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# Building on a global movement: Violence against women in the African context

*Fareda Banda*\*

Reader in the Laws of Africa, School of Oriental and African Studies, London,  
United Kingdom

### Summary

*This article celebrates the gains that have been made by women in the field of human rights as they pertain to issues of violence. It provides an overview of international and regional initiatives illustrated with reference to case law. The focus of the article is on provisions in the African Protocol on Women's Rights tackling violence. While acknowledging that normative recognition of rights is not by itself the panacea for the pervasive discrimination that affects women, the article argues that the almost universal recognition of violence against women as constituting a violation of their fundamental rights is cause for celebration, not least because it provides the framework for dealing with the problem and provides states with concrete goals.*

### 1 Introduction

The international community has travelled a long way towards recognising violence against women as a violation of their human and fundamental rights. Although the issue had received sporadic attention over the years, it is true to say that many of the substantial legal gains came in the last decade of the twentieth century. The most recent instrument pertaining to the rights of women, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa<sup>1</sup> (African Women's Protocol), contains comprehensive provisions

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\* BL LLB (Zimbabwe), DPhil (Oxon); fb9@soas.ac.uk

<sup>1</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women, 2003 <http://www.africa-union.org> (accessed 31 January 2008).

on violence against women. Indeed, the African Women's Protocol came into force on 25 November 2005, which is also International Day for the Elimination of Violence against Women. This marks the start of the annual 16 days of activism against gender violence campaigns, observed in many countries.<sup>2</sup> This article focuses on the issue of violence against women through the prism of human rights.

While the international focus on violence against women has been welcomed in many circles, Kapur identifies some difficulties with the attention paid to this topic, including the fact that it reinforces the notion that women, especially those from the south, are 'weak and vulnerable and in need of rescue and protection'.<sup>3</sup> She further notes that the international community's coalescing around the issue of violence has led to a distortion of the 'women's rights project', with violence against women now being seen as the principal human rights violation experienced by women.<sup>4</sup> She notes that the difficulty with this approach is that<sup>5</sup>

it deflects attention from the ways in which states are not implementing their obligations under a range of human rights documents, including CEDAW which, if implemented, could remove both structural and formal impediments that may contribute to women's experience of violence. The focus on violence against women has thus encouraged a focus on wrongs, rather than on rights and the facilitation of the promotion of these rights.

It is of course also worth acknowledging from the outset that the formal normative-based approach that I have chosen to take is not without its problems.<sup>6</sup> The adoption of human rights instruments is clearly not an end in itself, but the beginning. It goes without saying that rights without implementation and enforcement mechanisms are meaningless.<sup>7</sup> It is also important to acknowledge that one cannot look at a woman's right to be free from violence in isolation. The right to life, to bodily integrity and indeed to equality and to be free from discrimination on the grounds of sex must be seen as part of a mosaic of rights which include access to food, to adequate health

<sup>2</sup> Sixteen Days of Violence Against Women is an international campaign lasting from 25 November to 10 December (International Human Rights Day). <http://www.cwgl.rutgers.edu/16days/about.html> (accessed 31 January 2008).

<sup>3</sup> R Kapur 'Feminist critiques of human rights' in R Smith & C van den Anker (eds) *The essentials of human rights* (2005) 132-133. See also R Kapur 'The tragedy of victimisation rhetoric: Resurrecting the 'native' subject in international post-colonial feminist legal rhetoric' (2002) 15 *Harvard Human Rights Journal* 1; S Engle Merry *Human rights and gender violence* (2006) 101-2.

<sup>4</sup> Engle Merry (n 3 above) 81.

<sup>5</sup> Kapur 'Feminist critiques of human rights' (n 3 above) 133.

<sup>6</sup> D Kennedy 'The international human rights movement: Part of the problem?' (2002) 15 *Harvard Human Rights Journal* 101.

<sup>7</sup> M Robinson 'Foreword' in D Buss & A Manji (eds) *International law: Modern feminist approaches* (2005); C Chinkin *et al* 'Feminist approaches to international law: Reflections from another century' in Buss & Manji 17-26-28.

care, to education and equal opportunities to access resources and to participate in decision-making processes. It is not by accident that the Millennium Development Goals list gender equality as a goal to be achieved along with seven others.<sup>8</sup> Nevertheless, it remains important to examine, and indeed to celebrate, normative gains made by women at the international level.<sup>9</sup>

Divided into three parts, the article starts with an examination of existing human rights norms which pertain to issues of violence against women which are reflected in, and indeed informed, the drafting process of the African Women's Protocol. This includes an examination of the provisions of the international bill of rights<sup>10</sup> and the general recommendations of the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW Committee) focusing on CEDAW General Recommendation No 19 on violence against women.<sup>11</sup> Thereafter, the paper focuses on the United Nations (UN) General Assembly Declaration on the Elimination of Violence Against Women, 1993 (DEVAW).<sup>12</sup> Initiatives taken at international conferences, including Vienna,<sup>13</sup> Cairo<sup>14</sup> and Beijing,<sup>15</sup> are also considered in brief. In part two, I look at the regional, the African Charter on Human and Peoples' Rights (African Charter),<sup>16</sup> and sub-regional initiatives, including the Addendum to the Southern African Development Community (SADC)

<sup>8</sup> Millennium Development Goals <http://www.un.org/millenniumgoals/> (accessed 31 January 2008); CESCR General Comment No 16, art 3: The equal rights of men and women to the enjoyment of all economic, social and cultural rights (34th session, 2005) UN Doc E/C.12/2005/3 (2005). P Valley 'From dawn to dusk, the daily struggle of Africa's women' *The Independent*, London, 21 September 2006.

<sup>9</sup> Chinkin *et al* (n 7 above) 44.

<sup>10</sup> Universal Declaration on Human Rights, 1948 GA Res 217A (III) of 10 December 1948; International Covenant on Civil and Political Rights, 1966 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights, 1966 999 UNTS 3.

<sup>11</sup> See CEDAW General Recommendation No 12 on Violence Against Women, UN Doc A/44/38; CEDAW General Recommendation No 19 on Violence Against Women, UN Doc A/47/38.

<sup>12</sup> Declaration on the Elimination of Violence Against Women, GA Res 48/104, 20 December 1993.

<sup>13</sup> World Conference on Human Rights, Vienna Declaration and Programme of Action, 25 June 1993, UN Doc A/CONF. 157/23.

<sup>14</sup> International Conference on Population and Development, Cairo, UN Doc A/CONF 171/13, 18 October 1994.

<sup>15</sup> Beijing Declaration and Platform for Action, 1995 reproduced in United Nations Beijing Declaration and Platform for Action with the Beijing + 5 Political Declaration and Outcome Document (2001).

<sup>16</sup> African Charter on Human and Peoples' Rights (1981) 21 *International Legal Materials* 59; C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2007) 29.

Declaration on Gender and Development, 1998.<sup>17</sup> The examination of the provisions of the African Women's Protocol that was finally adopted includes an assessment of the feasibility of enforcement on a continent where gender discrimination continues to be one of the greatest challenges; this is part three. The conclusion follows.

## 2 Violence against women within the international human rights framework

The prohibition of discrimination contained in the international bill of rights ensures that all the rights contained therein are to be enjoyed without discrimination on the basis of sex.<sup>18</sup> This means that women are to be protected from torture and cruel, inhuman and degrading treatment.<sup>19</sup> Similarly, they have a right to life,<sup>20</sup> which in the context of the International Covenant on Economic, Social and Cultural Rights (CESCR) includes the right to food and an adequate standard of living, thus touching on issues of physical and economic violence against women.<sup>21</sup> Both the UN Convention on the Rights of the Child<sup>22</sup> (CRC) and the African Charter on the Rights and Welfare of the Child<sup>23</sup> (African Children's Charter) contain provisions prohibiting abuse,<sup>24</sup> and also

<sup>17</sup> 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 and Government. reproduced in (1999) 1 *SADC Gender Monitor* 37. SADC is in the process of finalising a draft Protocol on Gender and Development as amended by senior officials responsible for gender and women affairs, in Livingstone, Zambia, 13 December 2007. See in particular part 6 (arts 23-28) (on file with author).

<sup>18</sup> Arts 2 & 7 Universal Declaration; arts 2(1), 3 & 26 CCPR; arts 2(2) & 3 CESCR.

<sup>19</sup> Art 5 Universal Declaration; art 7 CCPR. See also Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, 1465 UNTS 85 and the Special Rapporteur on Violence Against Women who has noted that VAW can constitute torture. Report of the Special Rapporteur on Violence against Women, Ms R Coomaraswamy, submitted in accordance with Commission on Human Rights Resolution 1995/85, E/CN 4/1996/53, 6 February 1996. See also C Mackinnon 'On torture: A feminist perspective on human rights' in K Mahoney & P Mahoney (eds) *Human rights in the 21st century: A global perspective* (1993) 21.

<sup>20</sup> Art 3 Universal Declaration; art 6(1) CCPR.

<sup>21</sup> Art 11(1) CESCR. See also CESCR General Comment No 12 on the Right to Adequate Food E/C12/1999/5; C Chinkin & S Wright 'The hunger trap: Women, food and self-determination' (1993) 4 *Michigan Journal of International Law* 262; D Brand 'The right to food' in D Brand & C Heyns (eds) *Socio-economic rights in South Africa* (2005) 153.

<sup>22</sup> Convention on the Rights of the Child, 1989 GA Res 44/25 of 20 November 1989.

<sup>23</sup> African Charter on the Rights and Welfare of the Child, 1990 OAU Doc CAB/LEG/24.9/49.

<sup>24</sup> Art 19 CRC; art 16 African Children's Charter.

guarantee the child's right to life<sup>25</sup> and to be free from discrimination on grounds including sex.<sup>26</sup>

Although violence against women was mentioned at the Mexico, Copenhagen and Nairobi women's conferences,<sup>27</sup> it was not included in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).<sup>28</sup> The only provision that could be said to address violence against women directly is article 6 on trafficking and forced prostitution.<sup>29</sup> The CEDAW Committee has, through its general recommendations, done much to remedy the silences in CEDAW on the issue of violence against women.<sup>30</sup> General Recommendation No 19 seeks to provide a comprehensive understanding of issues pertaining to violence against women within CEDAW, providing:<sup>31</sup>

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.

General Recommendation No 19 makes the link between violence against women and existing human rights norms. The rights covered include protection from torture, the right to life, the right to equal protection under the law, the right to equality in the family, the right to health and also just and favourable conditions of work.<sup>32</sup> Building on the case of *Velasquez*,<sup>33</sup> the responsibility of the state to prevent, investigate, punish acts of violence and to compensate those affected

<sup>25</sup> Art 6 CRC; art 5(1) African Children's Charter.

<sup>26</sup> Art 2 CRC, art 3 African Children's Charter.

<sup>27</sup> H Charlesworth & C Chinkin 'Violence against women: A global issue' in J Stubbs (ed) *Women, male violence and the law* Institute of Criminology Monograph (1994) 13. It is worth noting that Nairobi did consider the issue in more detail than at previous conferences which had only touched on domestic violence.

<sup>28</sup> Convention on the Elimination of All Forms of Discrimination Against Women, 1979 1249 UNTS 13.

<sup>29</sup> However, see art 2(g) on states' obligation to 'repeal all national penal provisions which constitute discrimination against women', which arguably would include rape laws requiring the complainant to corroborate her testimony.

<sup>30</sup> Starting with General Recommendation No 12 on violence against women UN Doc A/44/38 (1990).

<sup>31</sup> General Recommendation No 19 para 6.

<sup>32</sup> n 31 above, para 7.

<sup>33</sup> *Velasquez Rodriguez v Honduras* 4 Inter Am Ct HR Ser C No 4 1988, reproduced in R Emerton *et al* (eds) *International women's rights cases* (2005) 91. See also the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, 9 June 1994 (1994) 33 *International Legal Materials* 960 (Convention of Belem do Para).

is included.<sup>34</sup> In addition to giving examples of some of the types of violence that are proscribed under various provisions in CEDAW, General Recommendation No 19 also considers the reasons (legal, cultural, socio-economic) behind the perpetuation of violence against women.<sup>35</sup> The recommendations offered reflect a holistic understanding of the causes and consequences of violence against women, providing as they do for states to undertake to strengthen institutions, provide training for judicial, law enforcement and other public officials, run education campaigns in the media, challenge attitudes and stereotypes that lead to the perpetuation of violence against women, provide counselling to the victims of violence and provide compensation to them.<sup>36</sup> States are also enjoined to report<sup>37</sup> on what they have done to meet the obligations envisaged by General Recommendation No 19,<sup>38</sup> and indeed they are examined on the issue by the Committee.<sup>39</sup>

It was at the 1993 human rights conference in Vienna that the issue of violence received detailed international scrutiny. This was because women from all over the world identified violence within their own societies as one of the key impediments to the enjoyment by women of their rights.<sup>40</sup> It was at Vienna that states agreed to the formulation of the document that became the United Nations Assembly Declaration on the Elimination of Violence Against Women, 1993<sup>41</sup> (DEVAW). In addition to highlighting the impact of intersectional discrimination on certain groups,<sup>42</sup> DEVAW closely mirrors CEDAW General Recommendation No 19 in recognising that women experience violence in the family, the community and at the hands of the state.<sup>43</sup> DEVAW envisages the adoption of a multi-agency approach to tackling violence against women. States are to provide resources for staff training

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<sup>34</sup> CEDAW General Recommendation No 19 para 9.

<sup>35</sup> n 34 above, paras 10-23.

<sup>36</sup> n 34 above, para 24.

<sup>37</sup> States are obliged to send the first post-ratification report a year after depositing instruments of ratification and thereafter every four years. See arts 18(1)(a) & (b) CEDAW.

<sup>38</sup> Although general recommendations are non-binding, it is worth noting that the Indian Supreme Court has adopted the provisions of CEDAW General Recommendation No 19 in its decision in the case of *Vishaka v State of Rajasthan* 1997 (6) SCC 241, in which it noted that sexual harassment was a manifestation of violence against women and urged the government of Rajasthan to adopt CEDAW General Recommendation No 19 in drawing up guidelines to deal with violence against women; V Chaudhuri 'Sexual harassment' (1998) (5) *Indian Journal of Gender Studies* 115.

<sup>39</sup> Engle Merry (n 3 above) 76.

<sup>40</sup> H Charlesworth & C Chinkin *The boundaries of international law* (2000) 12-14.

<sup>41</sup> Declaration on the Elimination of Violence against Women GA Res 48/104 of 20 December 1993.

<sup>42</sup> n 41 above, Preamble para 7.

<sup>43</sup> n 41 above, art 2. This is anticipated in CEDAW General Recommendation No 19 para 3.

as well as the provision of counselling services.<sup>44</sup> Moreover, there is recognition of the contributions that the non-government sector can make.<sup>45</sup> The UN is also enjoined to actively participate in the promotion and co-ordination of anti-violence strategies; as well as financing and facilitating international co-operation to tackle the issue.<sup>46</sup>

Once the international community had grasped the nettle, it pressed on, and in 1994, the UN appointed its first Special Rapporteur on Violence against Women, Radhika Coomaraswamy.<sup>47</sup> Reasons given for making the appointment included states' 'deep concern at the continuing endemic violence against women'.<sup>48</sup> Her findings on the causes and consequences of violence resonate with African women's experiences of violence. The UN Special Rapporteur on Violence against Women has produced a multitude of reports highlighting the fact that the issue affects women in the family,<sup>49</sup> in war situations,<sup>50</sup> and also that violence against women manifests itself in different ways the world over, hence her reports on cultural dimensions of violence<sup>51</sup> amongst many others. She has also made country visits and produced more than 20 reports.<sup>52</sup>

The appointment of the Special Rapporteur coincided with the International Conference on Population and Development (ICPD) held in Cairo in 1994. Cairo dealt with gendered dimensions of reproductive rights violations, including harmful traditional practices and the effects on women's health of violence and lack of access to adequate health care.<sup>53</sup> Focusing on issues of reproductive health, the Programme of Action made clear that violence against women hindered their right to health.<sup>54</sup> Specifically, issues such as forced abortion, sterilisation and

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<sup>44</sup> Art 4 DEVAW.

<sup>45</sup> Arts 4(e) & 5(h) DEVAW.

<sup>46</sup> Art 5 DEVAW.

<sup>47</sup> United Nations Commission on Human Rights Resolution 1994/45 on the question of integrating the rights of women into human rights mechanisms of the UN and the elimination of violence against women, adopted on 4 March 1994.

<sup>48</sup> As above.

<sup>49</sup> Special Rapporteur on Violence Against Women in the Family E/CN 4/1996/53 and E/CN 4/1999/68.

<sup>50</sup> Special Rapporteur on Violence Against Women Violence against women perpetrated or condoned by the state during times of armed conflict (1997-2000) E/CN 4/2001/73.

<sup>51</sup> Special Rapporteur on Violence Against Women Cultural practices in the family that are violence towards women E/CN 4/2002/83.

<sup>52</sup> See <http://www2.ohchr.org/english/issues/women/rapporteur/visits.htm> (accessed 31 January 2008).

<sup>53</sup> See also World Health Organisation (WHO) *World Report on Violence and Health* (2002).

<sup>54</sup> ICPD 1994 Principle 4.



harmful practices were identified as constituting a violation of women and children's rights.<sup>55</sup>

The gains made at Vienna and Cairo were reinforced in the Beijing Declaration and Platform for Action of 1995.<sup>56</sup> Violence against women was identified as one of the 12 critical areas of concern.<sup>57</sup> At Beijing it was recognised that women's lives were continuing to be blighted by violence. States were enjoined to act to prevent violence against women within their societies.<sup>58</sup> Again the different manifestations of violence were identified and it was reiterated that violence against women constituted a violation of their fundamental rights.<sup>59</sup> Interestingly, the Beijing+5 Outcome Document shows that much progress has been made in the global recognition of violence against women as violating their human rights.<sup>60</sup>

The coming into force of the Optional Protocol to CEDAW, 1999,<sup>61</sup> provided an avenue for individuals to bring individual complaints alleging a breach of CEDAW provisions to the Committee. For those states not opting out, it also provided for the Committee to invoke article 8, the inquiry procedure, to investigate reports of grave or systematic violations of rights. It is worth noting that one of the first cases dealt with by the Committee under the complaints provisions of the Optional Protocol to CEDAW relates to violence against women in the family.

In *AT v Hungary*,<sup>62</sup> a woman had been severely assaulted by her partner on many occasions. She had complained to the police and the courts. However, little concrete assistance had come of her many complaints. A complaint was made to the CEDAW Committee. The Committee decided that Hungary had violated articles 2(a), (b) and (e) as well as articles 5(a) and 16 of CEDAW. The Committee censured Hungary for not having provision in its law for restraining or protection orders. Moreover, it was censured for the absence of shelters to house Ms AT and her children. The existing shelters had failed to offer refuge to Ms AT because one of her children was disabled and the refuges could not cope with children with disabilities. The prioritisation by the civil courts of the abuser's

<sup>55</sup> A Carbert *et al* *A handbook for advocacy in the African human rights system Advancing reproductive and sexual health* (2002).

<sup>56</sup> Beijing Declaration and Platform for Action para 112.

<sup>57</sup> n 56 above, para 44.

<sup>58</sup> n 56 above, Strategic Objective D1.

<sup>59</sup> n 56 above, Strategic Objective D2.

<sup>60</sup> Beijing + 5 Outcome Document Reproduced in United Nations *Beijing to Beijing + 5: Review and appraisal of the implementation of the Beijing Platform for Action* (2001) 195. See section D para 13. However, para 14 identifies some of the obstacles that remain to be overcome.

<sup>61</sup> Optional Protocol to the Convention on the Elimination of all Forms of Discrimination Against Women, 1999 GA Res 54/4, 6 October 1999. B Sokhi-Bulley 'The Optional Protocol to CEDAW: First steps' (2006) 6 *Human Rights Law Review* 143.

<sup>62</sup> *AT v Hungary* Communication 2/2003, views adopted on 26 January 2005, 32nd session.



property rights over the victim's right to be protected from violence came under criticism.<sup>63</sup> Echoing the recommendations found in its General Recommendation No 19 on Violence Against Women and DEVAW, the Committee made clear that to address the failings identified in the *AT* case would require the state to undertake a range of measures which included providing legal aid, giving Ms AT and her children a safe and secure home, ensuring that she received the requisite child support, as well as compensation for the harm that she had suffered. In addition to implementing a national policy on the prevention of violence within the family, officials, including judges and the police, should be given training on CEDAW and its Optional Protocol. Moreover, the state was to ensure the introduction of a specific law outlawing violence against women and to 'investigate promptly, thoroughly, impartially and seriously all allegations of domestic violence and bring the offenders to justice in accordance with international standards'.<sup>64</sup>

The first inquiry undertaken by the CEDAW Committee was to Mexico to investigate reports of abduction, rape and murder of women, made by two non-governmental organisations (NGOs).<sup>65</sup> The NGOs alleged that more than 230 women had been killed near Ciudad Juarez and that little had been done to investigate their deaths and disappearances or indeed to bring the perpetrators to justice. Families of the victims had been kept in the dark. The Committee sent two of its members to investigate. In a long and comprehensive report, the Committee detailed the widespread violence against women and the fact that a culture of impunity appeared to have developed. The Committee produced a comprehensive list of recommendations for Mexico to implement. These included the timely investigation of crimes committed against women, the training of police and judges, ensuring that families were kept apprised of progress in investigations and that the law was enforced with punishments being meted out to the guilty and adequate remedies, including compensation for those who had experienced violations of their rights. The state was asked to report on progress in its next report under article 18 of CEDAW.

More recently, the UN has (re)turned its attention to specific forms of violence.<sup>66</sup> This can be seen by the adoption of the Palermo

<sup>63</sup> Compare the South African case of *S v Baloyi* 2000 2 SA 425 which dealt, amongst other things, with the tension between an accused person's right under criminal law to be presumed innocent until conviction (proof beyond all reasonable doubt) and the right of a woman alleging violence to have an interdict preventing the continuation of violence granted to her under civil law (proof on a balance of probabilities).

<sup>64</sup> *AT v Hungary* (n 62 above) paras II(v) & 11(vi).

<sup>65</sup> CEDAW Committee 'Report on Mexico Produced by the Committee on the Elimination of all Forms of Discrimination Against Women under article 8 of the Optional Protocol to the Convention and Reply from the Government of Mexico' UN Doc CEDAW/C/2005/OP.8/MEXICO, 27 January 2005.

<sup>66</sup> Beijing Declaration and Platform for Action Strategic Objective D3 (on trafficking and prostitution).

Protocol,<sup>67</sup> prohibiting the trafficking of women and also providing for inter-state co-operation and the punishment of traffickers.<sup>68</sup>

Not to be outdone, regional and sub-regional bodies have also paid attention to the effects of violence on the ability of women to enjoy their rights. The next section looks at some of these initiatives.

### 3 Regional initiatives on violence against women

In line with the international bill of rights, the African Charter has provisions proscribing torture<sup>69</sup> and guaranteeing the right to life,<sup>70</sup> to health<sup>71</sup> and outlawing discrimination including that based on sex.<sup>72</sup> Article 18(3) of the African Charter provides, in part, that women are to be protected from 'every discrimination'. More recently the African Union (AU) has adopted the Solemn Declaration on Gender Equality in Africa which makes it clear that violence and abuse of girls and women, particularly in times of armed conflict, is proscribed.<sup>73</sup>

Sub-regionally, the SADC has an instrument specifically on violence against women.<sup>74</sup> This, the Addendum to the 1997 Declaration on Gender and Development, forms the basis of the provisions on violence against women found in the African Women's Protocol and thus deserves close attention.

### 4 The Southern African Development Community

Coming as it did after the Beijing Conference of 1995, the SADC Addendum on violence reflects many of the international initiatives on violence against women discussed above. The Preamble to the SADC Addendum notes that there has been an increase in violence against

<sup>67</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime, 2000 UN Doc GA Res 55/383, 15 November 2000.

<sup>68</sup> UNHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking, 2002 UN Doc E/2002/68/Add 1.

<sup>69</sup> Art 5 African Charter.

<sup>70</sup> Art 4 African Charter.

<sup>71</sup> Art 16 African Charter.

<sup>72</sup> Art 2 African Charter.

<sup>73</sup> Solemn Declaration on Gender Equality in Africa, Assembly/AU/Decl 12 & 13 (III), Assembly of Heads of State and Government 3rd ordinary session 6-8 July 2004, Addis Ababa.

<sup>74</sup> Addendum (n 17 above). The Economic Community of West African States (ECOWAS) has a Declaration on the Fight against Trafficking in Persons, A/DC/12/12/01 25th ordinary session of the Authority of Heads of State and Government, Dakar, 20-21 December 2001. See also *Annexe a la Recommendation 03/99/CM/UEMOA. Plan d'action communautaire pour le renforcement du role de la femme dans l'UEMOA, 1.1 Santé*, [http://www.uemoa.int/actes/dec99/anex1\\_REC\\_03\\_99.htm](http://www.uemoa.int/actes/dec99/anex1_REC_03_99.htm) (accessed 30 April 2008).

women,<sup>75</sup> and article 3 notes that the occurrence of violence against women and children is a reflection of 'unequal power relations between women and men', resulting in women experiencing domination and discrimination.<sup>76</sup> Having identified the main cause of the problem, the definition given of what constitutes violence is very broad and covers 'physical and sexual violence, as well as economic, psychological and emotional abuse'.<sup>77</sup> The addition of economic violence constitutes an advance on previous documents which have focused on physical, sexual and psychological violence. However, in keeping with DEVAW and, indeed, the Convention of Belem do Para, the Addendum locates violence in the family, community and also violence committed or condoned by agents of the state.<sup>78</sup> The examples of types of violence given are also varied and include femicide, sexual harassment and trafficking.<sup>79</sup>

Noting that existing measures have failed to protect women and children from violence, the Addendum divides its recommendations for remedying that situation into categories covering not only legal change, but also cultural change. It places on states the duty of providing the resources necessary to tackle the problem.<sup>80</sup>

Under the legal section it is anticipated that states will enact laws proscribing violence against women and will amend those that contain discriminatory provisions which either excuse or minimise violence against them. In keeping with these injunctions, some of the SADC states have introduced legislation proscribing violence against women.<sup>81</sup> Judicial intervention has also brought about changes not least in the area of sexual violence against women. The Zimbabwean case of *H v H*<sup>82</sup> made it clear that the concept of marital rape was recognised in Zimbabwean law, challenging the long-held legal and socio-cultural assumption that upon her marriage a woman is presumed to give consent to intercourse with her husband for the duration of the marriage.<sup>83</sup>

The section on social, economic, cultural and political changes enjoins states to 'introduce and support gender sensitisation and

<sup>75</sup> See also 'Gender and development: A declaration of the Southern African Development Community, 1997' reproduced in (1999) 1 *SADC Gender Monitor* 34, art H(ix).

<sup>76</sup> See also Engle Merry (n 3 above) 77.

<sup>77</sup> Addendum to the SADC Declaration art 5.

<sup>78</sup> n 77 above, arts 5(a)-(c).

<sup>79</sup> As above.

<sup>80</sup> CEDAW General Recommendation No 12.

<sup>81</sup> Namibia Combating of Rape Act 8 of 2000, Combating of Domestic Violence Act 4 of 2003. However, little seems to have been done by the government by way of educating the population about the existence of the 2003 statute. See *Namibia Economist* 'Combating of Domestic Violence Act enforced' <http://www.economist.com.na/2004/6aug/08-06-18.htm>; South Africa Domestic Violence Act 116 of 1998.

<sup>82</sup> *H v H* 1999 (2) ZLR 358.

<sup>83</sup> See also Namibia Combating of Rape Act 2000 (n 81 above), sec 2(3).

public awareness programmes<sup>84</sup> as well as encouraging the media to avoid stereotyping women.<sup>85</sup> Related to this is that states undertake to eradicate those elements of traditional practice and norms that lead to the perpetuation of violence against women.<sup>86</sup> It is important that the Addendum recognises that not all aspects of tradition and religious practice are harmful or prejudicial to women. This opens up the possibility of working with or through religion and 'culture' or tradition to tackle discriminatory practices which are used to justify or which exacerbate violence against women.

The SADC Addendum echoes article 5 of DEVAW in that it anticipates the adoption of policies, programmes and mechanisms within the region to monitor violence against women and to ensure that the Addendum's recommendations are followed.<sup>87</sup> Although it has yet to come to pass, the Addendum urges states to give 'urgent consideration ... to the adoption of legally binding SADC Instruments on Preventing Violence against Women and Children'.<sup>88</sup> Perhaps it is because of this as yet unfulfilled promise that the SADC states were so influential in the drafting of the violence provisions in the African Women's Protocol. It is to this that the article now turns.

## 5 The African Women's Protocol

### 5.1 Provisions on violence in the final version of the African Women's Protocol

The significance of violence against women is highlighted in the Preamble which expresses concern that, despite the ratification by states of the African Charter and other human rights instruments, 'women in Africa still continue to be victims of discrimination and harmful practices'. Article 1 of the Women's Protocol defines violence against women as including:

[a]ll 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 conflict or of war.

The definition builds on those found in existing instruments, not least DEVAW and the SADC Addendum. In common with CEDAW General Recommendation No 19, the Women's Protocol reflects an understanding of gender (social and cultural construction of the roles of men and

<sup>84</sup> n 77 above, art 14. See also art 20 on the training of officials and service providers.

<sup>85</sup> n 77 above, art 15.

<sup>86</sup> n 77 above, art 13.

<sup>87</sup> n 77 above, art 25.

<sup>88</sup> n 77 above, art 26.

women in society) and how it impacts upon justifications often given for violence against women, and also the reasons why it is sometimes difficult to change behaviour.<sup>89</sup> This is clearly seen in article 2 which, like CEDAW, lists some of the state's obligations in seeking to eliminate discrimination against women and includes the duty to modify<sup>90</sup>

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.

It is significant that violence against women is recognised as an affront to their dignity, hence the injunction in article 3 that states have a duty to 'ensure the protection of every woman's right to respect for her dignity',<sup>91</sup> which includes the 'protection of women from all forms of violence, particularly sexual and verbal violence'.<sup>92</sup>

Although provisions on violence against women are found throughout the African Women's Protocol, they are concentrated in article 4 entitled 'right to life, integrity and security of the person'. Article 4(1) starts by reiterating the core human rights to life and to be free from degrading, inhuman punishment and treatment, while article 4(2) contains an exhaustive list of state obligations. These reflect those found in the instruments discussed in part one of this article and include the state's duty both to enact and also to enforce laws prohibiting all forms of violence against women.<sup>93</sup> Crucially, it is provided that violence is proscribed 'whether the violence takes place in private or public'. This suggests that forced sex, including that occurring between spouses, is proscribed, thus by implication requiring ratifying states that have not already done so to introduce the crime of marital rape into their national laws. Although those against recognising marital rape often argue that it is difficult for law to regulate the privacy of the marital unit,<sup>94</sup> it is hoped that states will ensure that those women who approach law enforcement agencies for assistance will receive help and support, not derision and condemnation.

Moreover, it needs to be emphasised that all forced sex is prohibited. The 'moral character' of the victim or indeed what she was wearing or where she was when she was raped or sexually abused should not

<sup>89</sup> CEDAW General Recommendation No 19 para 11.

<sup>90</sup> Art 2(2) African Women's Protocol. See also arts 4(2)(d), (f) & 5(a). See also CEDAW General Recommendation No 19 para 11.

<sup>91</sup> Art 3(4) African Women's Protocol.

<sup>92</sup> As above.

<sup>93</sup> Art 4(2)(a) African Women's Protocol.

<sup>94</sup> See discussion in F Banda *Women, law and human rights: An African perspective* (2005) 172-176.

be a consideration in deciding whether to prosecute an accused.<sup>95</sup> Procedural laws may need to be changed and states should consider the introduction of evidence from professionals acting as expert witnesses and testifying on the different effects of rape on women. Furthermore, it is worth noting that the understanding of rape should not be limited to stranger rape, thus ignoring what is sometimes termed 'date rape'. States should ensure that their definitions of rape do not discriminate against a victim who has not 'actively resisted' the rape or on stereotypical views of what constitutes an adequate or 'proper' response to rape, for as noted in the European case of *MC v Bulgaria*:<sup>96</sup>

Any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual's sexual autonomy. In accordance with contemporary standards and trends in that area, the member states' positive obligations under articles 3 and 8 of the Convention must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim.

The African Women's Protocol recognises that key to the enjoyment of rights is the need for an adequate infrastructure to deal with claims of violence. The first requirement therefore is that violence is recognised as a violation of human rights. Next, it requires that there be adequate administrative, social and economic measures to prevent, punish and eradicate all forms of violence against women.<sup>97</sup> Moreover, the state needs to punish perpetrators of violence and also provide rehabilitation to victims<sup>98</sup> and facilitate the provision of reparations if necessary.<sup>99</sup> Recognising the need for a multi-pronged approach, the Women's Protocol provides in article 8 for the state to provide access to justice by providing legal aid and training judges and providing information. The duty of the state to provide adequate remedies is reinforced in article 25 of the Women's Protocol.

The recommendations made in both the *Fernandez* and *AT* cases offer clear pointers to African states about what they will need to do to ensure that the African Women's Protocol provisions proscribing

<sup>95</sup> International Conference on the Great Lakes Region Protocol on the Prevention and Suppression of Sexual Violence against Women and Children, 30 November 2006 [http://www.icglr.org/common/docs/docs\\_repository/protsexualviolence.pdf](http://www.icglr.org/common/docs/docs_repository/protsexualviolence.pdf) (accessed 31 January 2008).

<sup>96</sup> *MC v Bulgaria* ECHR (Application 39272/98) Judgment, Strasbourg, 4 December 2003, para 166.

<sup>97</sup> Art 4(2)(b) African Women's Protocol.

<sup>98</sup> Art 4(2)(e) African Women's Protocol.

<sup>99</sup> Art 4(2)(f) African Women's Protocol.

violence against women are enforced.<sup>100</sup> The problem of violence against women requires that states go beyond the legal to take on responsibility for the provision of alternative housing, the guarantee of support to victims and their children as well as effective sanctions and compensation being offered. This requires adequate resource and budgetary provision.<sup>101</sup> For a continent strapped for resources, this constitutes a tall order. It may require a 'joined up' reading and interpretation of the African Women's Protocol so that the provisions on the state minimising defence spending in order to spend more on social development<sup>102</sup> can be used to prioritise spending on health, education and initiatives to tackle violence against women, thus moving resources from a negative form of violence (war) to violence prevention in the family and community.

Specific types of violence covered in the African Women's Protocol will now be considered.

## 5.2 Trafficking

Reflecting the renewed interest in trafficking<sup>103</sup> is article 4(2)(g), which requires the state to prevent and condemn the practice while prosecuting those involved in trafficking and offering assistance and protection to those most at risk. Although often associated with the sex trade, much of the trafficking that takes place in parts of Africa, especially West Africa, is linked to trafficking of children for labour.<sup>104</sup> Girl children are trafficked for domestic service.<sup>105</sup> In addition to being a violation of children's rights, the trafficking issue may also highlight the problem of domestic and other migrant workers in general and thus the need for African states to ratify the Migrant Workers Convention, 1990.<sup>106</sup> Although there are protocols on how to deal with trafficked people, much can be learnt from the ECOWAS Declaration on Trafficking, 2001, which anticipates inter-state co-operation to tackle the practice, includ-

<sup>100</sup> South African courts have set an admirable precedent in dealing with cases of gender-based violence. See *S v Baloyi (Minister of Justice & Another Intervening)* 2000 2 SA 425 (CC); 2000 1 BCLR 86 (CC); *Carmichele v Minister of Safety & Another (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC); *Omar v Government of the Republic of South Africa & Others* CCT 47/04; *Kern v Minister of Safety and Security* CCT 52/04.

<sup>101</sup> Art 4(2)(i) African Women's Protocol.

<sup>102</sup> Art 10(3) African Women's Protocol.

<sup>103</sup> See eg R Masika *Gender, trafficking and slavery* (2002).

<sup>104</sup> Compare art 13(g) African Women's Protocol.

<sup>105</sup> Human Rights Watch *Borderline slavery: Child trafficking in Togo* (2003); 'Nigeria: Domestic workers or modern day slaves?' <http://www.pambazuka.org/en/category/wgender/37175> (accessed 18 September 2006).

<sup>106</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families GA Res 45/158 of 18 December 1990. See Chinkin *et al* (n 7 above) 30-31; B Ehrenreich & A Hochschild *Global woman: Nannies, maids and sex workers in the new economy* (2003).



ing the setting up of specialist trafficking units, as well as education, together with punishment of the traffickers. It is worth noting that measures should also include the provision of counselling and support services for the victims of trafficking. The victims of trafficking should not be prosecuted or punished for immigration control violations because they did not enter the country voluntarily but under duress.<sup>107</sup>

### 5.3 Harmful practices

It is true to say that harmful practices receive the most attention in the African Women's Protocol.<sup>108</sup> They are defined thus:<sup>109</sup>

'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.

Interestingly, this definition identifies many of the consequences of violence listed in CEDAW General Recommendation No 19.<sup>110</sup> Article 5 of the Women's Protocol focuses on the elimination of harmful practices, noting that states have an obligation to take all 'necessary legislative and other measures to eliminate such practices'.<sup>111</sup> This is an area in which African states have already acted, with many having enacted legislation to prevent harmful practices such as female genital cutting (FGC).<sup>112</sup> The question becomes, is law by itself enough? Indeed, is law an effective tool to deal with what is a cultural practice?<sup>113</sup> Much time and thought has gone into addressing these questions, with the result that the common consensus is that states should adopt a multi-pronged approach which uses law as well as education as a preventative measure and rehabilitation for those affected. These should be provided by the state.<sup>114</sup>

Article 5 requires states not only to outlaw harmful practices, but also to educate the public about the practice, to set up outreach programmes, to rehabilitate victims and to protect women and girls at risk

<sup>107</sup> UNHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking, 2002, UN Doc E/2002/68/Add 1.

<sup>108</sup> See Preamble, arts 2(1)(b) & 2(2) African Women's Protocol.

<sup>109</sup> Preamble, art 1(g) African Women's Protocol.

<sup>110</sup> CEDAW General Recommendation No 19 para 11.

<sup>111</sup> Art 5 African Women's Protocol.

<sup>112</sup> The term 'female genital mutilation' is used in the Protocol. A Rahman & N Toubia *Female genital mutilation: A guide to laws and practices* (2000); Centre for Reproductive Rights *Female genital mutilation: A matter of human rights* (2003). See also Cairo Declaration for the Elimination of Female Genital Mutilation, 2003 <http://www.stopfgm.org/stopfgm.doc/EN/216.rtf> (accessed 31 January 2008).

<sup>113</sup> C Momoh 'FGM and issues of gender and human rights of women' in C Momoh (ed) *Female genital mutilation* (2005) 13.

<sup>114</sup> CEDAW General Recommendation No 14 on Female Circumcision, UN Doc A/45/38 (1990); CEDAW General Recommendation No 19 on Violence against Women; CEDAW General Recommendation No 24 on Health, UN Doc A/54/38 (2003). See also art 24(3) CRC and art 21(1)(b) African Children's Charter.

of being subjected to said practices. Significantly, the Women's Protocol provides that it does not matter if female genital cutting is taking place within a medical establishment; the state still has an obligation to eradicate it. This is an important innovation as it deals with the argument that female genital cutting is only a problem if performed under unsafe or unsanitary conditions. The drafting in article 5 highlights the fact that the practice falls squarely within the parameters of gender-based violence and cannot be tolerated whatever the surroundings in which it is perpetrated.

Given that harmful practices, especially FGC and early marriage, affect young girls disproportionately, it will be important for state parties to take measures to mitigate the vulnerability and powerlessness of young girls which leaves them open to being cut. This may include educating teachers to alert officials, mediators and educators to talk to family and community members about why these practices are harmful. It may also entail the provision of psychological counselling and medical assistance to those who are already affected.<sup>115</sup>

#### 5.4 Family

It is in the home and within the confines of the family that women are most likely to experience violence against them.<sup>116</sup> The effects of violence against women in the family are manifold. The economic vulnerability of women and children is compounded by their lack of voice and general powerlessness which leaves them open to experiencing abuse and the violation of their rights.<sup>117</sup> It is for this reason that violence needs to be taken seriously.<sup>118</sup> This will require states to train law officials to deal sensitively with victims of violence. It will also require states to put into place measures to deal with cases of violence against women which will need to include protection orders or interdicts prohibiting the violator from approaching or violating the woman again, fast-tracking legal services, instituting interim measures to ensure that violence ceases while a full hearing is organised, counselling and rehabilitation services, refuges if necessary and if appropriate, as well as providing financial support for the woman and any children that she might have.

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<sup>115</sup> United Nations General Assembly Traditional or Customary Practices Affecting the Health of Women and Girls, Report of the Secretary-General A/58/169, 18 July 2003.

<sup>116</sup> L Mcloskey *et al* 'Gender inequality and intimate partner violence among women in Moshi, Tanzania' (2005) 31 *International Family Planning Perspectives* 124.

<sup>117</sup> See eg Sachs J in *S v Baloyi* 2000 2 SA 425 paras 11 & 12. See also CEDAW General Recommendation No 19 para 23.

<sup>118</sup> CEDAW General Recommendation No 21 para 40.

Polygyny has been held up as constituting violence (emotional and psychological) against women.<sup>119</sup> The polygyny issue is somewhat tricky, for it has been argued that women's economic weakness makes marriage which may entail polygyny a necessary 'evil'.<sup>120</sup> On the other side of the fence are those who argue that polygyny increases the likelihood of women (and sometimes their children) experiencing economic, psychological and physical violence.<sup>121</sup> The final version of the African Women's Protocol does not commit to either side providing, as it does, that: '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'.<sup>122</sup>

Other forms of family-related violence outlawed in the African Women's Protocol include early marriage and forced marriage.<sup>123</sup> Also proscribed is the practice of subjecting widows to degrading and inhuman treatment on the deaths of their husbands.<sup>124</sup> The abuse of widows is well documented.<sup>125</sup> Also proscribed in the Women's Protocol is property-grabbing, which often leads to wives and female children being deprived of their property and indeed being evicted from their homes.<sup>126</sup> Moreover, it is also provided that widows have the right to remarry if they wish and also that they should be allowed to choose who they marry.<sup>127</sup> This is an important provision which outlaws, by implication, levirate unions, sometimes known as 'inheritance marriages' and, indeed, any forced marriage. In light of the HIV/AIDS crisis on the continent, I would argue that a widow's right to choose who she remarries should be linked to article 14(1)(e) on a woman's right to be informed '... 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'.<sup>128</sup>

<sup>119</sup> L Tibatemwa-Ekirikubinza 'Family relations and the law in Uganda: Insights into current issues?' in A Bainham (ed) *International survey of family law 2002* (2002) 437.

<sup>120</sup> F Kaganas & C Murray 'Law, women and the family in the new South Africa' (1991) *Acta Juridica* 116.

<sup>121</sup> W Wabwile *Child support rights in Kenya and the United Nations* (2001) 267 fn 2.

<sup>122</sup> Art 6(c) African Women's Protocol.

<sup>123</sup> Arts 6(a) & (b) African Women's Protocol.

<sup>124</sup> Art 20(a) African Women's Protocol.

<sup>125</sup> U Ewelukwa 'Post-colonialism, gender, customary injustice: Widows in African societies' (2002) 24 *Human Rights Quarterly* 424. There are other 'traditions' which constitute degrading treatment. See also the Nigerian case of *Muojekwo & Others v Ejikeme & Others* [2000] 5 NWLR 402.

<sup>126</sup> M Owen *A world of widows* (1996).

<sup>127</sup> Art 20(c) African Women's Protocol.

<sup>128</sup> See also E Durojaye 'Advancing gender equity in access to HIV treatment through the Protocol on the Rights of Women in Africa' (2006) 6 *African Human Rights Law Journal* 188.

### 5.5 The right to bodily integrity and violence against women

Given the sensitivities surrounding reproductive rights,<sup>129</sup> it is perhaps not surprising that article 14 on reproductive rights, and especially the limited right to abortion found in article 14(2)(c) has met with many objections.<sup>130</sup> While abortion is probably the most controversial issue in reproductive health, it is worth remembering that banning or denying women the right to abortion may lead to their having to seek the services of untrained people who may cause much physical and ultimately psychological damage by their incompetence. It is also worth remembering that abortion is a sex-specific service, meaning that inadequate or poor provision impacts solely on women to their detriment.

### 5.6 Violence against women and children in the work place and in school

Recognising that girl children are sometimes sexually harassed and indeed abused in schools is article 12(1)(c), which provides that states have a duty to 'protect ... the girl child from all forms of abuse, including sexual harassment in schools and other educational institutions'. The confronting of this issue, which acts as a major barrier to the enjoyment by female children of their right to education, is important.<sup>131</sup> Research done in South Africa yielded the following data:<sup>132</sup>

Our results show that younger women were significantly more likely to report rape than older women. The largest group of perpetrators (33%) were school teachers. Our findings suggest that child rape is becoming more common, and lend support to qualitative research of sexual harassment of female students in schools in Africa.

Tackling the problem will require states to take action against teachers and others in authority who abuse their position by forcing themselves on their pupils.<sup>133</sup> Equally important is the injunction that states are under an obligation to provide counselling and rehabilitation services to victims of abuse and sexual harassment.<sup>134</sup> This should include the provision of (alternative) educational opportunities for those forced to leave school prematurely as a result of pregnancy or harassment or abuse.<sup>135</sup>

Although African women have a low rate of participation in the formal labour market, those that do work outside the home are sometimes

<sup>129</sup> See eg Centre for Reproductive Rights *ICPD + 5 gains for women despite opposition* (2000).

<sup>130</sup> Banda (n 94 above) 186.

<sup>131</sup> See eg the South African report to CEDAW Initial Report of States Parties: South Africa (1998) CEDAW/C/ZAF/1 119; World Bank *Education and HIV/AIDS: A window of hope* (2002) 22 23.

<sup>132</sup> R Jewkes *et al* 'Rape of girls in South Africa' (2002) 359 *The Lancet* 319.

<sup>133</sup> Provided for in art 12(1)(c).

<sup>134</sup> Art 12(1)(d) African Women's Protocol.

<sup>135</sup> Art 12(2)(c) African Women's Protocol. See also art 10(f) CEDAW.

subjected to unwanted sexual advances. This constitutes harassment and is prohibited behaviour under the African Women's Protocol.<sup>136</sup> However, few states have laws explicitly proscribing sexual harassment in the workplace. The enactment of legislation will have to go hand in hand with workplace education tied up with enforcement to ensure that the message is received that sexual and other forms of harassment in the work place constitute a form of violence against women.<sup>137</sup>

Interestingly, article 13 on economic, social and cultural rights also requires states to 'take effective legislative and administrative measures to prevent the exploitation and misuse of women in advertising practices'.<sup>138</sup> This is an important innovation which addresses a long-standing feminist *bête noire*, namely the sexist portrayal of women in the media and in advertising which constitutes stereotyping of women.<sup>139</sup> This moves the debate on from seeing it as an issue of free speech to declaring it a form of gender-based violence grounded in women's inequality.

### 5.7 Women in armed conflict

Although there have been many critiques of the inadequacy of international humanitarian law to deal with violations perpetrated against women in armed conflict,<sup>140</sup> this is the area in which case law has grown exponentially.<sup>141</sup> With this in mind, the African Women's Protocol has a specific article on the protection of women in armed conflict.<sup>142</sup> It requires state parties to undertake to abide by the rules of international humanitarian law, particularly as they pertain to women.<sup>143</sup>

Building on the International Criminal Tribunal for Rwanda (ICTR) Statute,<sup>144</sup> the International Criminal Tribunal for Yugoslavia, (ICTY)

<sup>136</sup> Art 13(c) African Women's Protocol. The Indian Supreme Court has ruled that sexual harassment constitutes a violation of the right to equality and also the right to life because a woman who is harassed may not be able to continue to work to earn a livelihood. *Apparel Export Promotion Council v Chopra* 1999 (1) SCC 759.

<sup>137</sup> CEDAW General Recommendation No 19 para 18.

<sup>138</sup> Art 13(m) African Women's Protocol.

<sup>139</sup> See CEDAW Reporting Guidelines in United Nations, IWRAP, Commonwealth Secretariat *Assessing the status of women: A guide to reporting under the Convention on the Elimination of All Forms of Discrimination Against Women* (2000). See questions to art 5, questions 5 and 21.

<sup>140</sup> C de Than 'Violence against women in war time' in Smith & Van den Anker (n 3 above) 360-362. See also J Gardham & H Charlesworth 'Protection of women in armed conflict' (2000) 22 *Human Rights Quarterly* 148.

<sup>141</sup> Human Rights Watch *Genocide, war crimes, and crimes against humanity: Topical digest of the case law of the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia* (2004). Chinkin *et al* (n 7 above) 23; Emerton *et al* (n 33 above) xlii. However, see V Nikolic-Ristanovic 'Sexual violence, international law and restorative justice' in Buss & Manji (n 7 above) 273.

<sup>142</sup> Art 11 African Women's Protocol.

<sup>143</sup> N Dyani 'Protocol on the Rights of Women in Africa: Protection of women from sexual violence during armed conflict' (2006) 6 *African Human Rights Law Journal* 166.

<sup>144</sup> Arts 3 & 4 ICTR Statute.

Statute<sup>145</sup> and the Rome Statute,<sup>146</sup> all of which include rape as a crime against humanity, as well as the *Akayesu* decision,<sup>147</sup> in which the ICTR found that rape could constitute genocide, the African Women's Protocol makes it clear that:<sup>148</sup>

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.

The high incidence of rape and sexual violence against women in refugee camps and in times of war<sup>149</sup> on the continent indicates that states in conflict or with a refugee population in their midst will have to make tackling violence against women a priority. This is especially so when young girls are involved. The requirement in article 11(4) that children under 18 should not be recruited into combat is particularly important for female children, who are often treated as sex slaves or who become the 'wives' of soldiers or commanders, cooking for them and being forced into sexual relationships with the attendant risks of disease and pregnancy.<sup>150</sup>

Again, it is important to stress that states need to ensure that there are gender sensitive procedural guidelines in place. There is much to be learned from the work of the international tribunals, of whose work De Than notes:<sup>151</sup>

One strength of ICTY, ICTR and now the ICC has been the extent to which their rules of procedure and evidence in the context of sexual violence cases far outstrip those of most domestic legal systems, including victim anonymity, limitations on consent defences and victims and witness units. Many of the factors that result in the extraordinarily high acquittal rate in national courts are deemed to be simply irrelevant or inadmissible, such as spurious consent defences and cross-examination of the victim as to her previous sexual experiences.

The importance of women's participation in decision making and in the post-conflict reconstruction of their societies is acknowledged in

<sup>145</sup> Art 5 ICTY Statute.

<sup>146</sup> Rome Statute for the International Criminal Court, 1998 UN Doc A/CONF 183/9 (17 July 1998) arts 7 & 8.

<sup>147</sup> *In the Case of Akayesu* ICTR-96-4-T.

<sup>148</sup> Art 11(3) African Women's Protocol.

<sup>149</sup> Human Rights Watch 'Struggling to survive: Barriers to justice for rape victims in Rwanda' (2004) 16 *Human Rights Watch*; Human Rights Watch 'Seeking justice: The prosecution of sexual violence in the Congo war' (2005) 17 *Human Rights Watch*.

<sup>150</sup> Optional Protocol to the Children's Rights Convention on the Involvement of Children in Armed Conflict GA Res A/RES/54/263 of 25 May 2000; art 38 CRC. See also art 22 of the African Children's Charter; Amnesty International 'Sierra Leone: Childhood a casualty of conflict' AI Index AFR 5/069/2000; Children and Armed Conflict, Report of the Secretary-General, 10 November 2003 UN Doc A/58/546-S/2003/1053. See also 'Coalition to stop the use of child soldiers' <http://www.child-soldiers.org> (accessed 31 January 2008).

<sup>151</sup> De Than (n 140 above) 362. See also Great Lakes Protocol (n 95 above).

the Preamble, which refers to Security Council Resolution 1325 as well as in article 10(2).<sup>152</sup>

### 5.8 Violence and intersectionality

The African Women's Protocol is alive to the fact that some women may experience multiple and intersecting forms of discrimination.<sup>153</sup> In outlawing violence against the elderly,<sup>154</sup> disabled women<sup>155</sup> and women in distress,<sup>156</sup> the Women's Protocol is reminiscent of both the Preamble to DEVAW and article 9 of the Convention of Belem do Para, which provides:

With respect to the adoption of the measures in this Chapter, the States Parties shall take special account of the vulnerability of women to violence by reason of, among others, their race or ethnic background or their status as migrants, refugees or displaced persons. Similar consideration shall be given to women subjected to violence while pregnant or who are disabled, of minor age, elderly, socio-economically disadvantaged, affected by armed conflict or deprived of their freedom.

It is positive that the African Women's Protocol recognises the fact that women are not a homogeneous group. By making separate provision for the three groups, generally classified as 'vulnerable', there is a recognition that women have different needs.

## 6 Conclusion

It is clear from the above general overview of the development of the prohibition of violence against women that the issue of violence against women has been recognised as important and worth normative attention the world over. The African Women's Protocol reflects many of the international gains made in the field of women's rights, and in particular issues pertaining to violence, and is to be welcomed. All that remains is for it to be enforced.

<sup>152</sup> Security Council Resolution 1325 on Women, Peace and Security (31 October 2000). See Message of the Secretary-General of the United Nations on International Women's Day 8 March 2006 <http://www.un.org/events/women/iwd/2006/message.html> (accessed 31 January 2008). See also Report of the Secretary-General on Equal Participation of Women and Men in Decision-Making Processes at All Levels, December 2005 E/CN.6/2006/13.

<sup>153</sup> See also Committee on the Elimination of Racial Discrimination General Comment No 25 on Gender-Related Dimensions of Racial Discrimination (20 March 2000) UN Doc A/55/18 Annex V 152 (2000).

<sup>154</sup> Art 22(b) African Women's Protocol.

<sup>155</sup> Art 23(b) African Women's Protocol. 'Sexual abuse of women with disabilities' *Disability Update* 28 August to 5 September 2006 <http://www.kubatana.net> (accessed 31 January 2008).

<sup>156</sup> Art 24 African Women's Protocol.