

# **SEXUAL VIOLENCE, ARMED CONFLICT AND INTERNATIONAL LAW IN AFRICA**

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## **I. INTRODUCTION**

Recent empirical evidence suggests that sexual violence is increasingly becoming a phenomenon of armed conflict. There is a causal link between armed conflict and sexual violence: armed conflict results in casualties and many of those casualties tend to include women who have been sexually violated. The occurrence of sexual violence during armed conflict necessitates a reaction from states in accordance with their obligations under international law. This article examines the phenomenon of sexual violence in armed conflict in Africa and the international legal framework dealing with this problem.

There is a long history of sexual violence during armed conflict. For example, during World War II in occupied Europe thousands of women were subjected to rape and thousands more were forced to enter brothels for Nazi troops.<sup>1</sup> In addition, thousands of Korean women were forced by the Japanese army to work as 'comfort' women in Japanese army brothels. Only in 1992 did some Japanese leaders apologise for this practice.<sup>2</sup> Further, about 900 000 German women are estimated to have been raped by Russian forces in Berlin during the final days of World War II,<sup>3</sup> and about 20 000 Chinese women were raped in Nanking following the Japanese takeover of the city in 1937.<sup>4</sup> It is estimated that about 20 000 women were raped during the armed conflict in the former Yugoslavia. These women were raped by the Serbian, Croatian and Muslim military groups,

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- 1 F. Krill, 'The Protection of Women in International Humanitarian Law', 249 *International Review of the Red Cross* (1985) 337–363, at 337.
- 2 T. Meron Henry's Wars and Shakespeare's Laws: Perspectives on the Law of War in the Later Middle Ages, Oxford University Press (1993) 113.
- 3 S. Brownmiller, *Making Female Bodies the Battlefield*, in A. Stiglmayer, *Mass Rape: The War Against Women in Bosnia-Herzegovina*, University of Nebraska Press (1994) 180–182, at 182.
- 4 S. Brownmiller, *Against Our Will: Men, Women and Rape*, Bantum Books (1998) 65.

although most perpetrators were Serbian. In these instances rape was seen as a weapon of war to fulfil the policy of ethnic cleansing.<sup>5</sup>

There is an increasing documentation of sexual violence against women during the armed conflicts in Africa. For example, during the apartheid era in South Africa, it is reported women in detention centres were sexually abused. Pregnant women were subjected to electric shocks; medical care was withheld, leading to miscarriages; body searches and vaginal examinations were carried out; rape and forced intercourse with other prisoners occurred; and foreign objects, including rats, were inserted into women's vaginas.<sup>6</sup> Women's fallopian tubes were flooded with water, sometimes destroying their childbearing ability.<sup>7</sup> Approximately 500 000 women, mostly members of the Tutsi community, are estimated to have been raped during the genocide in Rwanda in 1994.<sup>8</sup> And, thousands of women were raped in Sierra Leone during the 10-year civil war.<sup>9</sup>

Recently, based on its investigations, the International Commission of Inquiry on Violations of International Humanitarian Law and Human Rights Law in Darfur established that the Government of Sudan and the government-backed *Janjaweed*, consisting mainly of Arab militia, raided the villages of those victims, mounted on horses or camels, and killed, looted, burned and raped.<sup>10</sup> It is reported that there were few cases reported of rebels committing rape and sexual violence.<sup>11</sup> The *Janjaweed* are reportedly targeting people from African tribes.<sup>12</sup>

These examples show that women are raped as part of a policy in order to either destroy the group to which they belong, for the purposes of ethnic cleansing and to defeat the opposition. Women are also targeted because of their gender. The examples also show that violence is widely recognised as one of the most pervasive problems facing women in every country throughout the world and it is one of the principal ways by which women are controlled and patriarchal

5 United Nations, General Assembly and Security Council, European Community Investigative Mission into the Treatment of Muslim Women in the former Yugoslavia, Annex 1 no. 14, UN Doc. A/48/92, S/25240.

6 B. Goldblatt & S. Mentjes, *South African Women Demand the Truth*, in M. Turshen, and C. Twagiramiya (eds), *What Women do in Wartime*, Zed Books (1998), 27–61, at 37.

7 *Ibid.*

8 Human Rights Watch, *Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath* (1996) 22. Also see Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935(1994), UN Doc S/1994/1405 (9 Dec 1994); Special Rapporteur of the Commission on Human Rights, Report on the Situation of Human Rights in Rwanda, UN Doc E/CN.4/1996/68 (29 Jan 1996).

9 Human Rights Watch, 'We'll Kill You If You Cry': *Sexual Violence in the Sierra Leone Conflict*, 15(1)(A) Human Rights Watch (2003) 25.

10 Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004, Geneva, 25 January 2005, at para 121. Also see generally the Report of the UN Special Rapporteur on the Rights of Women, Yarkin Ertük, Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women, Addendum Visit to the Darfur Region of the Sudan, Commission on Human Rights Sixty-first session, E/CN.4/2005/72/Add.5, 23 December 2004; Report of the Chairperson of the (AU) Commission on the Situation in Darfur (the Sudan), Peace and Security 45<sup>th</sup> Meeting, 12 January 2006, Addis Ababa, Ethiopia, PSC/PR/2 (XLV).

11 Report of the International Commission of Inquiry on Darfur, *ibid*, at para 335.

12 *Ibid*, at para 220.

structures reinforced.<sup>13</sup> From time immemorial women were regarded as virtual property and often enjoyed no legal capacity.<sup>14</sup> Consequently, rape committed by a member of a community was considered an injury to the male estate and the community, not to the woman in question.<sup>15</sup> Hence, the license to rape was considered a major incentive for the soldier involved in siege warfare.<sup>16</sup>

The protection of women from sexual violence is a (human) right.<sup>17</sup> The protection and realisation of human rights is the responsibility of individual states, but international instruments, institutions and structures are indispensable to ensure the fulfilling of this duty.<sup>18</sup> Therefore, international obligations exist at basically at two levels, namely, the global level under the auspices of the United Nations system, and at the regional level such as in Africa,<sup>19</sup> Europe<sup>20</sup> and the Americas.<sup>21</sup> Europe and the Americas human rights regional systems have received wide acceptance.

While the African regional system has been criticised for its inadequacy,<sup>22</sup> however, this article will demonstrate that Africa is making a significant contribution to the development of international law on sexual violence during armed conflict. First, I will explore the concept of sexual violence during armed conflict and the status of such violence under international law. I will then analyse international law protecting women from sexual violence during armed conflict and the jurisprudence of the international tribunals. Further, I will examine the obligations of states under international law. Finally, I will look at Africa's regional system to ascertain the role Africa plays in constructing a legal framework to protect women from sexual violence during armed conflict. I will particularly look at the provisions of the African Charter on Human and Peoples' Rights (the Charter),<sup>23</sup> the Protocol on the Rights of Women in Africa (the Women's Protocol)<sup>24</sup> and the

13 C.A. MacKinnon, 'Reflections on Sex Equality Under Law', 100 *Yale Law Journal* (1990–1991) 1281–1328, at 1302, where she argues that 'sexual violence symbolizes and actualizes women's subordinate social status to men'.

14 C.N. Niarchos, 'Women, War, and Rape: Challenges Facing the International Criminal Tribunal for the Former Yugoslavia', 17(4) *Human Rights Quarterly* (1995) 649– 690, at 660.

15 Brownmiller *supra* note 4, at 18.

16 Meron *supra* note 2, at 111–112.

17 See generally P. Singh, *Protection from Violence is a Right*, in S. Liebenberg (ed), *The Constitution of South Africa from a Gender Perspective*, Community Law Centre (1995), 136 at 136.

18 G.W. Mugwanya, *Human Rights in Africa: Enhancing Human Rights through the African Regional Human Rights System*, Transnational Publishers (2003) 6.

19 The African Union.

20 The Council of Europe.

21 The Organisation of American States.

22 See generally M. Mutua, 'The Banjul Charter and the African Fingerprint: An Evaluation of the Language of Duties', 35 *Virginia Journal of International Law* (1995), 339–380; C Heyns, 'The African Regional Human Rights System: The African Charter', 108 *Pennsylvania State Law Review* (2004), 679–702 at 687.

23 The Charter was adopted in 1981 and entered into force in 1986, reprinted in (1987) *ILM* 59. For a discussion of the Charter, see U.O. Umozurike, *The African Charter on Human and Peoples Rights*, Martinus Nijhoff Publishers (1997).

24 The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa adopted in Maputo in July 2003 and entered into force on 25 November 2005 after 15 ratifications.

Constitutive Act of the African Union<sup>25</sup> as well as the enforcement mechanisms such as the African Commission on Human and Peoples' Rights (the Commission)<sup>26</sup> and the African Court on Human and Peoples' Rights (the Court).<sup>27</sup>

## **II. THE CONCEPT OF SEXUAL VIOLENCE DURING ARMED CONFLICT**

Sexual violence during armed conflict usually does not involve a single isolated act, but it involves widespread and/or systematic acts, where a group of women are sexually assaulted because they belong to the opposition. The single isolated act is usually outside the scope of 'war'<sup>28</sup> and occurs during peacetime. This type of sexual violence is prosecuted in the domestic courts rather than in the international sphere. Systematic and widespread acts of sexual violence, however, are understood to mean acts 'carried out during the course of a systematic (and widespread) commission of physical, mental, and/or sexual violence'.<sup>29</sup> The term 'systematic' means that an act is 'thoroughly organised and following a regular pattern on the basis of a common policy using substantial public or private resources'.<sup>30</sup> However, an isolated act can constitute systematic and/or widespread act where there is a link between such an isolated act and the systematic and/or widespread acts.<sup>31</sup> This means that if the isolated act fits into the plan of the systematic and widespread acts, then such an isolated act will constitute systematic and/or widespread act. This article is based on sexual violence during armed conflict, which is widespread and/or systematic.<sup>32</sup>

The Rome Statute of the International Criminal Court (ICC) provides for the forms of sexual violence to include '... rape, sexual slavery, enforced sterilisation or any [other] form of sexual violence ...'.<sup>33</sup> This article deals with rape and other forms of sexual violence as mentioned in the statute of the Rome Statute. The term 'sexual violence' will be used in the course of this article to refer broadly to all forms of sexual violence.

25 The Constitutive Act was adopted in Lomé, Togo in July 2000 and entered into force in May 2001 replacing the Charter of the OAU, 23 May 1963, 47 UNTS 39, 2 ILM 766 (1963).

26 The Commission was established by article 30 of the Charter *supra* note 23.

27 The Court was established by the Protocol to the Charter on the Establishment of an African Court on Human and Peoples' Rights, adopted in Addis Ababa, Ethiopia in June 1998 and entered into force in January 2004.

28 K.D. Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals*, Martinus Nijhoff Publishers (1997) 15 note 39.

29 K.D. Askin, *Women and International Humanitarian Law*, in K.D. Askin and D.M. Koenig, *Women and International Human Rights Law*, Transnational Publishers (1999) 41–87, at 61.

30 *Prosecutor v Akayesu* Judgment 2 September 1998, Case No ICTR—96-13-T, at para 580.

31 *Prosecutor v Mrksic, Radic and Sljivancanin* Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 3 April 1996, Case No. IT-95-13-R61, para 30.

32 In *Prosecutor v Kunarac, Kovac and Vukovic* Case IT-96-23 (*Foca* Judgment) 22 February 2001, para 542, the Trial Chamber held that 'it is now well established that the requirement that the acts be directed against a civilian "population" can be fulfilled if the acts occur in either a widespread basis or in a systematic manner. Either one of these is sufficient to exclude isolated or random acts'.

33 Articles 7(1)(g) 8(2)(c)(vi) of the Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9.

### III. THE STATUS OF SEXUAL VIOLENCE IN INTERNATIONAL LAW

#### A. The law

Sexual violence during armed conflict has long been viewed as a criminal offence under international rules of war. The process of codifying customary laws of war, protecting civilians including the prohibition of rape and sexual assault began in the late eighteen century. One of the first documents protecting civilians was the Treaty of Amity and Commerce between the United States and Prussia signed in 1785, which specifically stated that, in the event of war between the two nations, ‘women and children ... shall not be molested in their persons’.<sup>34</sup> In addition, there was the Unites States Lieber Code of 1863<sup>35</sup> that was not of an international character, but was considered influential, that expressly criminalised rape as a war crime.<sup>36</sup>

Among the instruments that were influenced by the Lieber Code were the Hague Convention of 1899<sup>37</sup> and 1907,<sup>38</sup> which provided that family honour and rights, individual lives and property, as well as religious convictions and liberty must be respected, but never referred expressly to sexual violence or rape.<sup>39</sup> The protection of ‘family honour and rights’ is argued to have been a euphemism of the time, which encompasses a prohibition of rape and sexual assault, and this provision is mandatory.<sup>40</sup>

The Geneva Conventions do not explicitly mention rape or sexual violence as constituting ‘grave breaches’.<sup>41</sup> Only the fourth of the Geneva Conventions<sup>42</sup> prohibits rape. Article 27 of the Fourth Geneva Convention provides that ‘women shall be especially protected against any attack on their honour, in particular

- 34 See Y. Khushalani *Dignity and Honour of Women as Basic and Fundamental Human Rights*, Martinus Nijhoff Publishers (1982) 3.
- 35 Francis Lieber, *Instructions for the Government of Armies of the United States in the Field*, promulgated as US War Department, Adjutant General’s Office, General Orders No. 100 (24 Apr. 1863). Also see M.C. Bassiouni, *Crimes against Humanity in International Criminal Law*, (2<sup>nd</sup> Ed), Kluwer Law International (1999), 347.
- 36 Article 37 of the Lieber Code provides in part that: ‘The United States acknowledge and protect, in hostile countries occupied by them, religion and morality; ... the persons of the inhabitants, especially those of women; and the sacredness of domestic relations.’ Whereas, article 44 provides that: ‘All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking, even after taking a place by main force, all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offence.’
- 37 Convention with Respect to the Laws and Customs of War on Land, Annex of Regulations 29 July 1899.
- 38 Convention Respecting the Laws and Customs of War on Land, Annex of Regulations, 18 October 1907.
- 39 See Article 46 of the Hague Conventions.
- 40 Khushalani, *supra* note 34, at 10–11. Also see Bassiouni *supra* note 34, at 348; N. Dyani, ‘Protocol on the Rights of Women in Africa: Protection of women from sexual violence during armed conflict’, 6 *African Human Rights Law Journal* (2006) 166–187 at 171, on the objections by the advocates of women rights to the use of the term ‘honour’ in these Conventions.
- 41 The grave breaches are the principal crimes under the Geneva Conventions.
- 42 The Convention (IV) Relative to the Protection of Civilian Persons in Time of War (1949).

against rape, enforced prostitution, or any form of indecent assault'.<sup>43</sup> This article does not prohibit sexual violence as a grave breach. Nevertheless, sexual violence can be prosecuted as constituting 'grave breaches of the 1949 Geneva Conventions' and 'other serious violations of the laws of war or customs of war' under the terms 'torture' or 'inhuman treatment', and 'wilfully causing great suffering'.<sup>44</sup> In addition, the Additional Protocols<sup>45</sup> to the Geneva Conventions guarantee special protection of women and list rape as one of the acts prohibited against women.<sup>46</sup>

Women are also afforded protection from sexual violence during armed conflict under the international human rights treaties. The application of human rights treaties does not cease during armed conflict, instead they apply hand in hand with the treaties dealing with international humanitarian law.<sup>47</sup> The Universal Declaration on Human Rights prohibits torture or cruel, inhuman or degrading treatment or punishment.<sup>48</sup> The Universal Declaration also prohibits slavery and all forms of slave trade as well as torture and inhuman treatment.<sup>49</sup> In addition, the Convention on the Elimination of All Forms of Racial Discrimination<sup>50</sup> provides for the 'right and security of the person and protection against violence or bodily harm, whether inflicted by government officials or by any individual group or institution'.<sup>51</sup> Furthermore, article 8 of the International Covenant on Civil and Political Rights (ICCPR) prohibits torture.<sup>52</sup> Further, the ICCPR prohibits slavery in all its forms<sup>53</sup> and provides for the equal protection of the law.<sup>54</sup> The Committee on Human Rights has strongly affirmed in its General Comment 29,<sup>55</sup> that during the states of emergencies that prohibition of torture or cruel, inhuman or degrading punishment, and the prohibition of slavery and the slave-trade are non-derogable.<sup>56</sup>

#### The Convention on the Elimination of All Forms of Discrimination against

43 See Article 27 of the Fourth Geneva Convention (Emphasis added).

44 J. Pictet (ed), *International Committee of the Red Cross, Commentary: IV Geneva Convention*, ICRC, (1958) 598.

45 Protocol Relating to the Protection of Victims of International Armed Conflict (Protocol I) and Protocol Relating to the Protection of Victims of Non-International Armed Conflict (Protocol II).

46 Article 76 of Protocol I provides that 'women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any form of indecent assault,' whereas article 2(e) of Protocol II provides that 'outrage upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault'.

47 See generally H. Heintze 'On the relationship between human rights law protection and international humanitarian law', 86 (856) *International Review of the Red Cross* (2004) 789–814.

48 Article 5 of the Universal Declaration on Human Rights, GA Res. 217, UN GAOR, 3rd Sess., Supp. No. 127, UN Doc. A/810 (1948).

49 See Article 4 and 5 of the Universal Declaration.

50 660, U.N.T.S. 195, *opened for signature* Mar. 7, 1966 (entered into force Jan. 4, 1986).

51 Article 5(b) of the Racial Convention.

52 Dec. 16, 1966, GA Res. 2200, UN GAOR, 21st Sess., Supp. 16, 52, UN Doc A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

53 Article 9 of the ICCPR. Also see article 7(g) of the Rome Statute where sexual slavery is a crime against humanity; article 8(b)(xxii) where sexual slavery forms part of 'other serious violations of the laws and customs applicable in international armed conflicts'.

54 Article 26 of the ICCPR.

55 The Human Rights General Comment No. 29 on States of Emergencies *adopted* at the 1950th meeting, on 24 July 2001, CCPR/C/21/Rev.1/Add.11.

56 *Ibid*, at para 7.

Women (CEDAW),<sup>57</sup> which is ‘the definitive international legal instrument requiring respect for and observance of the human rights of women’<sup>58</sup> prohibits all gender-based discrimination that has the effect or purpose of impairing the enjoyment of fundamental rights and freedoms.<sup>59</sup> Disappointingly, CEDAW does not refer to violence of any kind in its provisions. However, through the interpretation by the Committee on Elimination of Discrimination against Women,<sup>60</sup> CEDAW prohibits discrimination and disparaging treatment on the basis of gender, including violence against women.<sup>61</sup> The General Recommendation 19 of the Committee on the Elimination of Discrimination against Women<sup>62</sup> provides that the general prohibition of gender discrimination includes ‘gender-based violence – that is, violence that is directed at 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 ...’<sup>63</sup>

Rape is also prohibited as a crime against humanity and a war crime in the provisions of the statutes of the ICTY<sup>64</sup> and the International Criminal Tribunal for Rwanda (ICTR).<sup>65</sup> Subsequent to the international criminal tribunals, the international community established the ICC, whose statute also criminalises sexual violence as a crime against humanity<sup>66</sup> and as a war crime.<sup>67</sup> The Rome Statute expands crimes against humanity to include explicitly other forms of sexual violence other than rape.<sup>68</sup> Other crimes enumerated within crimes against humanity, which have a particular application to women, are crimes such as

57 Convention on the Elimination of All Forms of Discrimination against Women, 1249 U.N.T.S. 13, 19 ILM 33 (1980), *adopted* by GA Res. 180 (XXXIV) (18 Dec. 1979) *entered into force* 3 Sept. 1981.

58 F. Kathrea, ‘Convention on all Forms of Discrimination against Women’, 11 *South African Journal on Human Rights* (1995) 421–437, at 421. Also see H. Combrinck, ‘Positive State Duties to Protect Women from Violence: Recent South African Developments’, 20 *Human Rights Quarterly* (1998) 666–690, at 672.

59 See article 1 of CEDAW.

60 The Committee on the Elimination of All forms of Discrimination Against Women was established by article 17 of the CEDAW ‘to oversee the implementation of its provisions’. See article 17 of the CEDAW.

61 See Askin, *supra* note 29, at 60.

62 See General Recommendation 19 (UN GAOR, Committee on the Elimination of Discrimination Against Women, 11<sup>th</sup> Sess., UN Doc. CEDAW/C/1992/1.1/Add. 15 (1992).

63 Para 6 of the General Recommendation.

64 Articles 2 and 3 (war crimes) and article 5 (crimes against humanity).

65 The International Criminal Tribunal for Rwanda (ICTR) was established for the ‘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 Violations in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994’, SC Res. 955 (8 Nov. 1994). The Statute of the ICTR is attached to SC Res. 955 as an Annex. Article 3 (crimes against humanity) and article 4 (war crimes).

66 Article 7 of the Rome Statute.

67 Article 8 of the Rome Statute.

68 Article 7(g) of the Rome Statute.

'enslavement',<sup>69</sup> 'torture',<sup>70</sup> and 'persecution'.<sup>71</sup> Furthermore, article 8(2)(e)(vi) of the Rome Statute, which concerns internal armed conflict, also uses the identical terms used in article 8(2)(b)(xxii) as serious violations of article 3 common to the Geneva Conventions. This, therefore, means that there is no doubt that sexual violence against women during armed conflict is considered a grave breach of the Geneva Conventions as it will seem illogical to use identical terms that have different meanings.<sup>72</sup>

### **B. The role of the international criminal tribunals to develop international law on sexual violence during armed conflict**

Following the conflicts in the former Yugoslavia and Rwanda, where sexual violence against women was rampant, and acting in accordance with its powers under Chapter VII of the UN Charter,<sup>73</sup> the Security Council established the ICTY and the ICTR in order to 'maintain or restore international peace and security'.<sup>74</sup> Hence, the ICTY and the ICTR are the subsidiary organs of the Security Council.<sup>75</sup> Significantly, when establishing the tribunals, the Security

- 69 The term 'enslavement' is defined as 'the exercise of any power attaching to the right of ownership over a person, including in the course of trafficking in persons, in particular women and children'. See article 7(2)(c) of the Rome Statute. This definition elaborates upon the traditional definition of slavery encompassed in article 1(1) of the 1926 Slavery Convention which defines 'slavery' as 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised'.
- 70 The term 'torture' is defined 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, except that torture shall not include pain and suffering arising out from inherent in or incidental to lawful sanctions'. The Rome Statute has eliminated the Torture Convention requirement that the act 'by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'. See article 7(2)(e) of the Rome Statute. It should be noted that the act of torture can constitute not only a crime against humanity, but also a war crime. Sexual violence has been found to constitute torture by the ICTY and the ICTR.
- 71 The term 'persecution' as a crime against humanity is defined as 'the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity'. See article 7(2)(g) of the Rome Statute.
- 72 See W.A. Schabas, *An Introduction to the International Criminal Court* (2<sup>nd</sup> ed.), Cambridge University Press (2004) 63. Also see N.N.R. Quénivet, *International Law and Sexual Offenses in Armed Conflict & International Law*, Transnational Publishers (2005), 101; J.G. Gardam and M.J. Jarvis, *Women, Armed Conflict and International Law*, Kluwer Law International (2001), 203; Dyani, *supra* note 40, at 178.
- 73 The Charter of the United Nations was signed on 26 June 1945, in San Francisco, at the conclusion of the United Nations Conference on International Organization, and came into force on 24 October 1945. [Hereinafter referred as the UN Charter.]
- 74 Article 39 of the UN Charter provides that '[t]he Security Council shall determine the existence of any threat to the peace, breach of peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with articles 41 and 42, to maintain or restore international peace and security'. Under article 41, the Security Council is empowered to use economic and diplomatic sanctions and to sever transportation and communication links in efforts to maintain or restore international peace and security. If the Security is of the view that such measures have been or will be inadequate to maintain or restore international peace and security, article 42 authorises the Security Council to take such military action, as it considers necessary to achieve these ends.
- 75 Article 29 of the UN Charter which states that '[t]he Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions'.

Council considered sexual violence during armed conflict as a threat to international peace and security. This means that sexual violence during armed conflict is no longer seen as spoils of war. The trial chambers of the tribunals have prosecuted and convicted perpetrators of sexual violence as war crimes, crimes against humanity and genocide.

### *1. Sexual violence as torture*

Affirming that sexual violence may constitute torture, the Trial Chamber in the *Akayesu Judgment* held that:

Like torture rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.<sup>76</sup>

While, the Trial Chamber in the *Celebici Judgment* considered the rape of any person to be ‘a despicable act which strikes at the very core of human dignity and physical integrity’.<sup>77</sup> It held that ‘rape causes severe pain and suffering both physical and psychological ... it is difficult to envisage circumstances in which rape by, or at the instigation of a public official, could be considered as occurring for a purpose that does not, in some way, involve punishment, coercion, discrimination or intimidation’.<sup>78</sup> Accordingly, the Trial Chamber held that ‘whenever rape and other forms of sexual violence meet the aforementioned criteria, then they shall constitute torture, in the same manner as any other act that meets the criteria’.<sup>79</sup>

In the *Furundzija Judgment*, the Trial Chamber not only stated that rape can amount to torture, it also related an act of rape to a violation of human dignity and physical integrity of women.<sup>80</sup> Although the Trial Chamber acknowledged that like torture, rape may be used to obtain information, it may also be used against women because of their gender.<sup>81</sup> Further, the Trial Chamber considered humiliating the victim as one of the possible purposes of torture, which is prohibited by the general spirit of international humanitarian law whose primary purpose is to safeguard human dignity.<sup>82</sup> It held that the notion of humiliation is ‘close to the

76 *Akayesu Judgment*, *supra* note 30, at para 597.

77 *Ibid.*, at para 495.

78 *Ibid.*, at para 495.

79 *Ibid.*, at para 496.

80 *Prosecutor v Furundzija Judgment* 10 December 1998, Case No. IT-95-17/1, para 595. Also see the Final Report of the Truth and Reconciliation Commission of Sierra Leone Vol 2, Chapter 2: Findings, para 528, where the Commission found that all the armed perpetrator groups pursued a deliberate strategy of perpetrating torture on women and girls perceived to be associated with the enemy and inhumane acts upon them or on persons close to them.

81 *Prosecutor v Delalic and Others Judgment* 16 November 1998, Case No. IT-96-21, paras 941 and 963 (referred to as the *Celebici Judgment*).

82 *Ibid.*

notion of intimidation, which is explicitly referred to in the Torture Convention's definition'.<sup>83</sup>

## 2. Sexual violence as genocide

For an act of sexual violence to constitute genocide it has to satisfy one of the elements listed in the Genocide Convention.<sup>84</sup> Hence, the Trial Chamber held that for a crime of genocide to have been committed, that the particular act be committed against a specifically targeted group, it being national, ethnical, racial or religious group.<sup>85</sup> The Trial Chamber emphasised that the crime of genocide does not imply the actual extermination of a group in its entirety, but is understood as such once any one of the acts mentioned in article 2(2) is committed with the specific intent to destroy 'in whole or in part'.<sup>86</sup> Hence, the Trial Chamber held that rape and sexual violence constitute genocide in the same way as any other act as long as they were committed with a specific intent to destroy, in whole or in part, a particular group, targeted as such.<sup>87</sup> It held further that rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even 'one of the worst ways of inflict (sic) harm on the victim as he or she suffers both bodily and mental harm'.<sup>88</sup> The Trial Chamber held that sexual violence was 'an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole'.<sup>89</sup> The Trial Chamber noted that 'the rape of Tutsi women was systematic and was

83 *Furundzija* Judgment *supra* note 80 para 162. The Torture Convention defines torture as: any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

See article 1(1) of the UN Convention against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment of 1984.

84 See Convention on the Prevention and Punishment of the Crimes of Genocide, GA Res. 260 A(III) (9 DEC. 1948), *entered into force* 12 January 1951. Article 2 of the Genocide Convention provides:

Genocide means any of the following acts committed with intent to destroy, in whole or in 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 in part;  
(d) Imposing measures intended to prevent births within the group;  
(e) Forcibly transferring children of the group to another group.

Article 4 of the ICTY and article 2 of the ICTR which deal with genocide were taken directly from the Genocide Convention.

85 *Akayesu* Judgment, *supra* note 30, at para 499.

86 *Ibid.*, at para 497.

87 *Ibid.*, at, para 731.

88 *Ibid.*

89 *Ibid.*

perpetrated against all Tutsi women and solely against them'.<sup>90</sup>

Discussing the required element ‘imposing measures intended to prevent births within the group’,<sup>91</sup> the Trial Chamber stated that it should be construed as sexual mutilation, the practice of sterilisation, forced birth control, separation of the sexes and prohibition of marriages.<sup>92</sup> The Trial Chamber stated further that in patriarchal societies where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case, where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother’s group.<sup>93</sup> This judgment is significant because for the first time sexual violence was considered as genocide.

### *3. Sexual violence as a form of enslavement*

For the first time sexual violence was held to constitute crimes against humanity in the form of enslavement by the ICTY. In the *Foca* Judgment, the three accused were charged with violations of the laws or customs of war and with crimes against humanity, in particular, rape, torture, enslavement and outrages upon personal dignity.<sup>94</sup> The accused were alleged to have detained the victims, including a 12 year-old girl, in apartments where the victims had to perform household chores and were frequently raped by the accused.<sup>95</sup>

The Trial Chamber defined enslavement as a crime against humanity in customary international law to consist ‘the exercise of any or all of the powers attaching to the right of ownership over a person’.<sup>96</sup> Hence it held that:

Under this definition, indications of enslavement include elements of control and ownership; the restriction or control of an individual’s autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim’s position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions. Further indications of enslavement include exploitation, the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily involving physical hardship, *sex, prostitution, and human trafficking*.<sup>97</sup>

<sup>90</sup> *Ibid.*, at para 732.

<sup>91</sup> Article 2(2)(d) of the ICTR Statute.

<sup>92</sup> *Akayesu* Judgment, *supra* note 30, at para 507.

<sup>93</sup> *Ibid.*

<sup>94</sup> *Foca* Judgment *supra* note 32 paras 1–11.

<sup>95</sup> *Ibid.*, paras, 6, 8 and 9. It is to be noted that only two accused (Kunarac and Kovac) were charged with enslavement in this case.

<sup>96</sup> *Ibid.*, para 539.

<sup>97</sup> *Ibid.*, para 542 (emphasis added).

In addition and of significance, the Trial Chamber held that the ‘acquisition’ or ‘disposal’ of someone for monetary or other compensation is not a requirement for enslavement.<sup>98</sup>

The tribunals have developed international law on sexual violence during armed conflict significantly. Sexual violence can constitute international crimes that can be prosecuted successfully in the international forum, thus sending a clear message to the would-be perpetrators. There is no doubt that the tribunals will leave a rich legacy in the development of international law on sexual violence during armed conflict.

#### **IV. THE OBLIGATIONS OF STATES UNDER INTERNATIONAL LAW ON SEXUAL VIOLENCE DURING ARMED CONFLICT**

The prohibition of international crimes constitutes peremptory norms (*jus cogens*) of international law.<sup>99</sup> The doctrine of *jus cogens* presupposes that there are some rules, which are so fundamental to international law that states cannot derogate.<sup>100</sup> These norms are recognised to have a superior status over other norms.<sup>101</sup> The doctrine of *jus cogens* in international law derives primarily from the Vienna Convention which defines *jus cogens*, in article 53 as ‘[a] peremptory norm of general international law accepted and recognised by international community of states as a whole from which no derogation is permitted and which can be modified only by a subsequent norm of a general international law having the same character’.<sup>102</sup> Since sexual violence constitutes crimes against humanity,

<sup>98</sup> *Ibid.*

<sup>99</sup> M.C. Bassiouni, ‘Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice’, 42 *Virginia Journal of International Law* (2001) 81–162, 108, where he lists the *jus cogens* international crimes as piracy, slavery, war crimes, crimes against humanity, genocide, apartheid and torture. Also see M.C. Bassiouni and E.M. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute Under International Law*, Martinus Nijhoff Publishers (1995) 52, where they argue that a number of rules prohibiting international offences such as aggression, genocide, and serious breaches of international humanitarian law, are widely held to constitute rules of *jus cogens*; M.C. Bassiouni, *Crimes Against Humanity in International Criminal Law*, Martinus Nijhoff Publishers (1999) 217, where he argues that since World War II a number of international and regional instruments along with numerous United Nations resolutions reaffirm and provide support for the assertion that the protected interests whose violations are criminalised in crimes against humanity have become *jus cogens*; and T. Meron, *War Crimes Law Comes of Age*, Clarendon Press (1998) 233, where he argues that the core prohibitions of crimes against humanity and the crime of genocide constitutes *jus cogens* norms.

<sup>100</sup> V. Chetail, ‘The Contribution of the International Court of Justice to International Humanitarian Law’, 85 (850) *International Review of the Red Cross* (2003) 235–269, 247. Also see generally C. Annacker, ‘The Legal Regime of erga omnes obligations in international law’, 46 *Austrian Journal of Public International Law* (1994) 131; G.A. Christenson, ‘Jus cogens: Guarding Interests Fundamental to International Society’, 28 *Virginia Journal of International Law* (1987–1988) 585–648; G.M. Danilenko, ‘International *jus cogens*: Issues of Law-Making’, 2 *European Journal of International Law* (1991) 42–65. Also see *East Timor (Portugal v Australia)* ICJ Reports 1995 para 29 (at 102).

<sup>101</sup> K.C. Randall, ‘Universal Jurisdiction Under International Law’, 66 *Texas Law Review* (1988) 785–841, at 830.

<sup>102</sup> Article 53 of the Vienna Convention on the Law of Treaties, with annex, May 23, 1969, U.N.Doc. A/CONF. 39/27.

war crimes and genocide, it is therefore argued that the prohibition of sexual violence during armed conflict has acquired the status of *jus cogens*.

The prohibition of international crimes that have acquired the status of *jus cogens* and customary international law give rise to obligations *erga omnes* amongst states. This doctrine was introduced in the obiter dictum of the International Court of Justice (ICJ) in the *Barcelona Traction* case.<sup>103</sup> The ICJ stated:

An essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.<sup>104</sup>

This statement by the ICJ gives rise to the obligations owed by a state towards the international community as a whole. If a state breaches such obligations it will have to be responsible to the whole community.<sup>105</sup> Hence, states bear the obligation to respect, ensure respect for, and to enforce norms of international human rights and humanitarian law that are incorporated in treaties to which they are parties, found in customary international law, and those that have been incorporated into their domestic legal system.<sup>106</sup> States are, therefore required to prevent sexual violence during armed conflict; to stop the act when it is being committed; and to compensate victims of sexual violence during armed conflict. Failure to do so will be a breach of the obligations *erga omnes* and the international community would be required to respond.

## V. AFRICA'S HUMAN RIGHTS REGIONAL SYSTEM

### A. From the Organisation of African Unity (OAU) to the African Union (AU)

The African leaders have replaced the OAU with the AU.<sup>107</sup> The OAU was established by the OAU Charter of 1963.<sup>108</sup> The OAU Charter neither made any express commitments to protect human rights generally and the achievement

<sup>103</sup> *Barcelona Traction Light and Power Co. Ltd (Belgium v Spain)*, 1970 ICJ Rep. 3, 32 (Judgment of 5 February).

<sup>104</sup> *Ibid.*

<sup>105</sup> Bassiouni, *supra* note 35, at 212 where he says that the first criterion of an obligation rising to the level of *erga omnes* is in the words of the Court – ‘the obligations of a state towards the International Community as a whole’.

<sup>106</sup> M.C. Bassiouni, *Introduction to International Criminal Law*, Transnational Publishers (2003) 97.

<sup>107</sup> See *supra* note 25.

<sup>108</sup> *Ibid.* For a critical analysis of the OAU see AW Chanda, ‘The Organisation of the African Unity: An Appraisal’, 21–24 *Zambia Law Journal* (1989–92), at 1.

of gender equality in particular, as key objectives of the OAU.<sup>109</sup> This Charter emphasised the sovereignty and territorial integrity of its member states<sup>110</sup> and enjoined member states from interfering in internal affairs of other states.<sup>111</sup> As Chirwa puts it, '[t]he concern for human rights was, therefore, not one of the factors that led to the establishment of the OAU'.<sup>112</sup>

In order to remedy the defects of the OAU, in 2000 the Heads of State and Government of the OAU adopted the Constitutive Act,<sup>113</sup> which establishes the AU, a move, which was seen to be a first step for Africa to ensure seriousness about human rights and to maintain peace, security and stability in Africa.<sup>114</sup> However, some sceptics have seen the move from the OAU to the AU as 'an old wine in a new wine skin' and that 'the AU is a reincarnation of the OAU'. As such, the AU 'is not likely to take human rights seriously'.<sup>115</sup> However, the Constitutive Act has provisions that clearly refer to human rights and armed conflict in Africa. The Preamble to the Constitutive Act stipulates that African leaders are 'conscious of the fact that the scourge of conflicts in Africa constitutes a major impediment to the socio-economic development of the continent and the need to promote peace, security and stability as a prerequisite for the implementation of our development and integration agenda'.<sup>116</sup> Therefore, they are 'determined to promote, protect human and peoples' rights, consolidate democratic institutions and culture, and to ensure good governance and the rule of law'.<sup>117</sup>

The AU has demonstrated that it takes gross human rights abuses seriously as article 4(h) of the Constitutive Act of the AU provides, as one of the principles of the Union, 'the right of the Union to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity'. However, it is unclear whether the AU is prepared to exercise the right to humanitarian intervention based purely on sexual violence against women during armed conflict. However, as I have argued elsewhere,<sup>118</sup> the law is clear that the AU may exercise the right to humanitarian

<sup>109</sup> D.M. Chirwa, 'Reclaiming (Wo)manity: The Merits and Demerits of the African Protocol on Women's Rights', 53 *Netherlands International Law Review* (2006) 63–96 at 67; V.O. Nmehielle, 'The African Union and African renaissance: A new era for human rights protection in Africa?', 7 *Singapore Journal of International and Comparative Law* (2001) 412–446; E. Baimu, 'The African Union: Hope for better protection of human rights in Africa', 2(2) *African Human Rights Law Journal* (2001) 299–314, at 313.

<sup>110</sup> Articles II(1)(c) and III(3) of the OAU Charter.

<sup>111</sup> Article III(2) of the OAU Charter.

<sup>112</sup> Chirwa, *supra* note 109, at 67.

<sup>113</sup> See *supra* note 25.

<sup>114</sup> See generally Baimu *supra* note 109; C. Heyns, 'The African Regional Human Rights System: In Need of Reform?', 2 *African Human Rights Law Journal* (2001) 155–174; T. Maluwa, 'The Constitutive Act of the African Union and Institution-Building in Post-Colonial Africa', 16 *Leiden Journal of International Law* (2003) 157–170; C.A.A. Packer and D. Rukare, 'The New African Union and Its Constitutive Act', 96 *American Journal of International Law* (2002) 365–378.

<sup>115</sup> N.J. Udombana, 'Can the Leopard Change its Spots? The African Union Treaty and Human Rights', 17 *American University International Law Review* (2001) 1177–1261, at 1211.

<sup>116</sup> See para 9 to the Preamble to the Constitutive Act.

<sup>117</sup> See para 10 to the Preamble to the Constitutive Act.

<sup>118</sup> Dyani, *supra* note 40, at 186.

intervention in cases of war crimes, genocide and/or crimes against humanity. Sexual violence during armed conflict constitutes such crimes.

### **B. The African Charter on Human and Peoples' Rights**

The Charter indicates that African leaders for the first time acknowledged that human rights violations are a matter of concern for the international community.<sup>119</sup> However, the Charter has been criticised for its conceptualisation of women's rights in its provisions.<sup>120</sup> Hence, it is necessary to look at the provisions of the Charter that provides protection to women to ascertain whether, if interpreted 'progressive[ly] and liberal[ly]',<sup>121</sup> they protect women from sexual violence during armed conflict.

The Charter requires states to 'ensure the elimination of every discrimination against women and also ensure protection of the rights of the woman and children as stipulated in international declarations and conventions'.<sup>122</sup> International declarations and conventions such as the Declaration on the Elimination of Violence against Women<sup>123</sup> and the CEDAW<sup>124</sup> prohibit sexual violence against women during armed conflict.<sup>125</sup> Therefore, this provision, by referring to the international treaties, provides such protection to women. However, this provision protects women in the context of family, which is 'the natural unit and basis of the society'.<sup>126</sup> Hence, the Charter fails to envisage changes in the form of family and to take into consideration of the fact that women are individuals in their own right.<sup>127</sup>

A significant provision that can be said to specifically protect women from sexual violence during armed conflict is article 5 which prohibits 'all forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment'.<sup>128</sup> As has been established above, sexual violence during armed conflict constitutes slavery, inhuman acts and torture; this provision protects women from sexual violence during armed conflict. Furthermore, on interpreting this provision the African Commis-

119 Chanda, *supra* note 108, at 19.

120 Onoria argues that '[t]he family unit remains the most oppressive of rights of women in African societies'. See H. Onoria 'Introduction to the African System of Protection of Human Rights and the Draft Protocol' in W. Benedek and W. Heinz (eds), *Regional Systems of Human Rights in Africa, America and Europe: Proceedings of the conference, Strasbourg 15–19th June 1992*, Friedrich Nauman Foundation (1992) at 234.

121 M. Mutua, *The African human rights system: A critical evaluation*, UNDP Background Paper (2000), available at <http://hdr.undp.org/publications/papers.cfm>.

122 Article 18(3) of the Charter.

123 UN GAOR, 48th Sess., UN Doc. A/Res/48/104 (23 Feb. 1994).

124 CEDAW, *supra* note 57.

125 Article 1 of CEDAW. Also see article 1 of the Declaration on the Elimination of Violence Against Women UN GAOR, 48th Sess., UN Doc. A/Res/48/104 (23 Feb. 1994).

126 Article 18(1) of the Charter.

127 E.A. Ankumah, *The African Commission on Human and Peoples' Rights: Practice and Procedures*, Martinus Nijhoff Publishers (1996) 152.

128 Article 5 of the Charter.

sion on Human and Peoples' Rights<sup>129</sup> has stated that the protection against cruel, inhuman, or degrading treatment or punishment 'extends to the widest possible protection against abuses, whether physical or mental'.<sup>130</sup> In addition, Commission has stated that '[a]rticle 5 prohibits not only torture, but also cruel, inhuman or degrading treatment. This includes not only actions which cause serious physical or psychological suffering, but which humiliate the individual or force him or her to act against his will or conscience'.<sup>131</sup>

These decisions by the Commission are in line with the provisions of article 147 of the Geneva Convention IV. The Commentary<sup>132</sup> to this article provides a broad interpretation of inhuman treatment, which stipulates that '[t]he aim of the Convention is certainly to grant civilians in enemy hands a protection which will preserve their human dignity, and prevent them being brought down to the level of animals. That leads to the conclusion that by "inhuman treatment" the Convention does not mean only physical injury or injury to health,' it also includes rape and sexual violence.<sup>133</sup> Further, the decisions by the Commission are in line with the decisions of the international criminal tribunals as has been shown above. Therefore, even though the Commission has not dealt with a communication that involves sexual violence during armed conflict as yet, this provision together with this interpretation by the Commission clearly protects women from sexual violence during armed conflict. Hence, if interpreted 'liberal[ly] and progressive[ly]',<sup>134</sup> as above, the Charter does protect women from sexual violence during armed conflict.

### C. The Protocol on the Rights of Women in Africa<sup>135</sup>

The Women's Protocol was adopted to remedy the deficiencies of the Charter on the rights of women. Article 3 of the Women's Protocol provides that every woman has 'the right to dignity inherent in a human being' and 'to respect as a person and to the free development of her personality'.<sup>136</sup> In addition every woman is entitled to 'respect for her life and the integrity of her person'.<sup>137</sup> These

129 In order to ensure that state parties adhere to their obligations under the Charter, the Charter makes provisions to establish the African Commission on Human and Peoples' Rights (the Commission) 'to promote human and peoples' rights and ensure their protection' in Africa. See article 30 of the Charter. The mandate of the Commission is found in article 45 of the Charter. See generally E. Bello, 'The Mandate of the African Commission on Human and Peoples' Rights: Article 45 Mandate of the Commission', 1 *African Journal of International Law* (1988) 31. The Commission was inaugurated on 2 November 1987.

130 See Communication No. 224/98, *Media Rights Agenda v Nigeria*, 2000–2001 Africa Annual Activity Report, Annexure V, para 71.

131 See Communications 137/94, 139/94, 154/96 and 161/97, *International Pen, Constitutional Rights Project, Interights on Behalf of Ken Saro-Wiwa Jr and Civil Liberties Organisation v Nigeria*, Twelfth Activity Report 1998–1999, Annex V, paras 79–80.

132 Pictet, *supra* note 44.

133 *Ibid.* at 598.

134 Mutua, *supra* note 121, at 20.

135 See *supra* note 24.

136 Article 3(1) of the Women's Protocol.

137 Article 4 of the Women's Protocol.

provisions demonstrate that women are individuals in their own right.

Further, the Women's Protocol also explicitly prohibits violence against women, something that is not expressly recognised by CEDAW. The Women's Protocol defines the term 'violence against women' to mean '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'.<sup>138</sup> From this definition, it is clear that state parties undertake to protect women from sexual violence during armed conflict.

The Women's Protocol goes further and stipulates that state 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'.<sup>139</sup> Whereas article 11(2) provides that state parties 'shall protect civilians including women irrespective of the population to which they belong'. Therefore, the Women's Protocol reaffirms the international law notion that sexual violence constitutes international crimes as stated in the Rome Statute and the statutes and judgments of the international criminal tribunals. Significantly, the Women's Protocol is the only international treaty that prohibits and explicitly treats sexual violence during armed conflict as genocide.

Article 11(1) of the Women's Protocol enjoins state parties 'to respect and ensure respect for the rules of international humanitarian law applicable in armed conflict situations, which affect the population, particularly women'. Furthermore, state parties 'undertake to protect ... women, irrespective of the population to which they belong, in the event of armed conflict'.<sup>140</sup> They will do so 'in accordance with the obligations incumbent upon them under international humanitarian law'.<sup>141</sup> In this instance, state parties are required to act in accordance with the Geneva Conventions, the Additional Protocols and any other international law treaty dealing with international humanitarian law to which they are party such as the Rome Statute, as well as customary international humanitarian law.

By criminalising sexual violence as war crimes, genocide and/or crimes against humanity, the Protocol has followed in the footsteps of the jurisprudence of the international criminal tribunals. This is an important step taken by the African community to address sexual violence, which is prevalent in Africa during armed conflict.

<sup>138</sup> Article 1 of the Women's Protocol.

<sup>139</sup> Article 11(2) of the Women's Protocol.

<sup>140</sup> Article 11(2) of the Women's Protocol.

<sup>141</sup> *Ibid.*

#### **D. Reflections on the role of the African Commission to protect women from sexual violence during armed conflict**

In order to ensure that state parties adhere to their obligations under the Charter, the Charter makes provisions to establish the African Commission ‘to promote human and peoples’ rights and ensure their protection’ in Africa.<sup>142</sup> It is therefore clear that the Commission has a dual mandate of promoting and protecting human and peoples’ rights in terms of the Charter.

The Commission cannot award damages, restitution or compensation. It is also not empowered to condemn an offending state; it can only make recommendations to the parties.<sup>143</sup> The Commission’s effectiveness in promoting and protecting human rights therefore depends, to a certain extent, upon whether the necessary support is provided by the AU.<sup>144</sup> For example, in order for the decisions of the Commission to be final, they have to be adopted by the Assembly of Heads of State and Government of the OAU/AU.<sup>145</sup> Once the Assembly approves the decisions then the target state is obliged to act accordingly to the recommendations of the Commission. However, the Assembly has been criticised for not taking seriously the decisions of the Commission on human rights violations by the states, as no response has been forthcoming from the OAU despite several cases being submitted to it.<sup>146</sup>

Ratification of the Charter binds a state to its provisions under international law.<sup>147</sup> Article 1 of the Charter underlines the primary obligation of states to recognise the rights in the Charter. State parties undertake to recognise the rights

142 Article 30 of the Charter. The mandate of the African Commission is laid down in article 45 of the Charter as follows:

1. To promote Human and Peoples Rights and in particular:
  - (a) to collect documents, undertake studies and researches on African problems in the field of human and People’s rights, organise seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples’ rights and should the case arise, give its views or make recommendations to Governments.
  - (b) To formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples’ rights and fundamental freedoms upon which African Governments may base their legislation.
  - (c) Co-operate with African and international institutions concerned with the promotion and protection of human and peoples’ rights.
2. Ensure the protection of human and peoples’ rights under conditions laid down by the present Charter.
3. Interpret all the provisions of the present Charter at the request of a State Party, an institution of the OAU or an African Organisation recognised by the OAU.
4. Perform any other tasks, which may be entrusted to it by the Assembly of Heads of States and Government.

Also see generally Bello *supra* note 129..

143 N.J. Udombana, ‘Toward the African Court on Human and Peoples’ Rights: Better Late than Never’, 3 *Yale Human Rights & Development Law Journal* (2000) 45–111, at 68.

144 *Ibid*, 50–51.

145 Articles 52, 54 and 59(2) of the Charter.

146 R. Murray, ‘The African Charter on Human and Peoples’ Rights 1987–2000: An Overview of its Progress and Problems’, 1 *African Human Rights Law Journal* (2001) 1 at 10–11.

147 Article 26 of the Vienna Convention of the Law of the Treaties of 1969.

by giving effect to the rights, duties and freedoms enshrined in the Charter.<sup>148</sup> The Commission has decided that:

Article 1 gives the Charter the legally binding character always attributed to international treaties of this sort. Therefore a violation of any provision of the Charter automatically means a violation of article 1. If a state party to the Charter fails to recognise the provisions of the same, there is no doubt that it is violation of this article. Its violation, therefore, goes to the root of the Charter.<sup>149</sup>

States undertake to recognise the provisions of the Charter by adopting legislation and by ‘other measures’.<sup>150</sup> One of the ‘other measures’ is that of abiding by the findings of the Commission related to communications against a state.<sup>151</sup> Hence, if states refuse to abide by the decisions of the Commission, the protective mandate of the Commission will be rendered meaningless.

The Commission has decided to play an active role in cases of massive violations of human rights, per article 58 of the Charter.<sup>152</sup> Therefore, the Commission has developed a mechanism for urgent response to human rights emergencies under article 58 of the Charter.<sup>153</sup> In its mechanism, the Commission or its bureau is required to act promptly in cases of human rights violations or emergency situations.<sup>154</sup> It will do so by conducting on-site visits, make diplomatic approaches and contact national and international organisations concerned with human rights.<sup>155</sup> The Commission has envisaged the lack of cooperation from states where massive human rights are alleged to have occurred. In such cases the Commission is to organise meetings near the state or its headquarters.<sup>156</sup>

On the involvement of the AU, the Commission, per its Early Intervention Mechanism, is to report emergency situations to the Assembly as specified by article 58. However, the Commission realises that the Assembly might not act promptly with regard to such reports. In this instance the Commission decided that it should, more specially, give publicity to the outbreak of emergencies and to its investigations.<sup>157</sup> ‘The impact of such publicity on public opinion is a weapon that cannot be underestimated in the protection of human rights.’<sup>158</sup> The Commis-

<sup>148</sup> Article 1 of the Charter.

<sup>149</sup> *Jawara v The Gambia*, Communications 147/95 and 147/96 para 46.

<sup>150</sup> Article 1 of the Charter.

<sup>151</sup> F. Viljoen and L. Louw, ‘The Status of the African Commission: From Moral Persuasion to Legal Obligation’, 48(1) *Journal of African Law* (2004) 1–22, at 7.

<sup>152</sup> Article 58 of the Charter states that

<sup>153</sup> See generally the Commission’s Reflection on the Establishment of an Early Intervention Mechanism in cases of Massive Human Rights Violations, Twenty-fourth Ordinary Session, Banjul, 22–31 October 1998, Doc/OS/52 (XXIV), reprinted in R. Murray and M. Evans, *Documents of the African Commission on Human and Peoples’ Rights*, Hart Publishing, (2001), at 757.

<sup>154</sup> Para 1 of the Early Intervention Mechanism.

<sup>155</sup> Para 2 of the Early Intervention Mechanism.

<sup>156</sup> Para 3 of the Early Intervention Mechanism.

<sup>157</sup> Para 8 of the Early Intervention Mechanism.

<sup>158</sup> *Ibid.*

sion is, therefore, breaking away from the requirement that before it publishes its findings it has to wait for the decision of the Assembly.<sup>159</sup>

### E. The Special Rapporteur on the Rights of Women in Africa

In order to remedy some of its defects and to fulfil its mandate the Commission has appointed six special rapporteurs including the Special Rapporteur on the Rights of Women in Africa (Special Rapporteur).<sup>160</sup> The mandate of the Special Rapporteur consists of, amongst others, conducting a study on the situation of the rights of women in Africa and to report to the Commission as well as any recommendations for the improvement of the situation of women's rights in Africa.<sup>161</sup> This mandate of the Special Rapporteur is wide and it does not specify how such mandate ought to be undertaken. This may lead the Special Rapporteur to concentrate on the study of women's rights that is of less significance than the one which requires urgent attention. For example, it has been noted that the Special Rapporteur has been concentrating on the ratification of the Protocol on the Rights of Women in Africa.<sup>162</sup> While the ratification of the Women's Protocol is important for the realisation of women's rights in Africa, other areas such as the prevalent sexual violence against women in the ongoing-armed conflict are being ignored. The Special Rapporteur needs a clear mandate.

One of the difficulties faced by the present Special Rapporteur is that the Commission proposed one of its own members to be a Special Rapporteur.<sup>163</sup> Appointing a commissioner as a special rapporteur, who is already swamped by her own work and that of the Commission, raises concerns on the abilities of the Special Rapporteur to fulfil her duties. It is rightly argued that 'adding further burden to the commissioners who already only act on a part-time basis is wholly unrealistic, and compounded by their being required to function in areas which may be far removed from their full-time professional expertise'.<sup>164</sup> It is also argued that as long as the Commission appointed one of its own, the work of

159 Article 59 of the Charter.

160 The position of the Special Rapporteur on the Rights of Women in Africa is the result of the Resolution on the Designation of a Special Rapporteur on the Rights of Women in Africa, Twelfth Activity Report 1998–1999, Annex IV. Other special rapporteurs appointed by the Commission are the Special Rapporteur on Summary, Arbitrary and Extrajudicial Executions (appointed in 1994, Eighth Annual Activity Report of the African Commission, Annex VII, mandate has not been renewed); the Special Rapporteur on Prisons and Conditions of Detention in Africa (appointed in 1996, Tenth Annual Activity Report of the African Commission, Annex VII); the Special Rapporteur on Human Rights Defenders in Africa, (appointed in June 2004, 35th Ordinary Session); Special Rapporteur on Freedom of Expression in Africa, (appointed in December 2004, 36th Ordinary Session; and the Special Rapporteur on Refugees and Internally Displaced Persons in Africa, (appointed in December 2004, 36th Session).

161 The Draft terms of Reference for the Special Rapporteur on the Rights of Women in Africa, DOC/OS/34c (XMI).

162 Para 25 of the Eighteenth Activity Report of the Commission.

163 Angela Melo is a member of the Commission and her predecessor, Julienne Ondziel-Gnelenga, was also a member of the Commission. See <<http://www.achpr.org>>.

164 M.D. Evans and R. Murray (eds), *The African Charter on Human and Peoples' Rights: the system in practice, 1986–2000*, Cambridge University Press (2002), 299.

the special rapporteur would be impossible to be wholly separate from the work of a commissioner, which is sometimes quite broad.<sup>165</sup> In fact, it is argued, it is questionable how much significance the act of appointing a special rapporteur from within the Commission has had.<sup>166</sup>

The idea behind appointing special rapporteurs by the Commission is remarkable and it is what Africa needs in order to promote and protect human and peoples' rights for thematic purposes. However, with no clear indication of the mandate, lack of time and willingness by the appointed special rapporteurs, the work of the special rapporteurs may be ineffective. With right skills, funding, specific mandate and willingness on the part of the Special Rapporteur, her work can assist the Commission and other relevant AU institutions to protect women during armed conflict. It is about time the Commission thought of appointing a Special Rapporteur from outside in order to fulfil its mandate to protect and promote women's rights in Africa, especially during armed conflict.

#### **F. The African Court and the protection of women from sexual violence during armed conflict**

The initial absence of a court and other clear enforcement powers or decision-making procedures was considered to be one of the major shortcomings of the Charter, preventing states from being compelled, and jurisprudence from being made. A court was seen as a required solution to these problems by depoliticising the Commission and to provide final binding judgments.<sup>167</sup> The African Court was established by the Protocol Additional to the African Charter on the Establishment of the African Court on Human and Peoples' Rights.<sup>168</sup> The Court is established to complement and reinforce the functions of the African Commission.<sup>169</sup>

The Court's jurisdiction extends 'to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instrument ratified by the states concerned'.<sup>170</sup> Article 7 further provides that 'the Court shall apply the provisions of the Charter and any other human rights instrument ratified by states concerned'.<sup>171</sup> When these provisions are compared to articles 60 and 61 of the Charter, where the Commission is required to merely look toward comparative and international human rights law when interpreting the provisions of the Charter, it is clear that

<sup>165</sup> J. Harrington, 'Special Rapporteurs of the African Commission on Human and Peoples' Rights', 2 *African Human Rights Law Journal* (2001) 247–267, at 253.

<sup>166</sup> *Ibid.*

<sup>167</sup> R. Murray, *The African Commission on Human and Peoples Rights and International Law*, Hart Publishing, (2000) 81.

<sup>168</sup> The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted in Addis Ababa, Ethiopia in June 1998 and entered into force in January 2004.

<sup>169</sup> Article 2 of the Protocol on the African Court.

<sup>170</sup> Article 3(1) of the Protocol on the African Court.

<sup>171</sup> Article 7 of the Protocol on the African Court.

the jurisdiction of the Court goes further than only applying the provisions of the Charter. Under the Protocol, the Court will exercise direct jurisdiction over all ‘human rights instruments ratified by the states concerned’.<sup>172</sup> Presumably, it is argued, this will extend to all regional, sub-regional, bilateral, multilateral and international treaties.<sup>173</sup>

Udombana argues that this provision has extremely important implications. He gives an example of a perception and fear that has been expressed that the Charter ‘does not adequately protect, or it could be used to abuse, women’s rights’. He maintains that rather than relying on the Charter then an aggrieved woman or a group of women could bring a case to Court under another international treaty that better protected her rights.<sup>174</sup> However, Professor Heyns believes that ‘other relevant’ treaties would be treaties that make express provision for adjudication by the Court.<sup>175</sup> In other words, in his restrictive approach, besides the Charter and the Protocol to the Court, only the Protocol on the Rights of Women in Africa will be interpreted by the Court, as it is the only treaty, so far, that makes express provision for the jurisdiction of the Court.<sup>176</sup> However, the *travaux préparatoires*<sup>177</sup> leave no doubt that this provision was intended to confer on the Court the power to apply treaties other than the Charter and Protocol.

The Court is empowered to offer remedies to victims of human rights violations<sup>178</sup> and to seek enforcement of its judgments against states.<sup>179</sup> Unlike the Commission, the Court has express powers to ‘make appropriate orders to remedy the [gross] violation [of human rights], including the payment of fair compensation or reparation’.<sup>180</sup> By providing reparations to victims, the Court will not only assist in returning individuals to the status *quo ante*, but will serve as an important deterrent and educational role as well.<sup>181</sup>

The Court may also take provisional measures in cases of extreme gravity or urgency to avoid irreparable harm.<sup>182</sup> These powers are of significance in cases

172 Article 3(1) of the Protocol on the African Court.

173 Udombana *supra* note 143, at 90; A.P. van der Mei, ‘The New African Court on Human and Peoples’ Rights: Towards an Effective Human Rights Protection Mechanism for Africa’, 18 *Leiden Journal of International Law* (2005) 113–129, *supra* note 168, at 120.

174 See Udombana *ibid.* at 91.

175 Heyns, *supra* note 114, at 155. Also see I. Osterdahl, ‘The Jurisdiction Ratione Materiae of the African Court of Human and Peoples’ Rights: A Comparative Critique’, 7 *Revue Africaine des Droits de l’Homme* 132 (1998), at 138–40.

176 Article 27 of Women’s Protocol.

177 The first Cape Town Draft already indicated that the Drafters intended to confer on the Court a broader competence than on the Commission. The draft defined the substantive scope to cover ‘any other applicable African human rights instrument’. During the Addis Ababa meeting this provision was amended so as to apply any other relevant human rights instrument’. None of the represented states objected to this change. Report of the Third Government Legal Experts Meeting on the establishment of the African Court on Human and Peoples’ Rights, 8–11 December 1997, Addis Ababa, Ethiopia, Doc OAU/LEG/EXP/AFC/RPT (III) Rev. I, para 16, quoted in A.P. Van der Mei, *supra* note 173, at 120 note 53.

178 Article 27(1) of the Protocol on the African Court.

179 Article 30 of the Protocol on the African Court.

180 Article 27(1) of the Protocol on the African Court.

181 Udombana, *supra* note 143, at 94.

182 Article 28 of the Protocol on the African Court.

of massive human rights violations, including sexual violence, where the Court can grant provisional measures ordering the state party to refrain from committing massive human rights violations or to stop the ongoing massive human rights violations. Unlike the Commission, which is supposed to report to the Assembly about massive human rights violations and conduct an in depth study at the request of the Assembly,<sup>183</sup> the Court has been given powers to deal with the matter promptly.

The Protocol provides that state parties ‘undertake to comply’ with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution.<sup>184</sup> At the same time, the Court is required to specifically list those states that have failed to comply with its judgment in its annual reports to the AU.<sup>185</sup> The naming and shaming mechanism will have adverse implications to those state parties that fail to abide by the decisions of the Court. The Assembly, as the supreme organ of the AU,<sup>186</sup> has powers to deal with those states, which fail to adhere to their obligations under the Charter as well as any other relevant human rights instrument, including issuing sanctions to such states.<sup>187</sup> Furthermore, the Protocol provides that the execution of the orders of the Court shall be monitored by the Council of Ministers.<sup>188</sup> The African Charter did not grant these powers to the African Commission, this therefore shows that state parties, on paper, are serious about the effectiveness of the Court.

Significantly, the Court is not constrained by the confidentiality clause that has hindered the effectiveness of the Commission under article 59 of the Charter. It needs no authorisation from the Assembly to make its activities and judgments public and its proceedings are to be conducted in public.<sup>189</sup> Public exposure and authoritative condemnation of human rights violations is an extremely effective tool to promote and protect human rights.

Article 28 of the Protocol stipulates that the Court shall render its judgments within 90 days of having completed its deliberations. Such judgment, decided by the majority, shall be final and not subject to appeal. This provision is remarkable because once the Court hands down its judgment then state parties are expected to act in accordance with its finding and ensure that they execute the judgment given accordingly. Therefore, the Court could be an effective mechanism in order to prevent and halt sexual violence during armed conflict.

<sup>183</sup> Article 58 of the Charter.

<sup>184</sup> Article 30 of the Protocol on the African Court.

<sup>185</sup> Article 31 of the Protocol on the African Court.

<sup>186</sup> Article 6(1) of the Constitutive Act.

<sup>187</sup> Article 23(2) of the Constitutive Act stipulates that states that fail to comply with the decisions and policies of the Union may be subjected to other sanctions such as the denial of transport and communication links with other member states, and other measures of a political and economic nature to be determined by the Assembly.

<sup>188</sup> Article 29 of the African Court Protocol.

<sup>189</sup> Articles 10 and 28(5) of the Protocol on the African Court.

## VI. CONCLUSION

International law on rape and other forms of sexual violence has developed significantly in the last decade. Sexual violence during armed conflict constitutes international crimes as has been evidenced by the judgments of the international criminal tribunals. The prohibition of international crimes has acquired the status of *jus cogens* which gives rise to obligations *erga omnes*. States are therefore obliged to act. The ICTR, which is based in Africa, will leave a rich legacy through the role it is playing in developing international law on sexual violence.

The African regional community has also followed suit on the protection of women from sexual violence by creating the African Charter and the Women's Protocol. The Charter, if interpreted liberally and progressively, does protect women from sexual violence during armed conflict. However, the Charter does not take cognizance of the changing forms of family. The Women's Protocol criminalises sexual violence during armed conflict as genocide as well as crimes against humanity and war crimes. It is also the first international treaty to explicitly criminalise sexual violence as genocide. The Commission is also playing a role in the protection of women from sexual violence during armed conflict. Member states, however, have to take the recommendations of the Commission seriously in accordance with their obligations under the Charter.

Another significant feature of the Commission was to establish the Special Rapporteur on the Rights of Women in Africa. However, the Special Rapporteur needs a clear mandate in order to be effective in the protection of women from sexual violence during armed conflict.

There is hope on the enforcement of human rights as the Court has come into force. The African Court not only has the binding effect, it is also required to interpret every human rights instrument ratified by the state parties. This means that the aggrieved parties will have discretion to choose an instrument that would better protect their rights. The court may also take provisional measures in cases of extreme gravity or urgency to avoid irreparable harm. This means that it may order states to halt sexual violence during armed conflict. It remains to be seen whether the African leaders will adhere to the decisions made by the Court.

There is no doubt that sexual violence during armed conflict is a problem in Africa. However, the African human rights regional system has rich human rights instruments that prohibit sexual violence during armed conflict. There are also mechanisms such as the African Commission (which includes the Special Rapporteur on the Rights of Women) and the African Court to deal with this issue. Hence, Africa is making a significant contribution to the development of international law on rape and other forms of sexual violence during armed conflict. What is lacking, however, is the implementation of these instruments. It is about time that African leaders take a stand to ensure their implementation to end sexual violence during armed conflict.