of rape, as was originally intended.<sup>197</sup> Also, there would have been no shifting of the burden, only the ability to raise a defence, if relevant and legally viable, as with any other crime. Consent, as an affirmative defence, might have developed a narrow existence, in restricted cases, in relation to adults victims. Lastly, removal of the lack of consent element, and correcting the error in law, using the standard reiterated in *Stakic*<sup>198</sup> and *Aleksovski*<sup>199</sup>, when applied to the *Gacumbitsi* facts would not have changed the final disposition of the appeal decision.

The *Gacumbitsi* Appeals Chamber has taken an important step with respect to addressing the lack of consent, thereby strengthening the interpretation that surrounding circumstances should prevail over the verbal utterances and conduct of a victim. However, it has simultaneously exacerbated future elaboration of the

197. See PV Sellers 'The Context of Sexual Violence: Sexual Violence as Violations of International Humanitarian Law' in GK McDonald & OS Goldman (eds) *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts: Commentary* (2000) 312 - 314.

198. See text and accompanying footnote 17.

199. See text and accompanying footnote 23.

framework of rape at the *ad hoc* Tribunals. Given the available appellate review tools, another ICTR or ICTY appellate chambers would be obliged to either wait until another appellant, challenges the position.

## 4 Conclusion

The ICTR Appeals Chamber is the bulwark of modern appellate jurisprudence on sexual assaults that are an inalienable component of genocide and, along with the ICTY Appeal Chamber, a consistent reviewer of crimes against humanity. These single levels of appellate review, are an immense substantive and procedural due process advance over the safeguards of the Nuremberg and Tokyo Tribunals. What constitutes access to justice in international law has been redefined and placed into practice. Recourse to the international appeals process based upon evidence of sexual crimes is germane to normalising this *de novo* standard of practice.

The *Akayesu*, *Musema*, *Semanza* and *Gacumbitsi* appellate judgments fall squarely into the norms of the appeals process. Each has endured appellate review to determine if errors of law or errors of fact occurred in relation to the interpretation of crimes, as well as issues of witness credibility, judicial impartiality or procedural abuse or length of sentences. Convictions have been sustained, acquittals newly entered, reversals of some acquittals and re-imposition of sentences, in short, the ordinary conduct of judicial affairs. The seamless intersection of sexual assault appellate jurisprudence with appellate jurisprudence resolves as much around grounds such as the application of the liability requirements of ‘instigation’ as well as the examination of circumstances that vitiate consent. The sheer breadth of the appellate jurisprudence testifies to Rwanda’s sexualized genocide. This jurisprudence is a Rosetta Stone for other international and national courts.

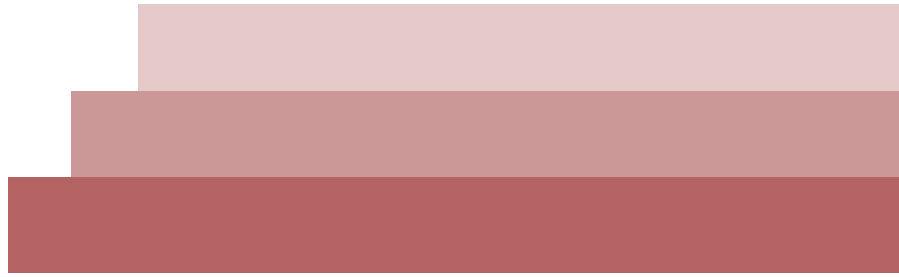
Still, the breadth and depth of this appellate jurisprudence can only hesitantly be denominated a ‘completed’ assessment of the judicial pronouncement on the Rwandan genocide. In addition to the selection of cases, witnesses and charges, the prevalence of omissions, during the investigation or during the trial phases could ultimately diminish the appeals chamber’s very access to the evidence and witnesses that it requires to execute its mandate to examine the appellate grounds arising from the law and facts of sexual assault evidence. More crucially, the access to justice for survivors of sexual assault crimes, for the accused and ultimately for the international community as a whole reposes upon the functioning and the competent recourse to the appellate process. The appellate chambers, in turn, must responsibly exercise their duty to utilise the appellate standards of review to render decisions that embody the ‘interest of justice’, especially when delivering pronouncements on sexual violence. The *Akayesu*, *Musema*, *Semanza* and *Gacumbitsi* appellate judgments, even with their flaws, should be a harbinger against the tendency of history to

forget or to relegate to insignificance crimes committed, in their majority, against women.





# 5



## **Arenas of anguish – tracking multiple, perpetuating trauma in HIV/AIDS and gender-based violence intersections**

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*Julie Stewart*

## 1 Introduction

My title seeks to capture that both HIV and AIDS and gender-based violence, separately and in combination, produce multiple perpetuating traumas. Further, there are attendant stressful and alienating processes of naming and blaming, ostracising and exclusion. While listing the interconnected implications of gender-based violence and HIV and AIDS at the personal, family, community, local and national levels is comparatively easy, assessing how to deal with these implications is a very different matter.<sup>1</sup>

I argue in this paper that there are sites or arenas into which gender-based violence and the spread of HIV intrude. These sites are reflective, in a seemingly contradictory manner, of a societal and economic breakdown on the one hand, and the persistence of patriarchal and cultural norms on the other. These sites allow victims to be created because of unaddressed social and economic problems or because there is inadequate attention given to confronting and removing the cultural and social factors that allow victims to be created. Furthermore, these sites do not exist in isolation; they are broad-based and interlinked. Inaction, indifference, ignorance, inequality, inequity, inertia, and indecision allow gender-based violence and the spread of HIV to interconnect and 'interbreed'. It is also institutional, as it is not just the victim who is affected, but also the social and economic fabric in which the victim is embedded that is affected and infected. At whatever level one examines the impact of the intertwining of gender-based violence and the HIV/AIDS epidemic, it is evident that there are significant institutional costs to be met, which are both financial and human. Therefore, responses to the impact of HIV and AIDS and gender-based violence have to be broad-based. They have to stretch to all corners of society, and they have to embrace everyone and every institution; a pervasive problem requires pervasive solutions. As this paper demonstrates, only a vigorous human rights analytical and action oriented approach can provide a sufficiently wide conceptual sweep to

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1. Perhaps it was my own lack of diligence that was the cause but I found it extremely difficult to find sources that discussed in depth the links, and implications of those links, between gender-based violence and HIV and AIDS. Women and Law in Southern Africa Research Trust (WLSA) has been carrying out in all its seven countries studies into HIV and AIDS and the law. Gender-based violence and spread of HIV are topics that do feature in those studies. However, the studies are as yet not published. There are gender-based studies that highlight the need to look at the HIV and AIDS pandemic through a gender lens such as V Tallis *Gender and HIV/AIDS: Overview Report*, Bridge, UK (2002), <http://www.bridge.ids.ac.uk/reports/CEP-HIV-report.pdf> (accessed 9 June 2007). The Pan-American Health Organization draw a connection between violence and abuse and HIV infection – and raise the need to for integrated research and response programmes dealing with both issues – PAHO Gender-based violence, and HIV/AIDS, [http://www.paho.org/english/ad/ge/Viol-HIV\\_FS0705.pdf](http://www.paho.org/english/ad/ge/Viol-HIV_FS0705.pdf). (accessed 9 June 2007). A broad-based bibliography dealing with gender-based violence and HIV and AIDS is to be found at the CADRE site <http://www.cadre.org.za/pdf/VAWA%20biblio.pdf> (accessed 9 June 2007).

encompass the action that needs to be taken. Such a sweep also has the potential for demanding accountability at national and regional government levels.

## 2 Obvious problems, obvious solutions?

At a simplistic level, breaking the transmission cycle of HIV is the first and most critical step in halting the pandemic. Providing anti-retroviral treatment (ART) to all infected persons as and when they are required is the appropriate medical response to ensure that adverse long-term social and economic consequences of the pandemic are minimised. Public education campaigns that induce behavioural change and raise awareness of the virus, methods of transmission, and protection against the virus are obvious interventions.

Similarly, undertaking legal, educational and social action to drastically reduce gender-based violence is an obvious response required from governments, communities, families and individuals.<sup>2</sup> That the failure to adequately address both of these socio-health issues creates arenas for them to intersect and proliferate is likewise obvious. That gender-based violence creates opportunities for HIV infection through criminal acts such as rape and statutory rape is widely recognised. That gender-based violence in the forced marriages of women to men already engaged in polygamy and the taking of multiple sexual partners heighten the risk of transmission of HIV is not in dispute. That gender-based genital mutilations potentially increase the risk of contracting HIV,<sup>3</sup> and that gender-based violence within marital or intimate partner relationships diminishes the capacity of women to control their own sexuality and to insist on safe sex practices are also obvious. Moreover, it is well-known that gender-based violence triggered by war or civil strife is a significant path through which the transmission of HIV is facilitated.<sup>4</sup> Gender-based violence, whether domestic, national or community-based, aids the transmission of the virus.

The medical, psychological, social and economic consequences of these realities lead to devastated and overburdened families, premature deaths, estranged and physically dislocated spouses and parents, and children growing up

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2. See on the link between violence and health, World Report on Violence and Health, EG Krug *et al* (ed) World Health Organization (WHO) (2002) <http://whqlibdoc.who.int/hq/2002/9241545615.pdf> (accessed 11 June 2007).

3. See UNIFEM 'Facts and Figures: violence against women' [http://pagebang.com/cgi/nph-proxy.cgi/111011A/http/www.unifem.org/attachments/gender\\_issues/violence\\_against\\_women/facts\\_figures\\_violence\\_against\\_women\\_200611.pdf](http://pagebang.com/cgi/nph-proxy.cgi/111011A/http/www.unifem.org/attachments/gender_issues/violence_against_women/facts_figures_violence_against_women_200611.pdf) (accessed 11 June 2007).

4. UNIFEM (n 3 above); also see UNIFEM 'Facts and Figures on HIV/AIDS' [http://pagebang.com/cgi/nph-proxy.cgi/111011A/http/www.unifem.org/gender\\_issues/hiv\\_aids/facts\\_figures.php](http://pagebang.com/cgi/nph-proxy.cgi/111011A/http/www.unifem.org/gender_issues/hiv_aids/facts_figures.php) (accessed 11 June 2007).

in child-headed households.<sup>5</sup> There are arenas of anguish – deep human anguish where the trauma of infection and violence are cycled and recycled in perpetual motion. The realities are known and stark. The frustration in trying to develop solutions is that, at a superficial level, they too are obvious: Curb the spread of HIV and drastically reduce the incidence of gender-based violence. So why do they continue?

### **3 Creating the victim**

Choosing, whether to deal with the creation of victims or the sites where they are created, of itself initiates a circular analytical process, as the two are deeply interlinked. However, for the purposes of clarity, I will start with the creation of the victim and then turn to the sites where such creation is facilitated. Taking a ‘victim’ perspective is not intended to imply that victims are either helpless or necessarily passive in their responses. The victim perspective shows that being a victim may be the result of external forces or factors that predispose individuals to becoming victims.

Potentially any person engaging in sexual intercourse, exchanging body fluids, receiving blood transfusions, or being involved in sexual or quasi-surgical rituals related to rites of passage is a potential victim of HIV transmission. However, none of these situations themselves give rise to infection with HIV. As a general proposition, exposure to HIV can be minimised through practicing safe sex, controlling the circumstances and situations where there is a risk of transmission of the virus, using appropriate prophylactic measures when women give birth, and avoiding cultural practices that increase the risk of gender-based violence. The availability of such measures indicates that infection is not inevitable; exposure to the virus has to be facilitated. Thus it is feasible to argue that victims of HIV transmission can ‘be created’ through external factors that expose individuals to infection with the virus. If external factors create the victim or increase the likelihood of an individual becoming a victim, elimination, or at least improved control of those factors should reduce the risk of infection.<sup>6</sup>

Within such a framework, gender-based violence in its many manifestations, as discussed elsewhere in this volume, can have a profound effect on the extent to which individuals can control and regulate their own sexuality and the extent to which they can determine on what terms and conditions to have sexual

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5. Statistics on HIV infections and on gender-based are available but the meshing of the two does not seem to be recorded, yet it is obvious. Partly this can be explained by the way in which both are treated, and of course because the instances of gender-based violence that create pre-dispositions to HIV infections are frequently hidden in the assessment of HIV and AIDS cases and vice versa. Rape cases where there is a risk of HIV infection should reveal some such cases.

6. See WHO (n 2 above).

intercourse. Thus, I argue that it is important to look at individuals not merely as victims of gender-based violence and/or HIV/AIDS, but as the product of a multiplicity of factors. The questions that need to be answered are: Who is vulnerable? Why are they vulnerable? Who and what contributes to their vulnerability? A similar set of questions needs to be asked in relation to the violator or perpetrator: Who violates? Why do they violate? Who or what contributes to their act of violation? Who sanctions their violation?

Many victims are made vulnerable by the conditions in which they are forced to live, the cultural milieu into which they are born, the chronic cumulative effects of economic privation, and the failure to access critical resources such as education, employment, development related resources and adequate health care. Realistically it must be acknowledged that everyone, regardless of gender and age, is affected. Nevertheless, because of their relatively greater potential for exclusion from self-development opportunities and self-actualising resources, females are more likely to be vulnerable and powerless. Women in disempowered situations are additionally at risk of the escalating effects of psychological disempowerment by their partners or resource-controlling family members. Loss of the notion of self-worth can leave women and the girl child vulnerable to HIV transmission, because they do not perceive themselves as having the right to control their own lives or sexual activity.<sup>7</sup> Consequently, they may shy away from, or even resist self-protection measures. They may also perceive themselves as having few options for survival other than acquiescence in social and cultural practices that increase their vulnerability to HIV infection. Such fatalism causes them to tolerate domestic and other forms of violence directed at them. Again, economic vulnerability or perceptions of economic vulnerability creates opportunities for the sexual harassment and sexual exploitation of women. Women may feel compelled, as a survival strategy, to comply with demands for sexual intercourse from superiors in employment situations and from those who control access to critical resources such as land, food, water and fuel.

If they were prompted and assisted to undertake an analysis of their own capacities and resources, women might realise that they are not as dependent as they believe. Nonetheless, they endure gender-based violence and a heightened risk of HIV infection. Women are forced to believe that they have no viable alternative in accessing resources for their own survival and that of their children, other than to comply with social and cultural tenets of control over the female body and female sexuality. The perception of the female body as a source of labour, not for the woman herself but for the males in her family, in conjunction with the appropriation of female sexuality and reproductive capacity, leaves women without control over the critical resources that would allow her to resist

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7. See WLSA studies forthcoming (n 1 above).

or walk away from situations that facilitate gender-based violence and HIV transmission. Women's perceptions of their economic and social dependence on male partners within 'marital' relationships<sup>8</sup> lead to women's acceptance of male promiscuity. Such promiscuity involves a heightened risk of transmission, but women's fears of rejection and the possible loss of resources constrain her from demanding safe sex.

Cultural regulatory measures that deny females control of their own sexuality expose women and girls to harmful and invasive practices, which heighten the likelihood of unsafe sex. Women continue to be regarded as the sexual property of males. Practices that control women's sexuality, such as female genital mutilation, virginity testing, seclusion and possessive control, create arenas for increased vulnerability to HIV infection. Vulnerability to transmission of the virus is increased because women are psychologically controlled and physiologically more susceptible to HIV infections.

Women who have been subjected to female genital mutilation report that they do not obtain pleasure from sexual intercourse. For those women, sexual intercourse becomes a mere vehicle for reproduction, which fulfills their female generative role. Such women report that their husbands/partners seek satisfying sex elsewhere, which heightens the risks of transmission of HIV when intercourse is engaged in for procreative purposes.<sup>9</sup> Women's roles as procreative vehicles for their husbands, along with the pressure that women face to produce children, especially sons, for their husbands' lineage and for securing their own status within their marital and natal families means that, unless women have already fulfilled these obligations, sexual intercourse is inevitable and exposure to HIV is likely.<sup>10</sup> Even without gender-based violence at the time of intercourse, skin in the genital area that has been cut, sewn and scarred is more likely to tear during sexual intercourse; such tearing facilitates transmission. Customary or religious marriage of young women, especially to older and more experienced men, also exposes women to increased risks of HIV transmission. Younger women are less able to negotiate safe sex and are often ignorant of safe sex practices. If women cannot determine the number of their husbands' past sexual partners, negotiate safe sex, or realistically expect that there will be a limitation on their husbands' future partners, they are exposed to a heightened risk of infection.

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8. Here the 'marital' relationship includes both marriages under customary law and civil law.

9. E Ondieki, *Culture and traditions among the Abagusii community influence the practice of genital mutilation: grounded notions and perspectives about male and female attitudes on how to maintain cultural identity without a cut* (2006) Unpublished Master's dissertation in Women's Law programme, University of Zimbabwe (I, personally, was present when these views were graphically and vigorously expressed by large numbers of women in the community).

10. The implications of this for women who have survived to the end of the period of their procreational obligations may be saved from further risk of infection through this route – not that this is in any way a justification of the practice – as the risk of not surviving in current circumstances is increased by the vulnerability inherent in such practices.

Risk of exposure to HIV is increased by a variety of circumstances that are still common in communities. One such circumstance is widow cleansing, where a woman is expected or sometimes coerced to have sexual intercourse with a member of the deceased husband's family to protect her rightful inheritance. Even if a woman complies with the ritual, her consent may not be genuine. She may believe that she has no alternative route to securing access to the resources that she needs to continue her life. The gateways of access to these resources are controlled by others who are in positions to demand and enforce her compliance with the rituals.<sup>11</sup> Another circumstance is when women are brought into marriages as surrogate procreators if a first wife is barren. Women are also at risk of HIV transmission where males are used as surrogate sperm providers. Women's consent to such practices is not always true and informed, because they are often coerced into compliance by other family members. Such cultural rituals and practices that women often cannot refuse put women at risk; this risk might be lessened under different social imperatives.

Victims are also created where individuals are uninformed about HIV/AIDS because their parents, religious leaders, educational authorities, traditional leaders and governments are reluctant to genuinely and informatively warn individuals of the risks involved in unsafe sexual practices. Victim creation is perpetuated when the state hides behind cultural relativism, protects adverse cultural practices, and fails to enforce human rights provisions. This failure on the part of the state may stem from the fears of alienating its perceived power base, which is rooted in patriarchal perceptions of self-interest and control over families and family-based resources. However, the state has an obligation to engage with these 'forces' in an informed dialogue that is directed at agreed and acceptable social and cultural reforms.

#### **4 Be our guest – creating the sites and opportunities: Subtitled – open sites for gender-based violence and HIV/AIDS transmission**

This section of the paper postulates that there are others who are wittingly or unwittingly complicit in the actions of the violators. This ought not to be construed as excusing violators or perpetrators because someone else is 'to blame' for their abuse of other or their lack of personal control. Rather, this issue is approached from the perspective that, in trying to ascertain how to tackle the arenas of anguish, it is important to understand who or what actively sanctions or who fails to adequately address both continued gender-based violence and HIV

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<sup>11.</sup> I return to this issue on a number of occasions later in this paper, because although superficially choice of action or legal protection ought to be available, they frequently are not because of economic decline and national abrogation of protective measures for the individual citizen.

transmission. The complicity lies in implied or active sanctioning of risky behaviour, an implicit approval of harmful cultural practices, pandering to male machismo, and dominant perceptions of male sexual and power drives. Sites of explicit and implicit approval or sanctioning of male behaviour that heightens the risk of or allows the occurrence of, gender-based violence are more frequent than might be initially envisaged. In addition, female collusion to gender-based violence at these sites should not be overlooked.

War, insurgencies, economic decline, and failures in governance and accountability on the part of the state all lead to the erosion of security, protection and livelihoods for individuals. This erosion exposes and presents multiple sites at which gender-based violence can and does take place.<sup>12</sup> For example, one of the most savage forms of gender-based violence, the rape of women and girls, is a recognised corollary of war and insurgency. Rape and other forms of brutal violations of women and girls in war and insurgencies are long-standing forms of subjugation, control, domination and ethnic reshaping. Rape committed in war has finally been recognised as a form of genocide, as evidenced in a recent decision by the International Criminal Tribunal for Rwanda in *the Prosecutor v Mikaeli Muhimana*.<sup>13</sup> The *Muhimana* case pointed out that women who were repeatedly and savagely raped fell victim to the HIV/AIDS scourge.<sup>14</sup> The victims of such rapes, as well other women who are raped, face family rejection, dislocation, ongoing re-traumatisation, the recycling of their victim status, and a deterioration in their health and ability to cope. Such women, as the only survivors of their family, may be profoundly depressed. In the *Muhimana* case, the defence argued extensively that some of the female victims of violence and rape continued to live with the accused. The plausible explanation for this is that these women acted in a framework of depressed compliance.<sup>15</sup>

Even if the fact of the rape does not emerge, in those cases where rape was not reported or pursued in war crimes trials or in criminal prosecutions, the women victims are liable to be stigmatised as HIV carriers and transmitters. They too face the risk of rejection and ejection from their families. They often are ostracised by communities, and they remain vulnerable; they are recycled into arenas of vulnerability, and they are at an increased risk of both gender-based violence and re-infection with HIV. Social and economic vulnerability may push them into activities that create a greater risk of gender-based violence and transmission of the virus, such as commercial sex work. They are victims of both HIV and gender-based violence, as are their children and sexual partners, because the violence created a site for exposure to HIV, which for the women and their

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12. UNIFEM (n 3 above).

13. *The Prosecution v Mikaeli Muhimana*, Case no ICTR-95-1B-T.

14. Renifa Madenga, one of the prosecutors noted that ironically those who, it seems, infected the women and were subsequently arrested and tried for the genocide and rapes are in receipt of ART while the victims have been left without any assistance.

15. R Madenga *Handling of survivors of rape as a crime against humanity: The gender perspective in the Rwandan genocide tribunal-Some lessons from the Muhimana case* (2005).



families generates anguish and distress. Children born of such rapes or in subsequent pregnancies are at risk of HIV infection through mother-to-child transmission. The tenuous lives that these children live and the parental stress that these children endure produces yet more anguish. This is as much the case for a woman raped in war or insurgency or in a refugee camp as it is for a woman raped by a family member.

Dislocated, disrupted and dysfunctional families are open sites for gender-based violence and HIV transmission. The migration of some family members in search of more favourable economic opportunities often leads to the creation of new sexual partnerships. Sexual partnerships, whether casual or long term, increase the risk of HIV infection, as new sexual partners are introduced into the family pool.<sup>16</sup> For example, a man who returns after being away for an extended time is likely to be resentful of a wife who declines or attempts to decline to have sexual intercourse if he refuses to use a condom. Her declining to have intercourse with him may be interpreted as impugning his faithfulness if he has been faithful, or challenging his self or culturally-perceived rights to control and access sex without any hindrance. Her refusal may also be interpreted as evidence of her own unfaithfulness. With either interpretation, the man may resort to violence, which could culminate in rape. There may be statutory provisions that criminalise marital rape, but women are reluctant to bring such allegations against their spouses.<sup>17</sup> This reluctance may stem from social pressures and the fear of ostracisation or from the fear of exclusion from access to resources that are controlled by the husband. The immediate cause of violence, which could result in HIV infection, is the tension between the couple over sexual access and control. However, the underlying triggers are the dislocation and separation caused by economic necessity.

Particularly heinous forms of gender-based violence take place when very young girls, especially those chosen at a very young age to ensure that they are virgins, are raped at the instigation of traditional healers and herbalists by men who are believed to be suffering from HIV/AIDS, on the basis that this will effect a cure. Gender-based violence in such cases is a reflection of the power that males think they hold over the bodies of women and girls. This perception is sanctioned by those holding cultural power. Whereas the immediate perpetrator may be the male who rapes the girl child, there are multiple perpetrators, including: the 'traditional healer' who recommends the course of action; the state, which fails to undertake public education to alter misconceptions about curative regimes and myths and fails to provide health interventions such as ART; and those who collude with the perpetrator in providing access to the girl child who is raped.

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16. J Stewart & E Sithole *Pregnancy and childbirth joy or despair: Women and gender-generated reproductive crimes of violence* (2005).

17. V Nkiwane *Marital rape: What are the consequences of removing the husband's immunity from prosecution?* (2000) 71 (Master's dissertation in Women's Law programme, University of Zimbabwe).

It is not extreme to treat the state as a player in the gender-based violence and HIV transmission arena. The state, in its failure to provide legitimate and realistic developmental, employment, educational and social opportunities for its inhabitants, has to be seen as partly accountable for the arenas that instigate and perpetuate gender-based violence and give rise to opportunities for HIV to be transmitted. Gender-based violence is also perpetrated as a result of social and economic pressures. The failure of the state to provide services to manage the consequences of the epidemic causes women and girls to give up educational and employment opportunities to care for the sick and dying at home. Often these important caring roles are performed under seriously resource-limited circumstances and without proper advice or facilities to appreciate the risks and minimise the potentially adverse consequences.

Although there have been attempts to use the law as a regulatory mechanism in relation to both gender-based violence and transmission of HIV, generally, the law has not been and is unlikely to be an effective tool to control HIV transmission. In a manner similar to gender-based violence, the role of the law is reactive. It attempts to punish after the event and perhaps in an allegorical fashion by sending out a deterrent message. If such prosecutions were regular and effective, they might serve a deterrent purpose, but prosecutions in this area are notoriously ineffectual. Prosecutions often fail for the want of clear evidence that the accused person knew or must have known at the time of the offence that he (or she) was HIV positive or had AIDS. Under-resourced courts, police forces and prosecution departments lead to delayed and ill-prepared prosecutions. Trials lapse and accused persons escape prosecution, which leads to a failure to send out the deterrent message. Where trials take place, sentences imposed on those convicted of sexual offences may be relatively light. Allegations of rape that are made by adult women tend to be treated with circumspection or prurient ‘beer hall’ style humour at police stations. Women reporting rapes become a subject of jest and ridicule. Likewise, charges of domestic violence are treated with a lack of interest and are met by cultural notions of men’s rights to control women in the domestic sphere. Thus, women are discouraged from actively seeking police or legal intervention in cases of gender-based violence such as rape or sexual assault, because such indifference or derision becomes common knowledge to most women.

Women may also be complicit in permitting, allowing or sanctioning gender-based violence against other females. Female family members who are aware of violations of young girls or refuse to recognise the violations are colluders in gender-based violence and the potential transmission of HIV. They may refrain from intervening or taking action for the same reasons as women who are themselves violated, such as the risk of rejection, exclusion from access to resources, or fear of family opprobrium. Thus we return to the sites where these offences fester and are not treated with the seriousness or concern that they deserve. We forget that circumcisors in communities have a vested interest in the continuation of the targeted cultural practices. We also overlook that the

traditional healers, who sanction the rape of girl children as a curative option for HIV infection, profit financially from this recommendation. This is their livelihood. As circumcisors and traditional healers, they have status and community recognition, which are not easy to abandon. These economic and societal motivations should be factored into any reform or dialogue process.<sup>18</sup>

‘Be our guest’ in a sense of creating sites, where gender-based violence spreads and facilitates HIV transmission, happens where there is severely limited economic opportunities and, or where individuals are forcefully displaced because of conflicts. Famine or crowding of people together with sustainable income generating opportunities, creates dependency on food and other aid. In turn, the dependency leads to power imbalances and potentially exploitative situations.

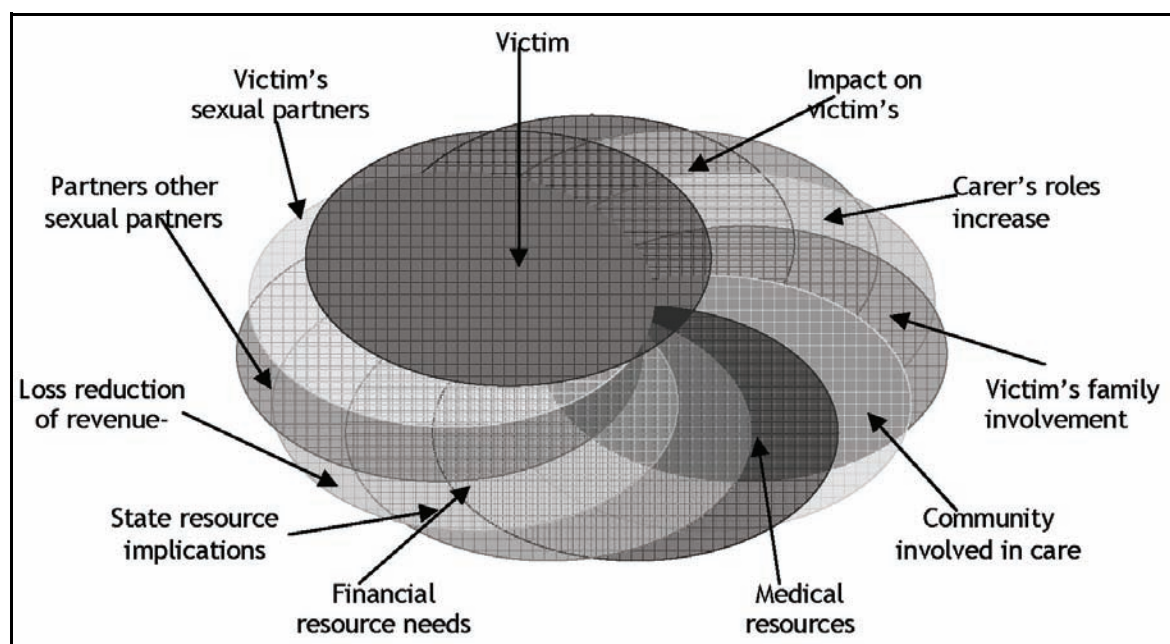
## 5 Not just the ‘victim’ – counting the cost

In conceptualising the interactions of gender-based violence and the HIV/AIDS pandemic as creating arenas of anguish, I was responding to an awareness that there are many victims beyond the immediately perceptible victims. It became important to ask: Who are the victims? At the risk of sounding alarmist, the answer is ‘we all are’. Even if we are not victims of gender-based violence or HIV transmission directly, we are spin-off victims. Each abused and infected person exists in a wider social and economic framework. Inevitably, we are all drawn into the social and economic costs of the pandemic and into the consequences of the intersections of the pandemic and gender-based violence. This can be illustrated by the diagram below, which seeks to show how just one HIV infection that emanates from sexual violence can have profound implications not only for the individual, but for the family, community and nation.

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<sup>18</sup>. E Ondieki (n 9 above).

Figure 1 – Interconnected implications of victims of HIV transmission



To fully comprehend the effect of the intersections, it is necessary to visualise them as layered, interconnected and intersected complex and perpetually recycling sites of trauma and potentially re-traumatising situations. Each HIV infection, however contracted, has protracted and extended implications not only for the patient, but for the patient's family, the community, and the nation as a whole. Each infection means there is a need for medical and financial interventions. The ART will, in the normal trajectory of the infection, eventually need to be sourced. Financing the ART requires private, family-based financial resources, medical aid funding, and state or donor-based financial resources. Each potential mode of funding is constrained not only by the availability of the necessary financial resources but, even more critically, by the inevitable redeployment of resources from the provision of other material and human activity based resources. Money that is diverted to HIV/AIDS related medication and care might otherwise be utilised for the prevention of other diseases and for general economic and developmental purposes at the personal, family or national levels. Without the caring 'obligations' created by the epidemic, family-based care givers might otherwise be free to benefit from educational opportunities, take up or continue employment, and engage in productive agricultural or other forms of work.<sup>19</sup>

19. E Sithole, 'Women's burden: women, home-based care and HIV/AIDS in Zimbabwe' in A Hellum *et al* (eds) *Human Rights, plural legalities and gendered realities: Paths are made by Walking* (2007).

When the state assumes the financial and medical responsibility of dealing with HIV infections, there is an inevitable decline in the overall provision for other medical needs. On the other hand, when the state substantially declines to deal with or severely under-funds appropriate and necessary interventions to curb the pandemic's prevalence, the state's overall revenue generating capacity declines, because productive members of the society are either dying or busy tending to the sick. At each level more 'victims' are drawn in, and the cumulative effects of the intersections and interconnections become more significant, not only for the individual, but also for society at large.

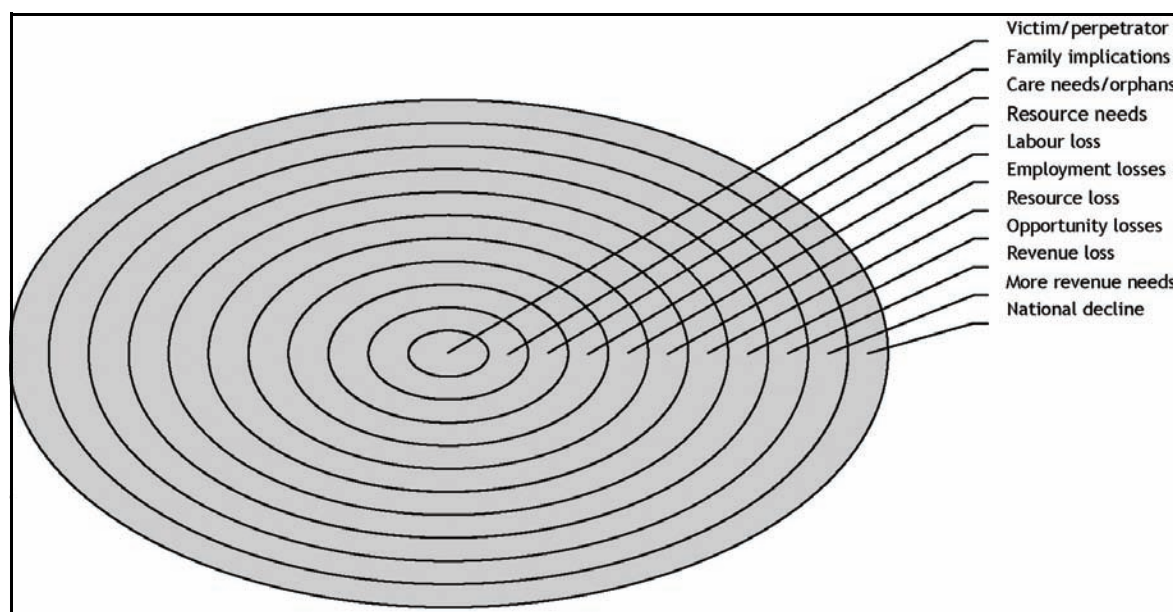
Caring roles that are assigned to family members, often young and teenage girls, interfere with and distract them from educational opportunities. If they miss vital elements of education, ultimately they may be less productive and miss out on income generating or employment opportunities in the future.<sup>20</sup> Older women, especially in rural areas, end up taking on caring roles with severely limited resources. Such resource constraints may result from limited family resources from the start, but they also may result from the drain that the care itself causes. Children who are left under such circumstances are likely to receive less adequate education, health care and nurturing than are their urban counterparts. Communities have tried to take on caring roles when there are child-headed households and when there are children in need of assistance but these roles constitute a heavy drain of resources and personnel. There is an acute awareness that the task is overwhelming.

The effect of one gender-based violence act, let alone many acts, which leads to HIV transmission and onward transmission, needs to be visualised as an integral part of the short and long term impact of the epidemic. It impacts not only the victim or the perpetrator connections, but the entire social and economic environment in which they live. The diagram below is a simplified representation of this ripple effect. To fully represent the effect would require replicating it and the intersecting and overlapping effects, as in figure 1. To continue the ripple analogy, once the ripple reaches the outer edge of the pond, there is a back wash. The impact of reduced resources and the reduced capacity to cope with the pandemic continues to diminish the capacity to manage the outcomes of the interactions of HIV and gender-based violence. The cycle continues and replicates over and over again.

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<sup>20</sup>. As above.

**Figure 2 – Ripple effect of gender-based violence and HIV/AIDS intersections**



Such representations present a daunting challenge to any activist or potential intervener. Figure 2 shows a bleak prospect of the potential spread of the problems and intersections across all sectors of the nation and the economy. Figure 1 shows how this impact spreads vertically and horizontally through generations within families. Overall national economic decline leads to an individual's loss of potential, resources, educational and health care bases dwindle and the causative factors are recycled to produce a new and perhaps an even more vulnerable set of victims and more desperate or savage perpetrators driven by their own increasing frustrations, fears and unmet expectations.

Portrayed in this format, it becomes evident that purely legal and medical interventions are, in isolation or in combination, inadequate. The social, cultural and particularly the economic dimensions and implications of the intersections have to be charted and addressed vigorously. The economic conditions that perpetuate vulnerability have to be reversed. The cultural and religious precepts that sanction gender-based violence have to be engaged through a culturally and religiously informed and reforming dialogue. Awareness of the consequences of gender-based violence in the form of problematic cultural practices has to be created. There is an aftermath for the families of women who have been subjected to gender violence, for the families of women who have been subjected to early marriage, and for families who decline to support women who are subjected to domestic violence. The families drawn into the long process of caring for the infected victim and taking on long term care of children who are orphaned are ultimately victims of the initial gender-based violence and its social sanctioning.

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A woman who has been rendered especially vulnerable to HIV transmission because of genital mutilation may become dependent on the very family that sanctioned or acquiesced in her mutilation when she actually becomes infected.

Conceptualising the creation of the victim, the sites of violation and infection, and the broader implications of the impact of the intersections of gender-based violence and HIV and AIDS leads to the ‘so what question’- what to do and how to do it.

## **6 Do something – a human rights approach, perhaps?**

The general thrust of this paper has been to try to ‘dissect’ and analyse the interconnections between gender-based violence and the spread of HIV. By doing so, the paper also identifies possible interventions and sites of intervention to break the cycles and limit, as far as possible, the arenas of anguish.

In thinking through the various stages of this process, it is critical that our first reaction-level perceptions of ‘who is affected and how’ have to be significantly broadened. It is important that our conceptualisation of the issues goes beyond women. In particular, we should think beyond the usual gendered and constrained paradigms of regarding women as the primary victims. This is important, as thinking on gender-based violence tends to be focused on consequences for women, especially those who are in their child bearing years. Whereas HIV/AIDS is seen as affecting a broad spectrum of the population, the bulk of the concern is aimed at the primary sufferer. Those who are not directly infected or affected, for instance family-based care givers, relatives who take on child care roles for children who are orphaned, care agencies, and medical resources and facilities, are often sidelines.

If, however, we focus on the broader implications of HIV/AIDS and gender-based violence, it becomes immediately apparent that both have an impact on women of all age categories, including children and men of all age groups. Considering the all-pervasive implications, it is obvious that it is a broad-based crisis that ought to compel drastic and far-reaching responses. That it seems not to produce these responses is a matter of the gravest concern.

Ways to compel states to act need to be found; ways to alter budget priorities to focus on the adverse consequences of the multiple spin-offs and spin-downs from gender-based violence and the transmission of HIV have to be devised and implemented. The specific responses required lie beyond the scope of this paper. However, whatever the required responses are, they have to be situation and context-sensitive.

This paper postulates that a holistic research and analysis of gender-based violence and the spread of HIV reveal that there are multiple ‘social’ sites through which adverse, often devastating, consequences of the intersections of gender-

based violence and HIV/AIDS epidemic proliferate. Unpacking the proliferations and exponential consequences of these intersections requires the formulation of a comprehensive set of research questions to be explored and a concomitant thorough analysis of the data collected in response to those questions. No one doubts that this takes time, but rushing in to address the problems with anything other than immediate medical and interim financial or aid assistance probably dooms the problems to recycle endlessly.

It seems logical that the first level of exploration should be a country and situation-specific investigation of the nature and form of the intersections between gender-based violence and spread of HIV and who the likely immediate victims and perpetrators are. Although there are likely to be similarities across countries, there will be significant local specificities. It is critical to understand that globalised non-culturally aware, or non-culturally and religiously-sensitive, responses are highly problematic and may be counter-productive, as they foster resistance and backlash. In particular, for the purposes of highlighting the broader consequences of gender-based violence, there is a need to carefully map out, country or location-specific, the ‘spin offs’ from the interactions in the intersections. There is also a need to identify who, additionally, is affected at each spin down (trajectory) from the intersections/interactions. An additional reason is that it is important to identify how the spin-off and spin-down victims of these interactions are affected. Following on the first four questions, the implications for action and intervention at these multiple sites must be considered. There is also a need to analyse how these interventions should be formulated and how the principles underlying their formulation should be articulated. Furthermore, how these interventions can be given legal and/or policy based substance must also be determined, and a situation-sensitive framework for translating these responses into actions needs to be considered. Lastly, there is a need to consider monitoring and evaluation strategies as a final element in the process.

As an activist lawyer and researcher, I am aware of the need to respond to issues while simultaneously conducting research. A call for research as outlined above is not and must not be interpreted as a delaying tactic, but the epidemic has been with us for 20 years and is proliferating. The implications broaden for all of us, but there seems to be no truly viable or long term interventions, and those that are made are often sporadic, limited and ineffective.

At the core of obtaining effective long term interventions is the need to make governments act. Governments need to be at the centre of intervention initiatives and efforts, and they should be held accountable for the efficacy of the interventions. This is not to suggest that others should not act. However, the breadth and the scope of the problem is such that governments have to respond multi-sectorally and nationally. Action in one sector, such as provision of ART, can be negated if conditions in other sectors continue to facilitate transmission as sites



of gender-based violence. Civil strife, disruption, war and economic insecurity all carry high risks of undermining even the most comprehensive ART programmes.<sup>21</sup> Home-based care programmes that have been inadequately set-up, informed or serviced become traps for co-opted family members who risk infection, loss of opportunities and downward spiralling in their own lives.

Timid and tentative information dissemination and awareness campaigns around HIV/AIDS and gender-based violence issues should not be tolerated; using euphemisms and vague exhortatory comments about sexual abstinence, and declining to be frank in the expression of risks and implications are not effective techniques. Through the combined actions of affected ministries, governments have to mainstream HIV/AIDS epidemic and gender-based violence prevention and amelioration initiatives. Critically, budgetary allocations have to be prioritised to address the epidemic. The increasing practice of conducting gender needs-oriented budget evaluations and demanding that gendered budgets be evolved to address gender imbalances are perfect pressure points for the inclusion of demands for the adequate financing of initiatives to address gender-based violence and the spread of HIV.

Failure on the part of governments to take adequate comprehensive action has necessitated or facilitated the intervention of other players. Sometimes, this is beneficial, but it may also leave space for ‘quackery’ and ineffective remedies to which individuals fall prey. It leaves space for spurious curative myths and profoundly dangerous ‘curative’ practices predicated on those myths to flourish. Failure to explain transmission of HIV and how it causes debilitation and death leaves space for the continuation of cultural investigations into causes of death, invoking allegations of super-natural causes or witchcraft. Allegations that are levelled against ‘wives’ triggering gender-based violations of the widow or widows’ rights to care and support derived from the estate of the deceased male, who may have been the initial source of the infection. Failure on the part of governments to provide ART, to support effective, well resourced and informed home-based care programmes, and to address the impact of orphans and their caring and educational needs results in the absence of the desire to discover one’s HIV status. Tragically, women are the most likely to discover their status through ante-natal testing and such discovery may itself trigger violent outcomes and the feminisation of HIV and AIDS.

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<sup>21.</sup> The example could be the ‘Murambatsvina (get rid of rubbish)’ campaign in Zimbabwe – tearing down of supposedly unsanctioned structures and habitations in Zimbabwe also dislocated families and access to treatment especially in urban areas.

## 7 Much talk little action – perhaps try a rights based approach?

I am acutely conscious that this paper talks at length about gender-based violence and the HIV transmission. It perhaps adds nothing more than verbiage to already overworked and seemingly futile discourse. As stated at the beginning of this paper, the problems are obvious, the solutions are obvious, but the implementation of the solutions is another matter altogether. One is inclined to puzzle over why it is that governments do not act comprehensively, because it seems that obvious that they cannot afford not to. Within the discourse, it is important to recognise that there are legislative measures taken,<sup>22</sup> there are treatment campaigns, and there are information campaigns about both gender-based violence and spread of HIV, but these measures do not seem to have the necessary penetrative effect to make a significant difference. Thus the next question becomes: How can responses that have the potential for long term impact be ensured?

There are multiple conventions and declarations that address violence against women. Human rights instruments that rail against adverse harmful cultural and religious practices are abundant, but they seem to be sterile. I would suggest that there is no need to look further than the immediate human rights instruments that already exist. Nor is there even a need to look beyond the continent to find the inspiration or the agreement on state obligations that have to be honoured, obligations that, if honoured, would effect change.

Below I draw on the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Protocol on Women)<sup>23</sup> as it is a source of obligations that some states on the continent have undertaken to honour. The fundamental point that I am making is that a comprehensive human rights-oriented base and compliance with that base would go a very long way in resolving some of the problems that have been identified. Secondly, I take this approach because there are too many new resolutions about what needs to be done without necessarily getting down to implementation of what is already there.

If states implement the obligations set out in the Protocol on Women, this would culminate in a significant reduction and ultimate elimination of discrimination against women and girls.<sup>24</sup> Likewise, serious implementation of the obligations on state parties to gradually eliminate harmful cultural and traditional

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22. There is domestic violence related legislation in place in a number of countries on the continent. Criminal prosecutions are possible in some instances for knowingly infecting someone with the virus but as discussed above at p12 these are highly problematic and difficult to effectively prosecute.

23. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa adopted in 2003 and entered into force in 2005.

24. Art 2(1) Protocol on Women.

practices that are based on notions of inferiority or superiority of the sexes is needed.<sup>25</sup> In 'signing up,' governments agree to take measures to modify social and cultural patterns of conduct through public education, information, and communication strategies.<sup>26</sup> Similarly states have to take legislative and other appropriate measures to eradicate harmful practices that negatively affect the rights of women.<sup>27</sup> Women have the right to dignity, the right to free development of their personalities, and the right to be protected against violence of all forms.<sup>28</sup> The Protocol on Women specifies in detail the need to protect women against both public and private violence and the need to identify the causes and consequences of violence against women.<sup>29</sup> There is also a necessity of tackling traditional and cultural beliefs, which legitimise and exacerbate the persistence and tolerance of violence against women.<sup>30</sup> A further requirement is adequate budgetary provision and mobilisation of resources in preventing and eradicating violence against women.<sup>31</sup> The Protocol on Women also requires states to ensure the right of women to live in a positive cultural context and to participate in determining that context.<sup>32</sup>

Apart from rights that may have direct links with gender-based violence, the Protocol on Women provides a wide range of rights, which, if implemented, could enhance the position of women and girl children, thereby reducing their vulnerability to gender-based violence. The Protocol on Women recommends that monogamy be the preferred form of marriage.<sup>33</sup> The need for consent to marriage by women and also the stipulation of 18 years as being the minimum age of marriage for women have been set out under the provisions of the Protocol on Women.<sup>34</sup> The Protocol on Women also raises the all important element of women's need to control their own destinies and their right to control and own property and to manage it themselves.<sup>35</sup>

The Protocol also invokes the importance of providing women and girl children with non-discriminatory education and training that eschews gender stereotyping, as well as with the right to employment and equality in the employment arena.<sup>36</sup> The right to sustainable development for women, invoked in article 19, a right which is fundamental to women's liberation from the notion of

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25. Art 2(2) Protocol on Women.

26. Art 2(2) Protocol on Women.

27. Art 5 Protocol on Women.

28. Arts 3 & 4 Protocol on Women.

29. Art 4 Protocol on Women.

30. Art 4(2)(d) Protocol on Women.

31. Art 4(2)(i) Protocol on Women.

32. Art 17 Protocol on Women.

33. Art 6(c) Protocol on Women.

34. Arts 6(a) & (b) Protocol on Women.

35. Art 6(j) Protocol on Women.

36. Arts 12 & 13 Protocol on Women.

dependency on men and men's largesse, is also set out in the Protocol on Women. Also emphasised are the protection of women in armed conflicts, their right to peace, and the need to provide protection against all forms of violence, including rape and sexual exploitation, during armed conflict.<sup>37</sup> The critical importance of health and reproductive rights are dealt with, and so is the issue of HIV transmission.<sup>38</sup> The Protocol on Women deals with widows' rights and their right to special protection, including the right to inherit.<sup>39</sup> Women in distress are singled out as needing protection, and similarly women suffering from disabilities are seen as vulnerable and thus requiring positive support and protection measures.<sup>40</sup>

The sites and arenas that contribute to the creation and perpetuation of the opportunities for gender-based violence and HIV transmission are encompassed in the Protocol on Women, and there is a clear mandate imposed on states to respond. Article 26 makes it clear that there are implementation measures that have to be met in the form of legislative action, budgetary provision and other devices. The Women's Protocol is an African instrument that addresses African needs and realities. If it is taken seriously, the change ought to happen, in terms of curbing and gradually eliminating both gender-based violence and HIV transmission facilitated through gender-based violence.

Ultimately the issues are not about the lack of appropriate human rights instruments. The issues seem to be about the need for good and sound people-oriented and genuinely concerned governance. It is about those involved in governance and administration of government policy not being corrupt, governing for the people, and with overall national welfare at the forefront of their approaches. It is civil society itself, at all levels, that has to be informed, encouraged and empowered to demand treatment and responses from governments. Civil society must be able to hold governments accountable for inadequate and inappropriate responses to gender-based violence and HIV and AIDS. As long as governments depend on patronage, systemic violence, and dubious electoral processes to retain power, instead of regularly testing their popular approval, the arenas of anguish will not dissipate.

## **8 Tools for engagement**

I have made much of the need for an informed action to change cultural perceptions and cultural justification for gender-based violence as one step in curbing the transmission of HIV. Challenging cultural practices is not easy. Cultural

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37. Arts 10, 11 & 13 Protocol on Women.

38. Art 14 Protocol on Women.

39. Art 20 & 21 Protocol on Women.

40. Art 24 Protocol on Women.

practices, such as female genital mutilation, that increase the risk of HIV transmission and that deprive women of control over their sexuality need to be challenged. However, they should be challenged in a productive manner that is not too confrontational. If a confrontational approach is necessary then it is important to ensure that there is an informed dialogue that accompanies the confrontation. For example, even if it is obvious to the outsider that a cultural celebration of the rites of passage of a female can be de-linked from genital cutting, it may not be so obvious to the insider if the community songs, rituals and practices are shaped and moulded around the cutting.<sup>41</sup> To engage the relevant players effectively, there is a need to understand how and why resistance is structured and how it might be possible to allow space to value and affirm some aspects of the rituals, while helping to promote eradication of the negative and harmful aspects.

In commencing an engagement directed at cultural change, often there is little informed awareness of why beliefs are held or how to go about constructing a non-confrontational dialogue. A methodological tool to help facilitate the engagement is needed. Although it is still at the testing stage, the process set out below is offered as a starting point. Some of the questions that need to be explored or answered before commencing are:

What is the source of the practice or the tradition?

Is it religious? If so, is there a definitive source, such as a religious text? Who interprets the source? Has the source been verified?

If it is cultural, why does it continue to exist? Have its origins been explored and explained? Are there alternative versions that might be engaged? How embedded is the practice? Are there indicators that change is possible or that communities are already questioning the practices?

Who are the bearers of the traditions and practices?

What do they have to gain from the practice or lose if it is discontinued?

Who else benefits? Who benefits from retention of the status quo?

Who wants change and why?

Who is resisting and why?

What are the incipient, sometimes unarticulated fears that cause resistance?

Is an informed dialogue possible, and with whom is it possible?

What is the best starting point for such dialogue and with whom?

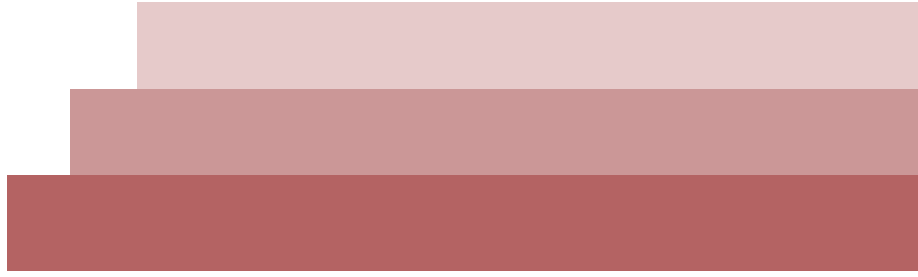
However, the last question needs a cautionary note related to arenas of exclusion from the dialogue. It is not infrequent that those who control and engage in the debate exclude women. The place where the engagement takes place may seem to be the seat of local power, but that setting may exclude important voices, such as those of the youth or women. It is critical to determine whether it is to be a debate or a dialogue. A debate indicates a potential winner of arguments, whereas a dialogue ought to facilitate negotiation and therefore real potential for change.

41. E Ondieki (n 9 above)

## **9 Conclusion**

Resolving and controlling the adverse outcomes of gender-based violence and its linkage to HIV transmission will not be easy. Nor will it be easy to limit the spin-offs and spin-downs of the trajectories of these two 'scourges'. However, in the long term, at the very least, amelioration and reduction of adverse consequences is possible. It is a matter for government action assisted by all aspects of civil society. Misinformation on causes of and cures for HIV/AIDS has to be corrected so that gender-based violations of individuals' sexual integrity are not perceived as sources of cures, nor are individuals mistreated because of their HIV status; women's rights to reproductive and sexual health should be taken seriously; harmful cultural practices that hide behind the blanket explanation of cultural relativism should be discussed and abolished; expectations of rights-based compliance to human development and associated needs have to be heightened. Equally, women have to take a far more positive and self-affirming approach to their own lives. They should control their bodies and sexuality. It will be a long process, but a positive long term outcome is possible.

# 6



## **Female genital mutilation as a manifestation of gender-based violence in Africa**

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*Laura Nyirinkindi*

## 1 Introduction

Female genital mutilation (FGM) is to some a cultural practice and to others a human rights violation. A discussion on the practice inevitably evokes complex discourses that relate to attitudinal and conceptual bases. FGM is a customary practice that has, in the last forty years since it debuted onto the regional and international scene generated heated and polarised debate. The two sides to the debate have very strong and dialectically opposed views and beliefs about its appropriateness and utility. In order to avoid the pitfalls and controversies associated with the nomenclature, the term female genital mutilation/circumcision or cutting (FGM/C) will be used for the purpose of this paper.

Other terms used to refer to FGM/C include female genital surgeries and female genital modifications. In an edifying scholarly piece, Lundquist<sup>1</sup> discusses the politics of discourse, analysing the nuances of the various terms employed such as mutilation, cutting and circumcision. She makes the case that the use of the term mutilation is meant to connote the undesirable elements or result of the procedures on female genitalia in contrast to male circumcision, which is fundamentally different in intention and outcomes. The expression 'cutting' was also adopted to differentiate the procedure in women from male circumcision in an attempt to infuse neutrality into the discourse, although it too is not immune from the conceptual ambiguities that bedevil the utility of any definition in decisively and adequately labeling the practice. While ostensibly innocuous, the dialectics run the risk of widening the conceptual divide and sometimes tend to cloud the real issues that cut to the core of the polemics – the dignity and rights of women.

The earliest references to FGM/C in the 1960s referred to female circumcision, and this term was adopted by several international organisations in the 1970s. The phrase female circumcision was used by several international and regional actors from the seventies to the nineties and is still in use in several quarters. One of the reasons for this may be due to the limited understanding of the nature and effects of the practice, which to date remains shrouded in secrecy in many communities. The term's prolonged usage may also be attributed to the need to mitigate the tensions arising out of the North-South divide in the women's movement around this issue. It may also have been a compromise measure in light of the sensibilities of the communities where this practice is considered the irreducible core of cultural identity.

Key international instruments that were drafted and adopted in the period before 1993 made allusion to 'harmful traditional or cultural practices' and this was generally understood by antagonists of FGM/C to include FGM/C. Examples of this are evident in the Convention on the Rights of the Child (CRC) and the African

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1. S Lundquist 'Transnational mobilization against female circumcision' (2004) 1 *Journal of Development and Social Transformation* 23.



Charter on the Rights and Welfare of the Child (African Children's Charter). Until 1999, when the Committee on Elimination of Discrimination considered the issue under General Recommendation 24, it used the term 'female circumcision'.

In 1993, the Declaration on the Elimination of Violence Against Women (DEVAW) was the first international instrument to directly incorporate the term FGM, while later, in 1994 at the International Conference on Population and Development (ICPD) in Cairo in 1994, the expression FGM was used specifically in illustration of a harmful practice against women. The phrase was also used in the Beijing Declaration and Platform for Action at the Fourth World Conference on Women in 1995. The World Health Organisation (WHO) took this term up in its classification of the types of FGM/C and officially adopted the term FGM in 1996. Years later, the term FGM has become the more commonly used term for the procedure, signalling the trends and developments in women's rights and international human rights law which categorise the practice as a women and children's rights violation.

## 2 Manifestations of female genital mutilation: Modes, incidences and rationales

### 2.1 Modes and incidence of female genital mutilation/cutting

The WHO has categorised FGM/C under the following classifications:<sup>2</sup>

1. Type I – the cutting out of the prepuce, which is the skin that covers the clitoris with or without cutting out part or the entire clitoris.
2. Type II – the cutting out of the clitoris with partial or total cutting out of the labia minora.
3. Type III – the cutting out of part or all of the external genitalia and stitching or narrowing of the vaginal opening, which is referred to as infibulation or pharaonic circumcision.
4. Type IV – The pricking, piercing or incision of the clitoris and/or labia; stretching of the clitoris and/or labia; cauterisation by burning of the clitoris and surrounding tissue; scraping of tissue surrounding the opening of the vagina (*angurya* cuts) or cutting of the vagina (*gishiri* cuts); introduction of corrosive substances or herbs into the vagina to cause bleeding or to tighten or narrow the vagina and any other procedure that can be included in the definition of female genital mutilation. Materials used for the FGM/C include sharp cutting or sewing objects like thorns, broken bottles or glass, knives, razor blades or penknives.

2. WHO Fact Sheet 241 <http://www.who.int/mediacentre/factsheets/fs241/en/> (accessed 20 August 2006).

FGM/C is practised in varying forms and degrees of severity of mutilation based on the particular mode favoured by the ethnic group that practices it. According to WHO data, excision of the clitoris and labia minora accounts for approximately 80 per cent of the FGM/C cases.<sup>3</sup> A United Nations Children's Fund (UNICEF) statistical survey indicates that infibulation, the severest form of FGM/C, accounts for up to 74 per cent of circumcised women in Sudan.<sup>4</sup> UNICEF has put the numbers of those who undergo FGM/C annually at approximately three million in the Sub-Saharan region of Africa, Sudan and Egypt and the Middle East. It is also believed that in Africa and areas where FGM/C is practised in the Middle East, 130 to 140 million women have been circumcised.

FGM/C is carried out at various stages depending on the various specificities of the custom of the group or community. Some procedures are carried out at infancy, others at puberty or in adulthood. There are instances where FGM/C is conducted on newly born infants, young girls, married women and women who have just given birth.

It is believed that about 28 countries in Africa practice FGM/C in various forms. These include Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Democratic Republic of Congo, Cote d'Ivoire, Djibouti, Egypt, Eritrea, Ethiopia, Gambia, Ghana, Guinea, Guinea Bissau, Kenya, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Somalia, Sudan, Tanzania, Uganda.

FGM/C is also practised by immigrant communities in many parts of the world including Australia, Belgium, Canada, Denmark, France, Italy, Netherlands, New Zealand, Norway, Spain, Sweden, the United Kingdom and the United States of America. It is also practised by some communities in Malaysia, Yemen, Indonesia, Sri Lanka, Oman, Saudi Arabia, United Arab Emirates, Iraq, Pakistan, Jordan, Peru, and by Australian aborigines.

## **2.2 The motivations for female genital mutilation/cutting**

It is inconceivable that if FGM/C had not served any purpose for those that champion it, the practice would not be the infamous force to reckon with that it has become. FGM/C carries a certain logic and appeal for those who insist on its validity, this should not be construed to mean that all women who have been circumcised are fervent believers in the procedures or the afflictions related to FGM/C. Those fighting to eradicate FGM/C, whether African or not, have in some instances learnt with a certain amount of surprise that the communities that practice FGM/C view efforts to eliminate the practice as attempts to wipe out their culture, usually considered the very heartbeat of their society. This fear in

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3. As above.

4. UNICEF 'Female genital cutting: A statistical exploration' UNICEF (2005) 15.

the 'beneficiary' community has contributed to the failure of several meticulously designed and well meant interventions by anti-FGM/C advocates.

FGM/C takes on different forms in the various tribes and ethnic groups across the continent. Often, even within the same country, the reasons for FGM/C, the form and the incidence among the various ethnic or religious groups vary. In some tribes, it is seen as an essential and indivisible part of age old and invaluable rites of passage into womanhood, accompanied by initiation procedures scheduled around the event. Many tribes use this time to impart knowledge on sexual issues, health and motherhood. In this regard, a female who is not circumcised is not viewed as ready or even eligible for marriage, and will be considered ceremonially unclean for spousal and maternal functions. Girls who undergo FGM in some cultures are known to be given gifts and attract large dowries in some instances, but even more special to the individual girl, she will be considered acceptable and fully embraced by the tribe as a woman.

In a community where the best or only choice for a woman to survive and fit in the existing societal framework is marriage, FGM/C becomes a more compelling feature. In this regard women who come from urban based families where cultural considerations are less imperative or diluted by cross-cultural interactions may be less prone to submit their daughters to the procedure, although instances abound where girls are referred back to the rural areas to undergo FGM/C in order to make them eligible for marriage according to societal norms.

FGM/C in some parts of Africa, Asia and the Middle East is practised by Muslim communities who harbour the illusion that it is required of them in fulfilment of their religious duties. While several Muslim clerics in countries with significant Muslim communities practising FGM/C have gone to great lengths to dispel this false notion, there is still evidence that religious motivations account for many Muslim women undergoing the procedure.<sup>5</sup> Nonetheless, the practise has been found to be prevalent even in predominantly Christian communities. According to several credible accounts, FGM/C predates Islam and has no roots in Christianity.

There are reasons why FGM/C has persisted in several parts of Africa that are unrelated to rites of passage, which may account for the occurrence of the procedure in babies and very young girls. Proponents of FGM/C in this regard extol the virtues of or defend the practice for varied reasons depending on the culture and tribe, but largely, the following have been found to be the reasons; it improves the appearance of the genital area as well as hygiene, and controls sexual deviance and promiscuity in women by reducing or eliminating their sexual desires. Some believe that it will increase male pleasure during intercourse, while some communities relate sterility or still births and infant morbidity to lack of performing FGM/C.

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5. Amnesty International 'Female genital mutilation - a human rights information pack' <http://www.amnesty.org/ailib/intcam/femgen/fgm1.htm> (accessed 28 August 2006).

However, not every person who participates in FGM/C whether personally or vicariously by acquiescing to a relative's participation willingly concedes to the viability of the practise. In a society where FGM/C is practised, one has to question how valid the concept of free agency or choice is, especially given the spectre of reprisals and sanctions by the predominant societal institutions for those that would object. A woman or girl who rejects FGM/C is most likely to be exposed to curses, ridicule and stigmatisation, regarded as unclean or a child, and not fit for marriage. In addition she will be deemed to have brought dishonour to her family for generations to come. Evidence of such societal sanctions for non-conformity in many communities undoubtedly serves to dissuade deviance or defiance.

Studies on the reasons for FGM/C do not come up with conclusive or firm evidence to bear out the supposition that FGM is linked to poverty or low education levels among women. The distinction between the impoverished and those of some economic means in tribes where FGM/C is practiced revolves more around the circumstances in which FGM/C is undertaken rather than the incidence. Those who are better off economically conduct FGM/C under more sanitised conditions, preferably in hospitals and with nurses or medical doctors who can ensure quicker and safer operations that will elude surveillance mechanisms.

On the whole, ethnicity, social eminence and impetus of tribal norms and practises seem to be the leading common denominators for the occurrence of FGM/C. Logic prevailing, it should follow that female children who access education, especially the higher levels of education, will have more information on the link between FGM/C and human rights violations as a result of which they are empowered enough to make informed choices. However, in many areas where this practice persists, school going girls opt for this procedure, taking advantage of school holidays to undergo FGM/C and continue with their school schedules with limited interruption. The deciding factor seems to relate to the strong loyalties to cultural norms and ethnic identity rather than to the external values and messages that abound in a cross cultural environment such as schools.

The promise of education and economic empowerment for women in fostering independent decision-making powers over women's bodies has been vigorously promoted in many advocacy messages. However in practice this has been challenged by incidents where even immigrant families living in informed societies subject their daughters to FGM/C. A comparative study on this phenomenon would be instructive as to what motivates these young women to adopt this practise.

### **3 International and regional developments in the human rights legal framework**

In tracing the various discourses and attempts by the international community to promote the rights of women, one theme is recurrent; the recognition that the

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violation of women's and children's rights is of universal concern, and that FGM/C is but one of the many manifestations of violence against women. In addition, the placement of FGM/C on the agenda of several international actors and activists negates the view that FGM/C as a cultural custom should not unduly concern non-practitioners, as advanced by its defenders.

The Declaration on the Elimination of Discrimination Against Women (DEDAW) of 1967 was revolutionary for the times in which it was adopted. It obligated state parties to take all appropriate measures to abolish customs and practices which discriminate against women, language which was later adopted in the Convention on the Elimination of All forms of Discrimination against Women (CEDAW). Arguably, this requirement entails comprehensive measures that go beyond mere formal and legalistic implementation. Abolishing customs and practices is not a mission that can be accomplished in the short term. Several immediate and multi-dimensional actions may be warranted pending a thorough appraisal of appropriate strategies and methodologies.

From the early 1990's the international community in several significant statements highlighted the human rights implications of FGM/C at a series of international conferences. The ICPD served to urge countries to eliminate gender-based violence and harmful traditional practices, including FGM/C. The ICPD called for changes in men and women's knowledge, attitudes and behaviour, citing these as necessary conditions for achieving the harmonious partnership of men and women. Even more significantly, it identified the influence and key role that men play in engendering gender equality, recognising that 'in most societies, men exercise preponderant power in nearly every sphere of life, ranging from personal decisions regarding the size of families to the policy and programme decisions taken at all levels of Government'.<sup>6</sup>

The Fourth World Conference on Women in Beijing (Beijing Conference) in 1995 highlighted acts of gender-based violence suffered by women and girls, among which was FGM/C and other traditional practices harmful to women. The Beijing Conference also noted the grave health risks posed by FGM/C.

Regardless of the ideological basis for practicing FGM/C, a human rights viewpoint decries the linkages to violence. The World Conference on Human Rights (World Conference) in Vienna in 1993 emphasised the need to eliminate violence against women in the public and private spheres, including the elimination of the harmful effects of certain traditional or customary practices, cultural prejudices and religious extremism. The World Conference further urged the General Assembly to adopt the draft Declaration on Violence Against Women in a bid to tackle violence against women.

DEVAW was a forward-looking document that looked beyond the traditional models of justice systems to give substantive protection to victims of violence and

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<sup>6</sup>. UN A/CONF 171/13 para 4.24.

build their capacity to seek legal redress. It provides that women who are subjected to violence should be provided with access to the mechanisms of justice and lays a duty on states to inform women of their rights in seeking redress through such mechanisms.

DEVAW recommends that states should cooperate with appropriate NGOs in developing national action plans, facilitate and recognise the efforts of other non-state actors at local, national and regional levels in eliminating violence against women. It calls for preventive mechanisms, specialised victim assistance, resource allocations towards elimination of violence against women, training of law enforcement agents on related implementation policies, carry out research and collect data. While it may be argued that DEVAW is not legally binding, it is nevertheless a useful referral point from which national, transboundary and inter-governmental actors can draw inspiration and insight in their advocacy efforts and interventions.

DEVAW, in addition, directs states to adopt measures towards the elimination of violence against women who are especially vulnerable to violence. This should provide a useful proactive legislative framework that targets women and girls at risk in FGM/C practicing communities, but who have not yet undergone the procedure; identification, preventive and protective measures should be designed in fulfillment of this objective.

The African Children's Charter in article 21 sends a very strong signal to societies practising FGM/C when it addresses the need to protect children against harmful social and cultural practices. It enjoins state parties to take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child. Particularly singled out are customs and practices prejudicial to the health or life of the child; and discriminatory to the child on among other grounds – sex. This is a strong basis on which young girls can be protected from FGM/C although FGM/C proponents can retort that cultural practices like FGM/C are in the best interests of the girl child to enable her fulfil future gender functions and roles.

The CRC under article 24 entails state parties to take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children. In this regard, FGM/C carried out on young girls must be outlawed, and no girl child should be said to have acquiesced to FGM/C as it is outside of her legal capacity to make this choice.

The decision of the United Nations (UN) to designate 6 February as the International Day of Zero Tolerance of Female Genital Mutilation is also a positive move to signal the prioritisation of and universal concern for women and girls who are victims of the practice in Africa and other parts of the world.

### **3.1 The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa and female genital mutilation/cutting**

In its preamble, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Protocol on Women) makes the important linkage between the elimination of gender-based violence, discrimination and the rights of women. Article 1 identifies violence against women as acts perpetrated against women which may potentially or actually cause physical, sexual, psychological and economic harm, a description which characterises FGM/C.

The right of every African woman to dignity is highlighted in article 3 of the Protocol on Women, as is the right to the recognition and protection of her human and legal rights. Under article 5 of the Protocol on Women, every woman is entitled to respect for her life and the integrity and security of her person. This provision further prohibits cruel, inhuman and degrading treatment. It can be argued that FGM/C violates this provision in every way and is to be deplored as having far reaching repercussions on women and young girls' bodily integrity and dignity especially when the procedure is carried out under unsuitable and coercive circumstances.

Article 5 of the Protocol on Women is comprehensive in that by implication it encompasses the WHO classifications of FGM/C by prohibiting all forms of harmful practices, specifically FGM, scarification, medicalisation and para-medicalisation of FGM/C and all other practices.

## **4 The human rights implications of female genital mutilation/cutting**

Traditional attitudes which promote the notion that women are subordinate to men or ascribe stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence, abuse, forced marriage, dowry deaths and female circumcision. Such prejudices and practices may justify gender-based violence as a form of protection or control of women. The effect of such violence on the physical and mental integrity of women is to deprive them the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms.<sup>7</sup>

### **4.1 The right to the highest attainable standard of health**

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<sup>7</sup>. General Comment 19 of the Committee on the Elimination of Discrimination Against Women.

The international legal framework relating to the protection of women's rights seeks to address the structural issues that predispose women to gender violence. Many women who practise harmful traditional practises such as FGM/C knowingly put themselves in harm's way and endure gender-based violence stoically and health care is not enough in itself to deal with the problem of FGM/C.

In General Recommendation 14, the Committee on the Elimination of Discrimination against Women (Committee on Women) linked the issue of FGM/C to the attainment of the highest standard of health by women as provided under CEDAW. Article 12 of CEDAW provides that state parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality between men and women, access to health care services, including those related to family planning. Thus it could be argued that the short and long term effects of FGM/C affect the health of women and that they flow from the violation of women's rights when discriminatory practices like FGM/C are allowed to flourish.

FGM/C is an irreversible procedure with numerous negative effects that vary depending on the nature of harm suffered by a woman. FGM/C often results in physical and psychological injury, hence its name. In some of the procedures undertaken, women or girls who put up a struggle may end up getting badly cut and suffer extensive mutilation and scarification. In the event of death, FGM/C is a violation of the right to life.

FGM/C as conducted in several communities is a physically traumatising experience usually done without anaesthesia. Some women may be given crude forms of alcohol to dull the pain, but in the majority of the cases, the woman or girl tries to break away from the painful process and has to be held down in order for the circumciser to carry out the procedure.

FGM/C is linked to severe health problems such as infections caused by lack of sterilised equipment and conducting the procedures in unhygienic environments and circumstances, including the use of unsterilised knives, herbs or animal products that are used in the curative process. Severe menstrual pains and difficult childbirths have been related to women who underwent FGM/C.

While some studies suggest that sexual intercourse for women who underwent FGM/C is generally painful and not pleasurable, these are at times conflicting and often inconsistent. In certain instances those who undergo FGM/C suffer during childbirth especially at the hands of local attendants who lack appropriate medical skills to deal with FGM/C related complications. This has resulted in fistulas and incontinence for several girls. Girls or women whose immunity is low at the time of the FGM/C operation suffer from chronic infections and for some, death. Such infections are believed to be linked to sterility in women who undergo FGM/C. HIV transmission through the indiscriminate sharing of cutting implements is also a fear that is not unwarranted bearing in mind that blood is one of the modes of its transmission.



In the case of infibulation where the genitalia is sewn up, the woman must be re-opened prior to the first sexual encounter and in the event of childbirth. While both require re-opening of the vagina, in the former scenario, the husband has to cut the vagina prior to intercourse, with foreseeable consequences for fresh injury.

The mental health of young girls and women is also sometimes put at risk through psychological trauma suffered in the event of FGM/C procedures, especially those bearing the element of surprise or unwillingness on the part of the victim. Many young girls have reported feeling a sense of betrayal as they were unknowingly led like a sheep to the slaughter by close female relations and neighbours, and these very people held them down while they experienced the pain and tribulation of FGM/C.<sup>8</sup> FGM/C unfortunately bears elements of a conspiracy set up as it involves the knowledge, consent and involvement of close family relations, hence it may cause a disconnection in relations when the young girls who are traumatised by the procedure fail to relate to family members whom they blame for their plight. In several discussions on the procedure, young girls who underwent this procedure forcefully have particularly highlighted this aspect of FGM/C.

Studies by WHO in six African countries suggest that women who have undergone FGM/C procedures may be more likely to suffer obstetric harm than those who did not, and identifies certain complications, such as caesarean sections, extended hospital stay, still birth or infant neonatal deaths, post partum haemorrhage and low birth weight.<sup>9</sup> Maternal and infant morbidity rates in Africa are still alarmingly high and for women to intentionally expose themselves and their unborn children to further related risk is a major cause of local, national and international concern.

Prioritisation of FGM/C eradication measures should dominate the health care strategies of policy makers and service institutions of every country where FGM/C is practised with a view to preventive and remedial health care where side effects of the practise are noted. The Final Declaration adopted by the African Parliamentary Conference on Violence Against Women, Abandoning Female Genital Mutilation: The Role of National Parliaments (African Parliamentary Declaration) urges governments to undertake and enhance basic health care services, especially sexual and reproductive health services, to ensure that women who have undergone FGM/C have access to all necessary health care.

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8. n 5 above.

9. WHO 'Female genital mutilation and obstetric outcome: WHO collaborative study in six African countries' <http://www.who.int/reproductive-health/fgm/> (accessed 12 August 2006).

## **4.2 Freedom from all forms of discrimination and the right to equality**

Harmful practices like FGM/C are based on cultural beliefs that are premised on or reinforce stereotypes of gender roles of men and women. The Committee on Women squarely pinpointed gender-based violence as a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men. Many women across the world put up with violence in the private sphere on a regular basis in the name of culture, which behaviour is largely deemed acceptable for that reason.

It is perhaps this reality that informs article 5 of CEDAW. This provision requires state parties to take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices, customary and all other practices which are based on the idea of the inferiority or the superiority of either on stereotyped roles for men and women. Adherence to the meaning and purpose of article 5 in the context of FGM/C will serve to eliminate the prejudices that only women should keep themselves chaste, that women cannot abstain from sexual relations without being sewn up or sexually de-sensitised and, that women's gender roles and maternal functions trump all other roles to the extent that their sexuality must be suppressed to conform to this goal, regardless of the individual.

There is a likelihood that FGM/C also limits the chances of women to marry or have sexual relations with communities that do not practise FGM/C due to the custom being specific to certain communities and the possibility of limited or no appeal to men of a different ethnic or religious disposition. This may further increase the marginalisation and vulnerability of women.

## **4.3 Freedom from violence and the right to bodily integrity**

FGM/C in many areas where it is practiced initially has been framed as a health issue in order to promote acceptability and defuse resistance or suspicion in those for whom it holds value. However, this approach is not comprehensive in tackling the root causes or the permanent effects of FGM/C on women, and clearly lacks a qualitative dimension needed to address the vulnerability of women to this practice. A proper understanding of FGM/C must address the wider context of the rights of women and the prevalence of gender based violence globally. The inferior status of women in most parts of the world and the resulting discrimination women renders women vulnerable to violence in the private and public sphere.

International human rights law while making inroads into the public powers of the state over the individual nonetheless largely retains the public/private distinction with regard to women's human rights and protection.<sup>10</sup> In this paradigm of responsibility for only state perpetrated violations what happens to women in the private sphere has for a long time been deemed to be outside the ambit of human rights law, and yet this is where the most gender-based violations happen at the hands of private actors such as the family and the community. The desire to control women's sexuality and curb deviant behaviour in many patriarchal societies has contributed to the perpetuation of practices that are harmful and yet considered cultural hence normal. In many instances, such prejudices have received the seal of approval from the powerful forces of society and even crucial public institutions engaged in justice and law enforcement which turn a blind eye to even rampant incidences of FGM/C.

As recognised by the Committee on Women in General Recommendation 19, CEDAW has an expansive interpretation of actors who perpetuate discrimination against women. It does not limit itself to state sponsored violence, that is, violent action committed by or on behalf of governments under articles 2(e), 2(f) and 5. Article 2(e) of CEDAW requires states to take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise. As noted by the Committee on Women, '[u]nder general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.' Governments that condone or fail to act to prevent violations caused by FGM/C procedures may be in dereliction of their international commitments and obligations.

Views have been advanced by women's activists that FGM/C bears a strong resemblance to the definition of torture. The extreme pain and suffering that afflicts the woman or girl undergoing the procedure, in certain cases the unwillingness of the woman or legal incapacity of the underage girls to acquiesce to the act of FGM/C by law, all bear strong resemblance to torture. The Rome Statute of the International Criminal Court (Rome Statute) provides for torture to mean the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused, and removes the requirement of any official actor. However, the Rome Statute limits prosecutions of torture to those committed within the context of crimes against humanity or grave war breaches and hence is not directly applicable to many forms of FGM/C.

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<sup>10</sup>. R Coomaraswamy *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences* UN Doc E/CN 4/1996/53 para 16.

#### **4.4 The right to education**

Because FGM/C is seen as a precursor to marriage, it being part of the eligibility criteria for marriage in the communities where it is practised, young girls who undergo FGM/C are usually lured into early marriages and pregnancies. Many girl children drop out of school to pursue marital or maternal functions prematurely after undergoing FGM/C.

In many African societies, women know little about their sexuality and lack crucial information about their reproductive health outside of strict societal parameters such as initiation and counselling procedures for FGM/C and marriage respectively. Public discussion of sex and sexuality is generally considered taboo and there is little room to raise awareness or knowledge around this area even in health care centres and units where these exist in the community. Consequently it is even easier to generate and perpetuate myths regarding female genitalia. Although several international instruments and statements by intergovernmental organisations have called upon states to undertake informal and formal education on reproductive health, awareness and sensitisation campaigns, implementation is limited to family planning efforts in several countries in Africa.

#### **4.5 The right to culture**

FGM/C reflects the dynamics of group identities, the functionality and centrality of cultural norms in constructing, organising and mobilising action along pre-determined roles in order to foster cohesion.

The right to culture is an inalienable and universal human right that all persons are entitled to regardless of which part of the world they are from. Hence, proponents of FGM/C argue that an attempt to eradicate FGM/C is a denial of a fundamental human right as FGM/C is, for those who practice it for cultural reasons, a cherished traditional norm of important cross-gender and cross-generational significance. These communities maintain that it is conducted in fulfillment of traditional custom and must not be denigrated or criticised by those who do not subscribe to the culture. Cultural relativists denounce anti-FGM/C sentiments as value judgments against different minded communities and a sign of cultural intolerance or imperialism, perpetrated mainly by the North and elitist African feminists, the latter normally branded traitors.

The concept of inalienability of human rights tends to be constructed in negative terms, in that human rights are inherent and cannot be taken away at any time, though they may be violated. A succinct definition of inalienability refers to

the concept of inalienable rights as ‘a set of human rights that are said to be absolute, not awarded by human power, not transferable to another power, and incapable of repudiation.’<sup>11</sup> This raises the questions – not whether a woman can repudiate her human rights in order to undergo FGM/C? For the woman desiring to undergo FGM/C, are efforts to eradicate FGM/C in essence asking her to repudiate her inalienable right to culture?

FGM/C also raises the troublesome reality of the frictions that exist between the attainment of group rights and conflict with personal rights. The enjoyment of cultural rights involves activities and interactions based upon agreed social constructions, and individual consensus for established processes is not an essential feature of cultural practises. In the case of FGM/C, the fulfilment of cultural responsibilities in order to participate in institutionally sanctioned norms and societal ceremonies relating to womanhood are inextricably intertwined. Thus the absence of an individualised approach to consent to cultural practises places a woman in the position of having to waive her rights in order to fit in the community in which she experiences her cultural life. This creates an external compulsion for a personal undertaking to derogate from one’s individual rights for the greater communal ideals.

To claim a right to harm oneself in the name of culture, despite recognition of its harmful and violent aspects is unconscionable. A woman who mutilates herself with sharp objects for a reason unrelated to FGM/C or any cultural practise would be referred for psychological treatment; it would be illogical to suggest that she is free to make choices that will result in bodily harm. Without implying that FGM/C practitioners share the same rationale, to make concessions for those who freely choose FGM/C to be regarded as having a right to chose physically harmful practises would lead to illogical conclusions. The argument that the community’s cultural norms should be respected to allow women to choose procedures that will inevitably cause pain and suffering may cause set backs in many of the gains in the protection of the human rights of women.

The thorny question of culture was addressed with a sense of frustration in the African Parliamentary Declaration, which noted that culture is not immutable and ‘is subject to perpetual change, adaptations and reforms’. It also asserted that ‘behaviour changes when the dangers of harmful practises are understood.’

The Protocol on Women is the first legally binding treaty that specifically identifies FGM/C as a harmful practice which negatively affects the human rights of women. In 2003, 37 heads of states of Africa signed the Protocol on Women, which finally came into effect in November 2005. The Protocol on Women cuts to the core of relativist arguments by stating unequivocally that FGM/C is contrary to recognised international standards, thus giving an entry point for universally accepted human rights norms to apply to women of all African cultures.

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11. ‘Inalienable rights’ [http://en.wikipedia.org/wiki/Inalienable\\_rights](http://en.wikipedia.org/wiki/Inalienable_rights) (accessed 14 August 2006).

DEVAW charges states not to invoke any custom or tradition to avoid their obligations to eliminate violence. It identifies violence against women as encompassing FGM/C and other traditional practices harmful to women. DEVAW further requires states to exercise due diligence to prevent, investigate and punish acts of violence against women by private actors. The value added by DEVAW in human rights protection is that it recognises the defining role of third party actors in violent acts such as FGM/C procedures. By direct implication, states are required to outlaw FGM/C and provide sanctions for private actors who actively promote the procedure.

The Protocol on Women, in article 17, provides that women shall have the right to live in a positive cultural context. Controversy may exist over who determines what a positive culture is but what is undeniable, and evidence of which is borne by women who have undergone FGM/C and former circumcisers, is that FGM/C has very harmful effects related to its occurrence despite the societal function it is understood to serve. In light of this, the arguments to perpetuate harm in the name of culture do not seem feasible or reasonable. In any event, the adoption of the Protocol on Women which identifies FGM/C as a harmful cultural practice sends strong signals that African culture will be modified through a positivist approach rather than wait with optimism for the eventual and positive metamorphosis of culture.

Whether willing or not, complicit or not, men are the intended and ultimate beneficiaries of FGM/C. While it is true that women are the primary custodians of this cultural norm and men don't participate in the rituals and procedures, the men are by no means powerless bystanders. The perception that women's genitalia and sexuality is problematic is condoned by male members of the society. The decisions to allow daughters and wives to undergo FGM/C must be sanctioned by the male heads of the household, who are the primary decision makers in matters involving sexuality of women. Without the endorsement of FGM/C by male members of the communities in which the practice is conducted, it would long have died out.

Violence against women is tied to unequal power relations, and in the case of FGM/C, the ultimate objective of this violent practice is to make women more malleable and wanton-free marriage material. The desire to keep women chaste before and during marriage places an unequal burden on women as the men do not bear this disparate obligation. This renders the gender roles and obligations unequal and discriminatory. Men from communities practising FGM/C will not consider marrying a woman who is not circumcised although this could also stem from fear of being ostracised for abandoning majority constructed societal norms.

Similarly, some of the women who hail from the communities that practice FGM/C are not detached actors, victims of circumstances in the FGM/C problematique. FGM/C in this regard poses a complex question because those whom human rights law would identify as it victims are also perpetrators of this human rights violation. In many instances, circumcised women are the key players

and active participants in the occurrence, celebration and promotion of FGM/C. Women are the gatekeepers of FGM/C, preserving its execution and the surrounding initiation ceremonies. The mothers of girls who will be operated upon will determine the exact day, the age at which the child will be circumcised, the circumciser, the location and female relations of the girl who will participate in related rituals such as singing, dancing and tending to the girl during the healing process. Various studies show that many women who suffered the pain and affliction of FGM/C and bear the best witness to its horrors will not refrain from putting their daughters and sisters through the same procedures. Many of the underage girls and even babies are identified and referred by their close relatives for the ritual.

Some traditional communities have defended their right to experience the cultural norm of FGM/C and this lends credence to the notion that it bears a strong value for its constituency base. Understanding the psyche of each individual practising community hence becomes indispensable in the crafting of appropriate interventions and messages for the community. To try and penetrate a community based on pre-conceived and pre-constructed notions of the gender and group dynamics is to undertake a meaningless, fruitless and discouraging adventure.

## 5 Strategies and interventions to eliminate female genital mutilation/cutting

### 5.1 Influencing attitudes

Key observers and human rights advocates on the African continent are of the view that FGM/C can be eliminated in one generation.<sup>12</sup> Whether this will be the case largely depends on appropriate and effective interventions on the part of both governments and non-state actors.

FGM/C is country and ethnic specific. Thus, customised interventions are relevant in the effort to address FGM/C as a social and cultural issue in the communities where this is practised. Interventions from non-community members are likely to be resented and mis-interpreted as judgmental, and even potential community based allies in the anti-FGM/C effort may unite with the community out of kinship allegiances rather than open up to external criticism. In this regard, the involvement of opinion leaders who wield influence in the communities, including religious leaders, traditional chiefs and elders is important.<sup>13</sup> Other community agents such as government leaders, community extension workers and

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12. UNICEF 'Three million girls undergo female genital cutting every year' UNICEF Press Centre [http://www.unicef.org/media/media\\_30047.html](http://www.unicef.org/media/media_30047.html) (accessed 25 August 2006).

13. As above.

development officials who have gained acceptable levels of integration in the community are useful in helping to access the communities. The Ouagadougou Declaration of 1999, passed under the auspices of the Inter-African Committee (IAC), likewise recommended the establishment of national and eventually sub-regional networks of religious and customary leaders, including traditional and modern communicators.

General Recommendation 14 adopted by of the Committee on Women made an important statement in requiring states to organise training programmes based on research findings about the problems related to FGM. It further urged states to disseminate information on the practice of FGM/C and to support women's organisations that were working to eliminate FGM/C nationally and at the local level. The Committee on Women proposed an inclusive framework for the purposes of influencing attitudes, with the participation of politicians, professionals, religious leaders, the media and arts in all related efforts. More importantly, it suggested that state parties should report on measures taken to eliminate FGM/C, which ensure continuity and consistency in governments' efforts to wipe out the practice.

The IAC has been quite active in spearheading advocacy efforts to eradicate FGM/C in Africa. A powerful advocacy and lobbying group, it vigorously and successfully linked up with presidents, ministers, and parliamentarians through various symposia, and worked in collaboration within the African inter-governmental cooperative framework of the former Organisation of African Unity (OAU) and with the Economic Commission for Africa (ECA). The Addis Ababa Declaration on Harmful Traditional Practices Affecting the Health of Women and Girl Children (Addis Ababa Declaration) is one valuable outcome of the IAC's efforts and collaborations. The Addis Ababa Declaration was subsequently endorsed by the OAU in June 1998.

## **5.2 Diverting the circumcisers away from female genital mutilation/cutting**

A major strategy in eliminating FGM/C currently being engaged by anti-FGM/C organisations is the targeting of circumcisers for diversion from this harmful occupation, and possibly recruiting them in advocacy efforts. However, sensitisation on the ill and harmful effects of FGM/C in some countries has shown modest results in dissuading circumcisers from continuing their harmful practises.<sup>14</sup> It has been stressed by anti-FGM/C advocates that all such overtures to overcome the lure of FGM/C procedures in its beneficiaries and practitioners must be contextualised within the backdrop of poverty and lack of economic

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<sup>14.</sup> The Christian Science Monitor 'Africa spurns female circumcision' <http://scmonitor.com/2005/0405/p06s01-woaf.html> (accessed 13 August 2006).



means that the majority of women in African communities live in.<sup>15</sup> The circumcisers are esteemed in the community where they are based, due to the social status they hold as key players in circumcision events. In addition they earn money or obtain gifts after each procedure. Given the high poverty levels of most African communities in which FGM is practised, it is in the interests of circumcisers to propound the cultural value of FGM/C and its inviolability for practical and self-serving reasons. To overcome this reality, some organisations have targeted circumcisers for training as birth attendants and community development work.<sup>16</sup>

Other forms of diverting circumcisers away from FGM/C have included identifying and providing small income generating projects that provide an alternative livelihood for the circumcisers.<sup>17</sup> In Kenya, efforts have been made to mobilise former circumcisers to meet and brainstorm on strategies to eliminate FGM/C by an international organisation called Equality Now.<sup>18</sup>

### 5.3 Advocacy efforts, awareness raising and education on FGM/C

One of the most crucial tools in the fight against FGM/C is to demystify the practise by breaking the silence, creating knowledge and awareness about sexuality, health and human rights for women in every community where FGM/C is practised. Just as FGM/C has been enabled and perpetuated by lack of knowledge, a mythical allure and emphasis on its inevitability, on the other hand an equally concerted effort to raise awareness on the salient issues is required.

Success has been registered in some areas in what are emerging as best practices in fighting FGM/C in the community. Egypt, for example, is registering significant momentum in a movement formed in 2003 by various actors, including the National Council for Childhood and Motherhood and also the United Nations Development Programme (UNDP).<sup>19</sup> This initiative, known as the FGM Village Free

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15. Final Declaration of The African Parliamentary Conference; Violence against Women, Abandoning Female Genital Mutilation: The Role of National Parliaments (2005).

16. IRIN 'Ethiopia: Focus on FGM' <http://irinnews.org/ReportID=30200> (accessed 26 August 2006).

17. IRIN 'Kenya: Boost for anti-FGM efforts as 200 circumcisers quit' <http://www.irinnews.org/report.asp?ReportID=39965> (accessed 26 August 2006).

18. Equality Now 'First International Meeting of Ex-Circumcisers, Convened by Equality Now, Brings Groundbreaking Perspective to the Campaign Against Female Genital Mutilation' [http://www.equalitynow.org/english/pressroom/press\\_releases/fgmmtg\\_20040607\\_en.html](http://www.equalitynow.org/english/pressroom/press_releases/fgmmtg_20040607_en.html) (accessed 20 June 2007).

19. IRIN 'Egypt: Village declares itself FGM free' [http://www.irinnews.org/report.asp?ReportID=47824&SelectRegion=Middle\\_East&SelectCountry=EGYPT](http://www.irinnews.org/report.asp?ReportID=47824&SelectRegion=Middle_East&SelectCountry=EGYPT) (accessed 20 August 2006).

Model is an attempt to rid villages of the practise through collaboration with the community members, and has been adopted in sixty districts.<sup>20</sup>

Advocacy efforts should aim at increasing awareness of the law prohibiting the practise where such laws exist. In many countries where anti-FGM/C laws exist, there is often little or no awareness of the legal sanctions or the workings of the legal machinery, which contributes to low appreciation for and non-adherence to the law by both the circumcisers and community members. Failure to report cases as well as reluctance of law enforcement agencies to handle gender-based violence which is committed in the private sphere tends to increase the vulnerability of victims.

As noted earlier, some of the practitioners of FGM/C undertake it for religious reasons. In this context, it is important for the religious leaders in communities which practise FGM/C based on religious beliefs to be involved in creating awareness on the true position of Islam on this issue and to condemn the practise of FGM/C as not properly setting out the duties and roles of women under Islam. In the same vein, traditional leaders who are respected in the community can contribute to changing the tide of opinion if they work within existing traditional mechanisms for dialogue to emphasise the value of protecting women's rights from harmful aspects of cultural practises.

The African Parliamentary Declaration recommends the dissemination of international and regional instruments in national languages to the judiciary and the population in a bid to raise awareness in the law enforcers and those for whom law enforcement institutions should protect. It also calls for training of judicial staff, law enforcement and security personnel. This is crucial, as there is a very real danger that strong patriarchal and cultural perspectives may hold sway in the judicial institutions of a country and reinforce gender prejudices in the judicial processes.

Another creative initiative that the African Parliamentary Declaration proposes is that of designing a meritorious system through which individuals (or organisations) that make significant contributions to the advancement of FGM/C will be distinguished. This would serve to motivate local actors engaged in the elimination of FGM/C and cast all such efforts in a positive or nationalistic light. It is possible that to the communities engaging in FGM/C such persons will be vilified, but it is also likely that some affected people in such communities will find role models or points of contact in such entities.

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<sup>20</sup>. UNDP Egypt 'A Girl from Benban Village in Aswan says "No" to Female Genital mutilation' <http://www.undp.org.eg/news/press/2005%20press/august/FGm%20feature.htm> (accessed 14 September 2006).

In Senegal, a local organisation, Tostan, has engaged the communities where FGM/C is practiced in a human rights education campaign aimed at addressing FGM/C within a comprehensive rights based and development framework.<sup>21</sup> The organisation engages in human rights education and lets the community make its own decisions, and this organ has registered success in other countries like Guinea, Mali and Burkina Faso. In addition, Tostan has worked towards convincing thousands of women to publicly abandon FGM/C.

## 5.4 Backlash

The success of efforts to raise awareness on the harmful effects of FGM/C have however produced a backlash. In an effort to avoid the long arm of the law and to have FGM/C undertaken in sanitised conditions, parents are taking their daughters to medical practitioners. This has been detected in Kenya, Sudan and Egypt, as well as in industrialised countries where immigrant communities live. According to a UNICEF study, there is an increase of medicalisation of FGM/C in Northern Sudan, Guinea, Egypt, Nigeria and Kenya.<sup>22</sup>

To avoid confrontation with enlightened, educated and empowered daughters who may reject FGM/C, some parents are taking their daughters for the procedure at younger and more vulnerable ages. This has been evidenced in Burkina Faso, where according to a survey by the National Committee Against the Practise of Circumcision and WHO, baptism ceremonies are being used to cover up FGM procedures on babies.<sup>23</sup> In Tanzania, babies who are merely a few days old are cut under extremely secretive circumstances. These tactics display a failure to appreciate FGM/C as a human rights issue but rather a health issue. What is also required is for advocacy efforts to intensify dissemination of information on the rights of women and girls in addition to the health aspects of FGM.

## 5.5 Criminalisation of FGM/C

The Protocol on Women prohibits all forms of FGM/C and calls for its criminalisation. Criminalisation is a very important element in the fight against FGM/C. This is especially so given that the victims of the practise; women and the girl child, almost invariably constitute the weak and powerless in African societies and hence there is an element of unequal power relations. However, only 14 of the

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21. M Sapp 'Fight to end mutilation hits gritty juncture' <http://www.womenseenews.org/article.cfm/dyn/aid/2642/context/archive> (accessed 19 August 2006).

22. UNICEF 'Female Genital Mutilation/Cutting: A Statistical Exploration' (2005) 13.

23. Pambazuka News 'Burkina Faso: Circumcisers are operating on baby girls to evade the law' 2004 <http://www.pambazuka.org/en/category/welfarer/22278> (accessed 15 August 2003).

29 counties in which FGM/C is practised have passed laws criminalising FGM/C.<sup>24</sup> These include Burkina Faso, Central African Republic, Chad, Cote d'Ivoire, Djibouti, Eritrea, Ethiopia, Ghana, Guinea, Kenya, Niger, Nigeria, Senegal, Tanzania.

A country like Uganda relies on indirect legal provisions to fight FGM/C, such as the constitutional prohibition on laws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status and the Children's Act that outlaws customary or social practices that are harmful to a child's health.

## **5.6 Is criminalisation the solution?**

Criminalisation, while providing the coercive impetus need to dissuade the practitioners who actively practise, aid and abet FGM/C, is not without its challenges. Many countries which are trying to eliminate the problem of FGM/C fall short of legislating against it, examples are Mali and Uganda. In Kenya, the Children's Act outlaws FGM/C for children below 18, and FGM/C forcefully against women above 18 years is unlawful. This ambiguous situation does not meet the spirit of the Protocol on the Rights of Women which requires all forms of FGM/C to be legislated against for all females.

Ghana has a law that prohibits FGM/C, but the Ghana Association of Women Lawyers has decried the weak law enforcement and failure to punish those who aid and abet FGM/C, which has led to its continuation.<sup>25</sup> Ghana is surrounded by countries where FGM exists and parents have continued to send their daughters across borders for FGM/C in countries such as Burkina Faso, Togo and Cote d'Ivoire.<sup>26</sup> In Uganda, where one tribe practises FGM/C, there is no law prohibiting FGM and Uganda is yet to sign the Protocol on Women. Tanzania has outlawed FGM for girls less than 18 years but has yet to prosecute any offender despite an 18 per cent prevalence rate of FGM/C, while Niger which has a prevalence rate of 5 per cent has yet to prosecute offenders under its anti-FGM law passed in 2001. The same situation exists in the Central African Republic. Egypt has had anti-FGM/C laws since 1959 but still suffers very high prevalence rates.

Where laws exist to criminalise FGM/C, they include sanctions such as prison terms. However, in the countries where such anti-FGM/C laws exist, there is evidence of low prosecutions, perpetuating the environment of impunity in which

24. US Department of State 'Prevalence of the practice of female genital mutilation (FGM); laws prohibiting FGM and their enforcement; recommendations on how to best work to eliminate FGM' <http://www.state.gov/g/wi/rls/rep/c6466.htm> (accessed 12 August 2006).

25. IRIN 'Women call for stiffer female circumcision laws' [http://www.irinnews.org/report.asp?ReportID=39247&SelectRegion=West\\_Africa&SelectCountry=GHANA](http://www.irinnews.org/report.asp?ReportID=39247&SelectRegion=West_Africa&SelectCountry=GHANA) (accessed 26 August 2006).

26. As above.

FGM/C flourishes. There seems to be a dearth of studies on why states with FGM/C laws have few prosecutions. A possible implication of this could be that FGM/C is seen by the communities as a cultural right and criminalisation is viewed as a judgment on the acceptability of the practise, hence failure to report the 'crime'. This is complicated further by the fact that the victim of the crime would in effect have to report or give evidence in court against members of her family who were complicit in the crime, in itself is an act of betrayal which would be seen as taboo in many parts of Africa. Women and girls are loathe to report cases of gender-based violence where the sanctions will have an effect on the cohesion of the family. Few women will be willing to have their parents or relatives incarcerated for fear of the social and cultural repercussions. The absence of cogent evidence by which courts can decide a case poses a big challenge for law enforcement agencies.

Clearly, while criminalisation of FGM/C is necessary to dissuade the practitioners and to protect the vulnerable, given the high illiteracy and poverty levels and the strong ties to culture in most communities practising FGM/C, a multi-faceted approach is needed to deal with this complex issue. A comprehensive legal, socially and economically feasible engagement on the part of government and a collaborative approach with the key stakeholders in the community is necessary to reach the affected populations.

## 5.7 Support and protection to victims and potential victims

The Protocol on Women gives state parties a proactive and activist role in requiring them to create awareness in all sectors of society through formal and informal education and outreach programmes on the content of FGM/C laws and the hazardous effects of FGM/C.

In addition, state parties are obliged to adopt preventative measures by protecting women who are at risk of being subjected to harmful practises. A liberal interpretation of this should see governments having a positive and practical duty to protect the next generation of young girls who are likely targets of FGM/C right from infancy. A good case in point is Burkina Faso, which established help lines for likely victims and concerned actors to contact the authorities to save potential incidences of FGM/C. Preventive measures call for informative awareness programmes, stronger and stricter enforcement measures and heightened scrutiny of communities and actors who promote FGM/C, in order to ensure that as known forms of FGM/C are being eradicated, no new underground tactics evolve.

Article 12 of the Protocol on Women requires government to eliminate stereotypes in curricula and to integrate gender sensitisation and human rights education at all levels of education. Burkina Faso has embarked on teaching about the dangers of FGM/C in the school curriculum.<sup>27</sup> Harmful practices should be highlighted in the formal education system; however great care should be taken not to re-stigmatise or reinforce prejudices against the members of communities practising FGM/C. The thrust of the message should not be finger pointing or ridiculing, but rather, identification of harmful practises and emphasis on the importance of respecting cultural identities and norms, so as to weed out the harmful aspects from the cherished values.

Health services including emotional and psychological counselling are provided under the Protocol on Women as a support mechanism for victims of harmful practices. Although access to basic health care is still a problem for many women in several African countries, governments can mainstream these services within existing health care programmes that cater for women's health rights, and set up specialised units where possible in the affected communities as a place of first call for victims.

In addition, the Protocol on Women calls on states to provide legal and judicial support to victims of harmful practises. This should include the extension of legal aid for victims and entail courts to come up with rules of procedure that are gender sensitive. It is a common phenomenon in Africa for gender-based violence cases involving sexual assault to be abandoned by female complainants because of the rigours of technical procedural requirements and the use of culturally inappropriate sexual terminology in public. The conduct of in camera proceedings would go a long way in alleviating the fears of victims of FGM/C who may wish to testify.

## **5.7 Alternative rituals to female genital mutilation/cutting**

What all sides of the polarised debate agree on is that where FGM/C is conducted as a rite of passage, there are aspects of valuable cultural values and objectives. Anti-FGM/C activists have attempted to look for a common basis on which to identify with these positive cultural customs and seek to use this as entry points to the community in their interventions. This has led to the innovation of the holding of alternative rituals that retain the symbolism of the FGM/C procedure while addressing several key issues of importance to women's reproductive rights and health in some countries. Many stakeholders have now taken up this approach to reassure communities that the way of the tribe will not be forgotten.

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27. IRIN '12 year campaign reduces female circumcision' <http://www.irinnews.org/report.asp?ReportID=38930> (accessed 26 August 2006).

In some of the alternative rituals sessions that have taken place, girls are mentored on their functions and important tribal norms and values in preparation for their future gender roles as wives and mothers. This is done to alleviate the fears of promoters of FGM/C that these crucial gender identities and roles will be lost or forgotten. Some Kenyan communities have adopted this approach and take the girls into seclusion, teaching them about health, social aspects of relationships, HIV/AIDS and other important life skills. The Kenya Ministry of Health in an innovative move has in conjunction with the German Development Cooperation instituted an intervention referred to as Inter Generational Dialogue that facilitates young and old people to talk about FGM/C and aspects of health such as HIV/AIDS and reproductive health.<sup>28</sup>

In other traditions that Amnesty International has observed,<sup>29</sup> ceremonial aspects of mutilation are held but without actual piercing or injury taking place. There might be symbolic placing of a knife next to the genitals or some light pricking of the clitoris or thigh or cutting of some pubic hair.

## 6 Conclusion

Arguments and discourses surrounding the conceptual basis of FGM/C and its place in international human rights law may serve some purposes at certain levels. Regardless, for the women who are undergoing or are at risk of undergoing the procedure, the dangers are more than academic and the harmful effects real and irreversible. Women and children's rights to be free from discrimination and violence are reiterated in every major human rights document and this is an established universal principle. Relativism as a tool for cultural renditions of the enjoyment of the right to culture must not be interpreted to translate into modification to the extent that the substance of the right will be rendered nugatory.

The increased multi-sectoral participation of all stakeholders in suppressing and eliminating FGM/C is necessary in order to build a critical mass at the grassroots where the affected populations are found. This numeric advantage should aim to mobilise opinions and new aspirations towards a violence free society for girls and women and seek to work with and convert the practitioners in an enduring collaborative and amicable framework.

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28. Inter Press Service Agency 'Health Kenya-Changing tradition through talk' <http://www.ipsnews.net/africa/nota.asp?idnews=33407> (accessed 26 August 2006).

29. n 5 above.





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## **State response to trafficking in women and children in Africa – the Nigerian experience**

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*Bisi Olateru-Olagbegi*

## 1 Introduction

The global scourge of human trafficking has assumed increasing dimensions and complexities over the years especially as the vulnerability of the source communities deepens and the dynamism of traffickers to recruit their victims assumes unprecedented levels. Such is the enormity of the phenomenon that it has become one of the three largest most lucrative international crimes in the world following trafficking in drugs and illegal arms dealing.<sup>1</sup> According to the International Labour Organization (ILO) Global Report for 2005 ‘the illicit profits produced by trafficked forced labourers annually is estimated at US\$32 billion’.<sup>2</sup> With such huge profits it is no surprise that those who benefit from human trafficking will go to any length to sustain their nefarious activities and keep up the illicit venture for as long as they can.

While it cannot be denied that men also suffer as victims of trafficking, there is a general consensus that women and children constitute the highest number of trafficked persons in the world.<sup>3</sup> Considering the recognised vulnerability of these groups, international focus has increasingly been to tackle trafficking with emphasis on reducing its impact on women and children. From a gender perspective, trafficking has come to be recognised as a form of violence against women thereby imposing international human rights obligations on states to respond appropriately.<sup>4</sup> As trafficking took deeper and more dynamic dimensions, the comity of nations came together at the global and regional levels to seek means of collectively responding to meet the growing threat. However, as with other aspects of international human rights law, the impact of international instruments can only be felt when efforts are replicated at the national level.

With the realisation that they were the preferred destination countries for trans-border trafficking, the United States of America (US) and several European states began to put laws into place to address the issue at their national levels in the late 1990s and the early 2000s. However, despite being identified that as source, transit and destination countries, African states largely failed to translate international commitments into national laws and policies. In fact, until the 1990s Africa did not consider human trafficking as a matter of grave concern though it was recognised that human trafficking was prevalent in Asia and Latin America. For example human trafficking was not publicly recognised and acknowledged in

1. CJ Wennerholm ‘Crossing borders and building bridges: The Baltic Region Networking Project’ in S Williams & R Masika (eds) *Gender, trafficking and slavery* (2002) 10 - 12 compares trafficking to arms and drug dealings but stresses that unlike the latter, women and children can be sold many times.
2. A Global Alliance Against Forced Labour, International Labour Conference, 93rd Session 2005, Report 1(B) 55.
3. S Williams & R Masika ‘Editorial’ in S Williams & R Masika (ed) *Gender, trafficking and slavery* (2002) 6.
4. See art 18 Vienna Declaration and Programme of Action 1993.

Nigeria until the mid 1990s. This recognition of trafficking as a human rights issue in Nigeria is sequel to two events. First was Nigeria's participation in 1996 in a pilot study on the effects and consequences of trafficking in Africa, commissioned by the United Nations Special Rapporteur on Violence Against Women. The second event was the mass repatriation of Nigerians (especially women and girls) from Europe and the Middle East countries and the wide publicity that this evoked in the country.

Following the media publicity that resulted from these events and the perception that the latter event had damaged the national psyche as a consequence of the negative attention it brought to the country, national momentum began to build against human trafficking. The growing momentum did not only end at participation at international fora, but attracted subregional focus to address the several issues involved. As one of the most affected states in Africa, Nigeria seems to have set the pace by developing a national framework aimed at addressing human trafficking. Accordingly, using Nigeria as an example of best practice in this regard, this paper examines national response to women and child trafficking in Africa.

## 2 What is human trafficking?

As Wennerholm has noted, the definition of human trafficking had been the subject of debate for some time.<sup>5</sup> The definition of trafficking varies according to the defining instruments and the focus of such instruments. However, the United Nations Protocol to Prevent, Suppress and Punish Trafficking Supplementing the United Nations Convention Against Transnational Organised Crime (Palermo Protocol)<sup>6</sup> defines trafficking in persons as:

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power, or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.<sup>7</sup>

Despite being the first comprehensive definition of trafficking, article 3 of the Palermo Protocol has not escaped criticism. While some writers have criticised the

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5. Wennerholm (n 1 above) 10.

6. Adopted in December 2000 and entered into force on 25 December 2003. Nigeria ratified this Protocol in 2001.

7. See art 3 Palermo Protocol.

Palermo Protocol as having been caught in the divide between consent and coercion as ingredients of a proper definition,<sup>8</sup> others have faulted its failure to clarify terms like ‘exploitation of the prostitution of others’ and ‘sexual exploitation’ as used in the definition of ‘trafficking in persons’.<sup>9</sup> Notwithstanding these criticisms, article 3 of the Palermo Protocol stands out as a standard for defining trafficking.

In Nigeria human trafficking had for a long time been misconstrued or confused with some cultural practices. Consequently incidents of trafficking had been condoned either as cultural or religious practices, which would in the long run be beneficial to the trafficked persons and their families. This confusion may also have been partly responsible for the absence of a comprehensive national definition of trafficking. In reality however such practices have resulted in traumatic human rights abuses which have had lifelong negative physical and psychological effects on the trafficked persons in addition to resulting in economic loss and loss of life. This was not peculiar to Nigeria, as until recently, local laws in most African countries did not define human trafficking.<sup>10</sup> In the case of Nigeria, while there was no clear definition of trafficking prior to 2003, both the Criminal Code of Nigeria (Criminal Code)<sup>11</sup> and the Penal Code of Nigeria (Penal Code)<sup>12</sup> contain offences relating to aspects of human trafficking that could provide a statutory framework for responding to the scourge of trafficking in the country.

The Criminal Code makes it an offence to procure women and girls for prostitution in or outside Nigeria.<sup>13</sup> Under section 223(1), it is an offence to procure a female person under 18 years who is not a prostitute or a person known to be of immoral character to have unlawful carnal connection with any person either in Nigeria or outside Nigeria. Other subsections make it an offence to procure a woman to be a common prostitute or to be an inmate of a brothel within Nigeria or elsewhere.<sup>14</sup> In similar vein, the Penal Code (which for historical reasons of being fashioned along the Islamic laws has stronger provisions) essentially creates offences related to what is now known as trafficking. Hence the Penal Code provides that:

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8. See J Doezema ‘Who gets to choose?’ in S Williams & R Masika (ed) *Gender, trafficking and slavery* (2002) 20.
  9. AD Jordan ‘Human rights or wrongs? The struggle for a rights-based response to trafficking in human beings’ in S Williams & R Masika *Gender, trafficking and slavery* (2002) 28.
  10. Ghana and Togo are some African countries that have passed specific anti-trafficking laws in recent times.
  11. Criminal Code Act promulgated 1 June 1916 is the criminal law applicable in the Southern part of Nigeria.
  12. Penal Code Act promulgated 30 September 1960 is the criminal law applicable in the Northern part of Nigeria.
  13. Sec 223 Criminal Code Act 1916.
  14. See sec 223(1) – (4) Criminal code of Nigeria. Also see secs 222A, 224, 225A, 227, 365, 366 and 369 of the Criminal Code, all of which contain offences relating to aspects of trafficking.

[W]hoever by any means whatsoever induces any girl under the age of 18 years to go from any place or to do any act with intent that such girl may be or knowing that it is likely that she will be forced or seduced to illicit intercourse with another person shall be punished with imprisonment which may extend to 10 years and shall also be liable to a fine.<sup>15</sup>

By the provisions of section 276, the Penal Code specifically prohibits trafficking of women into Nigeria but is silent on trafficking of women outside Nigeria. In fact the Penal Code also provides for the offence of ‘traffic in persons’ though the provision mainly relates to the offence of ‘slavery’.<sup>16</sup>

The various offences in both the Criminal Code and the Penal Code differ from the definition of trafficking as contained in the Palermo Protocol because the latter instrument includes certain elements that are lacking in the Codes. The key elements of trafficking as contained in the Palermo Protocol are;

- (i) Movement (of a person): This will involve the solicitation of the trafficked person, the recruitment, the transportation or transfer or harbouring, or receipt of such trafficked person.
- (ii) By any means: Traffickers have been known to be highly dynamic in the means or baits they use to get their victims. Such means include threats or use of force, abduction, fraud, coercion, deception, abuse of power or position or vulnerability or through sale to get the trafficked person into the trafficked position.
- (iii) Purpose/Motive: In all cases the trafficker has the motive to exploit the trafficked victim and it could be for sexual exploitation such as in subjection to prostitution or for forced labour such as farm labour or work in sweat shops or services such as domestic servitude, slavery-like practices or practices similar to slavery, servitude or for the removal of organs.

As there are many related offences to human trafficking such as illegal migration or human smuggling, forced labour and slavery, it should be noted that if any of the elements is absent, the transaction will not constitute human trafficking and may fall within the scope of any of the other related offences. It is therefore very important to have a proper understanding of the elements which constitute human trafficking as the understanding invariably affects the strategies to be used in addressing the issues. For example a transaction involving the illegal smuggling of another to a foreign country even with payment of fees and no more will not constitute human trafficking unless of course after the smuggled person is brought to the destination further acts such as debt bondage, forced labour or slave like practices are perpetrated against such smuggled person then the transaction transforms to human trafficking. In the case of human smuggling both the smuggler and the smuggled are guilty of criminal offences. However, in human trafficking it is only the trafficker who is guilty of a crime whereas the trafficked person is a victim of human rights abuse and needs protection. The lack of proper

15. Sec 275 Penal Code of Nigeria. See also sec 281 Penal Code.

16. Sec 279 Penal Code 1960.

understanding of the trafficked person has been responsible for some of the destination countries treating the trafficked persons as criminals and subjecting them to prosecution and conviction to imprisonment as illegal immigrants rather than being treated as victims.

The deficiency in the definition of trafficking in the Nigerian legal system has now been rectified by the Trafficking in Persons (Prohibition) Law Enforcement and Administration Act (NAPTIP Act).<sup>17</sup> Section 50 of the NAPTIP Act, defines trafficking as:

all acts and attempted acts involved in the recruitment, transportation within or across Nigerian borders, purchases, sale, transfer, receipt or harbouring of a person involving the use of deception, coercion or debt bondage for the purpose of placing or holding the person whether for or not in involuntary servitude (domestic, sexual or reproductive) in force or bonded labour, or in slavery-like conditions.

Probably as a result of not being familiar with the dynamics of trafficking, many countries had in the past confused human trafficking for prostitution with simple domestic prostitution and consequently adopted anti-prostitution laws as a means of curbing human trafficking. This has been found to be counter-productive as trafficked persons for prostitution have been driven further underground resulting in their suffering worse abuses and making their rescue and protection even more difficult than should be.<sup>18</sup>

Although the NAPTIP Act needs some overhauling in order to close some existing gaps, its promulgation has contributed to bringing the issue of human trafficking into national focus and shows government's commitment to address the issue of human trafficking seriously. It is pertinent to mention that the NAPTIP Act broadened the scope of the definition contained in the Palermo Protocol by providing for the offence of 'attempts' to commit human trafficking.<sup>19</sup> The creation of the offence for 'attempts at human trafficking' is a bold and laudable innovation in the NAPTIP Act as more often than not, those who are caught within the shores of Nigeria especially in trans-border human trafficking are invariably caught before the crime is fully executed so that they cannot be tried successfully for committing an offence. These people can now be prosecuted for attempts to commit the offence.

Further, the NAPTIP Act provides for stiff penalties which range from life imprisonment and payment of heavy fines to two years imprisonment with or without an option of a fine. The NAPTIP Act covers the traffickers as well as

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17. Trafficking in Persons (Prohibition) Law Enforcement and Administration Act 2003 (as amended by the Trafficking in Persons (Prohibition) Law Enforcement and Administration (Amendment) Act 2005).

18. See also Williams & Masika (n 3 above) 4. They argue that the conflation of trafficking with prostitution may force victims into the hands of third parties promising protection.

19. See sec 50 NAPTIP Act.

accomplices such as the parents and relatives, the commercial transporters and the religious leaders who perform oaths of secrecy on the victims.<sup>20</sup> Moreover, with a universally acceptable definition some of the misconceptions relating to the cultural and religious practices which tend to facilitate the nefarious activities of traffickers to the detriment of the trafficked persons have become glaring. Practices such as cultural fostering (which is a practice where relatively well-to-do families receive children of their poorer relatives for purposes of providing care and proper upbringings so as to stop the cycle of poverty) which are now being scrutinised when such children are subjected to various forms of exploitative labour under inhuman conditions. This cultural fostering is now within the ambit of the NAPTIP Act.<sup>21</sup> Relatives, non-relatives, neighbours and all those who engage in recruiting women and children from rural communities to traffic them to cities under exploitative conditions are now regarded as human traffickers who can be prosecuted under the NAPTIP Act.

It must be added here that the NAPTIP Act also creates the National Agency for the Prohibition of Trafficking in Persons and Other Related Matters (National Agency) charged with administering the law and prosecuting human trafficking offenders.

### 3 The character of trafficking in women and children in Nigeria

Human trafficking in Nigeria cannot be examined outside the context of the national socio-economic structure. Nigeria is the most populous country in sub Saharan Africa with a population of about 140 million.<sup>22</sup> Although Nigeria is endowed with abundant natural resources, it is estimated to have a per capita GNP of about US\$280.<sup>23</sup> Despite Nigeria's wealth in oil resources,<sup>24</sup> poverty is a major problem in most parts of Nigeria. There is a high rate of unemployment, poor standard of living, poor infrastructure and a generally low quality of life. Consequently there is a large population in the rural communities where poverty, illiteracy and general ignorance increase people's vulnerability to various forms of human rights abuse including human trafficking especially the trafficking of

20. See secs 11-24, 29-32 NAPTIP Act.

21. J Fong 'Literature on trafficking in West and East Africa' [http://gaatw.net/working\\_paper/africa](http://gaatw.net/working_paper/africa) (accessed 18 June 2007).

22. This is the estimate from the 2006 national census. See <http://www.nigeria.gov.ng>

23. 'World Bank Report 2003' [http://www.worldbank.org/annualreport/2003/download\\_report.html](http://www.worldbank.org/annualreport/2003/download_report.html) (accessed 18 June 2007). See also 'UNDP Human Development Report 2006' <http://hdr.undp.org/hdr2006/statistics/countries> (accessed 18 June 2007).

24. Nigeria is a member of OPEC and is ranked as the eight largest producer of oil in the world. See 'OPEC Annual Report 2005' <http://www.opec.org/Annual%20Statistical%20Bulletin/ASB2005.htm> (accessed 18 June 2007).

women and children. The situation is such that as at 2003 Nigeria was ranked as one of the seven poorest countries of the world.<sup>25</sup>

Considering the size of her population, the unfavourable socio-economic situation and other factors, Nigeria has been reputed as having contributed the largest population to the human trafficking trade. As at 2001, the US State Department's report on 'Trafficking in Persons' identified Nigeria as a source, transit and destination country for the illicit trade.<sup>26</sup> Other surveys conducted during the same period revealed that Nigeria was responsible for more cases of trafficking of women into Europe for forced prostitution than any other African country. For example the Italian authorities estimate that about 10 000 Nigerian prostitutes work in Italy, many of them victims of traffickers.<sup>27</sup> By June 2007 when the US State Department's 2006 report was released, Nigeria was still classified as a source, transit and destination country.<sup>28</sup>

Despite the lack of proper documentation, it is believed that internal and external or cross border human trafficking occur regularly in Nigeria.<sup>29</sup> As a source country most trafficked persons are recruited from the rural poor communities in almost all the geopolitical zones of Nigeria. Invariably the area of source of the trafficked person will determine the destination or type of exploitative labour the person will be subjected to. The recruitment of most internally trafficked persons is done in rural communities of Oyo, Ogun, Ondo, Akwa Ibom, Ebonyi, Benue, Kwara and Niger States. The internal destinations are usually urban centres or cities especially state capitals across the nation particularly Lagos, Port Harcourt and Kano.<sup>30</sup> Those who are trafficked across the borders are sourced mainly from rural communities in Ebonyi, Edo, Kwara, Akwa Ibom, Cross Rivers, Oyo and Ogun States. The destination countries for Nigerian trafficked persons are Benin, Togo, Ghana, Cote d'Ivoire, Cameroon, Gabon, Equatorial Guinea and countries in the central African sub-region. Other destinations include Italy, Belgium, Spain, Netherlands, Denmark, France, Germany and the United Kingdom in Europe and Saudi Arabia in the Middle East.<sup>31</sup> It is pertinent to mention that in the last decade most of the victims trafficked to Italy for prostitution or sex related work are sourced from Edo State. The Italian Ambassador to Nigeria acknowledged that as at 1999 Nigerian women constituted 60 per cent of the population of the entire prostitutes in Italy and that over 80 per cent of these prostitutes are from Edo

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25. UNDP Human Development Index 2003. This period was the peak of trafficking in Nigeria.

26. The US Trafficking in Persons Report of July 2001 <http://www.state.gov/g/tip> (accessed 18 June 2007).

27. Speech delivered by Dr Giovanni Germano (then Ambassador of Italy to Nigeria) at the All African Conference at the Sheraton Hotels and Towers, Abuja, Nigeria.

28. The US State Department 'Trafficking in Persons Report 2006' (US Report 2006), 193.

29. 'Human Trafficking in Nigeria: Root causes and recommendations' UNESCO Policy paper 14.2, (UNESCO Policy paper 2006) Paris, 2006, 22-24.

30. As above.

31. See also the US Report 2006 (n 28 above) 193.



State of Nigeria.<sup>32</sup> Most of these Nigerians engaged in prostitution were trafficked persons.

Over the years Nigeria has also been a destination country for trafficked persons from neighbouring countries in West Africa like Benin, Togo, Ghana and Niger such that Nigeria has been the largest recipient of nationals from other West African countries in the last two decades. These trafficked persons were mostly children and young women who are subjected to domestic servitude, begging and prostitution.<sup>33</sup> As a transit country, trafficked persons from Benin, Togo and Ghana pass through Nigeria enroute to destinations in Europe and the Middle East. Major transit routes for Nigerian trafficked women enroute to Europe are usually through parts of West and North Africa. These are countries such as Benin, Togo, Ghana, and Mali in West Africa and Libya, Algeria, Tripoli and Tunisia in North Africa. The women are trafficked for various forms of exploitative labour but predominantly for domestic work, farm labour, factory hands, marriage, begging and for sexual purposes.<sup>34</sup>

Originally, traffickers made use of air, sea and land routes to transport trafficked persons across national borders. As the vigilance by immigration officers heightened at airports, most of the traffickers resorted to taking their victims by road and sea routes.<sup>35</sup> Trafficked persons from Nigeria and neighbouring countries enroute to destinations such as Gabon, Fernando Po and Cameroon go through hazardous journeys by sea. The deplorable condition of travel by sea of the trafficked person was once described as 'only comparable to the 18th century trans-Saharan slave trade'.<sup>36</sup> Many of the trafficked persons have been lost at sea as a result of travelling in boats that were not sea worthy and were overloaded. Some of them lost their lives as a result of hunger and dehydration. The use of road transportation, though also hazardous, has in recent times become more popular especially for those victims heading for Europe. According to Father Don Oretse Benzi:<sup>37</sup>

Until two years ago they used to come to Europe by airplane, now they come by land, by foot and by car, going through various countries to Morocco,

32. See 'The Rape of the Innocents', a Report of the Proceedings of the Pan African Conference on Human Trafficking in Abuja, 2002.

33. See Fong (n 21 above) 2.

34. V Nwogu 'Trafficking of persons to Europe: the perspective of Nigeria as a sending country' paper presented at the ASI & OIKIS Conference on trafficking and migration: A human rights approach, 4-5 March 2005, 2.

35. Network for Justice and Democracy (NJD Report) 'International perspectives and Nigerian laws on human trafficking' <http://www.humantrafficking.org/publications> (accessed 31 May 2007).

36. AJ Ojomo (Assistant Inspector General of Police) presentation at national workshop on 'Trafficking in women and forced labour migration' Abuja, October 1999.

37. Don Oretse Benzi is president of the 'Community of Pope John XXIII', he is a Catholic priest working with the Nigerian trafficked victims for prostitution in Italy. He made a presentation at the Pan African Conference on Human Trafficking, Abuja, Nigeria, 2001 in this regard.

through the Gibraltar they arrive in Spain and then by train they reach Italy or other European countries.

Those going to Europe often go through the deserts of Mali, to North African countries such as Libya, Morocco and Tunisia before crossing the Suez Canal to Spain in Europe.

The experiences of Nigerian trafficked persons through deserts are sordid and horrific. Before reaching their destinations many of the girls die enroute as a result of the hazards of the journey. There have been stories of many of the trafficked persons being forced to have sex with strangers and those referred to as ‘the camel boys’ in the desert in exchange for food or water. Sometimes people lose their lives as a result of harsh weather conditions and physical abuse from traffickers or their agents. Trafficked persons are also often exposed to various health hazards and the risk of contracting sexually transmitted infections including HIV.<sup>38</sup> Most of the trafficked women and girls are sold and resold many times over before reaching North Africa and their final destinations in Europe. In North Africa there are many transit camps where the trafficked persons are forced to engage in prostitution for survival. Crossing the Atlantic Ocean or the Suez Canal from North Africa into Spain is another dangerous means of travel that trafficked persons are forced to undertake. Those who provide the boats and ferries to cross the sea are more interested in the number of passengers they carry and least interested in the number that survives the journey, consequently despite charging exorbitant prices of between US\$1500 - US\$3000 per person, the boats are usually overcrowded, unfit for human carriage and generally not seaworthy. In view of all these hazards only about one third of those who start the initial journey from Nigeria reach their destinations in Europe.

## **4 The profile of trafficked persons and traffickers**

### **4.1 Trafficked persons**

Most worldwide studies show that the majority of the trafficked persons are women and children, although there are a few cases of trafficking men, the situation in Nigeria is no different.<sup>39</sup> Women and children have been found to be most vulnerable as a result of many factors most of which are gender-based. Women and children, particularly girl children, are in the lowest of the Nigerian societal perception as a result of established norms of socialisation and patriarchy and as such they suffer deprivation of their rights in many spheres of human endeavour.<sup>40</sup> In effect Nigerian women lack the resources for equal

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38. NJD Report (n 35 above) 31-32.

39. Williams & Masika (n 3 above).

40. UNESCO Policy Paper 2006 (n 29 above) 32.

competition in the economy and have only a marginal representation in decision-making and governance. These factors have contributed immensely to the impoverishment of women and the pervading ignorance which has made them most vulnerable to being trafficked. The gender implications to human trafficking was duly acknowledged by Radhika Coomaraswamy when she stated: 'that the lack of rights afforded to women serves as the primary causative factor at the root of both women's migration and trafficking in women.'<sup>41</sup>

The vulnerability of children, especially the girl child to being trafficked is even worse because of the socio-cultural practices which place children, particularly the girl child at the lowest level of society making them suffer discrimination and various forms of human rights abuses. The position of vulnerability is further compounded when orphans and children from broken homes are involved. Most of the trafficked women from Nigeria were children when they were first trafficked.<sup>42</sup> This is more so as the demand for younger girls in the sex industry heightened as a result of socio-cultural erroneous beliefs that young girls are less likely to be living with HIV/AIDS.

A close examination of the profile of persons trafficked in Nigeria indicate that they are mostly women and girl children from poor rural communities or suburban communities. Most victims are unskilled and illiterate or semi-illiterate and ignorant of their rights as human beings. In most cases the quest for survival or for a better life make the women fall easy prey to the shrewd traffickers, who in many cases are persons in positions of trust to their victims.<sup>43</sup> Although poverty is a key push factor to the vulnerability of the trafficked persons there are other factors that make the impact of poverty even more acute. Such factors include the incidence of large families and the consequences of broken or dysfunctional homes.<sup>44</sup> Polygamy is usually the basis for such large families. Polygamy is practised in almost all societies in Nigeria with there being no limit to the number of wives a man can marry under customary law while Islamic law allows a man to marry up to four wives. As a result of the traditional practice of acquiring many wives and having many children who were supposed to work on the family farmland at a time when Nigeria relied mainly on the agrarian economy, many families in the rural communities are large with too many children for the meagre

41. See 'Integration of the human rights of women and the gender perspective' Violence Against Women, Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, Radhika Coomaraswamy, on trafficking in women, women's migration and violence against women, submitted in accordance with Commission on Human Rights Resolution 1997/44 (Coomaraswamy Report) available at <http://www.unhcr.ch/huridocda/huridoca.nsf/%28Symbol%29/E.CN.4.2000.68.En> (accessed 18 June 2007).

42. Women's Consortium of Nigeria (WOCON) 2000 Report on *Research on Trafficking in women in Nigeria*, study commissioned by the Dutch Embassy, Lagos.

43. See also Coomaraswamy Report (n 41 above) 19-21.

44. See the ILO International Programme on the Elimination of Child Labour (ILO/IPEC) (2001) *Combating trafficking in children for labour exploitation in West and Central Africa*, synthesis report, ILO, Geneva, 43.

resources of the families. Consequently any opportunity to reduce the number of mouths to feed is welcome and this opportunity may well be a bait from traffickers.

Faced with the Herculean task of feeding large families, most poor and unsuspecting parents or guardians readily succumb to the promises of better life for their children in the cities or outside the country and will give up their children to traffickers who will exploit them. In some cases it is not only the poverty or the large families but also other excruciating factors with historical connotations. Such is the case of Edo State where 80 per cent of trafficked victims who end up in Europe as prostitutes are sourced. Historically many Nigerians from Edo State had been involved in commercial enterprise with Italy when the Nigerian economy was experiencing a boom in the 1970s. By the 1980s when Nigeria experienced a recession and the local currency was greatly devalued, it became more attractive for the traders to source money from Italy by picking potatoes.<sup>45</sup> However with the influx of Eastern Europeans into West Europe (especially Italy) coupled with the growth in the international sex industry and the consequent demand for young Africans these traders diverted their businesses to that of human trafficking. Their major source area was from among their own people who they could trust to keep the clandestine transactions of human trafficking secret.<sup>46</sup> The traffickers do not distinguish women by age, all women are trafficked, although the trafficking of young girls is more rampant. There have been recent undocumented cases of middle-aged women between 35 and 55 years who are trafficked to Europe and the US to work as nannies or day care assistants.

## 4.2 Traffickers

Depending on the target and the form of trafficking involved, traffickers could be next-door neighbours, relatives, friends, total strangers or syndicated crime gangs. Those who engage in internal trafficking for domestic work and farm labour are usually individuals in the community who had been exposed to city life and have some wealth to show for it. In most cases they are perceived as 'village champions' who are respected or envied for their exposure to city life. Individuals in this category bait their victims with promises of a better life in the city, opportunities for work or petty businesses. Usually the village traffickers start with members of their extended families before sourcing for other victims in their village. When they have exhausted their clientele in a particular village, they move to neighbouring villages or communities. There is no sophistication or complexity about this form of internal trafficking as it is usually for domestic work even though in some cases the victims are forced into prostitution instead of domestic servitude or farm labour that had been promised them.

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<sup>45.</sup> See UNESCO Policy Paper 2006 (n 29 above) 34.

<sup>46.</sup> As above.

This type of individual trafficker acting in isolation could also be involved in the external trafficking to neighbouring countries where visas are not required for work on the farm plantations, or as market assistants, catering workers and domestic workers.<sup>47</sup>

Traffickers become more sophisticated when dealing with cross-border trafficking to European or the Middle Eastern countries where different classes of criminals are involved at different stages of the transaction. Using the procedure for trafficking of women in Edo State as an example, the traffickers do not operate individually as there are different actors needed for different stages of the transaction. These actors include the recruiters or their agents, members of the victims' families, the forgers of travel documents, the traditional priests who administer oaths of secrecy or rituals, the travel escorts and the law enforcement collaborators who facilitate the travels through corrupt means. Usually these actors constitute crime syndicates which may become violent if in danger of detection or are unable to acquire the anticipated gains from the victims or their relatives. Incidentally most of the traffickers engaged in the trafficking of women and children in Edo State of Nigeria are also from the same state.<sup>48</sup>

## 5 The forms and nature of human trafficking in Nigeria

### 5.1 Peculiar traits in the trafficking of women in Nigeria

There are numerous forms of forced labour that trafficked persons are intended to do once they arrive at their destination. Nigerian women and children are trafficked for domestic work, farm labour, prostitution, street hawking, food vending, forced marriage and other exploitative labour which traffickers may decide on.<sup>49</sup> However, new forms of trafficking are emerging that will need further investigation. These include activities that are popularly termed 'baby harvesting' and 'begging'.<sup>50</sup> *Baby harvesting* is a form of trafficking that has only recently emerged. Public attention has been drawn to its occurrence in parts of Lagos, Abia and Ebonyi States where illegal orphanages lure pregnant young women and teenagers into their homes under the guise of caring for their antenatal needs. While in the orphanages their movements are restricted and when these women and girls deliver, their babies are sold without their consent for sums ranging from US\$2500 - US\$4000. There have also been some unconfirmed reports of women being imprisoned in these homes and forced to have sex with men who impregnate them and upon delivery the babies are sold without the

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47. This is common within the ECOWAS region as a result of the ease of inter-border movement.

48. See UNESCO Policy Paper 2006 (n 29 above) 34.

49. See also US 2006 Report (n 28 above) 193.

50. UNESCO Policy Paper 2006 (n 29 above) 30-31.

consent of the mothers. It is claimed that the women victims are made to swear oaths of secrecy before they are paid off.<sup>51</sup>

### **5.1.1 Begging**

This is another emerging trend in trafficking.<sup>52</sup> In this case, men and women are trafficked for the purpose of being forced into begging on the streets. Traffickers recruit adults with physical disabilities and transport them from the northern part of Nigeria to the cities in the southern parts of the country, and more recently, to Saudi Arabia during the Holy Pilgrimage to work as beggars. The traffickers pay the victims a paltry sum of US\$3 daily for begging while the trafficker takes all the monies collected. This form of human trafficking needs further investigation and study.

### **5.1.2 Trafficking of *Buzu* women**

Trafficking of *Buzu* women from an area of Niger Republic had been going in the northern part of Nigeria without public knowledge for several years.<sup>53</sup> These *Buzu* women are received by wealthy families in the northern part of Nigeria and are required to serve as domestic workers. They are also engaged as sex partners or concubines to serve wealthy men. Occasionally, some of the trafficked *Buzu* women end up marrying their employers who are often affluent business people. This is another form of trafficking that has not been properly investigated even though there is evidence of its occurrence in many parts of northern Nigeria.

In all these cases of trafficking there is the common threat of violence faced by the trafficked women. These include:

- **Forced labour:** Which involves the traffickers and their collaborators placing the victims in work places under onerous conditions where the victims are underpaid, unprotected and generally work below the minimum standard of labour recommended by the ILO. Some of the women in domestic servitude work for over 18 hours per day, 7 days a week and earn as little as US\$24 per month. The trafficked women are also physically and sexually abused by male co-workers and male relatives in the employer's family.
- **Restriction of the movements:** This is done by ensuring the seizure of the victims' travel documents, denial of information on movement in the destination area and physically locking up of victims. In all these situations, traffickers rely on the use or threat of violence to maintain their hold on

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51. As above.

52. UNESCO Policy Paper (n 29 above) refers to this as 'organised begging'.

53. UNESCO Policy Paper 2006 (n 29 above) 24.

victims. There is also the innovative use of threats against family members back home in Nigeria to keep victims from escaping or exposing traffickers to authorities in the foreign state.<sup>54</sup>

- Debt bondage: where victims are forced to pay huge sums of money (up to US\$50 000) repayment of debts supposedly owed to the traffickers for facilitating the travel. Victims have to repay these debts with their earnings from forced labour and end up giving up all their 'earnings' to traffickers and their agents. Women trafficked for prostitution in foreign countries face serious health hazards in their attempt to repay the debt faster as they engage in unprotected sex for more money and thereby expose themselves to the risk of contracting sexually transmitted diseases including HIV.<sup>55</sup> In some cases the traffickers or their agents receive the wages of the trafficked person directly from the 'employers', sometimes for up to 3 years in advance, denying the victim the fruits of her labour and exposing the victims to slavery-like treatment and abuse.

In addition to these abuses and various forms of violence against women, it is necessary to highlight some peculiar traits in the trafficking of women in Nigeria especially relating to the trafficking of women for prostitution or sex work. After the recruitment exercise, in order to seal the transaction and ensure that the victims do not renege on the debt bondage or denounce the traffickers, the trafficked persons are made to undergo traditional oaths of secrecy. These oaths are administered on the victims and members of their families in traditional shrines and often involve the use of victims' blood, fingernails, bodily hairs which kept with the victims' photographs. The traditional priests prepare concoctions with material such as blood from chicken and other ritual substances. The victims and their relatives or guarantors drink these concoctions and are then made to swear oaths of secrecy. According to Father Oretse Benzi, in the course of the oath taking the trafficked girls are made to say repeatedly that 'if I don't pay I will go crazy or I will be killed'.<sup>56</sup> This traditional oath taking is meant to instil fear of serious reprisal such as death, madness or terrible harm to the victim, in the event that the victim reveals the secrets of the trafficking transaction or refuses to pay the debt bond. Many of the victims believe in the efficacy of these oaths and are so terrified that even when they are rescued from the trafficking situation, they still believe strongly that they will go mad and some actually do.

The concoctions taken during the oath-taking are also believed to have the efficacy of attracting sexual customers for the victims, of protecting victims from contracting HIV and even of preventing the detection of the victims by the immigration authorities of the destination countries.<sup>57</sup> The ritual of traditional

54. See also NJD Report (n 35 above) 27.

55. NJD Report (n 35 above) also identifies the aspect of debt bondage.

56. n 37 above.

57. WOCON's Report on 'Research on Trafficking in women in Nigeria' commissioned by the Dutch Embassy, Lagos, 2000.

oath-taking in shrines is a peculiar trait that is more common with human trafficking in Edo State of Nigeria and has had a largely negative impact on the flow of information on the issue of human trafficking. This has created more complexities because most people believe in the efficacy of these oaths irrespective of their religious affiliations. Traffickers know that the victims genuinely believe in these rituals and capitalise on it so as to establish control over their victims and therefore guarantee the repayment of the illegal debt. The removal of victims' hairs from the head, armpits and pubic area further cement the hold on the victims for as long as those items are kept in the shrine or in the custody of the trafficker. There are now cases of the traditional priests posting the photographs and other parts to the foreign destination where the trafficked persons are kept captive.<sup>58</sup>

Paradoxically, there is official avoidance of this aspect of the threat of violence as the government and courts in Nigeria play down the issue of rituals. This is in spite of the obvious psychological impact of these rituals on victims and potential witnesses. Many of those in European countries who are engaged in the combat of human trafficking have also found that the rescued Nigerian victims are affected psychologically by the oaths and will not break the oath even in exchange for resident permits in these countries. In order to press home their point, traffickers have in some cases tried to physically eliminate defaulting victims or their family members where the oath is either broken or where there has been a failure to make expected payments. This action is aimed at instilling fear in the victim and in other potential victims.<sup>59</sup> The joint research, which was disseminated by email to thousands of recipients, found that 'the traffickers use enforcers to ensure that their victims honour their contract – no matter how phoney or deceitful it might have been'.<sup>60</sup>

Unfortunately the Nigerian Police lacks the capacity to properly investigate these issues and protect victims of trafficking from reprisals so that the belief of the efficacy of the oaths continues to gain ground even when the traffickers physically perpetrate the reprisal attacks on victims who break the oath. Research conducted in Nigeria by Anti-Slavery International (UK) in 2002 clearly shows the incapacity of the police to protect the victims. According to the report:

If trafficked women leave their trafficker before paying back their debt (either because of being apprehended by authorities or of their own will), often agents and traffickers in Nigeria will harass and intimidate families in Nigeria to pay outstanding debt. In some cases they threaten the family verbally, physically or destroy the family's property. Positive examples of police protection from reprisals by traffickers are rare whilst allegations of

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58. As above.

59. Outcome of interviews conducted jointly by the Advocacy Project (USA) and WOCON in 2000 and reprinted in *Girls for Sale: The Scandal on trafficking from Nigeria* <http://www.advocacynet.org> (accessed 18 June 2007).

60. As above.



corruption and police complicity in trafficking remain rife. Lack of faith in the Police means reprisals ... Another Italian NGO, COLCE mentioned a case where a woman trafficked to Italy escaped her situation and was out to testify against the trafficker; however her family was being threatened and her mother in Edo State was shot dead.<sup>61</sup>

The situation of law enforcement has not changed much since this study as some trafficked victims have suffered reprisal attacks following their deportation or upon denunciation of their traffickers. There are also no victim protection schemes in operation at the moment and many victims have no security guaranteed in Nigeria.

### 5.1.3 Legal agreements

Apart from the oaths of secrecy, traffickers are known to have initiated the introduction of agreements to validate trafficking transactions. These agreements which are drawn up by lawyers are usually referred to as a 'friendly agreement' and aim to put an appearance of legitimacy to the transaction of human trafficking. Such agreements take the form of a tripartite agreement between the trafficker, the victim and the victim's relative or guarantor. The trafficking transaction is then disguised as a legitimate contractual loan agreement. The victim's relative guarantees that the victim will pay the trafficker huge sums of money in foreign currencies.

## 6 The international response

International responses to human trafficking have been varied and have taken place at both the global, regional and subregional levels. In this part of the paper, the most important responses to human trafficking at the international level will be laid out briefly with special focus on the Palermo Protocol. The main points of these responses will then be used to measure the African response, with Nigeria as the case study.

As noted in the Network for Justice and Democracy Report (NJD Report), the international response to human trafficking began long ago in the form of anti-slavery instruments.<sup>62</sup> Thus, the International Agreement for the Suppression of White Slave Traffic (Agreement) was adopted in 1904. This Agreement aimed at building inter-state cooperation to develop enforcement and other measures to combat the trafficking of women from Europe for the purpose of engaging in 'immoral' activities in Asia and the Middle East. Closely following the 1904

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61. As above.

62. NJD Report (n 35 above) 54.

Agreement was the International Convention for the Suppression of the Traffic in Women and Children.<sup>63</sup> In 1948, the Universal Declaration on Human Rights (UDHR) was adopted by the UN. While not specific to human trafficking, the UDHR contains provisions that guarantee the rights of all individuals to their human dignity and prohibits slavery in any form.<sup>64</sup> Soon after the UDHR, another trafficking-specific instrument was adopted in the form of the 1949 Convention for the Suppression of Traffic in Persons and for the Exploitation of the Prostitution of Others (1949 Convention). As the NJD Report notes, the 1949 Convention amplified the link between trafficking and prostitution (albeit forced prostitution).<sup>65</sup>

Since the 1949 Convention, several other instruments have been adopted, which directly or indirectly touch on the issue of human trafficking and its attendant evils. These include the Supplementary Convention on the Abolition of Slavery, the Slave Trade Institutions and Practices Similar to Slavery (1956) and the Abolition of Forced Labour Convention of 1957. In 1966, the International Covenant on Economic, Social and Cultural Rights (CESCR) and the International Covenant on Civil and Political Rights (CCPR) were adopted.<sup>66</sup> Like the UDHR, the CESCR and the CCPR are general human rights instruments but they contain provisions that impact on the campaign against trafficking.<sup>67</sup> Other instruments include the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) of 1979,<sup>68</sup> the 1984 Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment,<sup>69</sup> the 1989 Convention on the Rights of the Child (CRC),<sup>70</sup> and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW).<sup>71</sup> All of these instruments contain provisions relevant to the protection of human rights and the prevention of slavery, slavery-like activities, trafficking and all other activities that have the potential to interfere with the dignity of people.

In addition to the instruments set out above, other relevant ‘hard’ and ‘soft’ instruments demonstrating the international response to trafficking include the 1995 Conference on Women and the Beijing ‘Platform for Action’, the 1994 International Conference on Population and Development, the 1996 Stockholm Congress Against Commercial Sexual Exploitation of Children, the 1999 ILO Convention on the Worst Forms of Child Labour, and the 2000 United Nations Convention Against Transnational Organised Crime (Convention on Organised

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63. Adopted in 1921. See also NJD Report (n 35 above) 55.

64. Arts 1-5 UDHR.

65. NJD Report (n 35 above) 55-56.

66. Both the CESCR and the CCPR entered into force in 1976.

67. See arts 6 & 7 CESCR and arts 7 & 8 CCPR.

68. CEDAW entered into force in 1981. See arts 1 & 6 CEDAW.

69. CAT entered into force in 1987.

70. The CRC entered into force in 1990.

71. The CMW adopted in 1990 and entered into force in 1993.

Crime). The Convention on Organised Crime signaled the willingness of the international community to engage the rising threat of syndicated crimes such as trafficking in human beings.<sup>72</sup> Other trafficking specific instruments that require mention have followed the Convention on Organised Crime. One of these follow-up instruments is the Palermo Protocol that contains provisions that specifically address the question of trafficking in women and children. The others are the 2002 Optional Protocol to the Convention on the Rights of the Child on the Sale of the Child, Child Prostitution and Child Pornography and the 2006 United Nations Protocol Against Smuggling of Migrants Supplementing the United Nations Convention Against Transnational Organised Crimes. In varying ways and degrees, all of these instruments target or impact on the campaign against trafficking.

The bold step that the UN took putting in place a legal framework by adopting the Palermo Protocol is one that has laid a solid foundation for addressing the issues from different angles. Unfortunately the tone of the Palermo Protocol is watered down in some areas where it would have been necessary to give protection and care for the victims. Consequently even countries that signed and ratified the Palermo Protocol fail to discharge their obligations to protect the rights of the victims especially when they are from foreign countries. In many European states, trafficked persons are still being prosecuted for illegal migration and jailed before repatriation. Many trafficked persons from Nigeria suffer the fate of imprisonment for illegal migration in countries like the United Kingdom (UK), Denmark, Spain and the Netherlands.

Criminalising trafficked persons even for illegal migration is in utter negation of the recommended principles set down in the guidelines by the Office of the United Nations High Commissioner for Human Rights (OHCHR) published in New York in 2002. Guideline 6 of OHCHR Guidelines states that:

The trafficking cycle cannot be broken without attention to the rights and needs of those who have been trafficked. Appropriate protection and support should be extended to all trafficked persons without discrimination.

This guideline clearly enjoins all nations to distinguish the position of the trafficker from that of the trafficked person, so as to empathise with the victim as being the abused and not being the villain. As some have noted, it would have been better to introduce a human rights framework to the final text of the Palermo Protocol.<sup>73</sup> However, this was not achieved and the Palermo Protocol emerged as primarily a 'law enforcement tool'.<sup>74</sup> As Jordan notes further, the effect is that whereas states take on immediate obligations to adopt laws that

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72. NJD Report (n 35 above) contains a fairly comprehensive treatment of other instruments and declarations relating to trafficking in persons.

73. See Jordan (n 9 above) 31.

74. Jordan (n 9 above) 32.

criminalise trafficking, they undertake that they ‘shall consider’ and ‘shall endeavour’ to protect and to assist victims of trafficking.<sup>75</sup> All this leaves human rights concerns such as protection and rehabilitation of victims, providing access to compensation and equal protection by law largely untouched. This is the vacuum that regional, subregional and national responses ought to address.

## **7 The African response**

It must be pointed out that most African states have participated in having international instruments adopted after the era of colonialism and have signed and/or ratified all the instruments discussed above. At the specific regional level,<sup>76</sup> the African Charter on Human and Peoples’ Rights (African Charter) is the basic instrument for the protection of Africans from trafficking in persons.<sup>77</sup> Other relevant instruments are the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Protocol on Women),<sup>78</sup> and the African Charter on the Rights and Welfare of the Child (African Children’s Charter).<sup>79</sup> Articles 2 - 5 of the Protocol on Women contain provisions that can be useful for the protection of women and girl-children against the harms of trafficking. Similarly, articles 15, 27 and 29 of the African Children’s Charter contain provisions that seek to protect children against trafficking.

### **7.1 Subregional initiatives**

The West African subregion has taken steps since recognising the scourge of human trafficking as a major problem in the West African subregion. The subregional initiative was facilitated by ILO and UNICEF and culminated in the adoption of the ‘Libreville Common Platform of Action of the Sub-regional Consultation of the Development of Strategies to Fight Child Trafficking for Exploitative Labour Purposes in West and Central Africa’.<sup>80</sup>

At a ministerial meeting in December 2001 member states of the Economic Community of West African States (ECOWAS) at the 25th ECOWAS session in Dakar,

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75. As above.

76. The focus here is Africa and while this is not to suggest that other regions (especially Europe and America) have not done anything in this regard, they will not be the focus here.

77. The African Charter on Human and Peoples’ Rights, OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58 (1982) was adopted in Nairobi, Kenya on 27 June 1981 by the Organization of African Unity (OAU) and entered into force on 23 October 1986. See arts 1-5 of the African Charter.

78. Adopted in 2003 and entered into force in 2005.

79. Adopted in 1990 and entered into force in 1999.

80. 21 countries in West and Central Africa including Nigeria signed the Common Platform for Action in Libreville, Gabon on 24 February 2000.

adopted and endorsed the ECOWAS Plan of Action to combat trafficking in persons 2002 - 2003. Each country was in addition enjoined to take action during the years 2002 - 2003. These actions include:

- The passing of relevant comprehensive legislation to cover human trafficking especially criminalising traffickers, protecting victims including compensations and reparation rights.
- The signing and ratification of International and regional instruments on trafficking.
- Exchange of information on the incidents of trafficking among the member States.
- The training of law enforcements agents including border police and judges.
- Intensive awareness raising campaigns.
- Monitoring the implementation of Plan of Action.
- Regulations of border rules.

Each party to the ECOWAS Plan for Action was enjoined to set up a national plan of action and a national task force to monitor the implementation of the trafficking situation and give periodic reports. Furthermore the ECOWAS Interim Plan of Action essentially provides for the special care of victims which should include provision of travel documents for victims, encouraging commercial carriers to ascertain that passengers carry valid documents and the adoption of measures to require documents of minors travelling alone to be held by such minors. At the expiration of the ECOWAS Plan of Action, the ECOWAS Heads of States at the 27th session in Accra on 19 December 2003 extended the validity of the ECOWAS Initial Plan of Action to fight against trafficking in persons to 2004 - 2005 for continued implementation.<sup>81</sup>

## 8 National responses (the Nigerian experience)

Nigeria has substantially complied with the directives in the ECOWAS Plan of Action and was the first to promulgate a comprehensive law against human trafficking. However, before the recent focus on human trafficking, Nigeria had laws that sufficiently covered the field of trafficking in persons. As discussed earlier in this paper, both the Criminal Code and the Penal Code contain provisions that touch on trafficking, slavery and other slave-like activities.<sup>82</sup> In addition to these criminal law provisions and more importantly from a human rights perspective, sections 34 and 35 of the Nigerian Constitution of 1999 contain

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81. See art 1 Decision A/DEC 12/12/03 Relating to the Extension of the ECOWAS Initial Plan for Action on the Fight Against Trafficking in Persons (2002-2003).

82. Based on the principle of federalism, certain states in Nigeria have amended their Criminal Code laws to address specific areas of trafficking. The Edo State Criminal Code Amendment Law 2000 is an example of this.

provisions that should protect people against the harms of trafficking. Other relevant pieces of legislation in Nigeria are the Child Rights Act of 2003 and the Labour Act of 2004.<sup>83</sup> While sections 25 - 34 of the Child Rights Act deal with exploitative child labour, sections 59 - 63 of the Labour Act generally prohibit forced labour, the involvement of young people in forced labour and furthermore prohibit the recruitment of people to work abroad.

Nigeria stands out as one of the few countries in the world to have domesticated the Palermo Protocol by the enactment of the NAPTIP Act. As already noted, the NAPTIP Act established the National Agency. The main functions of the National Agency are to enforce laws against trafficking, investigate and prosecute suspected traffickers and coordinate the rehabilitation of trafficked persons.<sup>84</sup> In addition to expanding the definition of trafficking beyond that contained in the Palermo Protocol to include the offence of 'attempted' trafficking, the NAPTIP Act covers other areas that have been identified as shortfalls of the Palermo Protocol. For example, the NAPTIP Act allows victims of trafficking to institute civil actions against 'a trafficker and any other person, including a public officer' who has exploited or abused such a victim.<sup>85</sup> Furthermore, through amendments to the NAPTIP Act, a Victim's Trust Fund has been established to cater to the rehabilitation needs of the victims. The 2005 amendment of the NAPTIP Act also allows for the forfeiture and seizure of the assets of convicted traffickers.<sup>86</sup>

Apart from legislative efforts, Nigeria has also embarked on other measures to tackle trafficking. The government and its agencies have entered into agreements and memoranda of understanding with governments of some of the destination countries. For example, in September 2000, the Nigerian and Italian governments entered into an agreement on immigration matters. In November 2001, Nigeria entered into another agreement on immigration matters with Spain. Similarly, in November 2004, the Nigerian government signed a Memorandum of Understanding with the UK to cooperate, prevent, suppress and punish trafficking.<sup>87</sup>

These efforts have yielded some results. The US State Department acknowledged in its 2006 Report on Trafficking in Persons, that about six people had been prosecuted and convicted in Nigeria while others were being investigated or were facing trials.

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83. Labour Act, Cap L1, Laws of the Federation 2004.

84. See sec 5 NAPTIP Act.

85. Sec 38 NAPTIP Act.

86. See the US 2006 Report (n 28 above) 193.

87. On these agreements, see Nwogu (n 34 above) 6, 8 and 9.

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## 9 Conclusion

The trafficking of women is a form of violence against women. Women and girl children need to be protected. The human rights abuses occasioned by the trafficking of women are manifold and affect almost every aspect of women's lives.

Due to the global dimension of the trend of trafficking in women it is essential that cooperation should also be extended to the strategic stakeholders at the international level, particularly in the destination countries. Both the 'push and pull' factors responsible for the trafficking of women need to be addressed so as to give a balanced approach and meaningful result. Consequently there should be cooperation between all the strategic stakeholders such as the immigration, police and non-governmental organisations at the source, transit and destination countries.

As the issue of human trafficking is unfolding in Africa, there is need for serious attention and investigation into the trend and scope to enable all stakeholders to put in place strategies for effective combat. The situation where thousands of women and millions of children are facing untold trauma and human rights abuses needs urgent attention as the consequences will impact negatively on all affected parties. The well-being of women, and if their full participation in their country's development is to take place, there is a need to seriously deal with this problem.





# **Annexures**



## **Human rights instruments related to gender-based violence**

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### **United Nations instruments**

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## Convention on the Elimination of All Forms of Discrimination Against Women

The states parties to the present Convention,

*Noting* that the Charter of the United Nations reaffirms faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women,

*Noting* that the Universal Declaration of Human Rights affirms the principle of the inadmissibility of discrimination and proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex,

*Noting* that the states parties to the International Covenants on Human Rights have the obligation to ensure the equal rights of men and women to enjoy all economic, social, cultural, civil and political rights,

*Considering* the international conventions concluded under the auspices of the United Nations and the specialised agencies promoting equality of rights of men and women,

*Noting* also the resolutions, declarations and recommendations adopted by the United Nations and the specialised agencies promoting equality of rights of men and women,

*Concerned*, however, that despite these various instruments extensive discrimination against women continues to exist,

*Recalling* that discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity,

*Concerned* that in situations of poverty women have the least access to food, health, education, training and opportunities for employment and other needs,

*Convinced* that the establishment of the new international economic order based on equity and justice will contribute significantly towards the promotion of equality between men and women,

*Emphasising* that the eradication of apartheid, all forms of racism, racial discrimination, colonialism, neo-colonialism, aggression, foreign occupation and domination and interference in the internal affairs of states is essential to the full enjoyment of the rights of men and women,

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*Affirming* that the strengthening of international peace and security, the relaxation of international tension, mutual co-operation among all states irrespective of their social and economic systems, general and complete disarmament, in particular nuclear disarmament under strict and effective international control, the affirmation of the principles of justice, equality and mutual benefit in relations among countries and the realisation of the right of peoples under alien and colonial domination and foreign occupation to self-determination and independence, as well as respect for national sovereignty and territorial integrity, will promote social progress and development and as a consequence will contribute to the attainment of full equality between men and women,

*Convinced* that the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields,

*Bearing* in mind the great contribution of women to the welfare of the family and to the development of society, so far not fully recognised, the social significance of maternity and the role of both parents in the family and in the upbringing of children, and aware that the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole,

*Aware* that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women,

*Determined* to implement the principles set forth in the Declaration on the Elimination of Discrimination against Women and, for that purpose, to adopt the measures required for the elimination of such discrimination in all its forms and manifestations,

Have agreed on the following:

## PART I

### Article I

For the purposes of the present Convention, the term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

## **Article 2**

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 realisation of this principle;
- (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
- (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;
- (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
- (e) To take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise;
- (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
- (g) To repeal all national penal provisions which constitute discrimination against women.

## **Article 3**

States parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

## **Article 4**

1. Adoption by states parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

2. Adoption by states parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.

## **Article 5**

States parties shall take all appropriate measures:

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- (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;
  - (b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

#### **Article 6**

States parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

### **PART II**

#### **Article 7**

States parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:

- (a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;
- (b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;
- (c) To participate in non-governmental organisations and associations concerned with the public and political life of the country.

#### **Article 8**

States parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their governments at the international level and to participate in the work of international organisations.

#### **Article 9**

1. States parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.
2. States parties shall grant women equal rights with men with respect to the nationality of their children.

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PART III

**Article 10**

States parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women:

- (a) The same conditions for career and vocational guidance, for access to studies and for the achievement of diplomas in educational establishments of all categories in rural as well as in urban areas; this equality shall be ensured in pre-school, general, technical, professional and higher technical education, as well as in all types of vocational training;
- (b) Access to the same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises and equipment of the same quality;
- (c) The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods;
- (d) The same opportunities to benefit from scholarships and other study grants;
- (e) The same opportunities for access to programmes of continuing education, including adult and functional literacy programmes, particularly those aimed at reducing, at the earliest possible time, any gap in education existing between men and women;
- (f) The reduction of female student drop-out rates and the organisation of programmes for girls and women who have left school prematurely;
- (g) The same opportunities to participate actively in sports and physical education;
- (h) Access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.

**Article 11**

1. States parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

- (a) The right to work as an inalienable right of all human beings;
- (b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;
- (c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;
- (d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;

(e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;

(f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, states parties shall take appropriate measures:

(a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;

(b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;

(c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;

(d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.

3. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary.

#### **Article 12**

1. States parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

2. Notwithstanding the provisions of paragraph 1 of this article, states parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

#### **Article 13**

States parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular:

(a) The right to family benefits;

(b) The right to bank loans, mortgages and other forms of financial credit;

(c) The right to participate in recreational activities, sports and all aspects of cultural life.

#### **Article 14**

1. States parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival

of their families, including their work in the non-monetised sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas.

2. States parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:

(a) To participate in the elaboration and implementation of development planning at all levels;

(b) To have access to adequate health care facilities, including information, counselling and services in family planning;

(c) To benefit directly from social security programmes;

(d) To obtain all types of training and education, formal and non-formal, including that relating to functional literacy, as well as, *inter alia*, the benefit of all community and extension services, in order to increase their technical proficiency;

(e) To organise self-help groups and co-operatives in order to obtain equal access to economic opportunities through employment or self employment;

(f) To participate in all community activities;

(g) To have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes;

(h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

## **PART IV**

### **Article 15**

1. States parties shall accord to women equality with men before the law.

2. States parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.

3. States parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.

4. States parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.

### **Article 16**

1. States parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:



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- (a) The same right to enter into marriage;
  - (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
  - (c) The same rights and responsibilities during marriage and at its dissolution;
  - (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;
  - (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
  - (f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;
  - (g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;
  - (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.
2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

## PART V

### Article 17

1. For the purpose of considering the progress made in the implementation of the present Convention, there shall be established a Committee on the Elimination of Discrimination against Women (hereinafter referred to as the Committee) consisting, at the time of entry into force of the Convention, of eighteen and, after ratification of or accession to the Convention by the thirty-fifth state party, of twenty-three experts of high moral standing and competence in the field covered by the Convention. The experts shall be elected by states parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution and to the representation of the different forms of civilisation as well as the principal legal systems.
2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by states parties. Each state party may nominate one person from among its own nationals.
3. The initial election shall be held six months after the date of the entry into force of the present Convention. At least three months before the date of each election the Secretary-General of the United Nations shall address a letter to the states parties inviting them to submit their nominations within two months. The Secretary-General shall prepare a list in alphabetical order of all persons thus

nominated, indicating the states parties which have nominated them, and shall submit it to the states parties.

4. Elections of the members of the Committee shall be held at a meeting of states parties convened by the Secretary-General at United Nations Headquarters. At that meeting, for which two thirds of the states parties shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of states parties present and voting.

5. The members of the Committee shall be elected for a term of four years. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these nine members shall be chosen by lot by the Chairman of the Committee.

6. The election of the five additional members of the Committee shall be held in accordance with the provisions of paragraphs 2, 3 and 4 of this article, following the thirty-fifth ratification or accession. The terms of two of the additional members elected on this occasion shall expire at the end of two years, the names of these two members having been chosen by lot by the Chairman of the Committee.

7. For the filling of casual vacancies, the state party whose expert has ceased to function as a member of the Committee shall appoint another expert from among its nationals, subject to the approval of the Committee.

8. The members of the Committee shall, with the approval of the General Assembly, receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide, having regard to the importance of the Committee's responsibilities.

9. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention.

#### **Article 18**

1. States parties undertake to submit to the Secretary-General of the United Nations, for consideration by the Committee, a report on the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the present Convention and on the progress made in this respect:

- (a) Within one year after the entry into force for the state concerned;
- (b) Thereafter at least every four years and further whenever the Committee so requests.

2. Reports may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Convention.

#### **Article 19**

1. The Committee shall adopt its own rules of procedure.
2. The Committee shall elect its officers for a term of two years.

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**Article 20**

1. The Committee shall normally meet for a period of not more than two weeks annually in order to consider the reports submitted in accordance with article 18 of the present Convention.
2. The meetings of the Committee shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Committee.

**Article 21**

1. The Committee shall, through the Economic and Social Council, report annually to the General Assembly of the United Nations on its activities and may make suggestions and general recommendations based on the examination of reports and information received from the states parties. Such suggestions and general recommendations shall be included in the report of the Committee together with comments, if any, from states parties.
2. The Secretary-General of the United Nations shall transmit the reports of the Committee to the Commission on the Status of Women for its information.

**Article 22**

The specialised agencies shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their activities. The Committee may invite the specialised agencies to submit reports on the implementation of the Convention in areas falling within the scope of their activities.

**PART VI****Article 23**

Nothing in the present Convention shall affect any provisions that are more conducive to the achievement of equality between men and women which may be contained:

- (a) In the legislation of a state party; or
- (b) In any other international convention, treaty or agreement in force for that state.

**Article 24**

States parties undertake to adopt all necessary measures at the national level aimed at achieving the full realisation of the rights recognised in the present Convention.

**Article 25**

1. The present Convention shall be open for signature by all states.
2. The Secretary-General of the United Nations is designated as the depositary of the present Convention.
3. The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

4. The present Convention shall be open to accession by all states. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

**Article 26**

1. A request for the revision of the present Convention may be made at any time by any state party by means of a notification in writing addressed to the Secretary-General of the United Nations.

2. The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such a request.

**Article 27**

1. The present Convention shall enter into force on the thirtieth day after the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.

2. For each state ratifying the present Convention or acceding to it after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

**Article 28**

1. The Secretary-General of the United Nations shall receive and circulate to all states the text of reservations made by states at the time of ratification or accession.

2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.

3. Reservations may be withdrawn at any time by notification to this effect addressed to the Secretary-General of the United Nations, who shall then inform all states thereof. Such notification shall take effect on the date on which it is received.

**Article 29**

1. Any dispute between two or more states parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organisation of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each state party may at the time of signature or ratification of the present Convention or accession thereto declare that it does not consider itself bound by paragraph 1 of this article. The other states parties shall not be bound by that paragraph with respect to any state party which has made such a reservation.

3. Any state party which has made a reservation in accordance with paragraph 2 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

**Article 30**

The present Convention, the Arabic, Chinese, English, French, Russian and Spanish texts of which are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned, duly authorised, have signed the present Convention.

## **Declaration on the Elimination of Violence against Women**

**Proclaimed by General Assembly Resolution 48/104 of 20 December 1993**

The General Assembly,

*Recognising* the urgent need for the universal application to women of the rights and principles with regard to equality, security, liberty, integrity and dignity of all human beings,

*Noting* that those rights and principles are enshrined in international instruments, including the Universal Declaration of Human Rights, 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 and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

*Recognising* that effective implementation of the Convention on the Elimination of All Forms of Discrimination against Women would contribute to the elimination of violence against women and that the Declaration on the Elimination of Violence against Women, set forth in the present resolution, will strengthen and complement that process,

*Concerned* that violence against women is an obstacle to the achievement of equality, development and peace, as recognised in the Nairobi Forward-looking Strategies for the Advancement of Women, in which a set of measures to combat violence against women was recommended, and to the full implementation of the Convention on the Elimination of All Forms of Discrimination against Women, Affirming that violence against women constitutes a violation of the rights and fundamental freedoms of women and impairs or nullifies their enjoyment of those rights and freedoms, and concerned about the long-standing failure to protect and promote those rights and freedoms in the case of violence against women,

*Recognising* that violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men,

*Concerned* that some groups of women, such as women belonging to minority groups, indigenous women, refugee women, migrant women, women living in rural or remote communities, destitute women, women in institutions or in detention, female children, women with disabilities, elderly women and women in situations of armed conflict, are especially vulnerable to violence,

*Recalling* the conclusion in paragraph 23 of the annex to Economic and Social Council Resolution 1990/15 of 24 May 1990 that the recognition that violence

against women in the family and society was pervasive and cut across lines of income, class and culture had to be matched by urgent and effective steps to eliminate its incidence,

*Recalling* also Economic and Social Council Resolution 1991/18 of 30 May 1991, in which the Council recommended the development of a framework for an international instrument that would address explicitly the issue of violence against women,

*Welcoming* the role that women's movements are playing in drawing increasing attention to the nature, severity and magnitude of the problem of violence against women,

*Alarmed* that opportunities for women to achieve legal, social, political and economic equality in society are limited, *inter alia*, by continuing and endemic violence,

*Convinced* that in the light of the above there is a need for a clear and comprehensive definition of violence against women, a clear statement of the rights to be applied to ensure the elimination of violence against women in all its forms, a commitment by states in respect of their responsibilities, and a commitment by the international community at large to the elimination of violence against women,

Solemnly proclaims the following Declaration on the Elimination of Violence against Women and urges that every effort be made so that it becomes generally known and respected:

### Article 1

For the purposes of this Declaration, the term 'violence against women' means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.

### Article 2

Violence against women shall be understood to encompass, but not be limited to, the following:

- (a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;
- (b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;

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(c) Physical, sexual and psychological violence perpetrated or condoned by the state, wherever it occurs.

### **Article 3**

Women are entitled to the equal enjoyment and protection of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. These rights include, *inter alia*:

- (a) The right to life;
- (b) The right to equality;
- (c) The right to liberty and security of person;
- (d) The right to equal protection under the law;
- (e) The right to be free from all forms of discrimination;
- (f) The right to the highest standard attainable of physical and mental health;
- (g) The right to just and favourable conditions of work;
- (h) The right not to be subjected to torture, or other cruel, inhuman or degrading treatment or punishment.

### **Article 4**

States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination. States should pursue by all appropriate means and without delay a policy of eliminating violence against women and, to this end, should:

- (a) Consider, where they have not yet done so, ratifying or acceding to the Convention on the Elimination of All Forms of Discrimination against Women or withdrawing reservations to that Convention;
- (b) Refrain from engaging in violence against women;
- (c) Exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the state or by private persons;
- (d) Develop penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women who are subjected to violence; women who are subjected to violence should be provided with access to the mechanisms of justice and, as provided for by national legislation, to just and effective remedies for the harm that they have suffered; states should also inform women of their rights in seeking redress through such mechanisms;
- (e) Consider the possibility of developing national plans of action to promote the protection of women against any form of violence, or to include provisions for that purpose in plans already existing, taking into account, as appropriate, such cooperation as can be provided by non-governmental organisations, particularly those concerned with the issue of violence against women;
- (f) Develop, in a comprehensive way, preventive approaches and all those measures of a legal, political, administrative and cultural nature that promote the protection of women against any form of violence, and ensure that the re-victimisation of women does not occur because of laws insensitive to gender considerations, enforcement practices or other interventions;



- (g) Work to ensure, to the maximum extent feasible in the light of their available resources and, where needed, within the framework of international cooperation, that women subjected to violence and, where appropriate, their children have specialised assistance, such as rehabilitation, assistance in child care and maintenance, treatment, counselling, and health and social services, facilities and programmes, as well as support structures, and should take all other appropriate measures to promote their safety and physical and psychological rehabilitation;
- (h) Include in government budgets adequate resources for their activities related to the elimination of violence against women;
- (i) Take measures to ensure that law enforcement officers and public officials responsible for implementing policies to prevent, investigate and punish violence against women receive training to sensitise them to the needs of women;
- (j) Adopt all appropriate measures, especially in the field of education, to modify the social and cultural patterns of conduct of men and women and to eliminate prejudices, customary practices and all other practices based on the idea of the inferiority or superiority of either of the sexes and on stereotyped roles for men and women;
- (k) Promote research, collect data and compile statistics, especially concerning domestic violence, relating to the prevalence of different forms of violence against women and encourage research on the causes, nature, seriousness and consequences of violence against women and on the effectiveness of measures implemented to prevent and redress violence against women; those statistics and findings of the research will be made public;
- (l) Adopt measures directed towards the elimination of violence against women who are especially vulnerable to violence;
- (m) Include, in submitting reports as required under relevant human rights instruments of the United Nations, information pertaining to violence against women and measures taken to implement the present Declaration;
- (n) Encourage the development of appropriate guidelines to assist in the implementation of the principles set forth in the present Declaration;
- (o) Recognise the important role of the women's movement and non-governmental organisations world wide in raising awareness and alleviating the problem of violence against women;
- (p) Facilitate and enhance the work of the women's movement and non-governmental organisations and cooperate with them at local, national and regional levels;
- (q) Encourage intergovernmental regional organisations of which they are members to include the elimination of violence against women in their programmes, as appropriate.

#### **Article 5**

The organs and specialised agencies of the United Nations system should, within their respective fields of competence, contribute to the recognition and realisation of the rights and the principles set forth in the present Declaration and, to this end, should, *inter alia*:

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- (a) Foster international and regional cooperation with a view to defining regional strategies for combating violence, exchanging experiences and financing programmes relating to the elimination of violence against women;
- (b) Promote meetings and seminars with the aim of creating and raising awareness among all persons of the issue of the elimination of violence against women;
- (c) Foster coordination and exchange within the United Nations system between human rights treaty bodies to address the issue of violence against women effectively;
- (d) Include in analyses prepared by organisations and bodies of the United Nations system of social trends and problems, such as the periodic reports on the world social situation, examination of trends in violence against women;
- (e) Encourage coordination between organisations and bodies of the United Nations system to incorporate the issue of violence against women into ongoing programmes, especially with reference to groups of women particularly vulnerable to violence;
- (f) Promote the formulation of guidelines or manuals relating to violence against women, taking into account the measures referred to in the present Declaration;
- (g) Consider the issue of the elimination of violence against women, as appropriate, in fulfilling their mandates with respect to the implementation of human rights instruments;
- (h) Cooperate with non-governmental organisations in addressing the issue of violence against women.

### **Article 6**

Nothing in the present Declaration shall affect any provision that is more conducive to the elimination of violence against women that may be contained in the legislation of a state or in any international convention, treaty or other instrument in force in a state.

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## **General Recommendation 19 (11th session, 1992)**

### **Violence against women**

#### **Background**

1. Gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men.
2. In 1989, the Committee recommended that states should include in their reports information on violence and on measures introduced to deal with it (General recommendation 12, eighth session).
3. At its tenth session in 1991, it was decided to allocate part of the eleventh session to a discussion and study on article 6 and other articles of the Convention relating to violence towards women and the sexual harassment and exploitation of women. That subject was chosen in anticipation of the 1993 World Conference on Human Rights, convened by the General Assembly by its Resolution 45/155 of 18 December 1990.
4. The Committee concluded that not all the reports of states parties adequately reflected the close connection between discrimination against women, gender-based violence, and violations of human rights and fundamental freedoms. The full implementation of the Convention required states to take positive measures to eliminate all forms of violence against women.
5. The Committee suggested to states parties that in reviewing their laws and policies, and in reporting under the Convention, they should have regard to the following comments of the Committee concerning gender-based violence.

#### **General comments**

6. The Convention in article 1 defines discrimination against women. The definition of discrimination includes gender-based violence, that is, violence that 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. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.
7. Gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the Convention. These rights and freedoms include:
  - (a) The right to life;
  - (b) The right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment;
  - (c) The right to equal protection according to humanitarian norms in time of international or internal armed conflict;
  - (d) The right to liberty and security of person;
  - (e) The right to equal protection under the law;

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- (f) The right to equality in the family;
  - (g) The right to the highest standard attainable of physical and mental health;
  - (h) The right to just and favourable conditions of work.
8. The Convention applies to violence perpetrated by public authorities. Such acts of violence may breach that State's obligations under general international human rights law and under other conventions, in addition to breaching this Convention.
9. It is emphasised, however, that discrimination under the Convention is not restricted to action by or on behalf of governments (see articles 2(e), 2(f) and 5). For example, under article 2(e) the Convention calls on states parties to take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise. Under general international law and specific human rights covenants, states may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.

### **Comments on specific articles of the Convention**

#### **Articles 2 and 3**

10. Articles 2 and 3 establish a comprehensive obligation to eliminate discrimination in all its forms in addition to the specific obligations under articles 5-16.

#### **Articles 2(f), 5 and 10(c)**

11. Traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision. Such prejudices and practices may justify gender-based violence as a form of protection or control of women. The effect of such violence on the physical and mental integrity of women is to deprive them the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms. While this comment addresses mainly actual or threatened violence the underlying consequences of these forms of gender-based violence help to maintain women in subordinate roles and contribute to the low level of political participation and to their lower level of education, skills and work opportunities.

12. These attitudes also contribute to the propagation of pornography and the depiction and other commercial exploitation of women as sexual objects, rather than as individuals. This in turn contributes to gender-based violence.

#### **Article 6**

13. States parties are required by article 6 to take measures to suppress all forms of traffic in women and exploitation of the prostitution of women.

14. Poverty and unemployment increase opportunities for trafficking in women. In addition to established forms of trafficking there are new forms of sexual exploitation, such as sex tourism, the recruitment of domestic labour from developing countries to work in developed countries and organised marriages

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between women from developing countries and foreign nationals. These practices are incompatible with the equal enjoyment of rights by women and with respect for their rights and dignity. They put women at special risk of violence and abuse.

15. Poverty and unemployment force many women, including young girls, into prostitution. Prostitutes are especially vulnerable to violence because their status, which may be unlawful, tends to marginalise them. They need the equal protection of laws against rape and other forms of violence.

16. Wars, armed conflicts and the occupation of territories often lead to increased prostitution, trafficking in women and sexual assault of women, which require specific protective and punitive measures.

#### **Article 11**

17. Equality in employment can be seriously impaired when women are subjected to gender-specific violence, such as sexual harassment in the workplace.

18. Sexual harassment includes such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demand, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment.

#### **Article 12**

19. States parties are required by article 12 to take measures to ensure equal access to health care. Violence against women puts their health and lives at risk.

20. In some states there are traditional practices perpetuated by culture and tradition that are harmful to the health of women and children. These practices include dietary restrictions for pregnant women, preference for male children and female circumcision or genital mutilation.

#### **Article 14**

21. Rural women are at risk of gender-based violence because traditional attitudes regarding the subordinate role of women that persist in many rural communities. Girls from rural communities are at special risk of violence and sexual exploitation when they leave the rural community to seek employment in towns.

#### **Article 16 (and article 5)**

22. Compulsory sterilisation or abortion adversely affects women's physical and mental health, and infringes the right of women to decide on the number and spacing of their children.

23. Family violence is one of the most insidious forms of violence against women. It is prevalent in all societies. Within family relationships women of all ages are subjected to violence of all kinds, including battering, rape, other forms of sexual

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assault, mental and other forms of violence, which are perpetuated by traditional attitudes. Lack of economic independence forces many women to stay in violent relationships. The abrogation of their family responsibilities by men can be a form of violence, and coercion. These forms of violence put women's health at risk and impair their ability to participate in family life and public life on a basis of equality.

### **Specific recommendation**

24. In light of these comments, the Committee on the Elimination of Discrimination against Women recommends that:

- (a) States parties should take appropriate and effective measures to overcome all forms of gender-based violence, whether by public or private act;
- (b) States parties should ensure that laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to all women, and respect their integrity and dignity. Appropriate protective and support services should be provided for victims. Gender-sensitive training of judicial and law enforcement officers and other public officials is essential for the effective implementation of the Convention;
- (c) States parties should encourage the compilation of statistics and research on the extent, causes and effects of violence, and on the effectiveness of measures to prevent and deal with violence;
- (d) Effective measures should be taken to ensure that the media respect and promote respect for women;
- (e) States parties in their reports should identify the nature and extent of attitudes, customs and practices that perpetuate violence against women and the kinds of violence that result. They should report on the measures that they have undertaken to overcome violence and the effect of those measures;
- (f) Effective measures should be taken to overcome these attitudes and practices. States should introduce education and public information programmes to help eliminate prejudices that hinder women's equality (recommendation 3, 1987);
- (g) Specific preventive and punitive measures are necessary to overcome trafficking and sexual exploitation;
- (h) States parties in their reports should describe the extent of all these problems and the measures, including penal provisions, preventive and rehabilitation measures that have been taken to protect women engaged in prostitution or subject to trafficking and other forms of sexual exploitation. The effectiveness of these measures should also be described;
- (i) Effective complaints procedures and remedies, including compensation, should be provided;
- (j) States parties should include in their reports information on sexual harassment, and on measures to protect women from sexual harassment and other forms of violence of coercion in the workplace;

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- (k) States parties should establish or support services for victims of family violence, rape, sexual assault and other forms of gender-based violence, including refuges, specially trained health workers, rehabilitation and counselling;
- (l) States parties should take measures to overcome such practices and should take account of the Committee's recommendation on female circumcision (recommendation 14) in reporting on health issues;
- (m) States parties should ensure that measures are taken to prevent coercion in regard to fertility and reproduction, and to ensure that women are not forced to seek unsafe medical procedures such as illegal abortion because of lack of appropriate services in regard to fertility control;
- (n) States parties in their reports should state the extent of these problems and should indicate the measures that have been taken and their effect;
- (o) States parties should ensure that services for victims of violence are accessible to rural women and that where necessary special services are provided to isolated communities;
- (p) Measures to protect them from violence should include training and employment opportunities and the monitoring of the employment conditions of domestic workers;
- (q) States parties should report on the risks to rural women, the extent and nature of violence and abuse to which they are subject, their need for and access to support and other services and the effectiveness of measures to overcome violence;
- (r) Measures that are necessary to overcome family violence should include:
- (i) Criminal penalties where necessary and civil remedies in cases of domestic violence;
- (ii) Legislation to remove the defence of honour in regard to the assault or murder of a female family member;
- (iii) Services to ensure the safety and security of victims of family violence, including refuges, counselling and rehabilitation programmes;
- (iv) Rehabilitation programmes for perpetrators of domestic violence;
- (v) Support services for families where incest or sexual abuse has occurred;
- (s) States parties should report on the extent of domestic violence and sexual abuse, and on the preventive, punitive and remedial measures that have been taken;
- (t) States parties should take all legal and other measures that are necessary to provide effective protection of women against gender-based violence, including, *inter alia*:
- (i) Effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence, including *inter alia* violence and abuse in the family, sexual assault and sexual harassment in the workplace;
- (ii) Preventive measures, including public information and education programmes to change attitudes concerning the roles and status of men and women;

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(iii) Protective measures, including refuges, counselling, rehabilitation and support services for women who are the victims of violence or who are at risk of violence;

(u) States parties should report on all forms of gender-based violence, and such reports should include all available data on the incidence of each form of violence and on the effects of such violence on the women who are victims;

(v) The reports of states parties should include information on the legal, preventive and protective measures that have been taken to overcome violence against women, and on the effectiveness of such measures.



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# Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime

## Preamble

The states parties to this Protocol,

*Declaring* that effective action to prevent and combat trafficking in persons, especially women and children, requires a comprehensive international approach in the countries of origin, transit and destination that includes measures to prevent such trafficking, to punish the traffickers and to protect the victims of such trafficking, including by protecting their internationally recognised human rights,

*Taking* into account the fact that, despite the existence of a variety of international instruments containing rules and practical measures to combat the exploitation of persons, especially women and children, there is no universal instrument that addresses all aspects of trafficking in persons,

*Concerned* that, in the absence of such an instrument, persons who are vulnerable to trafficking will not be sufficiently protected,

*Recalling* General Assembly Resolution 53/111 of 9 December 1998, in which the Assembly decided to establish an open-ended intergovernmental ad hoc committee for the purpose of elaborating a comprehensive international convention against transnational organised crime and of discussing the elaboration of, inter alia, an international instrument addressing trafficking in women and children,

*Convinced* that supplementing the United Nations Convention against Transnational Organised Crime with an international instrument for the prevention, suppression and punishment of trafficking in persons, especially women and children, will be useful in preventing and combating that crime,

Have agreed as follows:

## I. General provisions

### Article 1: Relation with the United Nations Convention against Transnational Organised Crime

1. This Protocol supplements the United Nations Convention against Transnational Organised Crime. It shall be interpreted together with the Convention.

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2. The provisions of the Convention shall apply, *mutatis mutandis*, to this Protocol unless otherwise provided herein.

3. The offences established in accordance with article 5 of this Protocol shall be regarded as offences established in accordance with the Convention.

### **Article 2: Statement of purpose**

The purposes of this Protocol are:

- (a) To prevent and combat trafficking in persons, paying particular attention to women and children;
- (b) To protect and assist the victims of such trafficking, with full respect for their human rights; and
- (c) To promote cooperation among states parties in order to meet those objectives.

### **Article 3: Use of terms**

For the purposes of this Protocol:

- (a) ‘Trafficking in persons’ shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;
- (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;
- (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered ‘trafficking in persons’ even if this does not involve any of the means set forth in subparagraph (a) of this article;
- (d) ‘Child’ shall mean any person under eighteen years of age.

### **Article 4: Scope of application**

This Protocol shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of the offences established in accordance with article 5 of this Protocol, where those offences are transnational in nature and involve an organised criminal group, as well as to the protection of victims of such offences.

### **Article 5: Criminalisation**

1. Each state party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally.

2. Each state party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences:
  - (a) Subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article;
  - (b) Participating as an accomplice in an offence established in accordance with paragraph 1 of this article; and
  - (c) Organising or directing other persons to commit an offence established in accordance with paragraph 1 of this article.

## **II. Protection of victims of trafficking in persons**

### **Article 6: Assistance to and protection of victims of trafficking in persons**

1. In appropriate cases and to the extent possible under its domestic law, each state party shall protect the privacy and identity of victims of trafficking in persons, including, inter alia, by making legal proceedings relating to such trafficking confidential.
2. Each state party shall ensure that its domestic legal or administrative system contains measures that provide to victims of trafficking in persons, in appropriate cases:
  - (a) Information on relevant court and administrative proceedings;
  - (b) Assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence.
3. Each state party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons, including, in appropriate cases, in cooperation with non-governmental organisations, other relevant organisations and other elements of civil society, and, in particular, the provision of:
  - (a) Appropriate housing;
  - (b) Counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand;
  - (c) Medical, psychological and material assistance; and
  - (d) Employment, educational and training opportunities.
4. Each state party shall take into account, in applying the provisions of this article, the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children, including appropriate housing, education and care.
5. Each state party shall endeavour to provide for the physical safety of victims of trafficking in persons while they are within its territory.
6. Each state party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.

### **Article 7: Status of victims of trafficking in persons in receiving states**

1. In addition to taking measures pursuant to article 6 of this Protocol, each state party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases.
2. In implementing the provision contained in paragraph 1 of this article, each state party shall give appropriate consideration to humanitarian and compassionate factors.

### **Article 8: Repatriation of victims of trafficking in persons**

1. The state party of which a victim of trafficking in persons is a national or in which the person had the right of permanent residence at the time of entry into the territory of the receiving state party shall facilitate and accept, with due regard for the safety of that person, the return of that person without undue or unreasonable delay.
2. When a state party returns a victim of trafficking in persons to a state party of which that person is a national or in which he or she had, at the time of entry into the territory of the receiving state party, the right of permanent residence, such return shall be with due regard for the safety of that person and for the status of any legal proceedings related to the fact that the person is a victim of trafficking and shall preferably be voluntary.
3. At the request of a receiving state party, a requested state party shall, without undue or unreasonable delay, verify whether a person who is a victim of trafficking in persons is its national or had the right of permanent residence in its territory at the time of entry into the territory of the receiving state party.
4. In order to facilitate the return of a victim of trafficking in persons who is without proper documentation, the state party of which that person is a national or in which he or she had the right of permanent residence at the time of entry into the territory of the receiving state party shall agree to issue, at the request of the receiving state party, such travel documents or other authorisation as may be necessary to enable the person to travel to and re-enter its territory.
5. This article shall be without prejudice to any right afforded to victims of trafficking in persons by any domestic law of the receiving state party.
6. This article shall be without prejudice to any applicable bilateral or multilateral agreement or arrangement that governs, in whole or in part, the return of victims of trafficking in persons.

## **III. Prevention, cooperation and other measures**

### **Article 9: Prevention of trafficking in persons**

1. States parties shall establish comprehensive policies, programmes and other measures:
  - (a) To prevent and combat trafficking in persons; and
  - (b) To protect victims of trafficking in persons, especially women and children, from revictimisation.

2. States parties shall endeavour to undertake measures such as research, information and mass media campaigns and social and economic initiatives to prevent and combat trafficking in persons.

3. Policies, programmes and other measures established in accordance with this article shall, as appropriate, include cooperation with non-governmental organisations, other relevant organisations and other elements of civil society.

4. States parties shall take or strengthen measures, including through bilateral or multilateral cooperation, to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity.

5. States parties shall adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking.

#### **Article 10: Information exchange and training**

1. Law enforcement, immigration or other relevant authorities of states parties shall, as appropriate, cooperate with one another by exchanging information, in accordance with their domestic law, to enable them to determine:

(a) Whether individuals crossing or attempting to cross an international border with travel documents belonging to other persons or without travel documents are perpetrators or victims of trafficking in persons;

(b) The types of travel document that individuals have used or attempted to use to cross an international border for the purpose of trafficking in persons; and

(c) The means and methods used by organised criminal groups for the purpose of trafficking in persons, including the recruitment and transportation of victims, routes and links between and among individuals and groups engaged in such trafficking, and possible measures for detecting them.

2. States parties shall provide or strengthen training for law enforcement, immigration and other relevant officials in the prevention of trafficking in persons. The training should focus on methods used in preventing such trafficking, prosecuting the traffickers and protecting the rights of the victims, including protecting the victims from the traffickers. The training should also take into account the need to consider human rights and child- and gender-sensitive issues and it should encourage cooperation with non-governmental organisations, other relevant organisations and other elements of civil society.

3. A state party that receives information shall comply with any request by the state party that transmitted the information that places restrictions on its use.

#### **Article 11: Border measures**

1. Without prejudice to international commitments in relation to the free movement of people, states parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect trafficking in persons.

2. Each state party shall adopt legislative or other appropriate measures to prevent, to the extent possible, means of transport operated by commercial

carriers from being used in the commission of offences established in accordance with article 5 of this Protocol.

3. Where appropriate, and without prejudice to applicable international conventions, such measures shall include establishing the obligation of commercial carriers, including any transportation company or the owner or operator of any means of transport, to ascertain that all passengers are in possession of the travel documents required for entry into the receiving state.

4. Each state party shall take the necessary measures, in accordance with its domestic law, to provide for sanctions in cases of violation of the obligation set forth in paragraph 3 of this article.

5. Each state party shall consider taking measures that permit, in accordance with its domestic law, the denial of entry or revocation of visas of persons implicated in the commission of offences established in accordance with this Protocol.

6. Without prejudice to article 27 of the Convention, states parties shall consider strengthening cooperation among border control agencies by, *inter alia*, establishing and maintaining direct channels of communication.

### **Article 12: Security and control of documents**

Each state party shall take such measures as may be necessary, within available means:

(a) To ensure that travel or identity documents issued by it are of such quality that they cannot easily be misused and cannot readily be falsified or unlawfully altered, replicated or issued; and

(b) To ensure the integrity and security of travel or identity documents issued by or on behalf of the state party and to prevent their unlawful creation, issuance and use.

### **Article 13: Legitimacy and validity of documents**

At the request of another state party, a state party shall, in accordance with its domestic law, verify within a reasonable time the legitimacy and validity of travel or identity documents issued or purported to have been issued in its name and suspected of being used for trafficking in persons.

## **IV. Final provisions**

### **Article 14: Saving clause**

1. Nothing in this Protocol shall affect the rights, obligations and responsibilities of states and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.

2. The measures set forth in this Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the ground that they are victims of

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trafficking in persons. The interpretation and application of those measures shall be consistent with internationally recognised principles of non-discrimination.

**Article 15: Settlement of disputes**

1. States parties shall endeavour to settle disputes concerning the interpretation or application of this Protocol through negotiation.
2. Any dispute between two or more states parties concerning the interpretation or application of this Protocol that cannot be settled through negotiation within a reasonable time shall, at the request of one of those states parties, be submitted to arbitration. If, six months after the date of the request for arbitration, those states parties are unable to agree on the organisation of the arbitration, any one of those states parties may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court.
3. Each state party may, at the time of signature, ratification, acceptance or approval of or accession to this Protocol, declare that it does not consider itself bound by paragraph 2 of this article. The other states parties shall not be bound by paragraph 2 of this article with respect to any state party that has made such a reservation.
4. Any state party that has made a reservation in accordance with paragraph 3 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

**Article 16: Signature, ratification, acceptance, approval and accession**

1. This Protocol shall be open to all states for signature from 12 to 15 December 2000 in Palermo, Italy, and thereafter at United Nations Headquarters in New York until 12 December 2002.
2. This Protocol shall also be open for signature by regional economic integration organisations provided that at least one member state of such organisation has signed this Protocol in accordance with paragraph 1 of this article.
3. This Protocol is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations. A regional economic integration organisation may deposit its instrument of ratification, acceptance or approval if at least one of its member states has done likewise. In that instrument of ratification, acceptance or approval, such organisation shall declare the extent of its competence with respect to the matters governed by this Protocol. Such organisation shall also inform the depositary of any relevant modification in the extent of its competence.
4. This Protocol is open for accession by any state or any regional economic integration organisation of which at least one member state is a party to this Protocol. Instruments of accession shall be deposited with the Secretary-General of the United Nations. At the time of its accession, a regional economic integration organisation shall declare the extent of its competence with respect to matters

governed by this Protocol. Such organisation shall also inform the depositary of any relevant modification in the extent of its competence.

### **Article 17: Entry into force**

1. This Protocol shall enter into force on the ninetieth day after the date of deposit of the fortieth instrument of ratification, acceptance, approval or accession, except that it shall not enter into force before the entry into force of the Convention. For the purpose of this paragraph, any instrument deposited by a regional economic integration organisation shall not be counted as additional to those deposited by member States of such organisation.

2. For each state or regional economic integration organisation ratifying, accepting, approving or acceding to this Protocol after the deposit of the fortieth instrument of such action, this Protocol shall enter into force on the thirtieth day after the date of deposit by such state or organisation of the relevant instrument or on the date this Protocol enters into force pursuant to paragraph 1 of this article, whichever is the later.

### **Article 18: Amendment**

1. After the expiry of five years from the entry into force of this Protocol, a state party to the Protocol may propose an amendment and file it with the Secretary-General of the United Nations, who shall thereupon communicate the proposed amendment to the states parties and to the Conference of the parties to the Convention for the purpose of considering and deciding on the proposal. The states parties to this Protocol meeting at the Conference of the parties shall make every effort to achieve consensus on each amendment. If all efforts at consensus have been exhausted and no agreement has been reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the states parties to this Protocol present and voting at the meeting of the Conference of the parties.

2. Regional economic integration organisations, in matters within their competence, shall exercise their right to vote under this article with a number of votes equal to the number of their member states that are parties to this Protocol. Such organisations shall not exercise their right to vote if their member states exercise theirs and *vice versa*.

3. An amendment adopted in accordance with paragraph 1 of this article is subject to ratification, acceptance or approval by states parties.

4. An amendment adopted in accordance with paragraph 1 of this article shall enter into force in respect of a state party ninety days after the date of the deposit with the Secretary-General of the United Nations of an instrument of ratification, acceptance or approval of such amendment.

5. When an amendment enters into force, it shall be binding on those states parties which have expressed their consent to be bound by it. Other states parties shall still be bound by the provisions of this Protocol and any earlier amendments that they have ratified, accepted or approved.



**Article 19: Denunciation**

1. A state party may denounce this Protocol by written notification to the Secretary-General of the United Nations. Such denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General.
2. A regional economic integration organisation shall cease to be a party to this Protocol when all of its member states have denounced it.

**Article 20: Depositary and languages**

1. The Secretary-General of the United Nations is designated depositary of this Protocol.
2. The original of this Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

In witness whereof, the undersigned plenipotentiaries, being duly authorised thereto by their respective governments, have signed this Protocol.

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## **Beijing Declaration and Platform for Action, Fourth World Conference on Women, 15 September 1995**

### ***Excerpts***

1. We, the governments, participating in the Fourth World Conference on Women,

...

reaffirm our commitment to:

8. The equal rights and inherent human dignity of women and men and other purposes and principles enshrined in the Charter of the United Nations, to the Universal Declaration of Human Rights and other international human rights instruments, in particular the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child, as well as the Declaration on the Elimination of Violence against Women and the Declaration on the Right to Development;

...

We are determined to:

...

29. Prevent and eliminate all forms of violence against women and girls;

...

### **PLATFORM FOR ACTION**

...

#### **Chapter II: Global framework**

...

13. The end of the cold war has resulted in international changes and diminished competition between the super-Powers. The threat of a global armed conflict has diminished, while international relations have improved and prospects for peace among nations have increased. Although the threat of global conflict has been reduced, wars of aggression, armed conflicts, colonial or other forms of alien domination and foreign occupation, civil wars, terrorism and extremist violence continue to plague many parts of the world. Grave violations of the human rights of women occur, particularly in times of armed conflict, and include murder, torture, systematic rape, forced pregnancy and forced abortion, in particular under policies of 'ethnic cleansing'.

14. The maintenance of peace and security at the global, regional and local levels, together with the prevention of policies of aggression and ethnic cleansing and the resolution of armed conflict, is crucial for the protection of the human rights of women and girl children, as well as for the elimination of all forms of violence against them and of their use as a weapon of war.

...

41. The girl child of today is the woman of tomorrow. The skills, ideas and energy of the girl child are vital for full attainment of the goals of equality, development and peace. For the girl child to develop her full potential she needs to be nurtured in an enabling environment, where her spiritual, intellectual and material needs for survival, protection and development are met and her equal rights safeguarded. If women are to be equal partners with men, in every aspect of life and development, now is the time to recognise the human dignity and worth of the girl child and to ensure the full enjoyment of her human rights and fundamental freedoms, including the rights assured by the Convention on the Rights of the Child, universal ratification of which is strongly urged. Yet there exists world-wide evidence that discrimination and violence against girls begin at the earliest stages of life and continue unabated throughout their lives. They often have less access to nutrition, physical and mental health care and education and enjoy fewer rights, opportunities and benefits of childhood and adolescence than do boys. They are often subjected to various forms of sexual and economic exploitation, paedophilia, forced prostitution and possibly the sale of their organs and tissues, violence and harmful practices such as female infanticide and prenatal sex selection, incest, female genital mutilation and early marriage, including child marriage.

...

### **Chapter III: Critical areas of concern**

...

46. To this end, governments, the international community and civil society, including non-governmental organisations and the private sector, are called upon to take strategic action in the following critical areas of concern:

...

Violence against women

...

### **Chapter IV: Strategic objectives and actions**

...

48. The Platform for Action recognises that women face barriers to full equality and advancement because of such factors as their race, age, language, ethnicity, culture, religion or disability, because they are indigenous women or because of other status. Many women encounter specific obstacles related to their family status, particularly as single parents; and to their socio-economic status, including their living conditions in rural, isolated or impoverished areas. Additional barriers also exist for refugee women, other displaced women, including internally displaced women as well as for immigrant women and migrant women, including women migrant workers. Many women are also particularly affected by environmental disasters, serious and infectious diseases and various forms of violence against women.

## ***Beijing Declaration***

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### **A. Women and poverty**

...

Strategic objective A.1. Review, adopt and maintain macroeconomic policies and development strategies that address the needs and efforts of women in poverty

Actions to be taken

60. By governments:

...

(l) Ensure the full realisation of the human rights of all women migrants, including women migrant workers, and their protection against violence and exploitation;

...

### **B. Education and training of women**

...

Strategic objective B.4. Develop non-discriminatory education and training

Actions to be taken

85. By governments, educational authorities and other educational and academic institutions:

...

(l) Encourage, with the guidance and support of their parents and in cooperation with educational staff and institutions, the elaboration of educational programmes for girls and boys and the creation of integrated services in order to raise awareness of their responsibilities and to help them to assume those responsibilities, taking into account the importance of such education and services to personal development and self-esteem, as well as the urgent need to avoid unwanted pregnancy, the spread of sexually transmitted diseases, especially HIV/AIDS, and such phenomena as sexual violence and abuse;

...

### **C. Women and health**

...

94. Women's right to the enjoyment of the highest standard of health must be secured throughout the whole life cycle in equality with men. Women are affected by many of the same health conditions as men, but women experience them differently. The prevalence among women of poverty and economic dependence, their experience of violence, negative attitudes towards women and girls, discrimination due to race and other forms of discrimination, the limited power many women have over their sexual and reproductive lives and lack of influence in decision-making are social realities which have an adverse impact on their health. Lack of food and inequitable distribution of food for girls and women in the household, inadequate access to safe water, sanitation facilities and fuel supplies,

particularly in rural and poor urban areas, and deficient housing conditions, all overburden women and their families and have a negative effect on their health. Good health is essential to leading a productive and fulfilling life, and the right of all women to control all aspects of their health, in particular their own fertility, is basic to their empowerment.

95. Discrimination against girls, often resulting from son preference, in access to nutrition and health-care services endangers their current and future health and well-being. Conditions that force girls into early marriage, pregnancy and child-bearing and subject them to harmful practices, such as female genital mutilation, pose grave health risks. Adolescent girls need, but too often do not have, access to necessary health and nutrition services as they mature. Counselling and access to sexual and reproductive health information and services for adolescents are still inadequate or lacking completely, and a young woman's right to privacy, confidentiality, respect and informed consent is often not considered. Adolescent girls are both biologically and psychosocially more vulnerable than boys to sexual abuse, violence and prostitution, and to the consequences of unprotected and premature sexual relations. The trend towards early sexual experience, combined with a lack of information and services, increases the risk of unwanted and too early pregnancy, HIV infection and other sexually transmitted diseases, as well as unsafe abortions. Early child-bearing continues to be an impediment to improvements in the educational, economic and social status of women in all parts of the world. Overall, for young women early marriage and early motherhood can severely curtail educational and employment opportunities and are likely to have a long-term, adverse impact on the quality of their lives and the lives of their children. Young men are often not educated to respect women's self-determination and to share responsibility with women in matters of sexuality and reproduction.

...

99. HIV/AIDS and other sexually transmitted diseases, the transmission of which is sometimes a consequence of sexual violence, are having a devastating effect on women's health, particularly the health of adolescent girls and young women. They often do not have the power to insist on safe and responsible sex practices and have little access to information and services for prevention and treatment. Women, who represent half of all adults newly infected with HIV/AIDS and other sexually transmitted diseases, have emphasised that social vulnerability and the unequal power relationships between women and men are obstacles to safe sex, in their efforts to control the spread of sexually transmitted diseases. The consequences of HIV/AIDS reach beyond women's health to their role as mothers and caregivers and their contribution to the economic support of their families. The social, developmental and health consequences of HIV/AIDS and other sexually transmitted diseases need to be seen from a gender perspective.

100. Sexual and gender-based violence, including physical and psychological abuse, trafficking in women and girls, and other forms of abuse and sexual

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exploitation place girls and women at high risk of physical and mental trauma, disease and unwanted pregnancy. Such situations often deter women from using health and other services.

...

Strategic objective C.1. Increase women's access throughout the life cycle to appropriate, affordable and quality health care, information and related services

Actions to be taken

107. By governments, in collaboration with non-governmental organisations and employers' and workers' organisations and with the support of international institutions:

...

(h) Take all appropriate measures to eliminate harmful, medically unnecessary or coercive medical interventions, as well as inappropriate medication and over-medication of women. All women should be fully informed of their options, including likely benefits and potential side-effects, by properly trained personnel;

...

(q) Integrate mental health services into primary health care systems or other appropriate levels, develop supportive programmes and train primary health workers to recognise and care for girls and women of all ages who have experienced any form of violence especially domestic violence, sexual abuse or other abuse resulting from armed and non-armed conflict;

...

Strategic objective C.2. Strengthen preventive programmes that promote women's health

Actions to be taken

108. By governments, in cooperation with non-governmental organisations, the mass media, the private sector and relevant international organisations, including United Nations bodies, as appropriate:

(a) Give priority to both formal and informal educational programmes that support and enable women to develop self-esteem, acquire knowledge, make decisions on and take responsibility for their own health, achieve mutual respect in matters concerning sexuality and fertility and educate men regarding the importance of women's health and well-being, placing special focus on programmes for both men and women that emphasise the elimination of harmful attitudes and practices, including female genital mutilation, son preference (which results in female infanticide and prenatal sex selection), early marriage, including child marriage, violence against women, sexual exploitation, sexual abuse, which at times is conducive to infection with HIV/AIDS and other sexually transmitted diseases, drug abuse, discrimination against girls and women in food allocation and other harmful attitudes and practices related to the life, health and

well-being of women, and recognising that some of these practices can be violations of human rights and ethical medical principles;

...

(q) Adopt specific preventive measures to protect women, youth and children from any abuse – sexual abuse, exploitation, trafficking and violence, for example – including the formulation and enforcement of laws, and provide legal protection and medical and other assistance.

...

Strategic objective C.4. Promote research and disseminate information on women's health

#### Actions to be taken

110. By governments, the United Nations system, health professions, research institutions, non-governmental organisations, donors, pharmaceutical industries and the mass media, as appropriate:

...

(d) Increase financial and other support from all sources for preventive, appropriate biomedical, behavioural, epidemiological and health service research on women's health issues and for research on the social, economic and political causes of women's health problems, and their consequences, including the impact of gender and age inequalities, especially with respect to chronic and non-communicable diseases, particularly cardiovascular diseases and conditions, cancers, reproductive tract infections and injuries, HIV/AIDS and other sexually transmitted diseases, domestic violence, occupational health, disabilities, environmentally related health problems, tropical diseases and health aspects of ageing;

...

#### **D. Violence against women**

113. Violence against women is an obstacle to the achievement of the objectives of equality, development and peace. Violence against women both violates and impairs or nullifies the enjoyment by women of their human rights and fundamental freedoms. The long-standing failure to protect and promote those rights and freedoms in the case of violence against women is a matter of concern to all states and should be addressed. Knowledge about its causes and consequences, as well as its incidence and measures to combat it, have been greatly expanded since the Nairobi Conference. In all societies, to a greater or lesser degree, women and girls are subjected to physical, sexual and psychological abuse that cuts across lines of income, class and culture. The low social and economic status of women can be both a cause and a consequence of violence against women.

114. The term 'violence against women' means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or

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suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life. Accordingly, violence against women encompasses but is not limited to the following:

- (a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;
- (b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;
- (c) Physical, sexual and psychological violence perpetrated or condoned by the state, wherever it occurs.

115. Other acts of violence against women include violation of the human rights of women in situations of armed conflict, in particular murder, systematic rape, sexual slavery and forced pregnancy.

115 bis. Acts of violence against women also include forced sterilisation and forced abortion, coercive/forced use of contraceptives, prenatal sex selection and female infanticide.

116. Some groups of women, such as women belonging to minority groups, indigenous women, refugee women, women migrants, including women migrant workers, women in poverty living in rural or remote communities, destitute women, women in institutions or in detention, female children, women with disabilities, elderly women, displaced women, repatriated women, women living in poverty and women in situations of armed conflict, foreign occupation, wars of aggression, civil wars, terrorism, including hostage-taking, are also particularly vulnerable to violence.

...

118. Acts or threats of violence, whether occurring within the home or in the community, or perpetrated or condoned by the state, instil fear and insecurity in women's lives and are obstacles to the achievement of equality and for development and peace. The fear of violence, including harassment, is a permanent constraint on the mobility of women and limits their access to resources and basic activities. High social, health and economic costs to the individual and society are associated with violence against women. Violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men. In many cases, violence against women and girls occurs in the family or within the home, where violence is often tolerated. The neglect, physical and sexual abuse, and rape of girl children and women by family members and other members of the household, as well as incidences of spousal and non-spousal abuse, often go unreported and are thus



difficult to detect. Even when such violence is reported, there is often a failure to protect victims or punish perpetrators.

119. Violence against women is a manifestation of the historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of women's full advancement. Violence against women throughout the life cycle derives essentially from cultural patterns, in particular the harmful effects of certain traditional or customary practices and all acts of extremism linked to race, sex, language or religion that perpetuate the lower status accorded to women in the family, the workplace, the community and society. Violence against women is exacerbated by social pressures, notably the shame of denouncing certain acts that have been perpetrated against women; women's lack of access to legal information, aid or protection; the lack of laws that effectively prohibit violence against women; failure to reform existing laws; inadequate efforts on the part of public authorities to promote awareness of and to enforce existing laws; and the absence of educational and other means to address the causes and consequences of violence. Images in the media of violence against women, in particular those that depict rape or sexual slavery as well as the use of women and girls as sex objects, including pornography, factors contributing to the continued prevalence of such violence, adversely influencing the community at large, in particular children and young people.

120. Developing a holistic and multidisciplinary approach to the challenging task of promoting families, communities and states that are free of violence against women is necessary and achievable. Equality, partnership between women and men and respect for human dignity must permeate all stages of the socialisation process. Educational systems should promote self-respect, mutual respect, and cooperation between women and men.

121. The absence of adequate gender-disaggregated data and statistics on the incidence of violence makes the elaboration of programmes and monitoring of changes difficult. Lack of or inadequate documentation and research on domestic violence, sexual harassment and violence against women and girls in private and in public, including the workplace, impede efforts to design specific intervention strategies. Experience in a number of countries shows that women and men can be mobilised to overcome violence in all its forms and that effective public measures can be taken to address both the causes and the consequences of violence. Men's groups mobilising against gender violence are necessary allies for change.

122. Women may be vulnerable to violence perpetrated by persons in positions of authority in both conflict and non- conflict situations. Training of all officials in humanitarian and human rights law and the punishment of perpetrators of violent acts against women would help to ensure that such violence does not take place

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at the hands of public officials in whom women should be able to place trust, including police and prison officials and security forces.

123. The effective suppression of trafficking in women and girls for the sex trade is a matter of pressing international concern. Implementation of the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 18/ as well as other relevant instruments, needs to be reviewed and strengthened. The use of women in international prostitution and trafficking networks has become a major focus of international organised crime. The Special Rapporteur of the Commission on Human Rights on violence against women, who has explored these acts as an additional cause of the violation of the human rights and fundamental freedoms of women and girls, is invited to address, within her mandate and as a matter of urgency, the issue of international trafficking for the purposes of the sex trade, as well as the issues of forced prostitution, rape, sexual abuse and sex tourism. Women and girls who are victims of this international trade are at an increased risk of further violence, as well as unwanted pregnancy and sexually transmitted infection, including infection with HIV/AIDS.

124. In addressing violence against women, governments and other actors should promote an active and visible policy of mainstreaming a gender perspective in all policies and programmes so that before decisions are taken an analysis may be made of their effects on women and men, respectively.

Strategic objective D.1. Take integrated measures to prevent and eliminate violence against women

Actions to be taken

125. By governments:

- (a) Condemn violence against women and refrain from invoking any custom, tradition or religious consideration to avoid their obligations with respect to its elimination as set out in the Declaration on the Elimination of Violence against Women;
- (b) Refrain from engaging in violence against women and exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the state or by private persons;
- (c) Enact and/or reinforce penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs done to women and girls who are subjected to any form of violence, whether in the home, the workplace, the community or society;
- (d) Adopt and/or implement and periodically review and analyse legislation to ensure its effectiveness in eliminating violence against women, emphasising the prevention of violence and the prosecution of offenders; take measures to ensure

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the protection of women subjected to violence, access to just and effective remedies, including compensation and indemnification and healing of victims, and rehabilitation of perpetrators;

(e) Work actively to ratify and/or implement international human rights norms and instruments as they relate to violence against women, including those contained in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

(f) Implement the Convention on the Elimination of All Forms of Discrimination against Women, taking into account general recommendation 19 adopted by the Committee on the Elimination of Discrimination against Women, at its eleventh session;

(g) Promote an active and visible policy of mainstreaming a gender perspective in all policies and programmes related to violence against women and actively encourage, support and implement measures and programmes aimed at increasing the knowledge and understanding of the causes, consequences and mechanisms of violence against women among those responsible for implementing these policies, such as law enforcement officers, police personnel and judicial, medical and social workers, as well as those who deal with minority, migration and refugee issues, and develop strategies to ensure that the re-victimisation of women victims of violence does not occur because of gender-insensitive laws or judicial or enforcement practices;

(h) Provide women who are subjected to violence with access to the mechanisms of justice and, as provided for by national legislation, to just and effective remedies for the harm they have suffered and inform women of their rights in seeking redress through such mechanisms;

(i) Enact and enforce legislation against the perpetrators of practices and acts of violence against women, such as female genital mutilation, prenatal sex selection, infanticide and dowry-related violence and give vigorous support to the efforts of non-governmental and community organisations to eliminate such practices;

(j) Formulate and implement, at all appropriate levels, plans of action to eliminate violence against women;

(k) Adopt all appropriate measures, especially in the field of education, to modify the social and cultural patterns of conduct of men and women, and to eliminate prejudices, customary practices and all other practices based on the idea of the inferiority or superiority of either of the sexes and on stereotyped roles for men and women;

(l) Create or strengthen institutional mechanisms so that women and girls can report acts of violence against them in a safe and confidential environment, free from the fear of penalties or retaliation, and file charges;

(m) Ensure that women with disabilities have access to information and services in the field of violence against women;

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- (n) Create, improve or develop as appropriate, and fund the training programmes for judicial, legal, medical, social, educational and police and immigrant personnel, in order to avoid the abuse of power leading to violence against women and sensitise such personnel to the nature of gender-based acts and threats of violence so that fair treatment of female victims can be assured;
- (o) Adopt laws, where necessary, and reinforce existing laws that punish police, security forces or any other agents of the state who engage in acts of violence against women in the course of the performance of their duties, review existing legislation and take effective measures against the perpetrators of such violence;
- (p) Allocate adequate resources within the government budget and mobilise community resources for activities related to the elimination of violence against women, including resources for the implementation of plans of action at all appropriate levels;
- (q) Include in reports submitted in accordance with the provisions of relevant United Nations human rights instruments, information pertaining to violence against women and measures taken to implement the Declaration on the Elimination of Violence against Women;
- (r) Cooperate with and assist the Special Rapporteur of the Commission on Human Rights on violence against women in the performance of her mandate and furnish all information requested; cooperate also with other competent mechanisms, such as the Special Rapporteur of the Commission on Human Rights on torture and the Special Rapporteur of the Commission on Human Rights on summary, extra-judiciary and arbitrary executions, in relation to violence against women;
- (s) Recommend that the Commission on Human Rights renew the mandate of the Special Rapporteur on violence against women when her term ends in 1997 and, if warranted, to update and strengthen it.

126. By governments, including local governments, and community organisations, non-governmental organisations, educational institutions, the public and private sectors, particularly enterprises, and the mass media, as appropriate:

- (a) Provide well-funded shelters and relief support for girls and women subjected to violence, as well as medical, psychological and other counselling services and free or low-cost legal aid, where it is needed, as well as appropriate assistance to enable them to find a means of subsistence;
- (b) Establish linguistically and culturally accessible services for migrant women and girls, including women migrant workers, who are victims of gender-based violence;
- (c) Recognise the vulnerability to violence and other forms of abuse of women migrants, including women migrant workers, whose legal status in the host country depends on employers who may exploit their situation;
- (d) Support initiatives of women's organisations and non-governmental organisations all over the world to raise awareness on the issue of violence against women and to contribute to its elimination;

(e) Organise, support and fund community-based education and training campaigns to raise awareness about violence against women as a violation of women's enjoyment of their human rights and mobilise local communities to use appropriate gender-sensitive traditional and innovative methods of conflict resolution;

(f) Recognise, support and promote the fundamental role of intermediate institutions, such as primary-health-care centres, family-planning centres, existing school health services, mother and baby protection services, centres for migrant families and so forth in the field of information and education related to abuse;

(g) Organise and fund information campaigns, educational and training programmes in order to sensitise girls and boys and women and men to the personal and social detrimental effects of violence in the family, community and society; teach them how to communicate without violence; promote training for victims and potential victims so that they can protect themselves and others against such violence;

(h) Disseminate information on the assistance available to women and families who are victims of violence;

(i) Provide, fund and encourage counselling and rehabilitation programmes for the perpetrators of violence, and promote research to further efforts concerning such counselling and rehabilitation so as to prevent the recurrence of such violence;

(j) Raise awareness of the responsibility of the media in promoting non-stereotyped images of women and men, as well as in eliminating patterns of media presentation that generate violence, and encourage those responsible for media content to establish professional guidelines and codes of conduct, consistent with freedom of expression; and also raise awareness of the important role of the media in informing and educate people about the causes and effects of violence against women and in stimulating public debate on the topic.

127. By governments, employers, trade unions, community and youth organisations and non-governmental organisations, as appropriate:

(a) Develop programmes and procedures to eliminate sexual harassment and other forms of violence against women in all educational institutions, workplaces and elsewhere;

(b) Develop programmes and procedures to educate and raise awareness of acts of violence against women that constitute a crime and a violation of the human rights of women;

(c) Develop counselling, healing and support programmes for girls, adolescents and young women who have been or are involved in abusive relationships, particularly those who live in homes or institutions where abuse occurs;

(d) Take special measures to eliminate violence against women, particularly those in vulnerable situations, such as young women, refugee, displaced and internally displaced women, women with disabilities and women migrant workers,

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including enforcing any existing legislation and developing, as appropriate, new legislation for women migrant workers in both sending and receiving countries.

128. By the Secretary-General of the United Nations: Provide the Special Rapporteur of the Commission on Human Rights on violence against women with all necessary assistance, in particular staff and resources required to perform all mandated functions, especially in carrying out and following up on missions undertaken either separately or jointly with other special rapporteurs and working groups, and adequate assistance for periodic consultations with the Committee on the Elimination of Discrimination against Women and all treaty bodies.

129. By governments, international organisations and non-governmental organisations: Encourage the dissemination and implementation of the UNHCR Guidelines on the Protection of Refugee Women and the UNHCR Guidelines on the Prevention of and Response to Sexual Violence against Refugees.

Strategic objective D.2. Study the causes and consequences of violence against women and the effectiveness of preventive measures  
Actions to be taken

130. By governments, regional organisations, the United Nations, other international organisations, research institutions, women's and youth organisations and non-governmental organisations, as appropriate:

(a) Promote research, collect data and compile statistics, especially concerning domestic violence relating to the prevalence of different forms of violence against women and encourage research into the causes, nature, seriousness and consequences of violence against women and the effectiveness of measures implemented to prevent and redress violence against women;

(b) Disseminate findings of research and studies widely;

(c) Support and initiate research on the impact of violence, such as rape, on women and girl children, and make the resulting information and statistics available to the public;

(d) Encourage the media to examine the impact of gender role stereotypes, including those perpetuated by commercial advertisements which foster gender-based violence and inequalities, and how they are transmitted during the life cycle and take measures to eliminate these negative images with a view to promoting a violence-free society.

Strategic objective D.3. Eliminate trafficking in women and assist victims of violence due to prostitution and trafficking

Actions to be taken

131. By governments of countries of origin, transit and destination, regional and international organisations, as appropriate:

- (a) Consider the ratification and enforcement of international conventions on trafficking in persons and on slavery;
- (b) Take appropriate measures to address the root factors, including external factors, that encourage trafficking in women and girls for prostitution and other forms of commercialised sex, forced marriages and forced labour in order to eliminate trafficking in women, including by strengthening existing legislation with a view to providing better protection of the rights of women and girls and to punishing the perpetrators, through both criminal and civil measures;
- (c) Step up cooperation and concerted action by all relevant law enforcement authorities and institutions with a view to dismantling national, regional and international networks in trafficking;
- (d) Allocate resources to provide comprehensive programmes designed to heal and rehabilitate into society victims of trafficking including through job training, legal assistance and confidential health care and take measures to cooperate with non-governmental organisations to provide for the social, medical and psychological care of the victims of trafficking;
- (e) Develop educational and training programmes and policies and consider enacting legislation aimed at preventing sex tourism and trafficking, giving special emphasis to the protection of young women and children.

#### **E. Women and armed conflict**

132. An environment which maintains world peace and promotes and protects human rights, democracy and the peaceful settlement of disputes, in accordance with the principles of non-threat or use of force against territorial integrity or political independence and of respect for sovereignty as set forth in the United Nations Charter, is an important factor for the advancement of women. Peace is inextricably linked with equality between women and men and development. Armed and other types of conflicts and terrorism and hostage-taking still persist in many parts of the world. Aggression, foreign occupation, ethnic and other types of conflicts are an ongoing reality affecting women and men in nearly every region. Gross and systematic violations and situations that constitute serious obstacles to the full enjoyment of human rights continue to occur in different parts of the world. Such violations and obstacles include, as well as torture and cruel, inhuman and degrading treatment or punishment, summary and arbitrary executions, disappearances, arbitrary detentions, all forms of racism and racial discrimination, foreign occupation and alien domination, xenophobia, poverty, hunger and other denials of economic, social and cultural rights, religious intolerance, terrorism, discrimination against women and lack of the rule of law. International humanitarian law, prohibiting attacks on civilian populations, as such, is at times systematically ignored and human rights are often violated in connection with situations of armed conflicts, affecting the civilian population, especially women, children, the elderly and the disabled. Violations of the human rights of women in situations of armed conflicts are violations of the fundamental principles of international human rights and humanitarian law. Massive violations of human rights, especially in the form of genocide, 'ethnic cleansing' as a

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strategy of war and its consequences, rape, including systematic rape of women in war situations, creating mass exodus of refugees and displaced persons, are abhorrent practices that are strongly condemned and must be immediately stopped, while perpetrators of such crimes must be punished. Some of these situations of armed conflict have their origin in the conquest or colonisation of a country by another state and the perpetuation of that colonisation through state and military repression.

133. The Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 1949, and the Additional Protocols of 1977 provide that women shall especially be protected against any attack on their honour, in particular against humiliating and degrading treatment, rape, enforced prostitution or any form of indecent assault. The Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, states that 'Violations of the human rights of women in situations of armed conflict are violations of the fundamental principles of international human rights and humanitarian law'. All violations of this kind, including in particular murder, rape, including systematic rape, sexual slavery and forced pregnancy require a particularly effective response. Gross and systematic violations and situations that constitute serious obstacles to the full enjoyment of human rights continue to occur in different parts of the world. Such violations and obstacles include, as well as torture and cruel, inhuman and degrading treatment or summary and arbitrary detention, all forms of racism, racial discrimination, xenophobia, denial of economic, social and cultural rights and religious intolerance.

134. Violations of human rights in situations of armed conflict and military occupation are violations of the fundamental principles of international human rights and humanitarian law as embodied in international human rights instruments and in the Geneva Conventions of 1949 and the Additional Protocols thereto. Gross human rights violations and policies of ethnic cleansing in war-torn and occupied areas continue to be carried out. These practices have created, inter alia, a mass flow of refugees and other displaced persons in need of international protection and internally displaced persons, the majority of whom are women, adolescent girls and children. Civilian victims, mostly women and children, often outnumber casualties among combatants. In addition, women often become caregivers for injured combatants and find themselves, as a result of conflict, unexpectedly cast as sole manager of household, sole parent, and caretaker of elderly relatives.

...

136. While entire communities suffer the consequences of armed conflict and terrorism, women and girls are particularly affected because of their status in society and their sex. Parties to conflict often rape women with impunity, sometimes using systematic rape as a tactic of war and terrorism. The impact of violence against women and violation of the human rights of women in such situations is experienced by women of all ages, who suffer displacement, loss of



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home and property, loss or involuntary disappearance of close relatives, poverty and family separation and disintegration, and who are victims of acts of murder, terrorism, torture, involuntary disappearance, sexual slavery, rape, sexual abuse and forced pregnancy in situations of armed conflict, especially as a result of policies of ethnic cleansing and other new and emerging forms of violence. This is compounded by the life-long social, economic and psychologically traumatic consequences of armed conflict and foreign occupation and alien domination.

137. Women and children constitute some 80 per cent of the world's millions of refugees and other displaced persons, including internally displaced persons. They are threatened by deprivation of property, goods and services and deprivation of their right to return to their homes of origin as well as by violence and insecurity. Particular attention should be paid to sexual violence against uprooted women and girls employed as a method of persecution in systematic campaigns of terror and intimidation and forcing members of a particular ethnic, cultural or religious group to flee their homes. Women may also be forced to flee as a result of a well-founded fear of persecution for reasons enumerated in the 1951 Convention relating to the Status of Refugees and the 1967 Protocol, including persecution through sexual violence or other gender-related persecution, and they continue to be vulnerable to violence and exploitation while in flight, in countries of asylum and resettlement and during and after repatriation. Women often experience difficulty in some countries of asylum in being recognised as refugees when the claim is based on such persecution.

...

Strategic objective E.1. Increase the participation of women in conflict resolution at decision-making levels and protect women living in situations of armed and other conflicts or under foreign occupation

Actions to be taken

144. By governments and international and regional intergovernmental institutions:

...

(d) Ensure that these bodies are able to address gender issues properly by providing appropriate training to prosecutors and judges and other officials in handling cases involving rape, forced pregnancy in situations of armed conflict, indecent assault and other forms of violence against women in armed conflicts, including terrorism, and integrate a gender perspective into their work;

...

Strategic objective E.2. Reduce excessive military expenditures and control the availability of armaments

Actions to be taken

145. By governments:

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...

(c) Take action to investigate and punish members of the police, security and armed forces and others who perpetrate acts of violence against women, violations of international humanitarian law and violations of the human rights of women in situations of armed conflict;

(d) While acknowledging legitimate national defence needs, recognise and address the dangers to society of armed conflict and the negative effect of excessive military expenditures, trade in arms, especially those arms that are particularly injurious or have indiscriminate effects, and excessive investment in arms production and acquisition; similarly, recognise the need to combat illicit arms trafficking, violence, crime, the production and use of and trafficking in illicit drugs, and trafficking in women and children;

(e) Recognising that women and children are particularly affected by the indiscriminate use of antipersonnel land-mines;

...

Strategic objective E.3. Promote non-violent forms of conflict resolution and reduce the incidence of human rights abuse in conflict situations

Actions to be taken

146. By governments:

(a) Consider the ratification of or accession to international instruments containing provisions relative to the protection of women and children in armed conflicts, including the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 1949, the Protocols Additional to the Geneva Conventions of 1949 relating to the Protection of Victims of International Armed Conflicts (Protocol I) and to the Protection of Victims of Non-International Armed Conflicts (Protocol II);

(b) Respect fully the norms of international humanitarian law in armed conflicts and take all measures required for the protection of women and children, in particular against rape, forced prostitution and any other form of indecent assault.

147. By governments and international and regional organisations:

...

(d) Urge the identification and condemnation of the systematic practice of rape and other forms of inhuman and degrading treatment of women as a deliberate instrument of war and ethnic cleansing and take steps to ensure that full assistance is provided to the victims of such abuse for their physical and mental rehabilitation;

(e) Reaffirm that rape in the conduct of armed conflict constitutes a war crime and under certain circumstances it constitutes a crime against humanity and an act of genocide as defined in the Convention on the Prevention and Punishment of the Crimes of Genocide; take all measures required for the protection of women and children from such acts and strengthen mechanisms to investigate and punish all those responsible and bring the perpetrators to justice;

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(f) Uphold and reinforce standards set out in international humanitarian law and international human rights instruments to prevent all acts of violence against women in situations of armed and other acts of conflict; undertake a full investigation of all acts of violence against women committed during war, including rape, in particular systematic rape, forced prostitution and other forms of indecent assault and sexual slavery, prosecute all criminals responsible for war crimes against women and provide full redress to women victims;

...

(i) Take into account gender-sensitive concerns in developing training programmes for all relevant personnel on international humanitarian law and human rights awareness and recommend such training for those involved in United Nations peace-keeping and humanitarian aid, with a view to preventing violence against women, in particular;

(j) Discourage the adoption of and refrain from any unilateral measure that is not in accordance with international law and the Charter of the United Nations, that impedes the full achievement of economic and social development by the population of the affected countries, in particular women and children, that hinders their well-being and that creates obstacles to the full enjoyment of their human rights, including the right of everyone to a standard of living adequate for their health and well-being and their right to food, medical care and the necessary social services. This Conference reaffirms that food and medicine must not be used as a tool for political pressure;

...

Strategic objective E.4. Promote women's contribution to fostering a culture of peace

Actions to be taken

148. By governments, international and regional intergovernmental institutions and non-governmental organisations:

...

(c) Encourage the further development of peace research, involving the participation of women, to examine the impact of armed conflict on women and children and the nature and contribution of women's participation in national, regional and international peace movements; engage in research and identify innovative mechanisms for containing violence and for conflict resolution for public dissemination and for use by women and men;

(d) Develop and disseminate research on the physical, psychological, economic and social effects of armed conflicts on women, particularly young women and girls, with a view to developing policies and programmes to address the consequences of conflicts;

...

Strategic objective E.5. Provide protection, assistance and training to refugee women, other displaced women in need of international protection and internally displaced women

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### Actions to be taken

149. By governments, intergovernmental and non- governmental organisations and other institutions involved in providing protection, assistance and training to refugee women, other displaced women in need of international protection and internally displaced women, including the Office of the United Nations High Commissioner for Refugees and the World Food Programme, as appropriate:

(a) Take steps to ensure that women are fully involved in the planning, design, implementation, monitoring and evaluation of all short-term and long-term projects and programmes providing assistance to refugee women, other displaced women in need of international protection and internally displaced women, including the management of refugee camps and resources; ensure that refugee and displaced women and girls have direct access to the services provided;

(b) Offer adequate protection and assistance to women and children displaced within their country and find solutions to the root causes of their displacement with a view to preventing it and, when appropriate, facilitate their return or resettlement;

(c) Take steps to protect the safety and physical integrity of refugee women, other displaced women in need of international protection and internally displaced women during their displacement and upon their return to their communities of origin, including programmes of rehabilitation; take effective measures to protect from violence women who are refugees or displaced; hold an impartial and thorough investigation of any such violations and bring those responsible to justice;

(d) While fully respecting and strictly observing the principles of non-refoulement of refugees, take all the necessary steps to ensure the right of refugee and displaced women to return voluntarily to their place of origin in safety and with dignity, and their right to protection after their return;

(e) Take measures, at the national level with international cooperation, as appropriate, in accordance with the Charter of the United Nations, to find lasting solutions to questions related to internally displaced women, including their right to voluntary and safe return to their home of origin;

...

(h) Apply international norms to ensure equal access and equal treatment of women and men in refugee determination procedures and the granting of asylum, including full respect and strict observation of the principle of non-refoulement through, *inter alia*, bringing national immigration regulations into conformity with relevant international instruments, and consider recognising as refugees those women whose claim to refugee status is based upon the well-founded fear of persecution for reasons enumerated in the 1951 Convention relating to the Status of Refugees and the 1967 Protocol, including persecution through sexual violence or other gender-related persecution, and provide access to specially trained officers, including female officials, to interview women regarding sensitive or painful experiences, such as sexual assault;

(i) Support and promote efforts by states towards the development of criteria and guidelines on responses to persecution specifically aimed at women, by sharing information on states' initiatives to develop such criteria and guidelines and by monitoring to ensure their fair and consistent application;

(j) Promote the self-reliant capacities of refugee women, other displaced women in need of international protection and internally displaced women and provide programmes for women, particularly young women, in leadership and decision-making within refugee and returnee communities;

(k) Ensure that the human rights of refugee and displaced women are protected and that refugee and displaced women are made aware of these rights; ensure that the vital importance of family reunification is recognised;

...

(m) Raise public awareness of the contribution made by refugee women to their countries of resettlement, promote understanding of their human rights and of their needs and abilities, and encourage mutual understanding and acceptance through educational programmes promoting cross-cultural and interracial harmony;

(n) Provide basic and support services to women who are displaced from their place of origin as a result of terrorism, violence, drug trafficking or other reasons linked to violence situations;

(o) Develop awareness of the human rights of women and provide, as appropriate, human rights education and training to military and police personnel operating in areas of armed conflict and areas where there are refugees.

150. By governments:

(a) Disseminate and implement the UNHCR Guidelines on the Protection of Refugee Women and the UNHCR Guidelines on Evaluation and Care of Victims of Trauma and Violence, or provide similar guidance, in close cooperation with refugee women and in all sectors of refugee programmes;

(b) Protect women and children who migrate as family members from abuse or denial of their human rights by sponsors and consider extending their stay, should the family relationship dissolve, within the limits of national legislation.

...

## **H. Institutional mechanisms for the advancement of women**

...

Strategic objective H.3. Generate and disseminate gender-disaggregated data and information for planning and evaluation

Actions to be taken

209. By national, regional and international statistical services and relevant governmental and United Nations agencies, in cooperation with research and documentation organisations, in their respective areas of responsibility:

...

At the national level, subject to national constraints:

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...

(j) Develop improved gender-disaggregated and age-specific data on the victims and perpetrators of all forms of violence against women, such as domestic violence, sexual harassment, rape, incest and sexual abuse, and trafficking in women and girls, as well as on violence by the agents of the state;

...

211. By the United Nations:

(a) Promote the development of methods to find better ways to collect, collate and analyse data that may relate to the human rights of women, including violence against women for use by all relevant United Nations bodies;

...

### **I. Human rights of women**

213. Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of governments.

- The World Conference on Human Rights reaffirmed the solemn commitment of all states to fulfil their obligation to promote universal respect for, and observance and protection of, all human rights and fundamental freedoms for all, in accordance with the Charter of the United Nations, other instruments relating to human rights, and international law. The universal nature of these rights and freedoms is beyond question.
- The promotion and protection of all human rights and fundamental freedoms must be considered as a priority objective of the United Nations, in accordance with its purposes and principles, in particular with the purpose of international cooperation. In the framework of these purposes and principles, the promotion and protection of all human rights is a legitimate concern of the international community. The international community must treat human rights globally, in a fair and equal manner, on the same footing, and with the same emphasis. The Platform for Action reaffirms the importance of ensuring the universality, objectivity and non-selectivity of the consideration of human rights issues.
- The Platform for Action reaffirms that all human rights – civil, cultural, economic, political and social, including the right to development – are universal, indivisible, interdependent and interrelated, as expressed in the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights. The Conference reaffirmed that the human rights of women and the girl child are an inalienable, integral and indivisible part of universal human rights. The full and equal enjoyment of all human rights and fundamental freedoms by women and girls is a priority for governments and the United Nations and is essential for the advancement of women.

214. Equal rights of men and women are explicitly mentioned in the Preamble to the Charter of the United Nations. All the major international human rights instruments include sex as one of the grounds upon which states may not discriminate.

215. Governments must not only refrain from violating the human rights of all women, but must work actively to promote and protect these rights. Recognition of the importance of the human rights of women is reflected in the fact that three quarters of the states members of the United Nations have become parties to the Convention on the Elimination of All Forms of Discrimination against Women.

216. The World Conference on Human Rights reaffirmed clearly that the human rights of women throughout the life cycle are an inalienable, integral and indivisible part of universal human rights. The International Conference on Population and Development reaffirmed women's reproductive rights and the right to development. Both the Declaration of the Rights of the Child and the Convention on the Rights of the Child guarantee children's rights and uphold the principle of non-discrimination on the grounds of gender.

217. The gap between the existence of rights and their effective enjoyment derives from a lack of commitment by governments to promoting and protecting those rights and the failure of governments to inform women and men alike about them. The lack of appropriate recourse mechanisms at the national and international levels, and inadequate resources at both levels, compound the problem. In most countries, steps have been taken to reflect the rights guaranteed by the Convention on the Elimination of All Forms of Discrimination against Women in national law. A number of countries have established mechanisms to strengthen women's ability to exercise their rights.

218. In order to protect the human rights of women, it is necessary to avoid, as far as possible, resorting to reservations and to ensure that no reservation is incompatible with the object and purpose of the Convention or is otherwise incompatible with international treaty law. Unless the human rights of women, as defined by international human rights instruments, are fully recognised and effectively protected, applied, implemented and enforced in national law as well as in national practice in family, civil, penal, labour and commercial codes and administrative rules and regulations, they will exist in name only.

219. In those countries that have not yet become parties to the Convention on the Elimination of All Forms of Discrimination against Women and other international human rights instruments, or where reservations that are incompatible with the object or purpose of the Convention have been entered, or where national laws have not yet been revised to implement international norms and standards, women's *de jure* equality is not yet secured. Women's full enjoyment of equal rights is undermined by the discrepancies between some national legislation and international law and international instruments on human rights. Overly complex administrative procedures, lack of awareness within the judicial process and inadequate monitoring of the violation of the human rights of all women, coupled with the underrepresentation of women in justice systems, insufficient information on existing rights and persistent attitudes and practices perpetuate

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women's de facto inequality. De facto inequality is also perpetuated by the lack of enforcement of, inter alia, family, civil, penal, labour and commercial laws or codes, or administrative rules and regulations intended to ensure women's full enjoyment of human rights and fundamental freedoms.

220. Every person should be entitled to participate in, contribute to and enjoy cultural, economic, political and social development. In many cases women and girls suffer discrimination in the allocation of economic and social resources. This directly violates their economic, social and cultural rights.

221. The human rights of all women and the girl child must form an integral part of United Nations human rights activities. Intensified efforts are needed to integrate the equal status and the human rights of all women and girls into the mainstream of United Nations system-wide activities and to address these issues regularly and systematically throughout relevant bodies and mechanisms. This requires, inter alia, improved cooperation and coordination between the Commission on the Status of Women, the United Nations High Commissioner for Human Rights, the Commission on Human Rights, including its special and thematic rapporteurs, independent experts, working groups and its Subcommission on Prevention of Discrimination and Protection of Minorities, the Commission on Sustainable Development, the Commission for Social Development, the Commission on Crime Prevention and Criminal Justice, and the Committee on the Elimination of Discrimination against Women and other human rights treaty bodies, and all relevant entities of the United Nations system, including the specialised agencies. Cooperation is also needed to strengthen, rationalise and streamline the United Nations human rights system and to promote its effectiveness and efficiency, taking into account the need to avoid unnecessary duplication and overlapping of mandates and tasks.

222. If the goal of full realisation of human rights for all is to be achieved, international human rights instruments must be applied in such a way as to take more clearly into consideration the systematic and systemic nature of discrimination against women that gender analysis has clearly indicated.

223. Bearing in mind the Programme of Action of the International Conference on Population and Development and the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights, as stated in their respective reports, the Fourth World Conference on Women reaffirms that reproductive 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 concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents.

...



225. Violence against women both violates and impairs or nullifies the enjoyment by women of human rights and fundamental freedoms. Taking into account the Declaration on the Elimination of Violence against Women and the work of Special Rapporteurs, gender-based violence, such as battering and other domestic violence, sexual abuse, sexual slavery and exploitation, and international trafficking in women and children, forced prostitution and sexual harassment, as well as violence against women, resulting from cultural prejudice, racism and racial discrimination, xenophobia, pornography, ethnic cleansing, armed conflict, foreign occupation, religious and anti-religious extremism and terrorism are incompatible with the dignity and the worth of the human person and must be combated and eliminated. Any harmful aspect of certain traditional, customary or modern practices that violates the rights of women should be prohibited and eliminated. Governments should take urgent action to combat and eliminate all forms of violence against women in private and public life, whether perpetrated or tolerated by the state or private persons.

226. Many women face additional barriers to the enjoyment of their human rights because of such factors as their race, language, ethnicity, culture, religion, disability or socio-economic class or because they are indigenous people, migrants, including women migrant workers, displaced women or refugees. They may also be disadvantaged and marginalised by a general lack of knowledge and recognition of their human rights as well as by the obstacles they meet in gaining access to information and recourse mechanisms in cases of violation of their rights.

226 bis. The factors that cause the flight of refugee women, other displaced women in need of international protection and internally displaced women may be different from those affecting men. These women continue to be vulnerable to abuses of their human rights during and after their flight.

227. While women are increasingly using the legal system to exercise their rights, in many countries lack of awareness of the existence of these rights is an obstacle that prevents women from fully enjoying their human rights and attaining equality. Experience in many countries has shown that women can be empowered and motivated to assert their rights, regardless of their level of education or socio-economic status. Legal literacy programmes and media strategies have been effective in helping women to understand the link between their rights and other aspects of their lives and in demonstrating that cost-effective initiatives can be undertaken to help women obtain those rights. Provision of human rights education is essential for promoting an understanding of the human rights of women, including knowledge of recourse mechanisms to redress violations of their rights. It is necessary for all individuals, especially women in vulnerable circumstances, to have full knowledge of their rights and access to legal recourse against violations of their rights.

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228. Women engaged in the defence of human rights must be protected. Governments have a duty to guarantee the full enjoyment of all rights set out in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights by women working peacefully in a personal or organisational capacity for the promotion and protection of human rights. Non-governmental organisations, women's organisations and feminist groups have played a catalytic role in the promotion of the human rights of women through grass-roots activities, networking and advocacy and need encouragement, support and access to information from governments in order to carry out these activities.

229. In addressing the enjoyment of human rights, governments and other actors should promote an active and visible policy of mainstreaming a gender perspective in all policies and programmes so that, before decisions are taken, an analysis is made of the effects on women and men, respectively.

Strategic objective I.1. Promote and protect the human rights of women, through the full implementation of all human rights instruments, especially the Convention on the Elimination of All Forms of Discrimination against Women

Actions to be taken

230. By governments:

(a) Work actively towards ratification or accession to and implement international and regional human rights treaties;

...

(e) Consider drawing up national action plans identifying steps to improve the promotion and protection of human rights, including the human rights of women, as recommended by the World Conference on Human Rights;

(f) Create or strengthen independent national institutions for the protection and promotion of these rights, including the human rights of women, as recommended by the World Conference on Human Rights;

(g) Develop a comprehensive human rights education programme to raise awareness among women of their human rights and among others of the human rights of women;

(h) If they are states parties, implement the Convention by reviewing all national laws, policies, practices and procedures to ensure that they meet the obligations set out in the Convention; all states should undertake a review of all national laws, policies, practices and procedures to ensure that they meet international human rights obligations in this matter;

(i) Include gender aspects in reporting under all other human rights conventions and instruments, including ILO conventions, to ensure analysis and review of the human rights of women;

...

(n) Address the acute problems of children, inter alia, by supporting efforts in the context of the United Nations system aimed at adopting efficient international measures for the prevention and eradication of female infanticide, harmful child labour, the sale of children and their organs, child prostitution, child pornography and other forms of sexual abuse and consider contributing to the drafting of an optional protocol to the Convention on the Rights of the Child;

(o) Strengthen the implementation of all relevant human rights instruments in order to combat and eliminate, including through international cooperation, organised and other forms of trafficking in women and children, including for the purposes of sexual exploitation, pornography, prostitution and sex tourism, and provide legal and social services to the victims. This should include provisions for international cooperation to prosecute and punish those responsible for organised exploitation of women and children;

(p) Taking into account the need to ensure full respect for the human rights of indigenous women, consider a declaration on the rights of indigenous people for adoption by the General Assembly within the International Decade of the World's Indigenous People and encourage the participation of indigenous women in the working group elaborating the draft declaration, in accordance with the provisions for the participation of organisations of indigenous people.

(a) Give full, equal and sustained attention to the human rights of women in the exercise of their respective mandates to promote universal respect for and protection of all human rights - civil, cultural, economic, political and social - including the right to development;

(b) Ensure the implementation of the recommendations of the World Conference on Human Rights for the full integration and mainstreaming of the human rights of women;

(c) Develop a comprehensive policy programme for mainstreaming the human rights of women throughout the United Nations system, including activities with regard to advisory services, technical assistance, reporting methodology, gender impact assessments, coordination, public information and human rights education, and play an active role in the implementation of the programme;

...

(e) Include information on gender-based human rights violations in their activities and integrate the findings into all of their programmes and activities;

(f) Ensure that there is collaboration and coordination of the work of all human rights bodies and mechanisms to ensure that the human rights of women are respected;

(g) Strengthen cooperation and coordination between the Commission on the Status of Women, the Commission on Human Rights, the Commission for Social Development, the Commission on Sustainable Development, the Commission on Crime Prevention and Criminal Justice, the United Nations human rights treaty monitoring bodies, including the Committee on the Elimination of Discrimination against Women, and UNIFEM, INSTRAW, UNDP, UNICEF and other organisations of the United Nations system, acting within their mandates, in the promotion of the

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human rights of women, and improve cooperation between the Division for the Advancement of Women and the Centre for Human Rights;

(h) Establish effective cooperation between the United Nations High Commissioner for Human Rights and the United Nations High Commissioner for Refugees and other relevant bodies, within their respective mandates, taking into account the close link between massive violations of human rights, especially in the form of genocide, ethnic cleansing, systematic rape of women in war situations and refugee flows and other displacements, and the fact that refugee, displaced and returnee women may be subject to particular human rights abuse;

(i) Encourage incorporation of a gender perspective in national programmes of action and in human rights and national institutions, within the context of human rights advisory services programmes;

(j) Provide training in the human rights of women for all United Nations personnel and officials, especially those in human rights and humanitarian relief activities, and promote their understanding of the human rights of women so that they recognise and deal with violations of the human rights of women and can fully take into account the gender aspect of their work.

Strategic objective I.2. Ensure equality and non-discrimination under the law and in practice

Actions to be taken

232. By governments:

(a) Give priority to promoting and protecting the full and equal enjoyment by women and men of all human rights and fundamental freedoms without distinction of any kind as to race, colour, sex, language, religion, political or other opinions, national or social origins, property, birth or other status;

...

(e) Strengthen and encourage the development of programmes to protect the human rights of women in the national institutions on human rights that carry out programmes, such as human rights commissions or ombudspersons, according them appropriate status, resources and access to the government to assist individuals, in particular women, and ensure that these institutions pay adequate attention to problems involving the violation of the human rights of women;

(f) Take action to ensure that the human rights of women, including the rights referred to in paragraphs 96 and 97 in section IV.C are fully respected and protected;

(g) Take urgent action to combat and eliminate violence against women, which is a human rights violation, resulting from harmful traditional or customary practices, cultural prejudices and extremism;

(g) bis. Prohibit female genital mutilation wherever it exists and give vigorous support to efforts among non-governmental and community organisations and religious institutions to eliminate such practices;

---

(i) Provide gender-sensitive human rights education and training to public officials, including, inter alia, police and military personnel, corrections officers, health and medical personnel, and social workers, including people who deal with migration and refugee issues, and teachers at all levels of the educational system, and make available such education and training also to the judiciary and members of parliament in order to enable them to better exercise their public responsibilities;

...

(l) Review and amend criminal laws and procedures, as necessary, to eliminate any discrimination against women in order to ensure that criminal law and procedures guarantee women effective protection against, and prosecution of, crimes directed at or disproportionately affecting women, regardless of the relationship between the perpetrator and the victim, and ensure that women defendants, victims and/or witnesses are not re-victimised or discriminated against in the investigation and prosecution of crimes;

...

(n) Strengthen existing or establish readily available and free or affordable alternative administrative mechanisms and legal aid programmes to assist disadvantaged women seeking redress for violations of their rights;

(o) Ensure that all women and non-governmental organisations and their members in the field of protection and promotion of all human rights – civil, cultural, economic, political and social rights, including the right to development – enjoy fully all human rights and freedoms in accordance with the Universal Declaration of Human Rights and all other human rights instruments and the protection of national laws;

(p) Strengthen and encourage the implementation of the recommendations contained in the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities, paying special attention to ensure non-discrimination and equal enjoyment of all human rights and fundamental freedoms by women and girls with disabilities, including their access to information and services in the field of violence against women, as well as their active participation in and economic contribution to all aspects of society;

(q) Encourage the development of gender-sensitive human rights programmes.

...

## **J. Women and the media**

234. During the past decade, advances in information technology have facilitated a global communications network that transcends national boundaries and has an impact on public policy, private attitudes and behaviour, especially of children and young adults. Everywhere the potential exists for the media to make a far greater contribution to the advancement of women.

...

Strategic objective J.2. Promote a balanced and non-stereotyped portrayal of women in the media

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### Actions to be taken

243. By governments and international organisations, to the extent consistent with freedom of expression:

...

(f) Take effective measures or institute such measures, including appropriate legislation against pornography and the projection of violence against women and children in the media.

244. By the mass media and advertising organisations:

...

(b) Establish, consistent with freedom of expression, professional guidelines and codes of conduct that address violent, degrading or pornographic materials concerning women in the media, including advertising;

...

245. By the media, non-governmental organisations and the private sector, in collaboration, as appropriate, with national machinery for the advancement of women:

(a) Promote the equal sharing of family responsibilities through media campaigns that emphasise gender equality and non-stereotyped gender roles of women and men within the family and that disseminate information aimed at eliminating spousal and child abuse and all forms of violence against women, including domestic violence;

...

### **L. The girl child**

259. The Convention on the Rights of the Child recognises that 'states parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or status'. (article 2, para.1) However, in many countries available indicators show that the girl child is discriminated against from the earliest stages of life, through her childhood and into adulthood. In some areas of the world, men outnumber women by 5 in every 100. The reasons for the discrepancy include, among other things, harmful attitudes and practices, such as female genital mutilation, son preference -which results in female infanticide and prenatal sex selection - early marriage, including child marriage, violence against women, sexual exploitation, sexual abuse, discrimination against girls in food allocation and other practices related to health and well-being. As a result, fewer girls than boys survive into adulthood.

...

269. Sexual violence and sexually transmitted diseases, including HIV/AIDS, have a devastating effect on children's health, and girls are more vulnerable than boys to the consequences of unprotected and premature sexual relations. Girls often

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face pressures to engage in sexual activity. Due to such factors as their youth, social pressures, lack of protective laws, or failure to enforce laws, girls are more vulnerable to all kinds of violence, particularly sexual violence, including rape, sexual abuse, sexual exploitation, trafficking, possibly the sale of their organs and tissues, and forced labour.

...

Strategic objective L.2. Eliminate negative cultural attitudes and practices against girls

Actions to be taken

276. By governments:

...

(b) Set up educational programmes and develop teaching materials and textbooks that will sensitise and inform adults about the harmful effects of certain traditional or customary practices on girl children;

...

277. By governments and, as appropriate, international and non-governmental organisations:

...

(b) Encourage educational institutions and the media to adopt and project balanced and non-stereotyped images of girls and boys, and work to eliminate child pornography and degrading and violent portrayals of the girl child;

(c) Eliminate all forms of discrimination against the girl child and the root causes of son preference, which result in harmful and unethical practices such as prenatal sex selection and female infanticide; this is often compounded by the increasing use of technologies to determine foetal sex, resulting in abortion of female fetuses;

(d) Develop policies and programmes, giving priority to formal and informal education programmes that support girls and enable them to acquire knowledge, develop self-esteem and take responsibility for their own lives; and place special focus on programmes to educate women and men, especially parents, on the importance of girls' physical and mental health and well-being, including the elimination of discrimination against girls in food allocation, early marriage, violence against girls, female genital mutilation, child prostitution, sexual abuse, rape and incest.

...

Strategic objective L.7. Eradicate violence against the girl child Actions to be taken

283. By governments and, as appropriate, international and non-governmental organisations:

(a) Take effective actions and measures to enact and enforce legislation to protect the safety and security of girls from all forms of violence at work, including

## ***Beijing Declaration***

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training programmes and support programmes, and take measures to eliminate incidents of sexual harassment of girls in educational and other institutions;

(b) Take appropriate legislative, administrative, social and educational measures to protect the girl child, in the household and in society, from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse;

(c) Undertake gender sensitisation training for those involved in healing and rehabilitation and other assistance programmes for girls who are victims of violence and promote programmes of information, support and training for such girls;

(d) Enact and enforce legislation protecting girls from all forms of violence, including female infanticide and prenatal sex selection, genital mutilation, incest, sexual abuse, sexual exploitation, child prostitution and child pornography, and develop age-appropriate safe and confidential programmes and medical, social and psychological support services to assist girls who are subjected to violence.

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## United Nations Security Council Resolution 1325 (2000)

Adopted by the Security Council at its 4213th meeting, on 31 October 2000

The Security Council,

*Recalling* its resolutions 1261 (1999) of 25 August 1999, 1265 (1999) of 17 September 1999, 1296 (2000) of 19 April 2000 and 1314 (2000) of 11 August 2000, as well as relevant statements of its President and recalling also the statement of its President, to the press on the occasion of the United Nations Day for Women's Rights and International Peace of 8 March 2000 (SC/6816),

*Recalling* also the commitments of the Beijing Declaration and Platform for Action (A/52/231) as well as those contained in the outcome document of the twenty-third Special Session of the United Nations General Assembly entitled 'Women 2000: Gender Equality, Development and Peace for the twenty-first century' (A/S-23/10/Rev 1), in particular those concerning women and armed conflict,

*Bearing* in mind the purposes and principles of the Charter of the United Nations and the primary responsibility of the Security Council under the Charter for the maintenance of international peace and security,

*Expressing* concern that civilians, particularly women and children, account for the vast majority of those adversely affected by armed conflict, including as refugees and internally displaced persons, and increasingly are targeted by combatants and armed elements, and recognising the consequent impact this has on durable peace and reconciliation,

*Reaffirming* the important role of women in the prevention and resolution of conflicts and in peace-building, and stressing the importance of their equal participation and full involvement in all efforts for the maintenance and promotion of peace and security, and the need to increase their role in decision-making with regard to conflict prevention and resolution,

*Reaffirming* also the need to implement fully international humanitarian and human rights law that protects the rights of women and girls during and after conflicts,

*Emphasising* the need for all parties to ensure that mine clearance and mine awareness programmes take into account the special needs of women and girls,

*Recognising* the urgent need to mainstream a gender perspective into peacekeeping operations, and in this regard noting the Windhoek Declaration and the Namibia Plan of Action on Mainstreaming a Gender Perspective in Multidimensional Peace Support Operations (S/2000/693),

*Recognising* also the importance of the recommendation contained in the statement of its President to the press of 8 March 2000 for specialised training for

## UN Security Council Resolution 1325

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all peacekeeping personnel on the protection, special needs and human rights of women and children in conflict situations,

*Recognising* that an understanding of the impact of armed conflict on women and girls, effective institutional arrangements to guarantee their protection and full participation in the peace process can significantly contribute to the maintenance and promotion of international peace and security,

*Noting* the need to consolidate data on the impact of armed conflict on women and girls,

1. *Urges* member states to ensure increased representation of women at all decision-making levels in national, regional and international institutions and mechanisms for the prevention, management, and resolution of conflict;
2. *Encourages* the Secretary-General to implement his strategic plan of action (A/49/587) calling for an increase in the participation of women at decision-making levels in conflict resolution and peace processes;
3. *Urges* the Secretary-General to appoint more women as special representatives and envoys to pursue good offices on his behalf, and in this regard calls on member states to provide candidates to the Secretary-General, for inclusion in a regularly updated centralised roster;
4. *Further urges* the Secretary-General to seek to expand the role and contribution of women in United Nations field-based operations, and especially among military observers, civilian police, human rights and humanitarian personnel;
5. *Expresses* its willingness to incorporate a gender perspective into peacekeeping operations and urges the Secretary-General to ensure that, where appropriate, field operations include a gender component;
6. *Requests* the Secretary-General to provide to member states training guidelines and materials on the protection, rights and the particular needs of women, as well as on the importance of involving women in all peacekeeping and peace-building measures, invites Member States to incorporate these elements as well as HIV/AIDS awareness training into their national training programmes for military and civilian police personnel in preparation for deployment and further requests the Secretary-General to ensure that civilian personnel of peacekeeping operations receive similar training;
7. *Urges* member states to increase their voluntary financial, technical and logistical support for gender-sensitive training efforts, including those undertaken by relevant funds and programmes, inter alia, the United Nations Fund for Women and United Nations Children's Fund, and by the United Nations High Commissioner for Refugees and other relevant bodies;
8. *Calls* on all actors involved, when negotiating and implementing peace agreements, to adopt a gender perspective, including, *inter alia*: (a) The special needs of women and girls during repatriation and resettlement and for rehabilitation, reintegration and post-conflict reconstruction; (b) Measures that support local women's peace initiatives and indigenous processes for conflict resolution, and that involve women in all of the implementation mechanisms of

the peace agreements; (c) Measures that ensure the protection of and respect for human rights of women and girls, particularly as they relate to the constitution, the electoral system, the police and the judiciary;

9. *Calls* upon all parties to armed conflict to respect fully international law applicable to the rights and protection of women and girls as civilians, in particular the obligations applicable to them under the Geneva Conventions of 1949 and the Additional Protocols thereto of 1977, the Refugee Convention of 1951 and the Protocol thereto of 1967, the Convention Security Council - 5 - Press Release SC/6942 4213th Meeting (PM) 31 October 2000 on the Elimination of All Forms of Discrimination against Women of 1979 and the Optional Protocol thereto of 1999 and the United Nations Convention on the Rights of the Child of 1989 and the two Optional Protocols thereto of 25 May 2000, and to bear in mind the relevant provisions of the Rome Statute of the International Criminal Court;

10. *Calls* on all parties to armed conflict to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse, and all other forms of violence in situations of armed conflict;

11. *Emphasises* the responsibility of all states to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, war crimes including those relating to sexual violence against women and girls, and in this regard, stresses the need to exclude these crimes, where feasible from amnesty provisions;

12. *Calls* upon all parties to armed conflict to respect the civilian and humanitarian character of refugee camps and settlements, and to take into account the particular needs of women and girls, including in their design, and recalls its Resolution 1208 (1998) of 19 November 1998;

13. *Encourages* all those involved in the planning for disarmament, demobilisation and reintegration to consider the different needs of female and male ex-combatants and to take into account the needs of their dependants;

14. *Reaffirms* its readiness, whenever measures are adopted under article 41 of the Charter of the United Nations, to give consideration to their potential impact on the civilian population, bearing in mind the special needs of women and girls, in order to consider appropriate humanitarian exemptions;

15. *Expresses* its willingness to ensure that Security Council missions take into account gender considerations and the rights of women, including through consultation with local and international women's groups;

16. *Invites* the Secretary-General to carry out a study on the impact of armed conflict on women and girls, the role of women in peace-building and the gender dimensions of peace processes and conflict resolution, and further invites him to submit a report to the Security Council on the results of this study and to make this available to all member states of the United Nations;

17. *Requests* the Secretary-General, where appropriate, to include in his reporting to the Security Council, progress on gender mainstreaming throughout peacekeeping missions and all other aspects relating to women and girls;

18. *Decides* to remain actively seized of the matter.

## Resolution adopted by the General Assembly

[on the report of the Third Committee (A/61/438)]

### 61/143. Intensification of efforts to eliminate all forms of violence against women

The General Assembly,

*Reaffirming* the obligation of all states to promote and protect all human rights and fundamental freedoms, and reaffirming also that discrimination on the basis of sex is contrary to the Charter of the United Nations, the Convention on the Elimination of All Forms of Discrimination against Women<sup>1</sup> and other international human rights instruments, and that its elimination is an integral part of efforts towards the elimination of all forms of violence against women,

*Reaffirming also* the Declaration on the Elimination of Violence against Women,<sup>2</sup> the Beijing Declaration and Platform for Action,<sup>3</sup> the outcome of the twenty-third special session of the General Assembly entitled 'Women 2000: gender equality, development and peace for the twenty-first century',<sup>4</sup> and the declaration adopted at the forty-ninth session of the Commission on the Status of Women,<sup>5</sup>

*Reaffirming further* the international commitments in the field of social development and to gender equality and the advancement of women made at the World Conference on Human Rights, the International Conference on Population and Development, the World Summit for Social Development and the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, as well as those made in the United Nations Millennium Declaration<sup>6</sup> and at the 2005 World Summit,

*Recalling* all its previous resolutions on the elimination of violence against women and on the in-depth study on all forms of violence against women, and Security Council Resolution 1325 (2000) of 31 October 2000 on women and peace and security,

*Recalling also* Commission on Human Rights Resolution 2005/41 of 19 April 2005 on the elimination of violence against women,<sup>7</sup>

1. United Nations, *Treaty Series*, vol 1249, No 20378.

2. See Resolution 48/104.

3. *Report of the Fourth World Conference on Women, Beijing, 4-15 September 1995* (United Nations publication, Sales No E96IV13), chap I, Resolution 1, annexes I and II.

4. Resolution S-23/2, annex, and Resolution S-23/3, annex.

5. See *Official Records of the Economic and Social Council, 2005, Supplement No 7* and corrigendum.

6. See Resolution 55/2.

*Recalling further* the inclusion of gender-related crimes and crimes of sexual violence in the Rome Statute of the International Criminal Court,<sup>8</sup>

*Recognising* that violence against women is rooted in historically unequal power relations between men and women and that all forms of violence against women seriously violate and impair or nullify the enjoyment by women of all human rights and fundamental freedoms and constitute a major impediment to the ability of women to make use of their capabilities,

*Recognising also* that women's poverty and lack of empowerment, as well as their marginalisation resulting from their exclusion from social policies and from the benefits of sustainable development, can place them at increased risk of violence,

*Recognising further* that violence against women impedes the social and economic development of communities and states, as well as the achievement of the internationally agreed development goals, including the Millennium Development Goals,

*Recognising* the serious immediate and long-term implications for health, including sexual and reproductive health, as well as an increased vulnerability to HIV/AIDS, and the negative impact on psychological, social and economic development that violence against women represents for individuals, families, communities and states,

*Deeply concerned* about the pervasiveness of violence against women and girls in all its forms and manifestations worldwide, and reiterating the need to intensify efforts to prevent and eliminate all forms of violence against women and girls throughout the world,

*Taking note* of the report of the Secretary-General on the in-depth study on all forms of violence against women,<sup>9</sup> and having considered with interest the recommendations contained therein,

1. *Recognises* that violence against women and girls persists in every country in the world as a pervasive violation of the enjoyment of human rights and a major impediment to achieving gender equality, development and peace;
2. *Welcomes* the efforts and important contributions at the local, national, regional and international levels to eliminate all forms of violence against women, and takes note with appreciation of the work done by the Committee on the

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7. See *Official Records of the Economic and Social Council, 2005, Supplement No. 3 and corrigendum*

8. United Nations, *Treaty Series*, vol. 2187, No. 38544.

9. A/61/122 and Add.1 and Add.1/Corr.1.

## *UN General Assembly Resolution*

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Elimination of Discrimination against Women and the Special Rapporteur on violence against women, its causes and consequences;

3. *Stresses* that ‘violence against women’ means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life;

4. *Strongly condemns* all acts of violence against women and girls, whether these acts are perpetrated by the state, by private persons or by non-state actors, calls for the elimination of all forms of gender-based violence in the family, within the general community and where perpetrated or condoned by the state, and stresses the need to treat all forms of violence against women and girls as a criminal offence, punishable by law;

5. *Stresses* that it is important that states strongly condemn violence against women and refrain from invoking any custom, tradition or religious consideration to avoid their obligations with respect to its elimination as set out in the Declaration on the Elimination of Violence against Women;

6. *Stresses also* that challenges and obstacles remain in the implementation of international standards and norms to address the inequality between men and women and violence against women in particular, and pledges to intensify action to ensure their full and accelerated implementation;

7. *Stresses further* that states have the obligation to promote and protect all human rights and fundamental freedoms of women and girls and must exercise due diligence to prevent, investigate and punish the perpetrators of violence against women and girls and to provide protection to the victims, and that failure to do so violates and impairs or nullifies the enjoyment of their human rights and fundamental freedoms;

8. *Urges* states to take action to eliminate all forms of violence against women by means of a more systematic, comprehensive, multisectoral and sustained approach, adequately supported and facilitated by strong institutional mechanisms and financing, through national action plans, including those supported by international cooperation and, where appropriate, national development plans, including poverty eradication strategies and programme-based and sector-wide approaches, and to this end:

(a) To ensure that all human rights and fundamental freedoms are respected and protected;

(b) To consider ratifying or acceding to all human rights treaties, including, as a particular matter of priority, the Convention on the Elimination of All Forms of Discrimination against Women and the Optional Protocol thereto,<sup>10</sup> limit the extent of any reservations that they lodge and regularly review such reservations

with a view to withdrawing them so as to ensure that no reservation is incompatible with the object and purpose of the relevant treaty;

(c) To review and, where appropriate, revise, amend or abolish all laws, regulations, policies, practices and customs that discriminate against women or have a discriminatory impact on women, and ensure that provisions of multiple legal systems, where they exist, comply with international human rights obligations, commitments and principles, including the principle of non-discrimination;

(d) To exercise leadership to end all forms of violence against women and support advocacy in this regard at all levels, including at the local, national, regional and international levels, and by all sectors, especially by political and community leaders, as well as the public and private sectors, the media and civil society;

(e) To empower women, particularly poor women, through, *inter alia*, social and economic policies that guarantee them full and equal access to all levels of quality education and training and to affordable and adequate public and social services, as well as full and equal rights to own land and other property, and to take further appropriate measures to address the increasing rate of homelessness or inadequate housing for women in order to reduce their vulnerability to violence;

(f) To take positive measures to address structural causes of violence against women and to strengthen prevention efforts that address discriminatory practices and social norms, including with regard to women who need special attention in the development of policies to address violence, such as women belonging to minority groups, including those based on nationality, ethnicity, religion or language, indigenous women, migrant women, stateless women, women living in underdeveloped, rural or remote communities, homeless women, women in institutions or in detention, women with disabilities, elderly women, widows and women who are otherwise discriminated against;

(g) To ensure that diverse strategies that take into account the intersection of gender with other factors are developed in order to eradicate all forms of violence against women;

(h) To exercise due diligence to prevent all acts of violence against women, including by improving the safety of public environments;

(i) To end impunity for violence against women, by prosecuting and punishing all perpetrators, by ensuring that women have equal protection of the law and equal access to justice and by holding up to public scrutiny and eliminating those attitudes that foster, justify or tolerate violence;

(j) To strengthen national health and social infrastructure to reinforce measures to promote women's equal access to public health and address the health consequences of violence against women, including by providing support to victims;

(k) To recognise that gender inequalities and all forms of violence against women and girls increase their vulnerability to HIV/AIDS and ensure that women

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<sup>10</sup>. United Nations, *Treaty Series*, vol 2131, No 20378.

can exercise their right to have control over, and decide freely and responsibly on, matters related to their sexuality in order to increase their ability to protect themselves from HIV infection, including their sexual and reproductive health, free of coercion, discrimination and violence;

(l) To ensure that men and women and boys and girls have access to education and literacy programmes and are educated on gender equality and human rights, particularly women's rights and their responsibility to respect the rights of others, *inter alia*, by integrating women's rights into all appropriate *curricula* and by developing gender-sensitive teaching materials and classroom practices, especially for early childhood education;

(m) To provide training and capacity-building on gender equality and women's rights for, *inter alia*, health workers, teachers, law enforcement personnel, military personnel, social workers, the judiciary, community leaders and the media;

(n) To promote awareness and information campaigns on women's rights and the responsibility to respect them, including in rural areas, and encourage men and boys to speak out strongly against violence against women;

(o) To protect women and girls in situations of armed conflict, post-conflict settings and refugee and internally displaced persons settings, where women are at greater risk of being targeted for violence and where their ability to seek and receive redress is often restricted, bearing in mind that peace is inextricably linked with equality between women and men and development, that armed and other types of conflicts and terrorism and hostage-taking still persist in many parts of the world and that aggression, foreign occupation and ethnic and other types of conflicts are an ongoing reality affecting women and men in nearly every region, undertake efforts to eliminate impunity for all gender-based violence in situations of armed conflict, bearing in mind relevant General Assembly resolutions and Security Council Resolution 1325 (2000) on women and peace and security, and adopt, consistent with their obligations under the 1951 Convention relating to the Status of Refugees<sup>11</sup> and the 1967 Protocol thereto,<sup>12</sup> international human rights norms and relevant conclusions of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees and General Assembly resolutions, a gender-sensitive approach to the consideration of claims for the granting of asylum and refugee status;

(p) To integrate a gender perspective into national plans of action and establish or strengthen specific national plans of action on the elimination of violence against women, supported by the necessary human, financial and technical resources, including, where appropriate, time-bound measurable targets, to promote the protection of women against any form of violence, and accelerate the implementation of existing national action plans that are regularly monitored and updated by governments, taking into account inputs by civil society, in particular women's organisations, networks and other stakeholders;

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11. Ibid., vol. 189, No. 2545.

12. Ibid., vol. 606, No. 8791.



(q) To allocate adequate resources to promote the empowerment of women and gender equality and to prevent and redress all forms and manifestations of violence against women;

9. *Calls upon* the international community, including the United Nations system and, as appropriate, regional and subregional organisations, to support national efforts to promote the empowerment of women and gender equality in order to enhance national efforts to eliminate violence against women and girls, including, upon request, in the development and implementation of national action plans on the elimination of violence against women and girls, through, *inter alia*, and taking into account national priorities, official development assistance and other appropriate assistance, such as facilitating the sharing of guidelines, methodologies and best practices;

10. *Urges* states to integrate gender perspectives into the comprehensive national development plans and poverty eradication strategies that address social, structural and macroeconomic issues, and to ensure that such strategies address violence against women and girls, and urges the United Nations funds and programmes and the specialised agencies and invites the Bretton Woods institutions to support national efforts in this regard;

11. *Also urges* states to ensure the systematic collection and analysis of data on violence against women, including with the involvement of national statistical offices and, where appropriate, in partnership with other actors, taking note of the World Health Organization multi-country study on women's health and domestic violence against women and its recommendation to enhance capacity and establish systems for data collection to monitor violence against women;

12. *Urges* the United Nations bodies, entities, funds and programmes and the specialised agencies, and invites the Bretton Woods institutions, in accordance with their mandates, to support, upon request and within existing resources, the strengthening of national capacities and efforts on the collection, processing and dissemination of data, including data disaggregated by sex, age and other relevant information, for their possible use for legislative, policy and programme development and in the national plans of action against all forms of violence against women;

13. *Notes* the work carried out for the elimination of all forms of violence against women by relevant United Nations bodies, entities, funds and programmes and relevant specialised agencies, including those responsible for the promotion of gender equality and women's rights, and urges them and invites the Bretton Woods institutions:

(a) To enhance the coordination of and intensify their efforts to eliminate all forms of violence against women and girls in a more systematic, comprehensive and sustained way, *inter alia*, through the Inter-Agency Network on Women and

## *UN General Assembly Resolution*

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Gender Equality supported by the newly established Task Force on Violence against Women, in close collaboration with relevant civil society, including non-governmental organisations;

(b) To enhance coordination in a more systematic, comprehensive and sustained way of their assistance to states in their efforts to eliminate all forms of violence against women, including in the development or implementation of national action plans and, where appropriate, national development plans, including poverty reduction strategies where they exist, and programme-based and sector-wide approaches and in close collaboration with relevant civil society, including non-governmental organisations;

14. *Calls upon* the Inter-Agency Network on Women and Gender Equality to consider ways and means to enhance the effectiveness of the United Nations Trust Fund in Support of Actions to Eliminate Violence against Women as a system-wide funding mechanism for preventing and redressing all forms of violence against women and girls;

15. *Strongly encourages* states to increase significantly their voluntary financial support for activities related to preventing and eliminating all forms of violence against women, the empowerment of women and gender equality carried out by the specialised agencies and the United Nations funds and programmes, including the United Nations Trust Fund in Support of Actions to Eliminate Violence against Women;

16. *Stresses* that within the United Nations system adequate resources should be assigned to those bodies, specialised agencies, funds and programmes responsible for the promotion of gender equality and women's rights and to efforts throughout the United Nations system to eliminate violence against women and girls;

17. *Invites* the Economic and Social Council and its functional commissions, the Peacebuilding Commission, the Human Rights Council and other relevant United Nations bodies to discuss, by 2008, within their respective mandates, the question of violence against women in all its forms and manifestations, bearing in mind the recommendations contained in the report of the Secretary-General on the in-depth study on all forms of violence against women, and to set priorities for addressing this issue in their future efforts and work programmes and to transmit the outcome of those discussions to the Secretary-General for his annual report to the General Assembly;

18. *Requests* the Statistical Commission to develop and propose, in consultation with the Commission on the Status of Women, and building on the work of the Special Rapporteur on violence against women, its causes and consequences, a set of possible indicators on violence against women in order to assist states in assessing the scope, prevalence and incidence of violence against women;

19. *Requests* the Secretary-General to establish a coordinated database, containing data provided by States, in particular national statistical offices, including, where appropriate, through relevant United Nations entities and other relevant regional intergovernmental organizations, disaggregated by sex, age and other relevant information, on the extent, nature and consequences of all forms of violence against women, and on the impact and effectiveness of policies and programmes for, including best practices in, combating such violence;

20. *Also requests* the Secretary-General to submit an annual report to the General Assembly on the implementation of the present resolution, addressing the question of violence against women, and requests that the report include:

(a) At the sixty-second session of the General Assembly, information provided by the United Nations bodies, funds and programmes and the specialised agencies on their follow-up activities to implement the resolution;

(b) At the sixty-third session of the General Assembly, information provided by states on their follow-up activities to implement the resolution;

21. *Decides* to continue its consideration of the question at its sixty-second session under the item entitled 'advancement of women'.

81st plenary meeting  
19 December 2006





## **African regional instruments**

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## **Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa**

The States Parties to this Protocol,

CONSIDERING that article 66 of the African Charter on Human and Peoples' Rights provides for special protocols or agreements, if necessary, to supplement the provisions of the African Charter, and that the Assembly of Heads of State and Government of the Organization of African Unity meeting in its thirty-first ordinary session in Addis Ababa, Ethiopia, in June 1995, endorsed by Resolution AHG/Res 240 (XXXI) the recommendation of the African Commission on Human and Peoples' Rights to elaborate a Protocol on the Rights of Women in Africa;

CONSIDERING that article 2 of the African Charter on Human and Peoples' Rights enshrines the principle of non-discrimination on the grounds of race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status;

FURTHER CONSIDERING that article 18 of the African Charter on Human and Peoples' Rights calls on all states parties to eliminate every discrimination against women and to ensure the protection of the rights of women as stipulated in international declarations and conventions;

NOTING that articles 60 and 61 of the African Charter on Human and Peoples' Rights recognise regional and international human rights instruments and African practices consistent with international norms on human and peoples' rights as being important reference points for the application and interpretation of the African Charter;

RECALLING that women's rights have been recognised and guaranteed in all international human rights instruments, notably the Universal Declaration of Human Rights, 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 and its Optional Protocol, the African Charter on the Rights and Welfare of the Child, and all other international and regional conventions and covenants relating to the rights of women as being inalienable, interdependent and indivisible human rights;

NOTING that women's rights and women's essential role in development, have been reaffirmed in the United Nations Plans of Action on the Environment and Development in 1992, on Human Rights in 1993, on Population and Development in 1994 and on Social Development in 1995;

RECALLING ALSO United Nations Security Council's Resolution 1325 (2000) on the role of Women in promoting peace and security;

REAFFIRMING the principle of promoting gender equality as enshrined in the Constitutive Act of the African Union as well as the New Partnership for Africa's Development, relevant Declarations, Resolutions and Decisions, which underline the commitment of the African States to ensure the full participation of African women as equal partners in Africa's development;

FURTHER NOTING that the African Platform for Action and the Dakar Declaration of 1994 and the Beijing Platform for Action of 1995 call on all member states of the United Nations, which have made a solemn commitment to implement them, to take concrete steps to give greater attention to the human rights of women in order to eliminate all forms of discrimination and of gender-based violence against women;

RECOGNISING the crucial role of women in the preservation of African values based on the principles of equality, peace, freedom, dignity, justice, solidarity and democracy;

BEARING IN MIND related Resolutions, Declarations, Recommendations, Decisions, Conventions and other Regional and Sub-Regional Instruments aimed at eliminating all forms of discrimination and at promoting equality between women and men;

CONCERNED that despite the ratification of the African Charter on Human and Peoples' Rights and other international human rights instruments by the majority of states parties, and their solemn commitment to eliminate all forms of discrimination and harmful practices against women, women in Africa still continue to be victims of discrimination and harmful practices;

FIRMLY CONVINCED that any practice that hinders or endangers the normal growth and affects the physical and psychological development of women and girls should be condemned and eliminated;

DETERMINED to ensure that the rights of women are promoted, realised and protected in order to enable them to enjoy fully all their human rights;

HAVE AGREED AS FOLLOWS:

**Article 1: Definitions**

For the purpose of the present Protocol:

- (a) 'African Charter' means the African Charter on Human and Peoples' Rights;
- (b) 'African Commission' means the African Commission on Human and Peoples' Rights;
- (c) 'Assembly' means the Assembly of Heads of State and Government of the African Union;
- (d) 'AU' means the African Union;
- (e) 'Constitutive Act' means the Constitutive Act of the African Union;

(f) 'Discrimination against women' means any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life;

(g) 'Harmful Practices' means all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity;

(h) 'NEPAD' means the New Partnership for Africa's Development established by the Assembly;

(i) 'States parties' means the states parties to this Protocol;

(j) 'Violence against women' means all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war;

(k) 'Women' means persons of female gender, including girls;

### **Article 2: Elimination of Discrimination Against Women**

1. States parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures. In this regard they shall:

(a) include in their national constitutions and other legislative instruments, if not already done, the principle of equality between women and men and ensure its effective application;

(b) enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination particularly those harmful practices which endanger the health and general well-being of women;

(c) integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life;

(d) take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist;

(e) support the local, national, regional and continental initiatives directed at eradicating all forms of discrimination against women.

2. States parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.

### **Article 3: Right to Dignity**

1. Every woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights;



2. Every woman shall have the right to respect as a person and to the free development of her personality;
3. States parties shall adopt and implement appropriate measures to prohibit any exploitation or degradation of women;
4. States parties shall adopt and implement appropriate measures to ensure the protection of every woman's right to respect for her dignity and protection of women from all forms of violence, particularly sexual and verbal violence.

#### **Article 4: The Rights to Life, Integrity and Security of the Person**

1. Every woman shall be entitled to respect for her life and the integrity and security of her person. All forms of exploitation, cruel, inhuman or degrading punishment and treatment shall be prohibited.
2. States parties shall take appropriate and effective measures to:
  - (a) enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public;
  - (b) adopt such other legislative, administrative, social and economic measures as may be necessary to ensure the prevention, punishment and eradication of all forms of violence against women;
  - (c) identify the causes and consequences of violence against women and take appropriate measures to prevent and eliminate such violence;
  - (d) actively promote peace education through curricula and social communication in order to eradicate elements in traditional and cultural beliefs, practices and stereotypes which legitimise and exacerbate the persistence and tolerance of violence against women;
  - (e) punish the perpetrators of violence against women and implement programmes for the rehabilitation of women victims;
  - (f) establish mechanisms and accessible services for effective information, rehabilitation and reparation for victims of violence against women;
  - (g) prevent and condemn trafficking in women, prosecute the perpetrators of such trafficking and protect those women most at risk;
  - (h) prohibit all medical or scientific experiments on women without their informed consent;
  - (i) provide adequate budgetary and other resources for the implementation and monitoring of actions aimed at preventing and eradicating violence against women;
  - (j) ensure that, in those countries where the death penalty still exists, not to carry out death sentences on pregnant or nursing women.
  - (k) ensure that women and men enjoy equal rights in terms of access to refugee status, determination procedures and that women refugees are accorded the full protection and benefits guaranteed under international refugee law, including their own identity and other documents;

**Article 5: Elimination of Harmful Practices**

States parties shall prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards. States parties shall take all necessary legislative and other measures to eliminate such practices, including:

- (a) creation of public awareness in all sectors of society regarding harmful practices through information, formal and informal education and outreach programmes;
- (b) prohibition, through legislative measures backed by sanctions, of all forms of female genital mutilation, scarification, medicalisation and para-medicalisation of female genital mutilation and all other practices in order to eradicate them;
- (c) provision of necessary support to victims of harmful practices through basic services such as health services, legal and judicial support, emotional and psychological counselling as well as vocational training to make them self-supporting;
- (d) protection of women who are at risk of being subjected to harmful practices or all other forms of violence, abuse and intolerance.

**Article 6: Marriage**

States parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that:

- (a) no marriage shall take place without the free and full consent of both parties;
- (b) the minimum age of marriage for women shall be 18 years;
- (c) monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including in polygamous marital relationships are promoted and protected;
- (d) every marriage shall be recorded in writing and registered in accordance with national laws, in order to be legally recognised;
- (e) the husband and wife shall, by mutual agreement, choose their matrimonial regime and place of residence;
- (f) a married woman shall have the right to retain her maiden name, to use it as she pleases, jointly or separately with her husband's surname;
- (g) a woman shall have the right to retain her nationality or to acquire the nationality of her husband;
- (h) a woman and a man shall have equal rights, with respect to the nationality of their children except where this is contrary to a provision in national legislation or is contrary to national security interests;
- (i) a woman and a man shall jointly contribute to safeguarding the interests of the family, protecting and educating their children;
- (j) during her marriage, a woman shall have the right to acquire her own property and to administer and manage it freely.

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**Article 7: Separation, Divorce and Annulment of Marriage**

States parties shall enact appropriate legislation to ensure that women and men enjoy the same rights in case of separation, divorce or annulment of marriage. In this regard, they shall ensure that:

- (a) separation, divorce or annulment of a marriage shall be effected by judicial order;
- (b) women and men shall have the same rights to seek separation, divorce or annulment of a marriage;
- (c) in case of separation, divorce or annulment of marriage, women and men shall have reciprocal rights and responsibilities towards their children. In any case, the interests of the children shall be given paramount importance;
- (d) in case of separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of the joint property deriving from the marriage.

**Article 8: Access to Justice and Equal Protection before the Law**

Women and men are equal before the law and shall have the right to equal protection and benefit of the law. States parties shall take all appropriate measures to ensure:

- (a) effective access by women to judicial and legal services, including legal aid;
- (b) support to local, national, regional and continental initiatives directed at providing women access to legal services, including legal aid;
- (c) the establishment of adequate educational and other appropriate structures with particular attention to women and to sensitise everyone to the rights of women;
- (d) that law enforcement organs at all levels are equipped to effectively interpret and enforce gender equality rights;
- (e) that women are represented equally in the judiciary and law enforcement organs;
- (f) reform of existing discriminatory laws and practices in order to promote and protect the rights of women.

**Article 9: Right to Participation in the Political and Decision-Making Process**

1. States parties shall take specific positive action to promote participative governance and the equal participation of women in the political life of their countries through affirmative action, enabling national legislation and other measures to ensure that:

- (a) women participate without any discrimination in all elections;
- (b) women are represented equally at all levels with men in all electoral processes;
- (c) women are equal partners with men at all levels of development and implementation of State policies and development programmes.

2. States parties shall ensure increased and effective representation and participation of women at all levels of decision-making.

### **Article 10: Right to Peace**

1. Women have the right to a peaceful existence and the right to participate in the promotion and maintenance of peace.
2. States parties shall take all appropriate measures to ensure the increased participation of women:
  - (a) in programmes of education for peace and a culture of peace;
  - (b) in the structures and processes for conflict prevention, management and resolution at local, national, regional, continental and international levels;
  - (c) in the local, national, regional, continental and international decision making structures to ensure physical, psychological, social and legal protection of asylum seekers, refugees, returnees and displaced persons, in particular women;
  - (d) in all levels of the structures established for the management of camps and settlements for asylum seekers, refugees, returnees and displaced persons, in particular, women;
  - (e) in all aspects of planning, formulation and implementation of post conflict reconstruction and rehabilitation.
3. States parties shall take the necessary measures to reduce military expenditure significantly in favour of spending on social development in general, and the promotion of women in particular.

### **Article 11: Protection of Women in Armed Conflicts**

1. States parties undertake to respect and ensure respect for the rules of international humanitarian law applicable in armed conflict situations which affect the population, particularly women.
2. States parties shall, in accordance with the obligations incumbent upon them under the international humanitarian law, protect civilians including women, irrespective of the population to which they belong, in the event of armed conflict.
3. States parties undertake to protect asylum seeking women, refugees, returnees and internally displaced persons, against all forms of violence, rape and other forms of sexual exploitation, and to ensure that such acts are considered war crimes, genocide and/or crimes against humanity and that their perpetrators are brought to justice before a competent criminal jurisdiction.
4. States parties shall take all necessary measures to ensure that no child, especially girls under 18 years of age, take a direct part in hostilities and that no child is recruited as a soldier.

### **Article 12: Right to Education and Training**

1. States parties shall take all appropriate measures to:
  - (a) eliminate all forms of discrimination against women and guarantee equal opportunity and access in the sphere of education and training;
  - (b) eliminate all stereotypes in textbooks, syllabuses and the media, that perpetuate such discrimination;
  - (c) protect women, especially the girl-child from all forms of abuse, including

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sexual harassment in schools and other educational institutions and provide for sanctions against the perpetrators of such practices;

(d) provide access to counselling and rehabilitation services to women who suffer abuses and sexual harassment;

(e) integrate gender sensitisation and human rights education at all levels of education curricula including teacher training.

2. States parties shall take specific positive action to:

(a) promote literacy among women;

(b) promote education and training for women at all levels and in all disciplines, particularly in the fields of science and technology;

(c) promote the enrolment and retention of girls in schools and other training institutions and the organisation of programmes for women who leave school prematurely.

### **Article 13: Economic and Social Welfare Rights**

States parties shall adopt and enforce legislative and other measures to guarantee women equal opportunities in work and career advancement and other economic opportunities. In this respect, they shall:

(a) promote equality of access to employment;

(b) promote the right to equal remuneration for jobs of equal value for women and men;

(c) ensure transparency in recruitment, promotion and dismissal of women and combat and punish sexual harassment in the workplace;

(d) guarantee women the freedom to choose their occupation, and protect them from exploitation by their employers violating and exploiting their fundamental rights as recognised and guaranteed by conventions, laws and regulations in force;

(e) create conditions to promote and support the occupations and economic activities of women, in particular, within the informal sector;

(f) establish a system of protection and social insurance for women working in the informal sector and sensitise them to adhere to it;

(g) introduce a minimum age for work and prohibit the employment of children below that age, and prohibit, combat and punish all forms of exploitation of children, especially the girl-child;

(h) take the necessary measures to recognise the economic value of the work of women in the home;

(i) guarantee adequate and paid pre and post-natal maternity leave in both the private and public sectors;

(j) ensure the equal application of taxation laws to women and men;

(k) recognise and enforce the right of salaried women to the same allowances and entitlements as those granted to salaried men for their spouses and children;

(l) recognise that both parents bear the primary responsibility for the upbringing and development of children and that this is a social function for which the State and the private sector have secondary responsibility;

(m) take effective legislative and administrative measures to prevent the exploitation and abuse of women in advertising and pornography.

#### **Article 14: Health and Reproductive Rights**

1. States parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted. This includes:

- (a) the right to control their fertility;
- (b) the right to decide whether to have children, the number of children and the spacing of children;
- (c) the right to choose any method of contraception;
- (d) the right to self protection and to be protected against sexually transmitted infections, including HIV/AIDS;
- (e) the right to be informed on one's health status and on the health status of one's partner, particularly if affected with sexually transmitted infections, including HIV/AIDS, in accordance with internationally recognised standards and best practices;
- (f) the right to have family planning education.

2. States parties shall take all appropriate measures to:

- (a) provide adequate, affordable and accessible health services, including information, education and communication programmes to women especially those in rural areas;
- (b) establish and strengthen existing pre-natal, delivery and post-natal health and nutritional services for women during pregnancy and while they are breast-feeding;
- (c) protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.

#### **Article 15: Right to Food Security**

States parties shall ensure that women have the right to nutritious and adequate food. In this regard, they shall take appropriate measures to:

- (a) provide women with access to clean drinking water, sources of domestic fuel, land, and the means of producing nutritious food;
- (b) establish adequate systems of supply and storage to ensure food security.

#### **Article 16: Right to Adequate Housing**

Women shall have the right to equal access to housing and to acceptable living conditions in a healthy environment. To ensure this right, States Parties shall grant to women, whatever their marital status, access to adequate housing.

#### **Article 17: Right to Positive Cultural Context**

1. Women shall have the right to live in a positive cultural context and to participate at all levels in the determination of cultural policies.

2. States parties shall take all appropriate measures to enhance the participation of women in the formulation of cultural policies at all levels.

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**Article 18: Right to a Healthy and Sustainable Environment**

1. Women shall have the right to live in a healthy and sustainable environment.
2. States parties shall take all appropriate measures to:
  - (a) ensure greater participation of women in the planning, management and preservation of the environment and the sustainable use of natural resources at all levels;
  - (b) promote research and investment in new and renewable energy sources and appropriate technologies, including information technologies and facilitate women's access to, and participation in their control;
  - (c) protect and enable the development of women's indigenous knowledge systems;
  - (d) regulate the management, processing, storage and disposal of domestic waste;
  - (e) ensure that proper standards are followed for the storage, transportation and disposal of toxic waste.

**Article 19: Right to Sustainable Development**

Women shall have the right to fully enjoy their right to sustainable development. In this connection, the states parties shall take all appropriate measures to:

- (a) introduce the gender perspective in the national development planning procedures;
- (b) ensure participation of women at all levels in the conceptualisation, decision-making, implementation and evaluation of development policies and programmes;
- (c) promote women's access to and control over productive resources such as land and guarantee their right to property;
- (d) promote women's access to credit, training, skills development and extension services at rural and urban levels in order to provide women with a higher quality of life and reduce the level of poverty among women;
- (e) take into account indicators of human development specifically relating to women in the elaboration of development policies and programmes; and
- (f) ensure that the negative effects of globalisation and any adverse effects of the implementation of trade and economic policies and programmes are reduced to the minimum for women.

**Article 20: Widows' Rights**

States parties shall take appropriate legal measures to ensure that widows enjoy all human rights through the implementation of the following provisions:

- (a) that widows are not subjected to inhuman, humiliating or degrading treatment;
- (b) a widow shall automatically become the guardian and custodian of her children, after the death of her husband, unless this is contrary to the interests and the welfare of the children;
- (c) a widow shall have the right to remarry, and in that event, to marry the person of her choice.

**Article 21: Right to Inheritance**

1. A widow shall have the right to an equitable share in the inheritance of the property of her husband. A widow shall have the right to continue to live in the matrimonial house. In case of remarriage, she shall retain this right if the house belongs to her or she has inherited it.
2. Women and men shall have the right to inherit, in equitable shares, their parents' properties.

**Article 22: Special Protection of Elderly Women**

The states parties undertake to:

- (a) provide protection to elderly women and take specific measures commensurate with their physical, economic and social needs as well as their access to employment and professional training;
- (b) ensure the right of elderly women to freedom from violence, including sexual abuse, discrimination based on age and the right to be treated with dignity.

**Article 23: Special Protection of Women with Disabilities**

The states parties undertake to:

- (a) ensure the protection of women with disabilities and take specific measures commensurate with their physical, economic and social needs to facilitate their access to employment, professional and vocational training as well as their participation in decision-making;
- (b) ensure the right of women with disabilities to freedom from violence, including sexual abuse, discrimination based on disability and the right to be treated with dignity.

**Article 24: Special Protection of Women in Distress**

The states parties undertake to:

- (a) ensure the protection of poor women and women heads of families including women from marginalised population groups and provide them an environment suitable to their condition and their special physical, economic and social needs;
- (b) ensure the right of pregnant or nursing women or women in detention by providing them with an environment which is suitable to their condition and the right to be treated with dignity.

**Article 25: Remedies**

States parties shall undertake to:

- (a) provide for appropriate remedies to any woman whose rights or freedoms, as herein recognised, have been violated;
- (b) ensure that such remedies are determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by law.



**Article 26: Implementation and Monitoring**

1. States parties shall ensure the implementation of this Protocol at national level, and in their periodic reports submitted in accordance with article 62 of the African Charter, indicate the legislative and other measures undertaken for the full realisation of the rights herein recognised.
2. States parties undertake to adopt all necessary measures and in particular shall provide budgetary and other resources for the full and effective implementation of the rights herein recognised.

**Article 27: Interpretation**

The African Court on Human and Peoples' Rights shall be seized with matters of interpretation arising from the application or implementation of this Protocol.

**Article 28: Signature, Ratification and Accession**

1. This Protocol shall be open for signature, ratification and accession by the states parties, in accordance with their respective constitutional procedures.
2. The instruments of ratification or accession shall be deposited with the Chairperson of the Commission of the AU.

**Article 29: Entry into Force**

1. This Protocol shall enter into force thirty (30) days after the deposit of the fifteenth (15) instrument of ratification.
2. For each State Party that accedes to this Protocol after its coming into force, the Protocol shall come into force on the date of deposit of the instrument of accession.
3. The Chairperson of the Commission of the AU shall notify all Member States of the coming into force of this Protocol.

**Article 30: Amendment and Revision**

1. Any state party may submit proposals for the amendment or revision of this Protocol.
2. Proposals for amendment or revision shall be submitted, in writing, to the Chairperson of the Commission of the AU who shall transmit the same to the states parties within thirty (30) days of receipt thereof.
3. The Assembly, upon advice of the African Commission, shall examine these proposals within a period of one (1) year following notification of states parties, in accordance with the provisions of paragraph 2 of this article.
4. Amendments or revision shall be adopted by the Assembly by a simple majority.
5. The amendment shall come into force for each state party, which has accepted it thirty (30) days after the Chairperson of the Commission of the AU has received notice of the acceptance.

**Article 31: Status of the Present Protocol**

None of the provisions of the present Protocol shall affect more favourable provisions for the realisation of the rights of women contained in the national legislation of states parties or in any other regional, continental or international conventions, treaties or agreements applicable in these states parties.

**Article 32: Transitional Provisions**

Pending the establishment of the African Court on Human and Peoples' Rights, the African Commission on Human and Peoples' Rights shall be seized with matters of interpretation arising from the application and implementation of this Protocol.  
Adopted by the 2nd Ordinary Session of the Assembly of the Union  
Maputo, 11 July 2003

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## **Solemn Declaration on Gender Equality in Africa**

We, the Heads of State and Government of Member States of the African Union, meeting in the Third Ordinary Session of our Assembly in Addis Ababa, Ethiopia, from 6-8 July 2004:

*Reaffirming* our commitment to the principle of gender equality as enshrined in article 4(l) of the Constitutive Act of the African Union, as well as other existing commitments, principles, goals and actions set out in the various regional, continental and international instruments on human and women's rights, including the Dakar Platform for Action (1994), the Beijing Platform for Action (1995), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW - 1979), the African Plan of Action to Accelerate the Implementation of the Dakar and Beijing Platforms for Action for the Advancement of Women (1999); the Outcome Document of the Twenty-third Special Session of the United Nations General Assembly Special Session on the Implementation of the Beijing Platform for Action (2000); UN Resolution 1325 (2000) on Women, Peace and Security; and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003);

*Standing* by our Decision on gender parity taken at the Inaugural Session of the AU Assembly of Heads of State and Government in July 2002 in Durban, South Africa implemented during the Second Ordinary Session of the Assembly in Maputo, Mozambique, 2003 through the election of five female and five male Commissioners;

*Noting with satisfaction* that our Decision on gender parity is a historic achievement that does not yet exist in any other continent or regional organisations;

*Re-affirming* our commitment to continue, expand and accelerate efforts to promote gender equality at all levels;

*Determined* to build on the progress that we have achieved in addressing issues of major concern to the women of Africa;

*Taking cognizance* of the landmark decision to adopt the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa during the Second Ordinary Session of the Assembly in Maputo, Mozambique, 2003;

*Noting* the decision of the Chairperson of the African Union Commission to transform the African Women's Committee on Peace and Development (AWCPD) into the African Union Women's Committee (AUWC), which will be located in the Gender Directorate and serve as an Advisory Body to the Chairperson on Gender and Development;

## ***Solemn Declaration***

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*Recognising* that major challenges and obstacles to gender equality still remain and require concerted and collective leadership and efforts from all of us including networks working on gender and development;

*Deeply concerned* about the status of women and the negative impacts on women of issues such as the high incidence of HIV/AIDS among girls and women, conflict, poverty, harmful traditional practices, high population of refugee women and internally displaced women, violence against women, women's exclusion from politics and decision-making, and illiteracy, limited access of girls to education;

*Aware* of the policies and programmes we have put in place to curb the spread of HIV/AIDS pandemic as well as the current challenges in this campaign;

*Concerned* that, while women and children bear the brunt of conflicts and internal displacement, including rapes and killings, they are largely excluded from conflict prevention, peace-negotiation, and peace-building processes in spite of African women's experience in peace-building;

*Aware* of the fact that low levels of women's representation in social, economic and political decision-making structures and feminisation of poverty impact negatively on women's ability to derive full benefit from the economies of their countries and the democratisation process;

*Aware* of the digital divide between the North and the South, men and women and the role of information telecommunication technologies (ICTS) in the advancement of the gender issue as stated in the e-gender Forum Declaration of Tunis, May 2004 in preparation for the World Summit on Information Society (WSIS) 2005;

### **HEREBY AGREE TO:**

1. Accelerate the implementation of gender specific economic, social, and legal measures aimed at combating the HIV/AIDS pandemic and effectively implement both Abuja and Maputo Declarations on Malaria, HIV/AIDS, Tuberculosis and Other Related Infectious Disease. More specifically we will ensure that treatment and social services are available to women at the local level making it more responsive to the needs of families that are providing care; enact legislation to end discrimination against women living with HIV/AIDS and for the protection and care for people living with HIV/AIDS, particularly women; increase budgetary allocations in these sectors so as to alleviate women's burden of care;
2. Ensure the full and effective participation and representation of women in peace process including the prevention, resolution, management of conflicts and post-conflict reconstruction in Africa as stipulated in UN Resolution 1325 (2000) and to also appoint women as Special Envoys and Special Representatives of the African Union;
3. Launch, within the next one year, a campaign for systematic prohibition of the recruitment of child soldiers and abuse of girl children as wives and sex slaves

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in violation of their Rights as enshrined in the African Charter on Rights of the Child;

4. Initiate, launch and engage within two years sustained public campaigns against gender based violence as well as the problem of trafficking in women and girls; Reinforce legal mechanisms that will protect women at the national level and end impunity of crimes committed against women in a manner that will change and positively alter the attitude and behaviour of the African society;

5. Expand and Promote the gender parity principle that we have adopted regarding the Commission of the African Union to all the other organs of the African Union, including its NEPAD programme, to the Regional Economic Communities, and to the national and local levels in collaboration with political parties and the National parliaments in our countries;

6. Ensure the active promotion and protection of all human rights for women and girls including the right to development by raising awareness or by legislation where necessary;

7. Actively promote the implementation of legislation to guarantee women's land, property and inheritance rights including their rights to housing;

8. Take specific measures to ensure the education of girls and literacy of women, especially in the rural areas, to achieve the goal of 'Education for All' (EFA);

9. Undertake to Sign and ratify the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa by the end of 2004 and to support the launching of public campaigns aimed at ensuring its entry into force by 2005 and usher in an era of domesticating and implementing the Protocol as well as other national, regional and international instruments on gender equality by all States Parties;

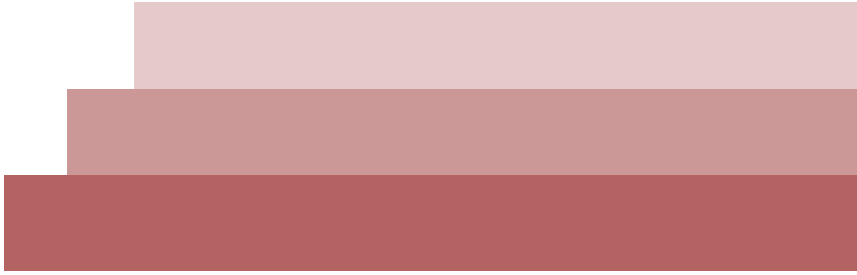
10. Establish AIDS Watch Africa as a unit within the Office of the Chairperson of the Commission who should render annual report on HIV/AIDS situation in the continent during annual Summits; and promote the local production of anti-retroviral drugs in our countries;

11. Accept to establish an African Trust Fund for Women for the purpose of building the capacity of African women and further request the African Union Commission to work out the modalities for the operationalisation of the Fund with special focus on women in both urban and rural areas;

12. Commit ourselves to report annually on progress made in terms of gender mainstreaming and to support and champion all issues raised in this Declaration, both at the national and regional levels, and regularly provide each other with updates on progress made during our Ordinary Sessions;

13. We request the chairperson of the African Union Commission to submit, for our consideration, an annual report, during our ordinary sessions, on measures taken to implement the principle of gender equality and gender mainstreaming, and all issues raised in this Declaration both at the national and regional levels.





# Africa sub-regional instruments

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## **Declaration on Gender and Development**

### **A Declaration by Heads of State or Government of the Southern African Development Community (SADC)**

#### **Preamble**

WE, the Heads of State or Government of the Southern African Development Community,

#### **A. Noting that**

- (i) Member states undertook in the SADC Treaty [article 6(2)] not to discriminate against any person on the grounds of gender, among others;
- (ii) All SADC member states have signed and ratified or acceded to the UN Convention on the elimination of All Forms of Discrimination Against Women (CEDAW), or are in the final stages of doing so;

#### **B. CONVINCED THAT**

- (i) Gender equality is a fundamental human right;
- (ii) Gender is an area in which considerable agreement already exists and where there are substantial benefits to be gained from closer regional co-operation and collective action.
- (iii) The integration and mainstreaming of gender issues into the SADC Programme of Action and Community Building Initiative is key to the sustainable development of the SADC region.

#### **C. DEEPLY CONCERNED THAT**

- (i) While some SADC member states have made some progress towards gender equality and gender mainstreaming, disparities between women and men still exist in the areas of legal rights, power-sharing and decision-making, access to and control over productive resources, education and health among others;
- (ii) Women constitute the majority of the poor;
- (iii) Efforts to integrate gender considerations in SADC sectoral programmes and projects have not sufficiently mainstreamed gender in a co-ordinated and comprehensive manner.

#### **D. RECOGNISING THAT**

- (i) The SADC Council of Ministers in 1990 mandated the SADC Secretariat to explore the best ways to incorporate gender issues in the SADC Programme of Work, and approved in 1996 gender issues at the regional level to be co-ordinated by the Secretariat;
- (ii) In execution of this mandate, the SADC Secretariat has developed and maintained working relations with key stakeholders in the area of gender, which resulted in the approval and adoption of the SADC Gender Programme by the SADC Council of Ministers in February 1997;



**WE THEREFORE:**

E. REAFFIRM our commitment to the Nairobi Forward Looking Strategies, the Africa Platform of Action and the Beijing Declaration and Platform for Action.

F. ENDORSE the decision of Council on:

(i) The establishment of a policy framework for mainstreaming gender in all SADC activities, and in strengthening the efforts by member countries to achieve gender equality.

(ii) Putting into place an institutional framework for advancing gender equality consistent with that established for other areas of co-operation, but which ensures that gender is routinely taken into account in all sectors;

(iii) The establishment of a standing Committee of Ministers responsible for gender affairs in the region.

(iv) The adoption of the existing Advisory Committee consisting of one representative from government and one member from the non-governmental organisations in each member state whose task is to advise the Standing Committee of Ministers and other sectoral committees of ministers on gender issues.

(v) The establishment of gender focal points whose task would be to ensure that gender is taken into account in all sectoral initiatives, and is placed on the agenda of all ministerial meetings.

(vi) The establishment of a gender unit in the SADC Secretariat consisting of at least two officers at a senior level.

**G. RESOLVE THAT**

As leaders, we should spearhead the implementation of these undertakings and ensure the eradication of all gender inequalities in the region;

**AND**

H. COMMIT ourselves and our respective countries to, *inter alia*

(i) Placing gender firmly on the agenda of the SADC Programme of Action and Community Building Initiative;

(ii) Ensuring the equal representation of women and men in the decision-making of member states and SADC structures at all levels, and the achievement of at least thirty percent target of women in political and decision-making structures by year 2005;

(iii) Promoting women's full access to, and control over productive resources such as land, livestock, markets, credit, modern technology, formal employment, and a good quality of life in order to reduce the level of poverty among women;

(iv) Repealing and reforming all laws, amending constitutions and changing social practices which will still subject women to discrimination, and enacting empowering gender-sensitive laws;

(v) Enhancing access to quality education by women and men, and removing gender stereotyping in the curriculum, career choices and professions;

(vi) Making quality reproductive and other health services more accessible to women and men;

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- (vii) Protecting and promoting the human rights of women and children;
- (viii) Recognising, protecting and promoting the reproductive and sexual rights of women and the girl child;
- (ix) Taking urgent measures to prevent and deal with the increasing levels of violence against women and children;
- (x) Encouraging the mass media to disseminate information and materials in respect of the human rights of women and children.

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## **The Prevention and Eradication of Violence Against Women and Children**

### **An Addendum to the 1997 Declaration on Gender and Development by SADC Heads of State or Government**

#### **Recalling that:**

1. We signed the SADC Declaration on Gender and Development at our Summit in Blantyre, Malawi on 8 September 1997, committing ourselves and our respective countries to take 'urgent measures to prevent and deal with the increasing levels of violence against women and children'.
2. In furtherance of this commitment, SADC Ministers of Justice, Gender/ Women's Affairs, Legislators, Government Officials and Representatives of Non-Governmental Organisations convened a SADC Conference on the Prevention of Violence Against Women in Durban, South Africa, on 5 to 8 March 1998, which recommended the adoption of certain measures:

**REAFFIRMING** our commitment to the prevention and eradication of violence against women and children in our region;

#### **Recognising that violence against women and children:**

3. Reflects the unequal relations of power between women and men, resulting in the domination and discrimination of women by men;
4. Is acknowledged by the Vienna Declaration and Programme of Action of 1993 as a serious violation of fundamental human rights;
5. Includes physical and sexual violence, as well as economic, psychological and emotional abuse;
  - (a) occurring in the family, in such forms as threats, intimidation, battery, sexual abuse of children, economic deprivation, marital rape, femicide, female genital mutilation, and traditional practices harmful to women;
  - (b) occurring in the community, in such forms as threats, rape, sexual abuse, sexual harassment and intimidation, trafficking in women and children, forced prostitution, violence against women in armed conflict; and that
  - (c) perpetrated or condoned by the agents of the state;

#### **Deeply concerned that:**

6. The levels of cases of the various forms of violence against women and children continue to increase;
7. Existing measures to protect women and children against violence have proved inadequate, ineffective and biased against the victims.

**WE STRONGLY CONDEMN** violence against women and children in all its forms, and resolve that the following measures be adopted:

### ***Legal***

8. Enacting laws such as sexual offences and domestic violence legislation making various forms of violence against women clearly defined crimes, and taking appropriate measures to impose penalties, punishment and other enforcement mechanisms for the prevention and eradication of violence against women and children;
9. Adopting legislative measures to ensure the protection and removal of all forms of discrimination against, and empowerment of women with disabilities, the girl-child, the aged, women in armed conflict and other women whose circumstances make them especially vulnerable to violence;
10. Reviewing and reforming the criminal laws and procedures applicable to cases of sexual offences, to eliminate gender bias and ensure justice and fairness to both the victim and accused;
11. Introducing, as a matter of priority, legal and administrative mechanisms for women and children subjected to violence, effective access to counselling, restitution, reparation and other just forms of dispute resolution;
12. Adopting such other legislative and administrative measures as may be necessary to ensure the prevention and eradication of all forms of violence against women and children;

### ***Social, Economic, Cultural and Political***

13. Promoting the eradication of elements in traditional norms and religious beliefs, practices and stereotypes which legitimise and exacerbate the persistence and tolerance of violence against women and children;
14. Introducing and supporting gender sensitisation and public awareness programmes aimed at eradicating violence against women and children;
15. Encouraging the media to play a constructive role in the eradication of violence against women and children by adopting guidelines which ensure sensitive coverage of the issue and avoid the perpetuation of stereotypes;

### ***Services***

16. Providing easily accessible information on services available to women and children victims/survivors of violence, including women and children with disabilities;
17. Ensuring accessible, effective and responsive police, prosecutorial, health, social welfare and other services, and establishing specialised units to redress cases of violence against women and children;
18. Providing accessible, affordable and specialised legal services, including legal aid, to ensure the just and speedy resolution of matters regarding violence against women and children;
19. Providing easily accessible, affordable and, where possible, free social, and administrative services for the empowerment of women and children victims/survivors of violence;

***Education, Training and Awareness Building***

20. Introducing and promoting gender sensitisation and training of all service providers engaged in the administration of justice, such as judicial officers, prosecutors, police, prison, welfare and health officials;
21. Undertaking and sharing research of the gathering of statistics and other information on the causes, prevalence and consequences of violence against women and children;
22. Encouraging the exchange of national, regional and international best practices for the eradication of violence against women and children;

***Integrated Approaches***

23. Ensuring that all these measures are implemented in an integrated manner by all stakeholders;

***Budgetary Allocations***

24. Allocating the necessary resources to ensure the implementation and sustainability of the above programmes;

**WE FURTHER RESOLVE THAT:**

25. Regional policies, programmes and mechanisms to enhance the security and empowerment of women and children, be adopted and their implementation monitored;
26. Urgent consideration be given to the adoption of legally binding SADC Instruments on Preventing Violence Against Women and Children, and to ensure that these commitments are translated into tangible actions;
27. SADC convene a Regional Conference, before the end of the year 2000, to review progress made in the implementation of the above measures and recommendations.
28. This addendum is an integral part of the 1997 SADC Declaration on Gender in Development.

IN WITNESS WHEREOF, WE, the Heads of State or Government, or duly authorised Representatives of SADC Member States, have signed this Addendum.  
DONE at Grand Baie this 14th day of September 1998 in two(2) original texts in the English and Portuguese languages, both texts being equally authentic

## **Declaration on the Fight Against Trafficking in Persons**

We, the Heads of States and Government of the Economic Community of West African States (ECOWAS), solemnly declare as follows:

*Deeply concerned* over the suffering caused by the growing incidence of trafficking in persons within the West African sub-region and from our member states to other parts of the world;

*Asserting* that it is fully unacceptable that human beings are traded, bought, sold, placed, or abducted thus being denied their most fundamental human rights;

*Condemning* trafficking in persons, especially women and children, as a violation of fundamental human rights, and as a criminal act;

*Disturbed* by the extensive and growing role in trafficking in persons by transnational organised criminal networks, whereby our member states are used as countries of origin, transit and destination;

*Recognising* that poverty, lack of education and lack of equal opportunity make persons, especially women and children, vulnerable to becoming victims of trafficking;

*Deeply concerned* that perpetrators of trafficking in persons, using coercion, abduction, fraud, or deception are taking advantage of the social or economic vulnerabilities of men, women, and children, in order to exploit them;

*Acknowledging* that children who become victims of trafficking are particularly vulnerable and need special measures of protection for their development and well-being;

*Recalling* the Universal Declaration of Human Rights, particularly article 4, which states that ‘no-one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms’;

*Recalling further* the 1989 United Nations Convention on the Rights of the Child, the 1999 International Labour Organization Convention 182 on the Worst Forms of Child Labour, and the 1999 African Charter on the Rights and Welfare of the Child, particularly article 15 (Child Labour); article 16 (Protection Against Child Abuse and Torture); and article 29 (Sale, Trafficking and Abduction); Resolution 217 A (III) of the General Assembly Resolution 14.25 Annex of the General Assembly.

*Recalling* the ECOWAS Protocol on the Mechanism Relating to Conflict Prevention, Management, Resolution, Peacekeeping and Security of 10 December 1999 and its provisions on the control of transborder crimes;

*Recalling* the ECOWAS Convention A/P1/7/92 on Mutual Assistance in Criminal Matters and ECOWAS Convention A/PI/8/94 on Extradition as well as the

fact that a number of bilateral and multilateral instruments on trafficking in persons and related matters have been adopted by ECOWAS member states;

*Recalling also* the United Nations General Assembly Resolution 55/25 of 15 November 2000, which adopted the United Nations Convention against Transnational Organized Crime and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, constituting effective tools for international cooperation in combating such criminal activities and providing an international agreed-upon definition of ‘trafficking in persons’;

*Aware* that the crime of trafficking in persons as defined in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, addresses the transnational and trans-regional dimension of this type of crime, but that similar acts can also occur within states;

*Recognising* that effective cooperation, intelligence gathering, information sharing, and training are essential to the prevention and eradication of trafficking in persons;

*Acknowledging* the importance of enhanced regional and international cooperation in the struggle against trafficking in human beings;

*Declaring* that effective action to prevent and combat trafficking in persons requires a comprehensive international approach in the countries of origin, transit, and destination that includes measures to prevent trafficking, to punish traffickers, and to protect victims of such trafficking, as well as protecting their internationally recognised human rights;

*Noting* the initiatives taken by the international community in support of sub-regional initiatives on specific aspects of trafficking in persons, in particular by United Nations International Children’s Fund (UNICEF), International Labour Organization (ILO) and International Organization on Migration (IOM);

...

*Considering the resolution* of the meeting of Ministers Foreign Affairs held in Dakar on 17 December 2001;

*Expressing our gratitude* to the Government of Japan and the United Nations Office for Drug Control and the Crime Prevention Centre for International Crime Prevention (ODCCP/CICP), for their support;

*Expressing our appreciation* to the Government of Ghana for hosting the ECOWAS-ODCCP/CICP Meeting of Experts on Trafficking in Human Beings;

*Expressing further our appreciation* to the Governments of the Republic of Benin for having initiated action on the matter under consideration and the Togolese Republic for its pro-active role in our search for practical measures that will address the problem of human trafficking;

## ***ECOWAS Trafficking Declaration***

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Hereby proclaim our strong commitment to the eradication of the trafficking in persons, especially women and children, and we:

1. Call upon our member states who have not yet done so, to ratify forthwith the ECOWAS Convention A/P1/7/92 on Mutual Assistance in Criminal Matters and ECOWAS Convention A/P1/8/94 on Extradition, and the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security;
2. Call upon our member states who have not yet done so, to take all necessary steps to sign, ratify and fully implement the African Charter on the Rights and Welfare of the Child;
3. Commend those member states which have signed and ratified the United Nations Convention against Transnational Organized Crime and the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, and recommend that those countries who have not yet done so, to sign or ratify these instruments at the earliest possible time;
4. Call upon our member states to adopt a Code of the Child, taking into consideration the provisions of the Convention on the Rights of the Child, and the African Charter on the Rights and Welfare of the Child.

We further commit ourselves to:

5. Adopt, as quickly as possible, such legislative and other measures as that are necessary to establish as criminal offences the trafficking in persons within, between, or from, their territory; to organise, direct, or participate as an accomplice, in this trafficking;
6. Take measures, in close consultation with the countries of origin, transit and destination and with the victims themselves, for the care and repatriation of any of our citizens who have been victims of trafficking whether within the territory of member states, or outside the ECOWAS sub-region;
7. Implement measures to provide for the protection and physical, psychological and social recovery of victims of trafficking through affording them the full protection of their physical safety, privacy and human rights;
8. Establish comprehensive policies, programmes, and other measures to prevent and combat trafficking in persons, and to protect victims of trafficking from further victimisation;
9. Use of all forms of state and public media to mount public awareness campaigns to educate potential victims of trafficking, their families, and the general population;
10. Provide and strengthen sensitisation and training for government officials, particularly law enforcement personnel, customs and immigration officials, prosecutors and judges, and other relevant officials on the prevention on trafficking in persons and on the investigation and prosecution of related crimes;



11. Create specialised anti-trafficking units within law enforcement agencies and within the prosecutorial services, with a special view to fight the involvement of organised criminal groups;
  12. Strengthen border controls, without prejudice to our Protocols and other international commitments to the free movement of people, as may be necessary to prevent and control trafficking in persons;
  13. Undertake to initiate or expand efforts to gather and analyse data on the situation, magnitude, nature, and economics of trafficking in persons, particularly of women and children, and on the means and methods used in the trafficking of persons;
  14. Exchange such information among law enforcement and other agencies of our member states, as well as with other countries of origin, transit and destination, and with the United Nations, and other relevant international organisations;
  15. Support and cooperate with national institutions, including local communities, civil society and relevant non-governmental organisations in their activities against trafficking in persons;
  16. Strengthen preventative measures, including educational and social measures within each member state to discourage the demand in trafficked persons, especially women and children, and to assist countries of destination in the development and implementation of similar measures;
- Call upon those states where persons, particularly women and children, have been trafficked from the ECOWAS sub-region, to make efforts to reduce the demand in their countries for such persons;
18. Direct the ECOWAS Secretariat to forge close links with the member states task forces on trafficking in persons in order to achieve better coordination of the control of trafficking in persons in the sub-region, and for that purpose to establish an ECOWAS unit for the coordination of the efforts to combat trafficking in persons;
  19. Direct the ECOWAS Secretariat to take appropriate action for the preparation of a sub-regional convention against trafficking, with special focus on trafficking in children and women;
  20. Invite states and funding agencies, as well as relevant intergovernmental organisations and non-governmental organisations, and those international industrial and commercial organisations who use the human and natural resources of our states, to provide financial and material assistance, including the provision of expertise, to support ECOWAS States in their anti-trafficking efforts.

Therefore:

21. Adopt the ECOWAS Initial Plan of Action against Trafficking in Persons 2002 - 2003 annexed to this Declaration;
22. Declare that we will undertake all necessary efforts to fully implement the ECOWAS Initial Plan of Action against Trafficking in Persons 2002 - 2003;

## ***ECOWAS Trafficking Declaration***

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Direct the ECOWAS Secretariat to monitor and report to the Ordinary Summits of Heads of State in 2002 and 2003 respectively, on the progress made in the implementation of this Declaration and the Initial Plan of Action.

Adopted in Dakar on 20 - 21 December 2001. Declaration A/DC12/12/01.