



LITIGATION STRATEGIES FOR SEXUAL VIOLENCE IN AFRICA

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Manual Litigation Strategies for Sexual Violence in Africa

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List of Abbreviations

ACHPR	African Commission on Human and Peoples' Rights
ACtHPR	African Court on Human and Peoples' Rights
AFRC	Armed Force Revolutionary Council
CAT	Committee Against Torture
CEDAW	Convention on Elimination of All Forms of Discrimination Against Women
COHRE	Centre on Housing Rights and Evictions
DPP	Director of Public Prosecutions
DRC	Democratic Republic of the Congo
ECCC	Extraordinary Chambers of the Courts of Cambodia
ECtHR	European Court of Human Rights
ECOWAS	Community Court of Justice of the Economic Community of the West African States
EECC	Eritrea Ethiopia Claims Commission
HRC	Human Rights Committee
IACHR	Inter-American Commission of Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
IWHRC	International Women's Human Rights Law Clinic
LTTE	Lankan Tigers of Tamil Eelam
NGO	Non-governmental Organisation
NHRC	National Human Rights Commission
OAU	Organization of African Unity
OTP	Office of the Prosecutor
PCA	Permanent Court of Arbitration
PRWA	Protocol on the Rights of Women in Africa
PTC	Pre-Trial Chamber
RUF	Revolutionary United Front
SADC	Southern African Development Community
SCSL	Special Court of Sierra Leone
UNCAT	United Nations Convention Against Torture
WIGJ	Women's Initiatives for Gender Justice

1. INTRODUCTION

Sexual violence is the most pervasive form of violence in many of the conflict-ridden countries in Africa and continues to remain so, through various post-conflict stages even after the conflict has ended. Violence, particularly of a sexual nature and against women, that was characteristic of a prolonged conflict, comes to be accepted as the norm and part of the culture more so than it was prior to the conflict.

1.1 What is sexual violence?

Sexual violence - though understood primarily as physical violence of a sexual nature such as rape - is an attack on the sexuality of the victim that may or may not involve physical attack. It includes sexual harassment, sexual exploitation, sexual abuse, sexual assault or other behaviour of a sexual nature without the consent of the victim. Silence or failure to say 'no' does not imply consent. Stripping of clothes, parading naked, being forced to wear certain forms of clothing, to urinate in public are examples of violence of a sexual nature or violence that the victim perceives to be of a sexual nature.

1.2 Prohibition and Accountability for Sexual Violence

National legal systems and institutions offer women different avenues of justice for sexual violence, albeit with limited or difficult accessibility. However, the prohibition on sexual violence is often limited to rape in many national legal systems. Moreover, rape is most of the time understood as an offense against morality and not as a crime against the bodily integrity of a woman. Other forms of sexual violence are often understood and articulated in the law as an outrage upon the modesty of a woman or against her dignity.

There have been significant developments in international law moving away from understanding sexual violence as a crime against the dignity of a woman, to an invasion or an attack on the body of a person. Such developments are yet to be incorporated in the national laws of many countries around the world, including Africa.

In the meantime, victims of sexual violence, women's rights and human rights groups must work within what may be a restrictive definition of sexual violence available in national laws. Women's general experience with accessing legal systems is often fraught with impediments ranging from lack of knowledge, awareness or resources; the distant location of the courts, non-existence of medical or forensic facilities and the gender bias of the officials in institutions of justice. Additionally, the general lack of support to victims of sexual violence from the family, community and society does not make the pursuit of justice among the first responses of a woman victim of sexual violence.

1.3 Why Justice through a Legal Process?

Throughout the world, the number of women experiencing rights violations is far more than the actual number of women filing reports of violations or bringing complaints before the national courts. Women are also under-represented in bringing complaints before regional and international treaty bodies. The proportion of cases brought is even lower in the specific context of violence against women generally and sexual violence in particular. For example, of the 31 cases decided between January 2007 and May 2009 by the United Nations Committee Against Torture, women were the principal complainants in only two cases. There have been more cases by women under the torture prohibition claiming non gender-specific torture than gender-related harms¹ such as sexual violence. The overall gross under-utilisation of legal processes by women to address all forms of violations, and specifically gender-related ones, needs to be remedied.

It is often argued that given the general difficulties in accountability for sexual violence, victims, particularly in conflict situations, are better off seeking social justice by

¹ Edwards, A, 'Violence against Women under International Human Rights Law,' Cambridge University Press, New York, 2011, pp.123-124.

participating in demands and processes that deal with the larger social issues such as reconstruction and development. The idea is that these processes benefit society as a whole and may help change gender biases and attitudes in the long run. While such other forms of justice are as important, justice through the legal process is among the only response to sexual violence that institutionally acknowledges the seriousness of sexual violence, validates a woman's suffering and establishes it as a crime or harm worthy of condemnation, accountability and a remedy.

1.4 The Manual

National constitutions, legislation and judicial institutions in various countries offer a host of rights, the violation of which gives rise to a remediable legal action. Where conflict has destroyed or significantly impaired existing legal systems and institutions, there is an opportunity to build new ones that are compliant with international human rights standards and the developments in international humanitarian and criminal laws. Countries like the Democratic Republic of the Congo (DRC), Rwanda, Burundi and Kenya are among those that have adopted new constitutions, made significant reforms in their national laws and strengthened their enforcement agencies to improve the prospects of accountability for crimes during conflict. Other States rely on their existing laws, systems and institutions, lacking as they may be with regard to their compliance with international human rights standards.

This Manual examines the different legal options available to a victim/survivor of sexual violence or a rights group on her behalf. Although these legal options serve the overall goal of justice, they have different requirements of documentation, need different levels of victim participation and focus on a specific aspect of the remedy. In some national laws, a victim cannot choose from among the legal options as the choice is made for her by the State. For example, in some countries an investigation and prosecution begins as soon as the police come to know of a murder; finding a rape victim or knowledge of a rape *sue motto* triggers an investigation and prosecution. In other national legislation, the action depends on the victim/survivor who may choose not to initiate a criminal proceeding but file for a remedial action in civil courts. In yet others, the civil courts depend on a prior criminal finding of guilt to proceed with the award of any civil or related remedy.

This Manual aims to provide an overview of the legal options available to women to pursue justice for sexual violence and discusses the legal strategies that influence the choice of any given option. The overview of the legal options at the domestic level are provided by laying out laws and systems typical of the three broad types of legal system in Africa - the common law system, the civil law system and Islamic law. For options at regional and international levels, the manual lays out the basics of various regional and international human rights mechanisms and the instruments applying international humanitarian and criminal law. From a discussion of the practical possibilities or impediments at the domestic level; the decisions of the regional and international human rights mechanisms; and the judgments of the regional and international courts and tribunals emerge strategies that women and victims of sexual violence may employ in their pursuit of justice, with varying degrees of potential success.

1.5 The Purpose and Objectives of the Manual

The overall purpose of this Manual is to eliminate the knowledge gap about strategies women may adopt to seek justice for sexual violence. It is also to encourage women to use and exhaust all available avenues of justice within their domestic legal system and, if these systems fail them, to explore bringing complaints under regional or international mechanisms. The exercise is undertaken with the understanding that these systems and mechanisms have their limitations and are flawed in their structure or their ability to provide justice to women. Accordingly, the different legal strategies for justice may not be available to all women, may not be accessible by all women, may not provide immediate or effective remedy and/or may have other limitations and constraints. Advocacy for law reform, ratification of regional or international treaties and/or general national compliance with international human rights standards with regard to sexual violence take on an added

significance in such situations, an exploration of which also forms a part of this Manual.

The specific objectives of the Manual are as follows:

- to document legal options available that address the issue of justice for sexual violence at the domestic, regional and international level;
- to study the possibilities and limitations of justice at the national level, the decisions of the regional and international human rights mechanisms and the judgments of the regional and international courts and tribunals;
- from the study of possibilities and limitations, decisions and judgments, to explore and identify possible legal strategies that could be employed for justice to victims/survivors of sexual violence;
- to outline the applicability, advantages and limitations of the legal strategies;
- to provide relevant precedents of success of each of the legal strategies and an analysis of where the strategy failed; and
- to discuss advocacy options where employing legal strategies is not an option.

1.6 The Structure of the Manual

The first substantive section of the Manual (Section 2) is on domestic processes of justice. It lists the different possible avenues of justice in three legal systems broadly found in Africa - the common law system, the civil law system and the Islamic law system. The possibilities and limitations of justice for sexual violence are examined using examples of laws and institutions of justice in Uganda, Democratic Republic of the Congo and Sudan as a typical model of each of these legal systems. Also discussed is the relative advantage, if any, of any one legal option over another.

Section 3 is on the admissibility criteria for bringing complaints to regional or international human rights mechanisms. The criteria are explained by reference to decisions of the treaty bodies on admissibility issues. One of the key admissibility issues that are often raised by the respondent State is that the complainant has not exhausted domestic remedies. This criterion is of particular concern for women victims given that domestic remedies are often not responsive or are inaccessible to women raising gender-related violations. Understanding the basics of the rule of exhaustion of domestic remedies and its interpretation and application is central to raising complaints of sexual violence at the regional and international levels.

Sections 4 and 5 examine the possibility of bringing complaints of violations to regional and international human rights treaty bodies. Since the Manual is about litigation strategies for sexual violence in Africa, African regional treaty bodies, including their various provisions that could be used for litigating claims of sexual violence and their decisions that may impact on cases of sexual violence are the focus of the study. The decisions and judgments of European and Inter-American human rights bodies and courts are used to examine precedents that may have an influence on the African mechanisms. Similarly, the international human rights instruments with provisions to address gender-related violations are examined along with some of the relevant decisions of their respective treaty bodies. The decisions and judgments are analysed with the objective to explore their potential to address sexual violence.

Possibilities of addressing sexual violence under international humanitarian and criminal laws are the focus of Section 6. While providing information on the articles that relate to addressing sexual violence in the Geneva Conventions and the Rome Statute of the International Criminal Court, this Section explores the judgments of international courts and tribunals that address sexual violence. An analysis of the judgments that apply the

laws, rules and principles of the Geneva Conventions and the Rome Statute provides a glimpse on the potential or limitation of successfully using these instruments.

The concluding section of the manual (Section 7) discusses the specifics of the ‘how to’ and the ‘why’ of the legal strategies that emerge from the previous sections. It provides a non-exhaustive list of the documentation that may be required for raising the issue of sexual violence at different forums of justice and addresses the question of strategic advantage of using one legal option over another. The advocacy needs of women and victims for whom none of the legal options are available or accessible is also raised with suggestions on ‘how to’ use international human rights standards for advocacy purposes domestically. The section pulls and links together all the previous sections in a manner that provides women information and knowledge that is required to explore possibilities of justice at all levels - domestic, regional and international. The victims/survivors and the rights groups working on their behalf in Africa and elsewhere, are already using some of the legal strategies discussed in this Manual to pursue justice for sexual violence. The section provides a comprehensive listing of all possible legal options and an analysis of their strategic advantage.

1.7 Manual+

While the information in the document is and is meant to be a manual, the extensive listing and gender-analysis of decisions and case law may indicate otherwise. A clarification therefore is in order that the case law of different international human rights treaty bodies, courts and tribunals are used as an analytical tool to guide victims and survivors, human rights and women’s rights lawyers to fully explore the potential of justice through the use of these mechanisms. Some of the cases are not directly about sexual violence but are related in some form to litigating sexual violence. For example, decisions that hold States accountable for a failure to exercise due diligence to prevent torture or domestic violence can be similarly used to argue State failure to prevent sexual violence. The judgments that affirm sexual violence as torture provide arguments of how torture provisions may be used to litigate sexual violence nationally. And, decisions on discrimination are discussed to show that sexual violence is a form of discrimination against women. The analysis thus is used to serve the objectives of the Manual on the best ways of ‘how to’ go about litigating sexual violence.

2. DOMESTIC JUSTICE PROCESSES FOR SEXUAL VIOLENCE

In theory, there are often a host of different legal options a victim/survivor of sexual violence may pursue at the national level. She could report an offence initiating a criminal prosecution, bring a civil action for damages or reparations, file a constitutional case for violation of fundamental rights or claim damages in applications before a quasi-legal institution such as a national human rights commission for violation of her rights.

A brief understanding of what these options entail is discussed below:

Criminal prosecution: Sexual violence, though often understood exclusively as rape, is a crime in almost all the penal legislations in Africa.²

Torture too is also a crime in many national laws. This may mean that it is possible to report sexual violence as torture. Though application of torture legislation to acts of sexual violence is not common in national legal systems, the recognition of rape as a form of torture is established in jurisprudence at the regional and international levels, at least in respect of acts carried out by State officials or in which the State did not take sufficient steps to protect the victim from the crime (see sections 4, 5 and 6 below).

Reporting an incident of sexual violence to the police is usually all that is required to initiate a criminal proceeding. Indeed, when a crime is recognised and prohibited in national legislation, it is often treated as a crime against the State. The police therefore have an obligation to act if they are made aware of the incident, even if no formal complaint was filed.

Civil action: The victim/survivor may simultaneously or alternatively file a civil action against the perpetrator or in some cases the responsible State, to claim compensation for the infraction of sexual violence or torture. In some jurisdictions there is no need to file a separate civil action. In such situations, civil claims form part of the criminal procedure and are determined after and on the basis of the judgment in the criminal case.

Constitutional cases and proceedings before NHRC: Constitutions of some countries explicitly prohibit sexual violence as a violation of fundamental rights. National Human Rights Commissions (NHRC) or other similar institutions have also adjudged sexual violence and State failures to respond to it as a violation of human rights.

2.1 Justice under Different Legal Systems

In Africa, one of three different formal legal systems applies -civil law, common law or Islamic law.

Local customs and traditions passed down orally from generation to generation have also acquired the status of informal or quasi-formal laws in some African countries. However, given how oral culture passed down through generations lends itself to being ‘dispersed and corrupted’, the rules and laws derived from it tend to be interpreted and applied arbitrarily. Moreover, customs and traditions are typically ‘informed by and seeped in patriarchal values that prioritise women’s traditional roles over women’s human rights’. Justice from such a system is more inclined to “enforce and perpetuate the patriarchal values that deny women their rights rather than secure it”.³ Therefore, while many women approach these informal systems for justice, these systems fall beyond the scope of the Manual.

² However, in many countries, marital rape is not explicitly covered under domestic laws relating to rape and other forms of sexual violence.

³ Nainar, V, ‘In the Multiple Systems of Justice in Uganda, Whither Justice for Women?’, FIDA-Uganda, 2011.

The justice process in each of the above three legal systems is examined below, using examples of the process in a country that applies a given legal system. The examples are used in order to demonstrate the possible litigation options available to women in each of the legal systems and the ways in which women can access the systems. Accordingly, to discuss the process in a civil law country, the laws and systems of the Democratic Republic of the Congo (DRC) are used as an example. The process in a common law system is discussed by reference to the laws and the legal system in Uganda. The process under Islamic laws is discussed with the example of the laws and systems in place in Sudan.

However, it should be noted that the process in each of these countries is not necessarily typical or representative of the legal system to which they correspond. Consequently, the process in two African countries following a same legal system may be different from each other based on the differences in the internal legal codes, the constitutions or practice.

2.2 Criminal Proceedings

2.2.1 Proceedings in the Democratic Republic of Congo

i) Substantive Laws on Sexual Violence

In the DRC, Law no. 06/018⁴ which entered into force in August 2006 has reformed the Congolese criminal code as to sexual violence. The new provisions have hardened penalties and broadened the definition of rape (article 170) in order to include both sexes, and all forms of penetration (that is to say, penetration by sexual organs as well as by any object). Moreover, the new law encompasses also under sexual violence: sexual slavery, mutilation, forced prostitution, forced sterilisation, forced pregnancy, forced marriage etc. Law no. 06/019⁵ has completed this reform by improving the criminal proceedings related to prosecution for sexual violence.

The official capacity of the alleged perpetrator is not a bar to prosecution. Similarly, there is no defence of “having followed orders” (article 42 *bis* and *ter* of the penal code as amended by the 2006 law on sexual violence).

Military Courts in DRC are competent for infractions committed by military personnel, including sexual violence as defined in the penal code,⁶ as well as for the specific infractions contained in the military penal code.⁷ Rape and torture as crimes against humanity are covered by the military penal code and indirectly under war crimes (violations of Congolese law that are not justified under the laws and custom of war). Only military courts have competence to try serious violations of international humanitarian law. The crimes of genocide, crimes against humanity and war crimes were integrated within the military Penal and Justice Code with the laws of 18 November 2002⁸. Victims have the possibility of acting as civil parties in these proceedings. Regardless of whether the crime is under the penal code or military penal code, where the alleged perpetrator is from the military, the case must be heard under military jurisdiction (as to which see further below).

⁴ Law no. 06/018 of 20 July 2006 on sexual violence reforming the Congolese Criminal Code (Loi n° 06/018 du 20 juillet 2006 modifiant et complétant le Décret du 30 janvier 1940 portant Code pénal congolais), available at: <http://www.leganet.cd/Legislation/JO/2006/JO.01.08.2006.C.P.P..pdf>.

⁵ Law no. 06/019 of 20 July 2006 on sexual violence reforming the Criminal Procedure Code (Loi n° 06/019 du 20 juillet 2006 modifiant et complétant le Décret du 06 août 1959 portant Code de Procédure Pénale Congolais), available at : <http://www.leganet.cd/Legislation/JO/2006/JO.01.08.2006.C.P.P.06.019.pdf>.

⁶ Code judiciaire militaire, art 76, <http://www.leganet.cd/Legislation/Droit%20Judiciaire/Loi.023.2002.18.11.2002.pdf>.

⁷ *Ibid.*

⁸ Law no. 024/2002 of 18 November 2002 on the Military Penal Code (*Code Pénal Militaire*) available at: www.leganet.cd/Legislation/Droit%20Judiciaire/Loi.024.2002.18.11.2002.pdf and Law no. 023/2002 of 18th November 2002 on the Military Justice Code (*Code Judiciaire Militaire*) available at: <http://www.leganet.cd/Legislation/Droit%20Judiciaire/Loi.023.2002.18.11.2002.pdf>.

ii) Procedures for non-military matters

A prosecution can be started by a victim of sexual violence, through an oral or written complaint made to the judicial police officer (*officier de police judiciaire*) who (as opposed to the ordinary criminal procedure) must refer it within 24 hours to the Public Ministry officer (*officier du Ministère public*): the *magistrat du parquet*. The procedure can also be started by the Public Ministry officer and/or the judicial police officer during their ordinary missions to seek out violations and prosecute alleged perpetrators. Thus they can rely on denunciations or information emanating from multiple sources such as human rights NGOs, the press and persons living in the area where the crime was committed.

The magistrate automatically requires the services of a doctor or psychologist in order to assess the state of the victims and determine appropriate treatment.

The preliminary phase of investigation (enquiry at the level of the Public Ministry officer) is required to be completed within a month before the Judge is seized of the matter. Thereafter, the Judge has three months to rule on the case. The sexual violence law provides that the victims shall be assisted by counsel.⁹

Article 74 (bis) of the sexual violence law provides that the judge or Public Ministry officer seized by a case of sexual violence shall take appropriate measures to ensure the security, physical and psychological wellbeing, dignity and respect of the private life of the victims or any other person involved. In that regard closed hearings are provided if requested by victims or the Public Ministry.¹⁰

As opposed to the usual procedure under DRC criminal law, when the prosecution for sexual violence is initiated by the Public Ministry (*action publique*) it cannot be stopped by a compromise or settlement between the parties, nor by a transactional fine.

There are mobile courts in DRC for itinerant hearings that travel outside their main jurisdiction but still within their geographical jurisdiction/limits.¹¹ The principle of mobile courts is set out in article 67 of the COCJ (*Code d'organisation et de compétence judiciaire*)¹² which provides for itinerant courts when necessary. Similarly, article 7 of the Military Justice Code¹³ provides for mobile courts in times of war.¹⁴

⁹ Law no. 06/019 of 20 July 2006 on sexual violence reforming the Criminal Procedure Code (Loi n° 06/019 du 20 juillet 2006 modifiant et complétant le Décret du 06 août 1959 portant Code de Procédure Pénale Congolais, Article 7 (bis) : « L'instruction et le prononcé du jugement se font dans un délai de trois mois maximum à partir de la saisine de l'autorité judiciaire (...) Durant toutes les phases de la procédure, la victime est assistée d'un conseil ». available at : <http://www.leganet.cd/Legislation/JO/2006/JO.01.08.2006.C.P.P.06.019.pdf>.

¹⁰ Law no. 06/019 of 20 July 2006 on sexual violence reforming the Criminal Procedure Code (Loi n° 06/019 du 20 juillet 2006 modifiant et complétant le Décret du 06 août 1959 portant Code de Procédure Pénale Congolais, Article 74 (bis) : « L'officier du Ministère Public ou le Juge saisi en matière de violences sexuelles prend les mesures nécessaires pour sauvegarder la sécurité, le bien-être physique et psychologique, la dignité et le respect de la vie privée des victimes ou de toute autre personne impliquée. A ce titre, le huis clos est prononcé à la requête de la victime ou du Ministère Public » ; available at : <http://www.leganet.cd/Legislation/JO/2006/JO.01.08.2006.C.P.P.06.019.pdf>

¹¹ Marcel Wetsh'okonda Koso; "The Democratic Republic of Congo -Military justice and human rights: An urgent need to complete reforms"; A review by AfriMAP and The Open Society Initiative for Southern Africa, 2009; Johannesburg, South Africa; p. 4; Available at: http://www.afriMAP.org/english/images/report/AfriMAP_DRC-MilitaryJustice_full_EN.pdf.

¹² Ordonnance-loi n° 82-020 du 31 mars 1982 portant Code de l'organisation et de la compétence judiciaires. (JOZ, n° 7, 1er avril 1982, p. 39), article 67 : « s'ils l'estiment nécessaire pour la bonne administration de la justice, les cours et tribunaux peuvent siéger dans toutes les localités de leur ressort. » available at: http://www.leganet.cd/Legislation/Droit%20Judiciaire/OL.31.03.82.n.82.020.htm#TITRE_1er_DE_ORGANISATION_JUDICIAIRE.

¹³ Loi n° 023/2002 of 18th Novembre 2002 portant Code Judiciaire Militaire, article 7 : « en temps de guerre, la haute cour militaire tient des chambres foraines en zones opérationnelles » ; Available at : <http://www.leganet.cd/Legislation/Droit%20Judiciaire/Loi.023.2002.18.11.2002.pdf>.

¹⁴ Loi n° 023/2002 of 18th Novembre 2002 portant Code Judiciaire Militaire, article 29 : « Pour l'application des lois pénales et l'organisation des juridictions militaires, le temps de guerre commence au jour fixé par le Président de la République pour la mobilisation des Forces Armées. Il prend fin au jour fixé par le Président de la République

iii) Limitations and Challenges

Most victims who live in remote rural areas do not bring a complaint of sexual violence. Some of the suggested reasons are ignorance of the law, shame, rejection they encounter from their own families and communities; fear of reprisals or of facing the perpetrator who often is an 'official' (*un homme en arme*). In addition, traditional notions of gender relations embedded in family laws requiring the wife to have the consent of the husband to initiate a legal action (*code de la famille*, art 448) also impact on victims' willingness or ability to bring a complaint.

Despite the requirements of the law, the victim and witness protection regime in DRC is almost non-existent. Moreover, apart from some military chiefs and low level soldiers who have been arrested and prosecuted under the provisions of the Rome Statute of the International Criminal Court (ICC) (since DRC is a monist State, the Rome Statute is directly applicable), high level officials in the command structure are not prosecuted.

A worrying feature of the military justice system which greatly contributes to impunity and works against the independence of the judiciary is the hierarchical principle, which requires that no military judge can hear a case where the accused is of a superior military rank.

2.2.2 Proceedings in Sudan

i) Substantive Laws on Sexual Violence

In Sudan, the criminal offence of rape and some forms of sexual violence (gross indecency) have been recognised in each of the Sudanese criminal acts in force to date (1925, 1974, 1983 and 1991).¹⁵

ii) Procedure to initiate a criminal case

A typical prosecution process for sexual violence involves investigation by the police and prosecution by the Attorney General before criminal courts. Where the alleged perpetrators are officials, they may be tried before special police/security courts, provided their immunity is lifted. In cases of physical injury (*qisas*), victims may also bring private prosecutions resulting, in principle, in prosecutions and trials where courts may impose 'eye for an eye' punishment. Alternatively, victims (or their families) may accept compensation (*diya*) and in such cases, the State may still impose discretionary punishment known as *ta'zir*.

iii) Limitations and Challenges

A series of shortcomings in law and practice have been identified as factors that contribute to the lack of protection of women (and men) and to impunity. Some of these are:

- Lack of clarity in the definition of rape, particularly in relation to adultery
- Lack of specificity of the rules on consent pertaining to rape
- Factors inhibiting victims from bringing complaints, such as:
 - the prospect of facing counter-charges for adultery (*zina*) or wrongfully accusing someone of adultery where rape cannot be proved (*quadf*);
 - difficulties in securing timely and adequate medical examinations and evidence; and

pour la remise de l'armée sur pied de paix. » ; Available at : <http://www.leganet.cd/Legislation/Droit%20Judiciaire/Loi.023.2002.18.11.2002.pdf>

¹⁵ The crime of rape is recognised in article 316 of the 1925 and 1974 Criminal Act, article 317 of the 1983 Criminal Act and article 149 of the 1991 Criminal Act. The crime of gross indecency is recognised in article 319 of the 1925 and 1974 Criminal Act, article 319 of the 1983 Criminal Act and article 151 of the 1991 Criminal Act.

- the absence of complaints procedures and facilities, such as women's desks at police stations
- The lack of programmes and/or procedural rules aimed at providing protection to victims of rape and at avoiding re-traumatisation
- Evidentiary hurdles, such as the four male witness rule, which make a conviction almost impossible unless the perpetrator confesses to the crime
- Immunity for officials accused of rape.¹⁶

Thus, the laws in Sudan are such that a woman complaining of rape may well be prosecuted herself for adultery. The evidentiary requirement of four male witnesses to the rape again may implicate the male witnesses in the rape itself or for failure to prevent the rape.¹⁷ In the absence of proof, the alleged perpetrator may be acquitted of the charge of rape but still be prosecuted for gross indecency under article 151 of the Criminal Act. Gross indecency however, "neither captures the heinous nature of rape nor provides for adequate punishment".¹⁸

2.2.3 Proceedings in Uganda

i) Substantive Laws on Sexual Violence

Uganda's Constitution provides that "women shall be accorded full and equal dignity of the person with men" (Article 33(1)). Article 33(2) further provides that "the state shall provide the facilities and opportunities necessary to enhance the welfare of the women to enable them to realise their full potential and advancement". Article 33(6) provides that "laws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status, are prohibited by this constitution".¹⁹

Under the Penal Code,²⁰ acts of sexual violence against women in Uganda are legally viewed as crimes against morality or honour, not as crimes against the physical and mental integrity of women and girls. The definitions of rape, defilement, prostitution, and other sexual offences fall under the Offences against Morality section of the Penal Code Act. The offence of rape is defined as "the unlawful carnal knowledge [by a person] of a woman or girl without her consent or with her consent, if the consent was obtained by force, threats or intimidation". Rape is punishable by the death penalty²¹ and attempted rape with life imprisonment with or without corporal punishment.²²

Uganda amended its Penal Code Act in 2007, expanding the definition of defilement (unlawful sexual intercourse with a minor under the age of 18) to include boys as victims.²³ In addition, under Chapter 23 of the Act common assault and grievous bodily harm are punishable as a misdemeanour, liable to imprisonment for five years.

¹⁶ *Time for Change: Reforming Sudan's Legislation on Rape and Sexual Violence*, REDRESS and KCHRED, November 2008, p. 9. See workshop reports, UNMIS, The Law Reform for the Prosecution of Rape and other Sexual Offences, 5 July 2006 and UNMIS in cooperation with National Assembly & Women Center for Human Rights, Reform of Legal Provisions of Criminal Law 1991 and Evidence Law 1994 on Violence against Women, 25 January 2007.

¹⁷ *Ibid.*, p. 34.

¹⁸ *Ibid.*

¹⁹ "'I can't afford justice,' - Violence Against Women in Uganda Continues Unchecked and Unpunished," Amnesty International Publications 2010, available at: http://www.amnesty.org.uk/uploads/documents/doc_20290.pdf.

²⁰ Penal Code with definition of rape available online at: <http://www.osall.org.za/docs/2011/03/Uganda-Penal-Code-Act-1950-Ch-120.pdf>.

²¹ Penal Code Act Chapter 120, Chapter XIV Offences Against Morality, Section 124.

²² Penal Code Act Chapter 120, Chapter XIV Offences Against Morality, Section 125.

²³ The Penal Code Act (Amendment) Act 2007 replaced section 129 and Section 319, it also amended Section 286.

ii) Procedures

Prosecutions of a criminal nature including for torture or sexual offences such as rape are under the remit of the Director of Public Prosecution (DPP). A victim/complainant would ordinarily file a complaint with the police, following which the police undertake investigations and gather evidence. The evidence is submitted to the DPP for prosecution. Prosecution may be in the High Court for very serious offences or in the Chief Magistrates Court for other offences. While in the law, the punishments associated with rape or attempted rape make it a serious offence, in practice, as seen below, there are numerous challenges with regards to prosecution.

One may opt for a private prosecution and this entails preparation of a charge sheet and requesting the court to issue a summons. The DPP however reserves the right to take over the private prosecution when deemed necessary.

iii) Limitations and Challenges

Initiating private prosecutions are problematic in torture cases or sexual offences because of the lack of legislation on protection for anybody involved. Additionally, the complainant bears the costs of investigation and evidence gathering as the police play no role in these circumstances. There are however very few private prosecutions on sexual violence because of the security risks involved.

In a discussion, Judge Kasule of the Magistrate Court in Gulu district of Uganda, listed the following as among the impediments to a successful prosecution of sexual assault:

- The enforcement institutions do not spend resources to perform some of the basic investigative functions such as visiting the crime scene, interrogation of key witnesses, forensic testing and medical examinations of victims and survivors. Poor investigation by the police is often the reason for acquittal of offenders for lack of evidence.
- Police or those related to the offender often intimidate the woman at the stage of investigation to prevent them coming to court and as such, the cases are often compromised.²⁴

2.3 Legal Action in Civil Courts

2.3.1 Proceedings in the DRC

Survivors of sexual violence can file a civil action independent from the criminal proceedings. To avoid inconsistent outcomes, criminal proceedings take priority. Civil action for damages will be stayed (suspended) until the criminal court issues a final judgment.

When an infraction is committed, there can be a penal or/and civil action which has the effect that the victims can ask the criminal tribunal (*tribunal répressif*) for reparation by constituting herself civil party, joining the penal action initiated by the “*ministère public*” (art 69 Congolese code of penal procedure), or she can wait for a judgment and use it in an action before civil jurisdictions to claim reparation. The first option (civil party) is the most common. Also, according to article 144 of the Congolese Civil Procedure Code, victims have to pay to lodge such a complaint²⁵.

²⁴ *supra* note 3, pps. 27-28.

²⁵ 7 mars 1960, Décret portant Code de procédure civile congolais ; Article 144 : « Lorsque, (...) le demandeur fournit les éléments nécessaires à la rédaction de l'assignation, il consigne entre les mains du greffier la somme de Z. 200,00 (zaïres deux cents) au premier degré, et de Z. 300,00 (zaïres trois cents) au degré d'appel » ; Available at: http://www.leganet.cd/Legislation/Droit%20Judiciaire/Dcret.7.03.1960.htm#TITRE_IV.

2.3.2 Proceedings in Sudan

A civil claim for tort may be made before the civil courts. A victim of rape may bring a claim for reparation as a supplementary civil suit in the course of criminal proceedings.²⁶ In case of bodily injury, he or she may bring a claim for *diya* (blood money), which is, however, meant to compensate for the bodily injury only and not for the rape.²⁷

In civil proceedings, a rape victim or his or her relatives can claim damages for tort, i.e. trespass against the person, under civil law.²⁸ Where the alleged perpetrator is an official, a civil suit may be instituted against the State but a suit against the perpetrator itself can only proceed if the head of the forces concerned lifts immunity.²⁹

2.3.3 Proceedings in Uganda

While a civil claim is an option, most victims of violations committed by State agents prefer to file for compensation with the Human Rights Commission (see below). Since tort claims can be made against public officials alleged to have committed acts of torture as well as against the State when the individual public official(s) cannot be identified,³⁰ survivors of sexual violence can also explore this option where the alleged perpetrator is a public official. In at least one High Court case (*Gulu*), damages were awarded to torture survivors.³¹

2.4 Human Rights Commissions

In Uganda, the practice for justice in cases of sexual violence has been mainly to lodge civil claims against the Attorney General before the Human Rights Commission with the intention of recovering monetary compensation for the suffering inflicted on the victim. In these cases the alleged perpetrator may never be known let alone punished individually. Moreover, since the Commission primarily addresses human rights violations by State agents, it only has jurisdiction when the violation is by an officer of the State or when the violation is defined as discrimination.³²

2.5 Violation of Constitutionally Guaranteed Fundamental Rights

A right to be free from all forms of violence, particularly sexual violence, embedded in a constitution is the highest form of protection available for violence against women at the domestic level. It demonstrates that the State considers violence against women a serious enough issue to include it as a fundamental right in the constitution and commits to protect women against it. It provides victims and survivors an avenue to enforce the State's due diligence responsibility to prevent violence against women and claim compensation from the State for failure to do so.

The Constitutional Court of South Africa for instance, in the case *Omar v. Government of the Republic of South Africa and Others*, ruled that a protection order against domestic

²⁶ Article 204 of the Criminal Procedure Act, 1991.

²⁷ Articles 42-45 of the 1991 Criminal Act.

²⁸ Article 153 (1) Civil Transaction Act, 1984.

²⁹ Article 33 (b) of the National Security Forces Act, 1999, article 45 (2) of the Police Act 2008 and article 34 (2) of the Armed Forces Act, 2007.

³⁰ Action Against Torture - A Practical Guide to the Istanbul Protocol for Lawyers in Uganda, REDRESS/International Rehabilitation Council for Torture Victims (IRCT), 2004, p. 17.

³¹ *State of Pain: Torture in Uganda*, Human Rights Watch, March 2004, Vol. 16 No. 4(A), p. 73.

³² *supra* note 3, pp. 23.

violence that included a suspended arrest warrant issued under section 8 of the Domestic Violence Act did not amount to arbitrary deprivation of liberty. It held that the possibility of the Act being manipulated and misused far outweighed its potential to afford protection by the police to the victims of domestic violence.³³ In other words, the Court upheld, reinforced and strengthened the due diligence role of the police in providing protection to women victims of domestic violence.

The Court of Appeal in Nigeria, in the case of *Mojekwu v Mojekwu*, ruled that customary law preventing females from inheriting property was discriminatory. The Court held that any form of societal discrimination on grounds of sex is unconstitutional and against the principles of an egalitarian society.³⁴

The **DRC Constitution** is unique in that it expressly prohibits sexual violence. Article 15 provides for an express prohibition of sexual violence, and its second paragraph characterises sexual violence as a crime against humanity when carried out in order to destroy or destabilise a family or a group.³⁵ Survivors of sexual violence therefore have an additional avenue to pursue justice by filing for violation of constitutional rights. There are however no reported cases on the use of this provision or reports of the State being challenged with violation of this fundamental right.

Where there is an explicit prohibition of torture but not sexual violence in the Constitution, survivors may explore filing for violation of constitutional rights in the event the facts of sexual violence meet elements of torture (which under most criminal laws will require that it is committed by, or involves the consent or acquiescence of, a public or State official).

Article 24 of the **Constitution of Uganda** prohibits torture and Article 50 gives the right to file for compensation upon violation of any right or freedom guaranteed by the Constitution.³⁶ Drawing on precedents from international law and domestic practice such as the constitutional case in South Africa cited above, it may still be possible to file for constitutional remedies where the violence is not by a public official, for the State's failure in its due diligence responsibility to take all measures to prevent the violence and protect the victim.

Sudan has a Bill of Rights, and victims could bring a case before the Constitutional Court claiming violation of fundamental rights but no relevant practice to date has been reported.

2.6 Possibilities and Challenges in the Domestic System

Despite the availability of multiple potential options for litigating sexual violence, justice systems are often inaccessible to women or are hostile to their experience of violence. Women therefore do not lodge complaints or report the violence, which makes it difficult to access regional or international mechanisms for justice.

The relatively innovative provisions in the laws in **DRC** in theory ought to be effective in the prevention and punishment of sexual violence. The field reality however is different. Customary compromises between the family of the victim and the family of the perpetrator persist in many villages and even in some cities. This comes from a deeply rooted practice

³³ *Omar v Government of the Republic of South Africa and Others* [2005] ZACC 17, summary available at: <http://www.saflii.org/za/cases/ZACC/2005/17media.pdf> and the judgment at: <http://www.saflii.org/za/cases/ZACC/2005/17media.pdf>.

³⁴ *Mojekwu v Mojekwu* [1997] 7 NWLR 283, referred to in *Non-Discrimination in International Law - A Handbook for Practitioners*, 2011 Edition, Interights, London, p. 134.

³⁵ DRC Constitution, 18 February 2006, Article 15: « Les pouvoirs publics veillent à l'élimination des violences sexuelles. Sans préjudice des traités et accords internationaux, toute violence sexuelle faite sur toute personne, dans l'intention de déstabiliser, de disloquer une famille et de faire disparaître tout un peuple est érigée en crime contre l'humanité puni par la loi », available at: <http://www.presidentrdc.cd/constitution.html>.

³⁶ *supra* note 31, p. 15.

in most Congolese tribes according to which the perpetrator of rape has to pay a dowry to the family of the victim or marry the victim who can then end up as the second or third wife of the perpetrator. Another major problem in the DRC is that, except where the perpetrator is caught in the act, a medical expert report is often required for a conviction for sexual violence despite the fact that there is nothing in Congolese law that requires a medical certificate before there can be a conviction for rape.³⁷ This report is difficult to obtain in the context of DRC within a month after the rape, the time limit that the public officer has to present the case before the judge. Doctors typically require remuneration for their work and this cost has to be borne by the often impoverished victims. The consequence is that many requests to doctors remain unanswered and “empty files” are transmitted to the judge who rules in favour of an acquittal, given the lack of evidence. Even in the rare cases where the doctor is paid on time, it can easily take 15 days for the doctor to produce his report. When the officer of the Public Ministry receives it, he does not have enough time to file additional procedural documents, which would allow him to transmit a complete file to the judge.

In Sudan, rape is defined as adultery resulting in potential complications when women complain about rape. Applying Islamic law, the woman herself may end up facing charges. The procedures require the victim to complete a particular police form that has acted as a disincentive. Finally, where State officials are the alleged perpetrator, the official immunity needs to be lifted first, which rarely happens in practice. There have been some reported prosecutions and trials for rape but such cases remain the exception.

There are ongoing efforts towards criminal law reform in Sudan to change the definition of rape and to remove elements of adultery from the definition. The Sudanese civil society advocating for law reform are taking cues from Pakistan, where reforms in similar laws have been introduced. The Protection of Women (Criminal laws Amendment) Act, 2006 in Pakistan is “particularly noteworthy for separating the criminal offence of rape from the *hadd* offence of adultery (*zina*) so as to enhance protection and combat impunity for rape more effectively”.³⁸ In the meanwhile, the Supreme Court of Sudan has a proactive role to play in providing guidance and establishing jurisprudence with regard to de-linking the definition of rape from the *hadd* provisions of adultery (*zina*). In the Trial of Musa’ab Mustafa Ahmed, the Supreme Court held that sexual intercourse with a child constitutes rape, which is not subject to the *hadd* evidentiary rules. The judgment however fell short of extending it to non-consensual sexual intercourse between adults.³⁹

Higher Courts in the region have, on appeal, ruled on expanding and clarifying the definition of sexual violence in the absence of explicit legislation on the matter. In *Masiya v Director of Public Prosecutions Pretoria and Another*, the constitutional court in South Africa held that the common law definition of rape though not unconstitutional, fell short of the spirit, purpose and objects of the Bill of Rights and therefore extended the definition to include non-consensual penile penetration of the anus of females.⁴⁰

In Uganda, there are several issues that impede women’s access to justice post conflict. Amnesty International in their report titled ‘Uganda Doubly Traumatized, Lack of Access to Justice for female victims of sexual and gender-based violence in northern Uganda,’ gives a

³⁷ “Justice, Impunity, and Sexual Violence in Eastern Democratic Republic of Congo”, All Party Parliamentary Group on the Great Lakes Region of Africa and the Swedish Foundation for Human Rights; November 2008; p.20; Available at: <http://www.saflii.org/za/cases/ZACC/2005/17.pdf>.

³⁸ Time for Change: Reforming Sudan’s Legislation on Rape and Sexual Violence, REDRESS and KCHRED, November 2008, p. 28.

³⁹ Supreme Court/Criminal Appeal 545/2000 (*Trial of Musa’ab Mustafa Ahmed*), Sudan Law Journal 2000 available at: <http://sjsudan.org/details.php?id=2348&lang=ar&target=p&title=%E3%CD%C7%DF%E3%C9:%20%E3%D5%DA%C8%20%E3%D5%D8%DD%EC%20%C3%CD%E3%CF>.

⁴⁰ *Masiya v Director of Public Prosecutions Pretoria and Another* [2007] ZACC 9, Summary of the judgment available at: <http://www.saflii.org/za/cases/ZACC/2007/9media.pdf> and the judgment at: <http://www.saflii.org/za/cases/ZACC/2007/9media.pdf>.

detailed account of such impediments. They range from lack of police and legal protection, incompetence, hostility and indifference, difficulties gathering medical evidence and frustrations with the slow court process.⁴¹ Despite these impediments, the majority of the criminal cases in the courts of the Northern region are of sexual assault or related cases. Judge Kasule says, “30 out of 50 criminal cases at my court are either of defilement, rape or murder but connected with some form of sexual assault”.⁴²

Notwithstanding these challenges, it is important that women and survivors seeking justice within their respective domestic legal systems build documentation on the outcomes and experience of each of these judicial processes. Such documentation will allow survivors to continue to advocate for addressing the challenges women experience in the process of justice. In addition, it will have exhausted domestic remedies, opening avenues of pursuing justice at the regional and international level.

⁴¹ ‘Uganda Doubly Traumatized, Lack of Access to Justice for female victims of sexual and gender-based violence in northern Uganda,’ Amnesty International, AI Index: AFR 59/005/2007, 30 November 2007.

⁴² *Supra* note 3, p. 22.

3. ADMISSIBILITY AND EXHAUSTION OF DOMESTIC REMEDIES

3.1 Admissibility

To access remedies beyond national borders, certain basic requirements need to be fulfilled for the application or the petition to be declared admissible. The admissibility requirements for complaints from individuals under most regional and international human rights mechanisms are more or less the same. There are exceptions or differences, which are discussed under the respective mechanism in sections below. Accordingly, an individual complaint may be declared inadmissible on the following grounds:

- The application is **anonymous**.
- The applicant is **not the victim** and has **not obtained authorisation** from the victim or the victim's family to make a complaint.
- The application is about **events which occurred before the treaty (and the individual complaints procedure tied to it) entered into force** for the State concerned. For example, under Article 27 of the Convention Against Torture, that convention comes into force (becomes applicable) 30 days after a State has ratified it. This means that if State X ratifies the convention (and accepts the individual complaint procedure) on 31 March 2000, it will come into force for that State on 30 April 2000. The Committee Against Torture can then only examine complaints which are about events which occurred on or after 30 April 2000 (or, in certain circumstances, violations which took place earlier but can be classified as 'continuing violations', with continuing impact beyond 30 April 2000).
- The **time-limit** for submission of an application has expired. As a general rule, the time-limit begins to run from the time a final official decision is taken in the case. This could mean the date of the incident where no remedy has been sought (but see below for exhaustion of domestic remedies), but in general it will mean the date of a decision not to prosecute, a court judgment, the lodging of a petition by the victim to which no response has been received, or some other such decision which represents the final step in the process of seeking a remedy within the domestic system.
- The communication is **incompatible** with the provisions of the relevant convention.
- The application is considered **manifestly ill-founded** or an **abuse of the right** of submission. This is the only ground of inadmissibility on which the body concerned can refer to the facts of a case. It is assessed on a case-by-case basis, and is applied where it is considered that the facts could not possibly reveal the violation alleged, therefore being clearly an allegation without any basis for which the right of submission should not have been used.
- The facts of the case have **already been examined** under this or another procedure of international settlement.
- **Domestic remedies** have not been exhausted.⁴³

⁴³ This highlighted section is taken from: The Torture Reporting Handbook, Human Rights Centre, University of Essex, Colchester, 2000, p. 79.

3.2 Decisions on Admissibility

The admissibility criteria as listed above are clear and relatively self-explanatory. The decisions of different regional mechanisms, particularly when States challenge admissibility of any communication from their citizens, help further clarify how these criteria are understood, interpreted and applied to cases before them.

Often, the first response of States with regard to a treaty body communication of an alleged violation claimed by its citizen is to challenge the admissibility. The most common ground on which States challenge admissibility is non-exhaustion of domestic remedies by the applicant. But the basis could also be any of the above-mentioned admissibility criteria i.e. non-applicability of the treaty obligation to the alleged event because it happened prior to its ratification of the treaty or that the application is made beyond the permissible time limitation. Some of the cases where States have raised admissibility issues on the said grounds are discussed below:-

Not within time-limit: Most human rights mechanisms have a time-limit within which the application has to be submitted after the last domestic remedy has been accessed and adjudged. The ECOWAS Court however, asserted the inalienable quality of human rights and that they therefore do not impose any time limitations. Although the case in question did not concern the time-limit of submission of application after the last remedy had been exhausted, it nevertheless addressed the question of *when* an application should be made. The State in the case of *Hadijatou Mani Koroua v. Niger*, claimed “that Hadijatou Mani was not competent to bring the case as, by the time she had submitted it, she was no longer a slave. The State had argued that by failing to submit her application while still a slave, she had rendered it ineffective”.⁴⁴ The ECOWAS Court stated that “[i]t should be underlined that since human rights are inherent to the human being, they are ‘inalienable, inprescriptible and sacred’ and do not suffer any limitation”.⁴⁵

Continuing Violation: The Human Rights Committee (HRC) and other treaty bodies have expanded the scope of the criteria for admitting applications related to events that occurred prior to the entry into force for the State concerned of the individual complaints procedure. In *Lovelace v. Canada*⁴⁶ the HRC held that communication of violations committed prior to the date the State ratified the Optional Protocol, but which continued to have effects which themselves constitute a violation of the Covenant after that date, are admissible. The extension of the remedy to continuing violations is significant as it can open up possibilities for women to bring claims for past violence that is considered to be a permanent or continuous violation. For example, in *Szjarto v. Hungary* the CEDAW Committee ruled that forced sterilisation that occurred prior to the entry into force of the Optional Protocol for the State Party was a continuing violation, and a communication on that basis was held to be admissible.⁴⁷

Burden of Proof: The HRC, in another case, further clarified that the burden of proof for a showing of ‘continuing violation’ is shared between the complainant and the State Party, in acknowledgment that the latter has better access to specific information thereby balancing power between the two parties.⁴⁸

Disparaging and insulting language: In its decision on admissibility in *Zimbabwe Lawyers for Human Rights/ Zimbabwe(ZLHR)*, the ACHPR stated *inter alia* that:

⁴⁴ Duffy, Helen ‘*Hadijatou Mani Koroua v Niger*: Slavery Unveiled by the ECOWAS Court’, Human Rights Law Review(2008), Oxford University Press, 2008, p. 8.

⁴⁵ *Ibid.*

⁴⁶ *Lovelace v. Canada*, HRC Comm. No. 24/1977 (30 July 1981). See also *J.L. v. Australia*, HRC Comm. No. 491/1992 (28 July 1992).

⁴⁷ *Szjarto v Hungary*, CEDAW Comm. No. 4/2004 (14 August 2006), para. 10.4; For a continuing pattern of violence see *A.T. v. Hungary* (CEDAW Comm. No. 2/2003 (2005)), para. 8.5.

⁴⁸ *Bleier v. Uruguay*, HRC Comm. No. 30/1978 29 March 1982, para 13.3.

“in determining whether a certain remark is disparaging or insulting and whether it has dampened the integrity of the judiciary, the Commission has to satisfy itself whether the said remark or language is aimed at unlawfully and intentionally violating the dignity, reputation or integrity of a judicial officer or body and whether it is used in a manner calculated to pollute the minds of the public or any reasonable man to cast aspersions on and weaken public confidence on the administration of justice. The language must be aimed at undermining the integrity and status of the institution and bring it into disrepute... A balance must be struck between the right to speak freely and the duty to protect state institutions to ensure that while discouraging abusive language, the African Commission is not at the same time violating or inhibiting the enjoyment of other rights guaranteed in the African Charter, such as in this case, the right to freedom of expression”.⁴⁹

In *Ligue Camerounaise des Droits de l'Homme v. Cameroon*⁵⁰, the African Commission held that the Communication was inadmissible because of the complainant's use of language like “[President] Paul Biya must respond to crimes against humanity”, “30 years of the criminal neo-colonial regime”, “regime of torturers”, “government barbarisms” etc, which was considered insulting language.

In *Darfur Relief and Documentation Centre v. Sudan*, the complainant stated:

“[t]his Communication documents a situation of absolute misuse of government authority and executive powers to inflict gross injustice and suffering among a vulnerable segment of the Sudanese citizens. This situation is a classical example of the absence of accountability of public officials and for the lack of proper administration of justice and the rule of law in Sudan”.⁵¹

The Respondent State objected to the statements made by the Complainant arguing not that the language is disparaging or insulting but that it is improper to describe any sovereign State as such. The ACHPR held that the language used in the communication is not insulting or disparaging to the Government of Sudan and as such, was not contrary to Article 56(3) (prohibition of use of disparaging or insulting language).

Non-Exhaustion of Domestic Remedies: In the course of determining admissibility, the human rights mechanisms examine the communication to ascertain that the complainants have exhausted domestic remedies. Failure to appeal a decision to higher courts⁵² may be regarded as a failure to exhaust domestic remedies. This is discussed further below.

3.3 Rule - Exhaustion of Domestic Remedies

Most human rights treaties require the State to provide an effective remedy for violations of rights and freedoms and enact necessary domestic legislation that provides for preventive measures, investigation and prosecution, and reparations to the victims and survivors. States therefore have an independent and continuing obligation under international law to provide effective remedies for all violations of rights and freedoms.⁵³ An important prerequisite

⁴⁹ *Zimbabwe Lawyers for Human Rights v. Zimbabwe* (ZLHR), (ACHPR Commu 284/2003) available at: <http://caselaw.ihlda.org/doc/284.03/view/>.

⁵⁰ *Ligue Camerounaise des Droits de l'Homme v. Cameroon* (ACHPR Commu. 65/92) available at : <http://caselaw.ihlda.org/doc/65.92/view/>.

⁵¹ *Darfur Relief and Documentation Centre v. Sudan*, (ACHPR Commu. 310/05), para 40 available at : <http://caselaw.ihlda.org/doc/310.05/view/>.

⁵² *Law offices of Ghazi Suleiman v. Sudan*, ACHPR Commu. 220/98, available at: <http://caselaw.ihlda.org/doc/220.98/view/>.

⁵³ *Reparation - A Sourcebook for Victims of Torture and other Violations of Human Rights and International Humanitarian Law*, REDRESS, 2003, p. 13.

therefore to approaching regional or international human rights mechanisms for violations of human rights including sexual violence is that the victim or survivor must have accessed all available and effective remedies domestically and failed to achieve meaningful justice.

Typically, an application to a human rights treaty body would include details of the facts of the violation, the rights violated, the steps the applicant has taken domestically to address the violation and details of the unsatisfactory outcome of these efforts. The State in response would either: dispute the facts, assert the validity/outcome of the domestic process and/or claim existence of other remedies that the applicant did not explore. Since it is the State that often claims non-exhaustion of domestic remedies, the burden of proving so, lies with the State.

The basics of what ‘exhaustion of domestic remedies’ entails are well documented and one such comprehensive documentation is reproduced in the shaded box within this section, followed by the implications of the admissibility requirement on women’s access to human rights treaty body mechanisms. Some of the treaty bodies have also issued clarifying information on the admissibility requirement of exhaustion of domestic remedies or compiled their decisions on it. Significant decisions of the different regional and international mechanisms interpreting the rule are discussed below.

3.3.1 Basics about exhaustion of domestic remedies

What does ‘exhaustion of domestic remedies’ mean?

Basically, it means that if a victim of a human rights violation wants to bring an individual case before an international body, he or she must first have tried to obtain a remedy from the national authorities. It must be shown that the State was given an opportunity to remedy the case itself before resorting to an international body. This reflects the fact that States are not considered to have violated their human rights obligations if they provide genuine and effective remedies for the victims of actions of State officials, in recognition that certain individuals may engage in unacceptable behaviour without the approval of their governments.

The international bodies do recognise, however, that in many countries, remedies may be non-existent or illusory. They have therefore developed rules about the characteristics which remedies should have, the way in which the remedies have to be exhausted, and special circumstances where it might not be necessary to exhaust them.

What kind of remedies must a complainant have exhausted?

A complainant must have exhausted any remedy (whether judicial or administrative in nature) which is:

- **Available:** the remedies exist and the victim (or someone else on his or her behalf) is able to use them without restrictions;
- **Effective:** it is possible for the remedy to be used successfully;
- **Adequate:** the **remedy** is able to provide suitable redress for the complaint - for example, if an individual was about to be deported, a remedy which could not suspend the deportation would not provide suitable redress.

If the existing domestic remedies do not fulfil these criteria, a victim may not have to exhaust them before complaining to an international body. However, the complainant needs to be able to show that the remedies do not fulfil these criteria in practice, not merely in the opinion of the victim or that of his or her legal representative. For example, it might be necessary to be able to show that no person alleging torture who has ever used a particular remedy has ever been granted compensation. If there is any doubt as to whether a remedy is effective, the complainant should at least be able to show that an attempt was made to use it. Furthermore, if the remedy has become unavailable through the complainant’s own fault (e.g. where the complainant has failed to respect the deadline for making an appeal,

so that the appeal procedure becomes unavailable), this would not normally be accepted as a justification for non-exhaustion of the remedy.

If a complainant wishes to argue that a particular remedy did not have to be exhausted because it is unavailable, ineffective or inadequate, the procedure is as follows:

1. The complainant states that the remedy did not have to be exhausted because it is ineffective (or unavailable or inadequate) - this does not yet have to be proven
2. The State must then show that the remedy is effective
3. If the State is able to establish this, then the complainant must either demonstrate that he or she did exhaust the remedy, or that it could not have been effective in the specific case even if it may be effective in general.

How must the remedy have been exhausted?

The subject of the complaint argued before the international body must have been referred to in the complaint before the domestic authorities. The reason for this is to make sure that the State has been given an opportunity to provide redress for the specific complaint which is being brought before the international body.

An example might be where a complainant has brought a domestic case seeking compensation for an act of torture, during which he or she did not question the nature of the police investigation into the complaint at any stage. If the court refuses to award compensation on the ground that the evidence presented was insufficient to establish that an act of torture occurred, and the complainant claims before the Committee Against Torture that there has been a violation of the State's obligation to ensure that there is a prompt and impartial investigation of allegations of torture, it is quite possible that this complaint will not be accepted because it was never raised before the domestic authorities - although it may be possible to complain about the failure to provide compensation.

When might it not be necessary to exhaust domestic remedies?

In special circumstances, the international body may find that domestic remedies did not have to be exhausted even where they were available, and potentially effective and adequate. Such special circumstances include:

- Where application of the remedies is unreasonably prolonged, e.g. where court proceedings or the investigation of allegations are excessively long, not due to any fault of the complainant
- Where no independent judiciary exists
- Where there is a general climate of intimidation such that it is not possible to obtain legal representation

Each case will be considered on its facts, and grounds which have been rejected in one case have sometimes been accepted in another, so do not hesitate to be creative in your arguments. One word of warning, however: ignorance of the existence of available remedies is unlikely to be accepted as a justification for non-exhaustion. You should make sure that you are fully-informed of the potential domestic remedies available in any case.⁵⁴

3.3.2 The requirement that a remedy be “available”, “effective” and “adequate”

International and regional human rights bodies have provided guidance on when a remedy is considered “available”, “effective” and “adequate”, such that it must be exhausted under the domestic remedies rule.

⁵⁴ This highlighted section is taken from: The Torture Reporting Handbook, Human Rights Centre, University of Essex, Colchester, 2000, pps. 79-82.

The Human Rights Committee (HRC) allows cases where the domestic remedies available offer no reasonable prospect of redress.⁵⁵ In an important decision concerning rights of women, the HRC declared that where there is “no administrative remedy which would enable a pregnancy to be terminated on therapeutic grounds, nor any judicial remedy functioning with the speed and efficiency required to enable a woman to require the authorities to guarantee her right to a lawful abortion within the limited period”, the exhaustion requirement is met, because there is no need to exhaust a remedy which had no chance of being successful.⁵⁶

The IACtHR has explained that adequate domestic remedies are those within the domestic legal system that are suitable to address an infringement of a legal right. An effective remedy is one that is capable of producing the result for which it was designed.⁵⁷ It will admit cases if the domestic remedies are considered inadequate or ineffective, such as by reason of indigence and lack of legal aid.⁵⁸

The European Court of Human Rights (ECtHR) has also recognised that the rule should be applied with flexibility and without formalism,⁵⁹ that applicants need only to exhaust remedies that are available and effective and not exhaust extraordinary measures,⁶⁰ and that in determining whether a remedy is available and effective, the circumstances of the individual case and the overall political and legal context must be taken into account.⁶¹ The ECtHR however, in *Cyprus v. Turkey* ruled that “lack of financial means does not absolve the applicant from making at least some attempt to take legal proceedings”.⁶²

Article 4(1) of the Optional Protocol (OP)-CEDAW waives the rule of exhaustion of domestic remedies where such remedies are unlikely to bring effective relief.⁶³ The CEDAW Committee has ruled that a constitutional challenge “could not be regarded as a remedy... which was likely to bring effective relief to a woman whose life was under a criminal dangerous threat”.⁶⁴

The African Commission on Human and Peoples’ Rights (ACHPR) has explained availability, effectiveness and sufficiency in the simplest yet clear manner. In *Dawda Jawara v. The Gambia*, the Commission stated that “[a] remedy is considered available if the petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint”.⁶⁵

⁵⁵ *Colamarco v. Panama*, HRC 437/1990 (21 October 1994), para 5.2.

⁵⁶ *K.L. v. Peru*, HRC 1153/2003 (24 October 2005), para 5.2.

⁵⁷ I/A Court H. R., *Velásquez Rodríguez Case*. Judgment of July 29, 1988, Series C No. 4, paras. 63-64; I/A Court H. R., *Godínez Cruz Case*. Judgment of January 20, 1989, Series C No. 5, paras. 66-67; I/A Court H. R., *Fairén Garbí and Solís Corrales Case*. Judgment of March 15, 1989. Series C No. 6, paras. 87-88.

⁵⁸ Exceptions to Exhaustion of Domestic Remedies (Advisory Opinion), IACtHR, Ser.A.No.11 (10 August 1990).

⁵⁹ *Ringeisen v. Austria*, ECtHR Judgment of 16 July 1971, Series A no. 13, § 89; *Lehtinen v. Finland* (dec.), no. 39076/97, ECtHR 1999-VII.

⁶⁰ *Cinar v. Turkey*, ECtHR no. 28602/95, decision of 13 November 2003; *Prystavka v. Ukraine*, ECtHR no. 21287/02, decision of 17 December 2002.

⁶¹ *Van Oosterwijck v. Belgium*, ECtHR Judgment of 6 November 1980, §§ 36-40; *Akdivar v. Turkey*, ECtHR Judgment of 16 September 1996, §§ 68-69; *Khashiyev and Akayeva v. Russia*, ECtHR Judgment of 24 February 2005, §§ 116-117; *Isayeva and Others v. Russia*, ECtHR Judgment of 24 February 2005, §§ 152-153.

⁶² *Cyprus v. Turkey* ECtHR no. 8007/77, (dec.), DR 13, 85, § 352.

⁶³ Article 4(1), Optional Protocol, Convention on Elimination of All Forms of Discrimination Against Women.

⁶⁴ *Goecke v. Austria*, CEDAW 5/2005 (6 August 2007), para 7.5.

⁶⁵ *Dawda Jawara v. The Gambia*, (ACHPR Commu. Nos. 147/95 and 149/96) para.32 available at: <http://caselaw.ihrrda.org/doc/147.95-149.96/view/>.

i) **Disciplinary and Administrative Remedies considered inadequate for certain violations**

The HRC has explained that “purely disciplinary and administrative remedies cannot be deemed to constitute adequate and effective remedies within the meaning of article 2, paragraph 3, of the Covenant, in the event of particularly serious violations of human rights, notably in the event of an alleged violation of the right to life”.⁶⁶ The Committee has also held this to be the case where torture is alleged.⁶⁷ This position has also been adopted by other human rights bodies, including the Inter-American Commission on Human Rights.⁶⁸

ii) **Domestic exhaustion neither practical nor desirable**

The ACHPR has ruled on the exception to exhaustion of local remedies in instances where it is “neither practical nor desirable” to require complainants to exhaust these. In *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah v. DRC*, the Commission held that it “has never held the requirement of local remedies to apply literally in case where it is impractical or undesirable for the Complainant to seize the domestic courts in the case of each violation”.⁶⁹ In *Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea) v. Guinea*, the Commission held, “In this present case, Sierra Leonean refugees [were] forced to flee Guinea after suffering harassment, eviction, looting, extortion, arbitrary arrests, unjustified detentions, beatings and rapes. Would it be required to return to the same country in which they suffered persecution? Consequently, the requirement to exhaust local remedies is inapplicable”.⁷⁰

iii) **Mass Violations Exception in the ACHPR**

The ACHPR has made an important exception to the ‘exhaustion’ rule when it recognised the futility of pursuing domestic remedies in cases of mass violations affecting a large number of victims and survivors. In *Amnesty International and Others v. Sudan*, the Commission held that “[t]he seriousness of the human rights situation in Sudan, and the great numbers of people involved render such remedies unavailable in fact, or, in the words of the Charter, their procedure would probably be unduly prolonged”.⁷¹ In *Malawi African Association v. Mauritania*, the Commission applied its own ‘impractical and undesirable’ rule of exhausting domestic remedies to situations that result in many victims. In the decision, it stated that “it does not believe that the condition that internal remedies must have been exhausted can be applied literally to those cases in which it is ‘neither practicable nor desirable’ for the complainants or the victims to pursue such internal channels of remedy in every case of violation of human rights. Such is the case where there are many victims”.⁷²

⁶⁶ Decision of 13 November 1995, Communication 563/1993, Case *Nydia Erika Bautista* (Colombia), UN doc. CCPR/C/55/D/563/1993, para. 8(2). See also Decision of 29 July 1997, Communication 612/1995, Case *José Vicente and Amado Villafañe Chaparro, Luis Napoleón Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres* (Colombia), UN doc. CCPR/C/60/D/612/1995, para. 8(2).

⁶⁷ *Giri v Nepal*, CCPR 1761/2008 (24 March 2011), para. 6.3; *Chaulagain v. Nepal*, CCPR 2018/2010, Decision on Admissibility (8 March 2012), para. 6.4.

⁶⁸ *Cañas Cana v Colombia*, Report No. 75/03, Petition 42/04, (22 October 2003), paras. 27-28.

⁶⁹ *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah v. DRC* (ACHPR Commu. 25/89-47/90-56/91-100/93) Available at: <http://caselaw.ihlda.org/doc/25.89-47.90-56.91-100.93/>.

⁷⁰ *Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea) v. Guinea* (ACHPR Comm. No. 249/02) available at: <http://caselaw.ihlda.org/doc/249.02/view/>.

⁷¹ *Amnesty International and Others v. Sudan*, (ACHPR Commu. 48/90- 50/91-52/91- 89/93) para.30 available at <http://caselaw.ihlda.org/doc/48.90-50.91-52.91-89.93/view/>.

⁷² *Malawi African Association v. Mauritania*, (ACHPR Commu. 54/91, 61.91, 98/93, 164/97-196,97 and 210/98) para.85 available at http://caselaw.ihlda.org/doc/54.91-61.91-96.93-98.93-164.97_196.97-210.98/view/.

The Commission confirmed this decision in *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan*, where it held that “considering that the alleged violations prima facie constitute ‘serious and massive violations’, [it] finds that under the prevailing situation in the Darfur, it would be impractical to expect the complainants to avail themselves of domestic remedies, which, are in any event, ineffective. Had the domestic remedies been available and effective, the Respondent State would have prosecuted and punished the perpetrators of the alleged violations, which it has not done”.⁷³

3.3.3 Meeting the exhaustion requirement: key aspects

- **The need to make “normal use” of the remedy**

If a domestic remedy is covered by the exhaustion rule (i.e., it meets the requirement of effectiveness and other conditions), a victim is obliged to make “normal use” of that remedy. “Normal use” implies that she complies with procedural requirements in domestic law, such as time limits, and formal requirements, such as subject matter jurisdiction and standing to bring the action. The failure of counsel to observe procedural requirements will not absolve the victim of the responsibility to meet the requirements of domestic law, unless that failure is in some way attributable to conduct by the State. If procedural requirements are so onerous or impractical as to make the remedy ineffective or inaccessible in the circumstances of the case, or authorities impede recourse to the procedure, resort to those remedies would not be considered “normal use.”

...

- **The need for a final decision**

In order to meet the exhaustion requirement, a victim must have obtained a final decision from the highest court to which recourse is available. If there are ongoing proceedings at the time the Committee considers a communication, the claim will not have been properly exhausted. In such circumstances, the complainant must either demonstrate that an exception to the requirement applies or re-submit the communication after obtaining a final judgment. A final decision implies that appeals have been taken to the highest possible level. If there are multiple claims, all must have been pursued through to a final decision at the highest appellate level. Claims that have been discontinued by the victim will be considered unexhausted. Like initial proceedings, appellate remedies must be available, adequate and effective in the particular circumstances of the case in order to be subject to the exhaustion rule.

...

- **The need to raise the substance of the claim at the domestic level**

In order to satisfy the exhaustion requirement, the claim presented in a communication must have been raised in substance at the domestic level. This requirement is well-established in human rights jurisprudence.⁷⁴

The ECtHR has clarified that the European Convention right, need not be explicitly raised in the domestic proceedings, as long as the issue was raised in substance.⁷⁵ On this particular issue, the CEDAW Committee has unfortunately rendered a communication inadmissible where sex discrimination has not been raised explicitly in a domestic proceeding even where it was implicitly raised.⁷⁶

⁷³ *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan*, (ACHPR Commu. 279/03-296/05) para.102 available at <http://caselaw.ihrrda.org/doc/279.03-296.05/view/>.

⁷⁴ Sullivan, Donna J, ‘Overview of the Rule Requiring Exhaustion of Domestic Remedies Under the Optional Protocol to CEDAW’, OP-CEDAW Technical Papers No. 1, International Women’s Rights Action Watch Asia Pacific, pp. 8-10, available at: http://www.iwraw-ap.org/publications/doc/DonnaExhaustionWeb_corrected_version_march%2031.pdf.

⁷⁵ *Castells v. Spain*, ECtHR no. 11798/85, Judgment of 23 April 1992, § 32; *Ahmet Sadik v. Greece*, ECtHR no. 18877/91, Judgment of 15 November 1996, § 33; *Fressoz and Roire v. France*, ECtHR no. 29183/95, Judgment of 21 January 1999, § 38; *Azinas v. Cyprus*, ECtHR no. 56679/00, Grand Chamber Judgment of 28 April 2004, §§ 40-41; *Cardot v. France*, ECtHR no. 11069/84, Judgment of 19 March 1991, Series A no. 200, p. 18, § 34.

⁷⁶ *Kayhan v. Turkey*, CEDAW 8/2005 (27 January 2006); *N.S.F. v. United Kingdom*, CEDAW 10/2005 (30 May 2007).

3.3.4 Implications of the ‘exhaustion’ rule on women

Of the general admissibility requirements listed above, exhaustion of domestic remedies is particularly a challenge for women seeking to bring individual complaints of violations or other forms of discrimination. Many women around the world lack general access to domestic remedies for violations they experience. Alternatively, the patriarchal bias against women entrenched in State institutions makes access to remedies very difficult. Such biases manifest in different ways - police around the world view domestic violence as a private matter that does not merit State intervention; claims of sexual violence by women are often considered incredible and therefore not investigated; women are harassed for daring to report violations, women’s secondary status is entrenched in law when it requires women to get their husband’s permission to pursue legal remedies; the low socio-economic status of women generally renders them powerless in approaching the often distant, abstract, intimidating and expensive legal systems. Moreover, “legal systems often discriminate against persons living in poverty who are unable to afford legal advice, are illiterate and are powerless to change legislative processes”.⁷⁷ The committees presiding over individual complaints of the human rights instruments have, in recognition of some of these challenges, adopted a broad interpretation of exhausting domestic remedies opening doors for women to access these mechanisms for justice.

3.3.5 Recognised exceptions to the exhaustion of domestic remedies rule

International and regional treaties provide for exceptions to the application of the exhaustion rule. For example, Article 46.2 of the American Convention establishes three situations in which the rule requiring the exhaustion of domestic remedies does not apply.⁷⁸

- (a) when the domestic legislation of the State concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;
- (b) when the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; and
- (c) when there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

Similarly, the Optional Protocol to the ICCPR provides that the exhaustion rule shall not apply “where the application of the remedies has been unreasonably prolonged”,⁷⁹ and the Optional Protocol to CEDAW provides that the rule will not apply where “the application of such remedies is unreasonably prolonged or unlikely to bring effective relief”.⁸⁰

In determining whether the application of a remedy has been unreasonably prolonged, human rights bodies consider all of the circumstances, including the complexity of the case and the conduct of the author and the authorities.⁸¹ For example, in the case of *Giri v Nepal*, the Human Rights Committee held that a failure to investigate allegations of torture and arbitrary detention four years after the State Party had been put on notice of those allegations amounted to an unreasonable delay.⁸² In *AT v Hungary* the CEDAW Committee found that a delay of three years since the incident meant that remedies had been

⁷⁷ Anderson, M ‘Access to Justice and Legal Process: Making Legal Institutions Responsive to Poor people in LDCs.’ SOAS Institute of Development Studies Working Paper No. 178, 2003 available at: <http://www.ids.ac.uk/files/dmfile/Wp178.pdf>.

⁷⁸ Article 46.2 of the American Convention of Human Rights.

⁷⁹ Article 5(2)(b).

⁸⁰ Article 4(1).

⁸¹ See, for example, *Gunaratna v. Sri Lanka*, CCPR 1432/2005, 17 March 2009, para. 7.5.

⁸² *Giri v Nepal*, CCPR 1761/2008, 24 March 2011, para. 6.3.

unreasonably prolonged, particularly because the complainant had been at risk of serious injury during that period.⁸³

3.3.6 Challenges and Limitations of Admissibility Criteria

Feminists have critiqued the human rights treaty mechanisms generally as reflecting ‘male’ standards and excluding women’s experiences. Some of the male standards, as discussed below, are reflected in the procedures to access the remedies to redress these violations. As such, the admissibility criteria to access the individual complaints mechanisms of the human rights treaties themselves end up as the reason for rejection of women’s claims. Most of the human rights mechanisms, (with the exception of the ACHPR, which is explained in detail below) require the individual victim or groups on her behalf to apply disallowing groups of individual victims to apply together as a class of victims having suffered the same or similar violations.

Christine Chinkin argues that, “[t]he mechanism for group or collective complaints allow women who may hold shared experience, such as widespread rape or sexual violence during armed conflict, to benefit from collective representation. In addition, collective complaints by women may be better placed to address structural causes of violence and inequality”.⁸⁴ The emphasis on the complaints procedures of human rights treaties that it comes from a ‘victim of violation’ or on her behalf, “prohibits actions being brought challenging a particular law, policy, or practice ... Women who face ... irreversible genital mutilation may have little use for the individual petitions system, as it is geared towards post-abuse reparation rather than preventive action”.⁸⁵

Women’s experience of sexual violence often accompanies trauma, a sense of shame, guilt or fear of reprisals from the perpetrators. The presupposition of the human rights mechanisms that victims themselves can or ought to bring complaints serves to discourage women complainants. That women can approach groups to act on their behalf is a solution, however the local groups they may know or can approach are not necessarily the ones that have the knowledge and expertise of handling a complaints procedure of an international treaty mechanism. The complaints procedures of these mechanisms now “have safeguards (interim measures) against ill-treatment or intimidation against complainants, ... and all committees allow names to be removed from the public written records. However, the latter does not keep the identity of the victim secret from the State Party, not least because admissibility criteria disallow anonymous submission, but also because to do so would prevent the State Party responding to the particular facts at hand”.⁸⁶

Finally, it is indeed positive for victims and survivors that different regional and international mechanisms have held that prolonged delay in achieving justice at the domestic level may constitute an indication that the remedy is in effect not available. However, the consequence of a prolonged delay by these regional or international mechanisms to decide on complaints filed with them is less clear. There are cases at the ACHPR, for example that have been pending for more than ten years and it could be said that justice for the complainants of these cases is practically not available before the ACHPR. In such cases, the admissibility criteria that the case must not have been examined before any other international mechanism serves to limit victims’ access to other possible regional or international avenues of justice. It is not clear if the complainants in such cases can send their communication to another appropriate regional or international mechanism and request waiver of the admissibility criteria of ‘the case not to be examined by another international mechanism’ on the grounds of justice in effect not being available at the international mechanism of the first instance because of prolonged delay.

⁸³ *A.T. v. Hungary* (CEDAW Comm. No. 2/2003 (2005).

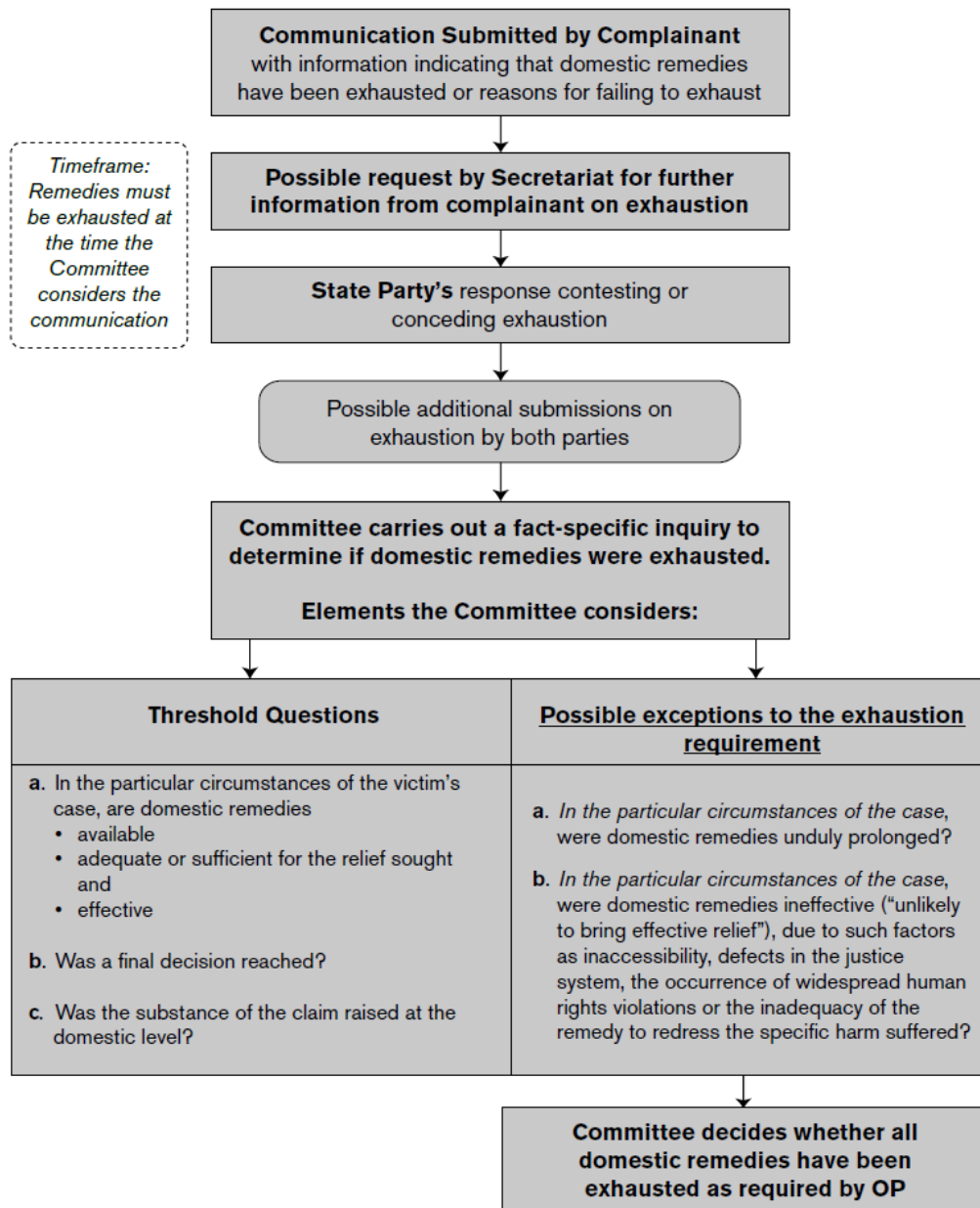
⁸⁴ Chinkin, Christine, ‘Feminist Interventions into International Law,’ (1997)19 *Adel.L.R.*13 (20).

⁸⁵ *Supra n. 1*, at p. 129.

⁸⁶ *Ibid.*, at p. 128.

ANNEXURE 3A: EXAMPLE: EXHAUSTING DOMESTIC REMEDIES BEFORE THE CEDAW COMMITTEE

Guide to navigating the exhaustion requirement:



Source: Sullivan, Donna J, 'Overview of the Rule Requiring Exhaustion of Domestic Remedies Under the Optional Protocol to CEDAW', OP-CEDAW Technical Papers No. 1, International Women's Rights Action Watch Asia Pacific, p.30, available at: http://www.iwraw-ap.org/publications/doc/DonnaExhaustionWeb_corrected_version_march%2031.pdf

4. REGIONAL MECHANISMS

4.1 The African Commission on Human and Peoples' Rights

In accordance with Article 30 of the African Charter on Human and Peoples' Rights, the African Commission on Human and Peoples' Rights (ACHPR) was established in 1987 to promote human and peoples' rights and ensure their protection in Africa.

The reports in the compilation '*Mass Rape, Rape as Weapon of War and Women in War Zones*' document a range of crimes against women and various forms of violation of women's rights, both in conflict and post-conflict contexts. Accountability for such crimes within the national systems have been difficult as legal systems in most of these countries have broken down or have only recently been reformed, the functionality of which is yet to be complete. Even with a fractured legal system, States have often investigated and prosecuted crimes like murder, assault, detention and torture but not sexual violence or other forms of violations women experience. Leaving sexual violence out of the accountability process is a form of discrimination against women invoking State's liability and responsibility towards women. Testimonies of survivors from such contexts clearly indicate violation of a number of articles of the African Charter, particularly Article 2, 3, 4, 5 and 6. Bringing communications of such violence to a regional body is an option for justice that women survivors and women's rights activists may want to consider pursuing aggressively.

4.1.1 Key Provisions Relevant to Women's Rights

Articles of the African Charter most relevant to address violation of women's rights are:

- Article 2 prohibits discrimination on the grounds of sex
- Article 3 provides equality before law and equal protection of law
- Article 4 assures right to life
- Article 5 prohibits torture and cruel, inhuman and degrading treatment
- Article 6 gives right to personal liberty and protection from arbitrary arrest
- Article 7 concerns the right to fair trial
- Article 14 concerns the right to property
- Article 15 concerns the right to work
- Article 16 concerns the right to health
- Article 17 concerns the right to education
- Article 18 concerns the protection of the family and vulnerable groups
- Article 18(3) provides that the State shall ensure the elimination of every form of discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.

i) Admissibility

Communications are subject to all the general admissibility criteria listed in the admissibility section. The additional criteria, specific to the African Commission are:

- the complaint must not be based exclusively on news disseminated through the mass media;
- the complaint must be submitted within a reasonable period of time from when the local remedies had been exhausted;
- the complaint does not deal with cases which have been already settled in accordance with the principles of the Organisation of African Unity (OAU) or the provisions of the African Charter of Human and Peoples' Rights.

Although one of the admissibility criteria is that the communication cannot be anonymous, the victim or the survivor herself need not send the communication. It may also be sent by an NGO, on behalf of the victim. Moreover, unique in the human rights system is the

African Commission's *actio popularis* approach where the individual or the NGO sending the communication need not know or have any relationship with the victims of the violation.⁸⁷ Such an approach enables an NGO to initiate a remedial action on behalf of a class of victims of specific violation.

ii) Complaint Procedure

Upon receipt of a communication from an individual or NGO, the ACHPR Secretariat may request further information if they find the complaint incomplete or inadequate. If there is sufficient information, the communication is transmitted to the concerned Government. Both parties are invited to submit their comments on admissibility, following which the Commission considers the admissibility of the complaint. If declared admissible, the Commission proceeds to a consideration of the merits of the complaint.

In order to examine the merits, both parties must provide their observations on the matter. This may involve an oral hearing before the Commission during one of its regular sessions, which normally take place in Banjul, the Gambia. The merits consideration takes place in private. The Commission reaches a decision on whether or not there has been a violation of the Charter and accordingly arrives at a decision. The Commission makes itself available to the parties to assist with reaching a friendly settlement, if there is an indication that a settlement might be possible. The Commission continues to work with the parties to assist with implementation of its decision, but there is no formal enforcement mechanism and it relies essentially on the OAU political bodies for enforcement.

4.1.2 Decisions Relevant to Women's Rights

The African Commission has not yet issued any decision directly related to women's rights generally or justice for crimes against women in particular. It has, however, made reference to or highlighted issues that are relevant to protection of women's rights in some of its decisions, and certain mass crimes cases such as the case concerning Darfur, have dealt with rape allegations amongst a host of other violations. In doing so, the Commission relies not only on the African Charter but other sources of international law and human rights treaties. Decisions relevant to women include those on the following issues:

i) Inhuman and Degrading Treatment

In *Doebbler v Sudan*,⁸⁸ the African Commission clarified that the African Charter also prohibits inhuman and degrading treatment in addition to cruel treatment and torture. Such inhuman and degrading treatment includes actions that "humiliate or force the individual against his will or conscience". The Commission emphasised that the prohibition "is to be interpreted as widely as possible to encompass the widest possible array of physical and mental abuses".⁸⁹

Such recognition of prohibition of inhuman and degrading treatment is relevant to women's experience of violence. Forcing women to strip in public as was alleged in the *Doebbler* communication, forcing women to urinate and defecate in public, abusing women with sexual innuendos, and humiliating women by attacking their characters particularly before their families or other persons they care about, are examples of different forms of inhuman and degrading treatment meted out to women that escape notice and recognition of the law.⁹⁰ Women survivors have recounted similar experiences of violence by armed forces in conflict and post-conflict countries that would likely meet the test of "widest possible

⁸⁷ Article 19 / Eritrea, ACHPR Commn. No. 275/03 available at: <http://caselaw.ihrrda.org/doc/275.03/view/>.

⁸⁸ *Curtis Francis Doebbler v. Sudan* (Comm. No. 236/2000 (2003)) available at: <http://caselaw.ihrrda.org/doc/236.00/view/>.

⁸⁹ *Ibid.*, ¶¶ 36 & 37.

⁹⁰ See 'Mass Rape, Rape as Weapon of War and Women in War Zones,' Reports of violence against women in conflict and post-conflict countries available at: <http://www.angelfire.com/space2/light11/women/mass1.html>.

array of physical and mental abuse” set by the decision. It is up to women survivors and women’s rights and human rights organisations to explore the potential of the *Doebbler* decision to address some forms of violations on women’s personal and bodily dignity within the provisions of the African Charter.

ii) Violation of International Humanitarian Law and other International Human Rights Treaties

In *D.R. Congo v. Burundi, Rwanda and Uganda*, the African Commission held that the rape and killing of Congolese women by the Rwandan and Ugandan forces violated the first Protocol Additional to the Geneva Conventions and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and by extension, the African Charter.⁹¹

iii) Equal Access to Justice and Protection of Law

In *Amnesty International and Others v. Sudan*,⁹² it was alleged in the petition, among other things, “that non-Muslims were persecuted in order to cause their conversion to Islam. They do not have the right to preach or build their churches; there are restrictions on freedom of expression in the national press. Members of the Christian clergy are harassed; Christians are subjected to arbitrary arrests, expulsions and denial of access to work and food aid”.⁹³

On application of *Shari’a* laws, the Commission held “[w]hile fully respecting the religious freedom of Muslims in Sudan, the Commission cannot countenance the application of law in such a way as to cause discrimination and distress to others. ... When Sudanese tribunals apply *Shari’a*, they must do so in accordance with the other obligations undertaken by the State of Sudan. Trials must always accord with international fair-trial standards. ... and everyone should have the right to be tried by a secular court if they so wish”.⁹⁴ The Commission held Sudan to have discriminated against non-Muslims and therefore to have violated Article 2, which provides for equal protection of law.

While this particular case is about application of *Shari’a* laws, indeed the same is true for some aspects of customary and other semi-formal laws that discriminate against women. Since discrimination against women on the basis of sex and gender is a global phenomenon; decisions that emphasise equal access to justice and protection of law are important tools in the course of seeking justice for women.

iv) Obligation to Investigate and Prosecute Crimes including Rape

In *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan*,⁹⁵ the African Commission held the Republic of Sudan in violation of several articles of the African Charter, particularly Articles 4 and 5. It found that Sudan failed to prevent mass scale torture, rape and other gross violation of human rights in the Darfur region and further, failed to effectively investigate and prosecute them. It was therefore recommended that Sudan should take all necessary and urgent measures to ensure protection of victims of human rights violations and take steps to prosecute those responsible for the human rights violations, including murder, rape, arson and destruction of property.⁹⁶

The decision implies that the African Commission regards rape to be among the human

⁹¹ *D.R. Congo v. Burundi, Rwanda and Uganda* (Comm. No. 227/99) ((2003)) available at: <http://caselaw.ihrrda.org/doc/227.99/view/>.

⁹² *Amnesty International and Others v. Sudan* (Comm. 48/90/ 50/91, 52/91, 89/93 (1999)) available at: <http://caselaw.ihrrda.org/doc/48.90-50.91-52.91-89.93/view/>.

⁹³ *Ibid.*, ¶ 74.

⁹⁴ *Ibid.*, ¶¶ 72 & 73.

⁹⁵ *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan* (Comm. No. 279/03-296/05) available at: <http://caselaw.ihrrda.org/doc/279.03-296.05/view/>.

⁹⁶ *Ibid.*, ¶ 229.

rights violations comparable in gravity to murder, torture, arson and destruction of property. The decision may be quoted and used to explore justice for conflict-time mass rapes despite the fact that there is no explicit prohibition of rape or sexual violence in the African Charter.

v) Extent of States' Due Diligence Responsibility

Taking cues from the other regional mechanisms, the African Commission ruled strongly on the standards of States' due diligence responsibility for violations by private actors in *Zimbabwe Human Rights NGO Forum v. Zimbabwe*.⁹⁷

It is well documented that unless situated in a conflict or post conflict country, most violations of women's rights are by private actors or public officials acting in a private capacity. For many years after adoption of the standards set in the declaration of universal human rights, women have been deprived the protection of international law because of the presumption that international human rights treaties and conventions regulate only State conduct. While human rights treaties do set human rights standards for States to respect and promote, States also have an obligation to protect their citizens from violation of these rights by others. When States fail in their performance of this obligation, they incur a direct responsibility.

The African Commission in *Zimbabwe Human Rights NGO Forum v Zimbabwe* ruled that "...an act by a private individual and therefore not directly imputable to a State can generate responsibility of the State, not because of the act itself, but because of the lack of due diligence⁹⁸ to prevent the violation or for not taking the necessary steps to provide the victims with reparation".

The Commission cited the judgment of the Inter-American Court of Human Rights in the case of *Velásquez Rodríguez v Honduras*⁹⁹ which sets the standard for determining State responsibility for acts by private individuals. The Inter-American Court reaffirmed that States are "obliged to investigate every situation involving a violation of the rights protected by [international law]" and to "take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation".¹⁰⁰ The Commission applied this authoritative interpretation of State duty, by extension, to Article 1¹⁰¹ of the African Charter of Human and Peoples' Rights and transformed what is otherwise a private conduct to a constructive act of State, "because of the lack of due diligence to prevent the violation or respond to it as required by the [African Charter]".¹⁰²

The significance of the due diligence responsibility of the State to protect women and prevent violations cannot be understated. While the most pervasive form of violence against women by private actors is domestic violence, it is also a well-documented fact that most offenders in the case of rape are persons known to the victim, which often are private or non-State actors. Like in domestic violence, women often find it difficult to get the local police and State institutions to take action against the offender in cases of sexual violence.

⁹⁷ *Zimbabwe Human Rights NGO Forum v Zimbabwe* (Comm. No. 245/02) available at: <http://caselaw.ihrda.org/doc/245.02/view/>.

⁹⁸ In human rights jurisprudence this standard was first articulated by a regional court, the Inter-American Court of Human Rights, in looking at the obligations of the State of Honduras under the American Convention on Human Rights. See, *Velásquez-Rodríguez*, ser. C., No.4, 9 Human Rights Law Journal 212 (1988).

⁹⁹ *Velásquez Rodríguez v. Honduras*, Inter-Am Court of Human Rights, Judgment of 29 July 1989.

¹⁰⁰ *Ibid.*, ¶ 174.

¹⁰¹ "...recognize the rights, duties and freedoms enshrined in the Charter and ... undertake to adopt legislative and other measures to give effect to them".

¹⁰² *Zimbabwe Human Rights NGO Forum v Zimbabwe* (Comm. No. 245/02) available at: <http://caselaw.ihrda.org/doc/245.02/view/>, ¶ 144.

States often evade or limit their due diligence responsibility by passing legislation providing different forms of remedies and compensation to the victims and survivors without putting any monitoring mechanism in place to ensure its implementation. In general terms, the Human Rights Committee has held, for example, that the existence of legal rules or legislation is not sufficient in and of itself. The rules must also be implemented and applied (entailing for instance, investigations and judicial proceedings) and victims must have an effective remedy.¹⁰³

Some States contend that beyond having legislation there is little they can do to foresee private violations and prevent them. The African Commission states that “[e]ven though it is not always possible for a State to know beforehand how a non-State actor is going to act, the question to be addressed here is not necessarily who violated the rights, but whether under the present communication, the State took the necessary measures to prevent violations from happening at all, or having realized violations had taken place, took steps to ensure the protection of the rights of the victims”.¹⁰⁴ The question that arises therefore is: what must States do to fulfil their responsibility to protect individuals from private violations?

The doctrine of due diligence requires the State to “organize the governmental apparatus, and in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights”.¹⁰⁵ For example, actions by officials of all the State’s institutions of law enforcement, the judiciary and administrative bodies that implement laws, rules and policies to prevent and protect victims of violence are indicators to measure due diligence. Individual cases of policy failure or sporadic incidents of non-punishment would not meet the standard to warrant international action. Rather, the test is whether the State undertakes its duties seriously.¹⁰⁶ Such seriousness can be evaluated through the actions of both State agencies and private actors on a case-by-case basis.

Thus the due diligence standard for establishing State responsibility for private violations is flexible. However, when States condone a pattern of abuse through pervasive non-action - when they do not actively engage in acts of violence but routinely disregard evidence of violence, rape or assault, it can be said that the State has generally failed to take the necessary steps to protect their citizens and may be considered, by extension, complicit in the violation. To avoid such complicity, States must demonstrate due diligence by taking active measures to protect, prosecute and punish private actors who commit abuses.

4.1.3 Challenges and Limitations

One of the significant limitations of the ACHPR is that cases can take many years from the time of submission of a petition to the issuance of a decision. There are cases pending in the ACHPR for as long as ten years. Given that most of the human rights commissions both at the regional and international level (including the ACHPR) have determined undue delay in providing redress at the national level as failure on the part of the State to provide an effective remedy, it is of importance to know how these mechanisms view delay on their

¹⁰³ E. Klein, “The Duty to Protect and to Ensure Human Rights Under the International Covenant on Civil and Political Rights”, in Eckart Klein (ed.), *The Duty to Protect and to Ensure Human Rights* (Colloquium, Potsdam, 1-3 July 1999), 2000.

¹⁰⁴ *Zimbabwe Human Rights NGO Forum v Zimbabwe* (Commu. No. 245/02) available at: <http://caselaw.ihrda.org/doc/245.02/view/>, ¶ 157.

¹⁰⁵ *Velásquez Rodríguez v. Honduras*, Inter-Am Court of Human Rights, Judgment of 29 July 1989, ¶ 166.

¹⁰⁶ Commission on Human Rights, Fifty-second session, February 1996, Report of the Special Rapporteur on violence against women, its causes and consequences, “Further Promotion And Encouragement Of Human Rights And Fundamental Freedoms, Including The Question Of The Programme And Methods Of Work Of The Commission Alternative Approaches And Ways And Means Within The United Nations System For Improving The Effective Enjoyment Of Human Rights And Fundamental Freedoms”, submitted in accordance with Commission on Human Rights Resolution 1995/85.

own part to provide an effective and prompt remedy. At the very least, in such cases, the admissibility requirement that the complaint must not be pending before any other international mechanism should be waived so that the complainant has the option to approach other relevant mechanisms for justice.

Another limitation at the ACHPR is that hearings are not scheduled in advance and they are generally held in private. Neither the press nor the public has any access to the hearings. The decisions of the Commission are by way of recommendations to the State and not binding judgments. Implementation of these recommendations therefore depends entirely on the goodwill of the State concerned that may or may not take the recommendations seriously.

Attached as Annexure 4A is the standard format for submission of complaints. The same guidelines apply to submission of complaints raising violations of the Protocol (see point 4.3 below).

4.2 The African Court on Human and Peoples' Rights

The *African Court on Human and Peoples' Rights* (ACtHPR) was established as a legal entity by a Protocol to the African Charter on Human and Peoples' Rights. This Protocol was signed in June 1998 in Ouagadougou, Burkina Faso, by the African Heads of State. The Court came into being only on 25 January 2005, with the ratification by fifteen Member States. Its seat is in Arusha, Tanzania.

To date, the African Court has only delivered one final judgment in a concrete case of human rights violations.

Institutional relationship

For some time, the relationship between the Court and the Commission was not clear. However, two joint meetings regarding this issue have taken place in 2009. The two organs finally harmonised their interim rules of procedure and in particular points relating to

- their complementarity;
- the consultation mechanisms between the Court and the Commission;
- their respective advisory opinion;
- the seizure of the Court by the Commission;
- representation of the Commission before the Court; and
- points relating to content of the application and the transfer of procedure to the case file to the Court by the Commission.

In 2004, the AU decided to integrate the African Court on Human and Peoples' Rights with the African Court of Justice (ACJ) out of the concern for the growing number of AU institutions. The ACJ is not yet operational but it is intended to be the principal judicial organ of the AU. While the courts should be merged, the AU Commission recommended that the integrity of the jurisdiction of the two courts should be retained. The AU Commission recommended administering the protocols governing the two courts by way of special chambers, and by adopting a new protocol. This new protocol ("Protocol on the Statute of the African Court of Justice and Human Rights") was adopted by the AU Assembly of Heads of States and Governments. Fifteen countries need to ratify it before a merged court can come into force.¹⁰⁷

¹⁰⁷ The highlighted text is taken from: Claiming Human Rights - Guide to International Procedures Available in Cases of Human Rights Violations in Africa http://www.claiminghumanrights.org/au_court.html?&L=1.

There are two ways in which the African Court may be seized of a case: (i) by referral from the African Commission, or (ii) by direct seizure by individuals or NGOs.

Option (ii) is only available if the State Party has made a declaration under Article 34(6) of the African Court Protocol accepting the competence of the Court to receive cases under Article 5(3). As of March 2011 five countries had accepted this competence: Tanzania, Burkina Faso, Malawi, Mali and Ghana.

4.3 The Protocol on Rights of Women in Africa

The African Human Rights system has a specific Protocol on the Rights of Women in Africa (hereinafter the Women's Protocol).¹⁰⁸

4.3.1 Key Provisions

The Women's Protocol is comprehensive in many respects and has unique provisions to ensure that States promotes and protects women's rights. Among these are:

- rights related to elimination of discrimination (Article 2)
- the right to dignity and respect for her person (Article 3)
- the right to life and freedom from exploitation and cruel, inhuman or degrading treatment or punishment (Article 4)
- the right to elimination of harmful practices (Article 5)
- the right to justice and equal protection before the law (Article 8)
- the right to peace (Article 10)
- the right to protection of women in armed conflict (Article 11)
- economic and social welfare rights (Article 13)
- health and reproductive rights (Article 14)
- the right to food security (Article 15)
- the right to adequate housing (Article 16)

All of the above provisions can be relied upon in communications before the Commission, in respect of articles violated by countries that have ratified and implemented it domestically. As of August 2012, the 28 countries that had ratified the Protocol were Angola, Benin, Burkina Faso, Cape Verde, Comoros, Democratic Republic of the Congo, Djibouti, Gambia, Ghana, Guinea Bissau, Lesotho, Liberia, Libya, Mali, Malawi, Mozambique, Mauritania, Namibia, Nigeria, Rwanda, South Africa, Senegal, Seychelles, Tanzania, Togo, Uganda, Zimbabwe and Zambia.¹⁰⁹

4.3.2 Using the Women's Protocol

Realising the potential of the Women's Protocol, women's rights groups in Africa have developed a detailed and useful guide on the procedure to bring a remedial claim.¹¹⁰ The Guide is very thorough with a section on relevant case law of the African Commission pointing out cases that might be useful if one brings a case under the Women's Protocol or relevant to women's rights. However, although the Women's Protocol came into force in November 2005 and 28 Member States to the African Charter have ratified it, there has been no communication brought for violations under the Women's Protocol yet. This gap points to the need for a greater and intensified dissemination and awareness campaign among women in Africa on the potential of the Women's Protocol for justice where national systems have been ineffective or have failed.

¹⁰⁸ A protocol is an addition to the primary Convention but more precise on a particular element relevant to but not adequately addressed in the Convention. It must be specifically ratified. The text of the Protocol is available at: http://www.achpr.org/files/instruments/women-protocol/achpr_instr_proto_women_eng.pdf.

¹⁰⁹ See the ratification table at: <http://www.achpr.org/instruments/women-protocol/ratification/>.

¹¹⁰ Solidarity for African Women's Rights - A Guide to Using the Protocol on the Rights of Women in Africa available at: http://www.soawr.org/resources/Manual_on_Protocol_on_Women_Rights_in_Africa.pdf.

The Protocol is specifically about violations women experience and they are articulated expansively. It is therefore unfortunate that there are thus far no communications sent under the Protocol. Victims, survivors and groups on behalf of women must feel encouraged to send submissions to the ACHPR under the Protocol.

4.4 ECOWAS Court

The Community Court of Justice of the Economic Community of the West African States (ECOWAS) has only recently exerted its influence on a human rights matter. It issued a landmark judgment of critical importance to women, on the issue of slavery.¹¹¹

4.4.1 Mandate and Admissibility

The Economic Community of West African States (ECOWAS) was created in 1975 to replace the Customs Union of West African States. The Community Court of Justice was established in 1993. In January 2005, ECOWAS adopted a protocol to permit persons to bring suits against Member States. At the same time, the jurisdiction of the Community Court was revised to include review of violations of human rights in all Member States.¹¹²

The admissibility criteria for accessing the ECOWAS Court are much less restrictive than the general admissibility requirements for other regional and international human rights mechanisms as listed in section 3 above. Article 10(d)(ii) of Supplementary 5 Protocol A/SP.1/01/05 on the ECOWAS Court states that access to the Court is open to the following:

- a) individuals on application for relief for violation of their human rights; the submission of application for which shall:
 - i) not be anonymous; nor
 - ii) be made whilst the same matter has been instituted before another International Court for adjudication.

It is significant to note that exhaustion of domestic remedies is not a criterion for admissibility. Indeed, the Court ruled as such in its judgment on *Mme Hadijatou Mani Koraou v. The Republic of Niger*, when the State argued that the applicant had not exhausted domestic remedies.¹¹³ For women victims and survivors of sexual violence and other forms of violations in West Africa who find remedies at national level ineffective or inaccessible, accessibility of a regional court without having to exhaust domestic remedies is a significant advantage in their pursuit of justice.

4.4.2 Member States

The Member States of ECOWAS are Benin, Burkina Faso, Cape Verde, Gambia, Ghana, Guinea, Ivory Coast, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo.

4.4.3 Substantive Ruling on Slavery

The case of *Mme Hadijatou Mani Koraou v. The Republic of Niger* involved the sale of 12 year old Hadijatou Mani to El Hadj Souleymane as a slave to do household chores and provide sexual services to the 'master'. She was subjected to conditions of harsh labour with no remuneration. She bore three children for the master. Nine years later El Hadj Souleymane decided to 'liberate' and marry her. He therefore issued a 'liberation

¹¹¹ *Mme Hadijatou Mani Koraou v The Republic of Niger*, 27 October 2008, ECW/CCJ/JUD/06/08.

¹¹² Solidarity for African Women's Rights - A Guide to Using the Protocol on the Rights of Women in Africa, p. 65, available at http://www.soawr.org/resources/Manual_on_Protocol_on_Women_Rights_in_Africa.pdf.

¹¹³ *Mme Hadijatou Mani Koraou v The Republic of Niger*, 27 October 2008, ECW/CCJ/JUD/06/08 ¶ 49.

certificate' signed by the chief of the village to that effect. After her 'liberation', Hadijatou Mani refused to marry her former master, who continued to harass her. When she went to the authorities for protection, she was arrested and detained for two months for bigamy because subsequent to her 'liberation', she had married another person of choice.¹¹⁴

On the definition of slavery, despite the facts of the case indicating the classic form of slavery involving sale, purchase, transfer and 'liberation' of a person, the Court affirmed that slavery may exist simply where powers of ownership are exercised through a certain level of control by one individual over another, sufficient to indicate the latter's enslavement. By showing that "Mani had no freedom of movement; her master completely controlled how she lived; she was psychologically and physically abused by him: he demeaned her with his sexual and other abuse and insults, reminding her she was no more than a slave; her attempts to escape were met with punishment; she was forcefully beaten; she was raped throughout her time as a slave, including when she was a child; and that this treatment continued over a period of 10 years and attempts at control continued after her 'liberation' and departure; it was proved that a clearer case of slavery would be difficult to envisage".¹¹⁵

The Court found the State of Niger legally responsible for its failure to protect Hadijatou Mani from slavery. It reiterated that Niger had failed through its judicial and administrative authorities to protect her human rights. The Court ruled that judicial failure to initiate a criminal proceeding on its own motion when the case was being adjudicated amounted to acceptance or at least tolerance of the practice of slavery. The Court noted that a State's responsibility under international as well as national law for any form of human rights violation founded on slavery results from its tolerance, passivity, inaction and abstention in relation to the practice.¹¹⁶

The Court's emphasis on the definition of slavery to exercising control and power by one individual over another is significant for women. Slavery in traditional societies, as is the case today, is a highly gendered form of domination; the great majority of persons ever enslaved were women.¹¹⁷ While the enslavement traditionally was for the purpose of having slave labour for economic activity, even if women were not needed for economic activities, they were always usable as reproducers of slave labour.¹¹⁸ Slavery as practiced in modern days does not necessarily involve sale, purchase or transfers of persons. Women, still considered property in some places, may be sold into marriage. Men or women may be coerced into working in brothels, sweatshops, construction sites and fields. As illegal migrant workers, they may be subjected to sexual violence, horrific living conditions, threats against their families and dangerous workplaces.¹¹⁹ In such situations, there is indeed exercise of subtle or overt control or power by one individual over another meeting all elements of slavery. However, despite pronouncing a landmark ruling on slavery, it is unfortunate that the ECOWAS Court did not hold the State of Niger responsible for discrimination on the basis of sex. The responsibility for discrimination was attributed to the individual 'master' instead.¹²⁰

¹¹⁴ Duffy, Helen 'Hadijatou Mani Koroua v Niger: Slavery Unveiled by the ECOWAS Court', Human Rights Law Review(2008), Oxford University Press, 2008, p. 2.

¹¹⁵ *Ibid.*, p. 10.

¹¹⁶ *Mme Hadijatou Mani Koroua v The Republic of Niger*, 27 October 2008, ECW/CCJ/JUD/06/08 ¶¶ 83, 84 & 86.

¹¹⁷ Robertson, Claire C. and Klein, Martin 'Introduction' (Eds.), *Women and Slavery in Africa*, Heineman, Portsmouth, NH, 1997.

¹¹⁸ Patterson, O, "Trafficking, Gender and Slavery - Past and Present, Forthcoming in Jean Allain, ed., *The Legal Understanding of Slavery: From the Historical to the Contemporary* (Oxford: Oxford University Press, Sept. 2012) available at: http://scholar.harvard.edu/patterson/files/trafficking_gender_slavery_12_20_11_cambria_autosaved_.pdf.

¹¹⁹ Gender Equality, Trafficking in Human Misery available at: <http://www.unfpa.org/gender/violence1.htm>.

¹²⁰ Duffy, Helen 'Hadijatou Mani Koroua v Niger: Slavery Unveiled by the ECOWAS Court', Human Rights Law Review(2008), Oxford University Press, 2008, at pps. 13 & 14.

4.4.4 Opportunities and Challenges

Since the ECOWAS Court is not a human rights court, it has limited experience adjudicating human rights matters, which may present some challenges. The challenges may manifest by way of lack of foresight on understanding the nuances of violations and state responsibility and/or therefore not seizing opportunities to rule on violations as basic as discrimination that levels up with international standards.

However, one of the opportunities with the ECOWAS Court is the relative speed with which the Court addressed the urgent human rights issue on slavery. A court's ability to render timely justice is of critical importance in situations of ongoing grave human rights violations. The Hadijatou Mani case was completed within a year of filing the application, a much encouraging timeline as compared to the prolonged proceedings before other human rights commissions and courts. The Court's ability and willingness to sit and conduct hearings in the State where the violations occur is of further significance in the struggle for justice for human rights violations.¹²¹ Moreover, not requiring applicants to exhaust domestic remedies and the fact that the Court has a mandate to issue binding judgments should encourage women victims and survivors from the sub-region to file applications with the ECOWAS Court.

4.5 SADC Tribunal

Like the ECOWAS Court, the Southern Africa Development Community's (SADC) Tribunal too recently exerted its influence on a human rights matter and decided on a case of racial discrimination and unlawful expropriation of land without access to courts in Zimbabwe.¹²² The SADC Tribunal, like other sub-regional courts, does not have an exclusive mandate to adjudicate on human rights matters but has jurisdiction to decide on questions of human rights violations among other issues. Indeed, the SADC Tribunal's mandate to judge human rights matter is not without contention. The Tribunal has been effectively stalled following the judgment in the landmark Zimbabwean case.

The Tribunal was established in 1992 as an institution of the treaty establishing the Southern Africa Development Community's (SADC) and was sworn in November 2005. By Article 4 of that treaty, SADC and its Member States are obliged to act in accordance with the principles of human rights, democracy and the rule of law. This is the basis of the SADC Tribunal's interpretation of its own role. The Tribunal's seat is Windhoek, Namibia.

It has jurisdiction over disputes between SADC Member States and on disputes between legal or natural persons and Member States. However, in order for a person to bring a case before the Tribunal, all internal legal remedies of the Member State concerned have to be exhausted.

Also, a person can bring a case against another person under SADC law directly to the Tribunal if the other party so agrees. Persons may sue the Community over the legality, interpretation or application of SADC law. A person may also bring a Member State to the Tribunal in connection with SADC law or the State's obligations under such law once national remedies have been exhausted, thus making the Tribunal a final court of appeal for matters relating to SADC Law.

Proceedings before the Tribunal shall be instituted by either an application or a special agreement between the parties to the proceedings. Conditions for admissibility are the following:

1. The application shall state:(a) the name and address of the applicant (b) the name,

¹²¹ *Ibid.*, at page 18.

¹²² *Mike Campbell (Pvt) Ltd & Ors v. Republic of Zimbabwe* [2008] SADCT2008/2 available at <http://www.saflii.org/sa/cases/SADCT/2008/2>.

designation and address of the respondent (c) the precise nature of the claim together with a succinct statement of the facts (d) the form of relief or order sought by the applicant.

2. The application shall state the name and address of the applicant's agent to whom communications on the case, including service of pleadings and other documents should be directed.
3. Any application which does not comply with the requirements of sub-rules 1 and 2 shall render the application inadmissible.
4. The original of the application shall be signed by the agent of the party submitting it.
5. The original of the application accompanied by all annexes referred to therein shall be filed with the Registrar together with five copies for the Tribunal and a copy for every other party to the proceedings. All copies shall be certified by the party filing them.
6. Where the application seeks the annulment of a decision, it shall be accompanied by documentary evidence of the decision for which the annulment is sought.
7. An application made by a legal person shall be accompanied by: (a) the instrument regulating the legal person or recent extract from the register of companies, firms or associations or any other proof of its existence in law; (b) proof that the authority granted to the applicant's agent has been properly conferred on him or her by someone authorised for the purpose.
8. (a) If an application does not comply with requirements set out in sub-rules 4 to 7, the Registrar shall prescribe a reasonable period within which the applicant is to comply with them whether by putting the application in order or by producing any of the documents. (b) If the applicant fails to put the application in order within the time prescribed, the Tribunal shall, after hearing the agents decide whether the non-compliance renders the application formally inadmissible.

The applications must be sent to the following address:

The Registrar, SADC Tribunal, P.O. Box 40624 Ausspahnplatz, Windhoek, Namibia

(Source: Claiming Human Rights - Guide to International Procedures Available in Cases of Human Rights Violations in Africa <http://www.claiminghumanrights.org/sadc.html>)

4.5.1 Member States

The Member States of the SADC are Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

4.6 The East African Court of Justice

The Court is the judicial body of the East African Community (EAC). It combines the roles of a Court of Justice for the EAC as well as that of a human rights and appellate court (still to be finally determined). The Court has jurisdiction over the interpretation and application of the East African Treaty of 1999. It may have extended jurisdiction upon conclusion of a protocol to that end such as other original, appellate, or human rights jurisdiction. The protocol to extend the jurisdiction to human rights has not yet been concluded.

Its human rights jurisdiction will be based on the African Charter on Human and Peoples' Rights. Even though it lacks a human rights mandate as clear as that of the ECOWAS Court, the East Africa Court of Justice has a very progressive human rights judgment to its credit.

Reference to the Court may be by legal and natural persons resident in any of the Member States, EAC Member States and the Secretary General of the EAC. The Court's temporary seat is in Arusha, Tanzania.¹²³

4.6.1 Member States

The Member States of the EAC are Burundi, Kenya, Rwanda, Tanzania and Uganda.

4.7 Decisions of other regional bodies of significance to women's rights

Other regional bodies such as the Inter-American Commission and Court of Human Rights (IACHR and IACtHR) and the European Court of Human Rights (ECtHR) have delivered important judgments and decisions on various issues that advance rights of women including justice for all forms of violence against women. While these may not specifically relate to sexual violence, the reasoning and arguments advanced in these decisions on how women's experience of violence violate provisions of the relevant treaties may well be used for similarly advancing case law and establishing jurisprudence in the African region for accountability for various forms of violence, including sexual violence against women. The decisions are on issues such as:

4.7.1 Gravity of Domestic Violence

The ECtHR in *Opuz v. Turkey*¹²⁴ held "that the issue of domestic violence, which can take various forms ranging from physical to psychological violence or verbal abuse, cannot be confined to the circumstances of the present case. It is a general problem which concerns all Member States and which does not always surface since it often takes place within personal relationships or closed circuits and it is not only women who are affected. The Court acknowledges that men may also be the victims of domestic violence and, indeed, that children, too, are often casualties of the phenomenon, whether directly or indirectly".¹²⁵ It is significant that the Court stresses the gravity of the issue of domestic violence in these words. Underlining the gravity of domestic violence further, the Court emphasised "that in domestic violence cases perpetrators' rights cannot supersede victims' human rights to life and to physical and mental integrity".¹²⁶

Opuz v. Turkey concerned a petition filed by a victim of domestic violence, whose abusive ex-husband killed her mother and the State ignored her continued pleas for protection and action. The Court found in favour of the applicant and held that the State of Turkey was in breach of the right to life and the right to be free from torture. On the right to equal protection of law, the Court found that "the State's failure to protect women against domestic violence breaches their right to equal protection of the law and that this failure does not need to be intentional".¹²⁷

4.7.2 Rape as Torture

The Inter-American Commission on Human Rights made a finding that rape may amount to torture in the *Fernando and Raquel Mejia v. Peru* case.¹²⁸ In *Aydin v. Turkey*, the European

¹²³ The highlighted text comes from: Claiming Human Rights - Guide to International Procedures Available in Cases of Human Rights Violations in Africa <http://www.claiminghumanrights.org/eac.html>

¹²⁴ *Opuz v. Turkey* (Application no. 33401/02) Judgment, European Court of Human Rights, Strasbourg, 9 June 2009.

¹²⁵ *Ibid.*, ¶ 132.

¹²⁶ *Ibid.*, ¶ 147.

¹²⁷ *Ibid.*, ¶ 191.

¹²⁸ *Fernando and Raquel Mejia v. Peru* (Decision of 1 March 1996), Report No. 5/96, case no 10.970, in Annual Report of the Inter-American Commission on Human Rights 1995 OEA/Ser.L/V/II.91, pp. 182-188.

Court of Human Rights clarified that “although the ill-treatment that Mrs. Aydin had suffered included being stripped, beaten, sprayed with cold water from high-pressure jets, put in a car tyre and spun around and raped by an individual in military clothing, *the rape on its own would have been sufficient for the Court to make a finding of torture* under Art. 3 of the European Convention on Human Rights”.¹²⁹

4.7.3 States’ Due Diligence Responsibility

The understanding and application of due diligence standards has evolved over time. The IACHR and IACtHR have, in their reports and judgments, established the due diligence principle as a benchmark to decide on situations of violence against women perpetrated by private actors. The *Velasquez Rodriguez* case already referred to above is among the first cases that found State responsibility for violence by private actors. The due diligence responsibility of the State has been reinforced by other decisions since.

The IACHR established in the case of *Maria Da Penha Maia Fernandes v. Brazil* “that the obligation of States to act with the due diligence necessary to investigate and sanction human rights violations applies to cases of domestic violence”.¹³⁰ Moreover the rights contained in the American Convention may be implicated when a State fails to prevent, prosecute and sanction acts of domestic violence perpetrated by private individuals.¹³¹

In *Claudia Ivette González and Others*,¹³² the IACHR determined that “The protection of the right to life is a critical component of a State’s due diligence obligation to protect women from acts of violence. This legal obligation pertains to the entire State institution, including the actions of those entrusted with safeguarding the security of the State, such as the police forces”.¹³³

The IACtHR too made similar observations on the legal obligations of the State in the landmark case of *González et al. (“Cotton Field”) v. Mexico*.¹³⁴ The ECtHR in the case of *Opuz v. Turkey*,¹³⁵ discussed the extent and limits of such a responsibility. The question that States often contest is that there is no way a State could foresee or know the behaviour of a private individual to trigger the responsibility of prevention.

In determining the question of knowledge, one common feature in the rulings of the ECtHR is that the State authorities had already recognised a risk of harm to the victim and/or her family members, but had failed to act diligently to protect them. The recognition of risk was reflected in the issuance of protection orders,¹³⁶ the detention of the aggressor,¹³⁷ assistance to the victim and/or her family members in the filing of complaints,¹³⁸ and the

¹²⁹ *Aydin v. Turkey*, Judgment of 27 September 1997, European Court of Human Rights, Application No. 57/1996/676/866.

¹³⁰ IACHR, Report N° 54/01, Case 12.051, April 16, 2001.

¹³¹ Report N° 54/01, Case 12.051, *Maria Da Penha Maia Fernandes* (Brazil), Annual Report of the IACHR 2001, ¶¶ 3, 37-44.

¹³² IACHR, Report 28/07, Cases 12.496-12.498, March 9, 2007.

¹³³ See, IACHR, Report N° 28/07, Cases 12.496-12.498, *Claudia Ivette Gonzalez and Others* (Mexico), March 9, 2007, ¶¶ 247-255; I/A Court H.R.

¹³⁴ I/A Court H.R., *Case of González et al. (“Cotton Field”) v. Mexico*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 16, 2009. Series C No. 205, ¶ 245.

¹³⁵ *Opuz v. Turkey* (Application no. 33401/02) Judgment, European Court of Human Rights, Strasbourg, 9 June 2009.

¹³⁶ See CEDAW Committee, Views on Communication No. 5/2005, *Sahide Goekce v. Austria*, July 21, 2004; CEDAW Committee, Views on Communication No. 6/2005, *Fatma Yildirim v. Austria*, July 21, 2004.

¹³⁷ See, European Court of Human Rights, *Branko Tomasic and Others v. Croatia*, Application No. 46598/06, 15 January 2009.

¹³⁸ See, European Court of Human Rights, *Kontrová v. Slovakia*, Application No. 7510/04, ECtHR 2007-VI (extracts).

institution of criminal proceedings,¹³⁹ in response to the victim's and/or her family members repeated contacts with the authorities.

4.7.4 Non-Discrimination

Non-discrimination is an important principle for women as noted by several regional and international instruments. It is linked to the international recognition that the due diligence duty of States to protect and prevent violence has special connotations in the case of women, due to the historical discrimination they have faced as a group.¹⁴⁰ Non-discrimination is articulated in instruments as 'equality before law,' 'equal protection of law,' or 'equal access to justice' and sex is listed as one of the prohibited grounds of discrimination.

Discrimination, while being a violation of a fundamental right to equality by itself, is also the root of all other forms of violence against women. Indeed, it is the lack of State's due diligence to end structural discrimination that leads to violence against women. The IACHR report on Maria Eugenia Morales de Sierra underscores the link between discrimination, violence against women and due diligence, highlighting that the States' duty to address violence against women also involves measures to prevent and respond to the discrimination that perpetuates this problem.¹⁴¹ Such measures are required to modify the social and cultural patterns of conduct of men and women and to eliminate prejudices, customary and other practices based on the idea of the inferiority or superiority of either of the sexes, and on stereotyped roles for men and women.

Indeed, the applicant, Maria Eugenia Morales de Sierra's case was typical of discrimination based on stereotyped roles for men and women. The applicant complained that the Code, by treating women and men differently on the basis of sex, violated her right to equal protection of and before the law under Article 24 of the American Convention. The IACtHR laid out its interpretation of the meaning of 'equal protection of the law' under Article 24. At paragraph 31, it stated that:

[T]he right to equal protection of the law set forth in Article 24 of the American Convention requires that national legislation accord its protections without discrimination. Differences in treatment in otherwise similar circumstances are not necessarily discriminatory ... A distinction which is based on 'reasonable and objective criteria' may serve a legitimate State interest in conformity with the terms of Article 24... It may, in fact, be required to achieve justice or to protect persons requiring the application of special measures ... A distinction based on reasonable and objective criteria (1) pursues a legitimate aim and (2) employs means which are proportional to the end sought ...

The international and regional systems have also identified certain groups of women as being at particular risk for acts of violence due to having been subjected to discrimination based on more than one factor, among these girl-children, and women pertaining to ethnic, racial, and minority groups; a factor which must be considered by States in the adoption of measures to prevent all forms of violence,¹⁴² including sexual violence.

¹³⁹ *Opuz v. Turkey* (Application no. 33401/02) Judgment, European Court of Human Rights, Strasbourg, 9 June 2009.

¹⁴⁰ See, e.g., UN General Assembly, Human Rights Council, *Accelerating efforts to eliminate all forms of violence against women: ensuring due diligence in prevention*, A/HRC/14/L.9/Rev.1, 16 June 2010; UN General Assembly, *Intensification of efforts to eliminate all forms of violence against women*, A/RES/64/137, 11 February 2010 and A/RES/63/155, January 30, 2009; UN, *Declaration on the Elimination of Violence against Women*, General Assembly resolution 48/104, 20 December 1993, A/RES/48/104, 23 February 1994; UN, *Beijing Declaration and Platform for Action, Fourth World Conference on Women*, 15 September 1995, A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995); CEDAW, General Recommendation 19: *Violence against Women*, (11th Session 1992), U.N. Doc.A/47/38 (1993).

¹⁴¹ IACHR, Report N° 4/01, *Maria Eugenia Morales de Sierra* (Guatemala), 19 January 2001, para. 44.

¹⁴² UN General Assembly, Human Rights Council, *Accelerating efforts to eliminate all forms of violence against women: ensuring due diligence in prevention*, A/HRC/14/L.9/Rev.1, 16 June 2010, para. 10; IACHR, *Violence and*

ANNEXURE 4A: Standard Format for the Submission of Communications to the African Commission on Human and Peoples' Rights

There is no hard and fast rule or format for the submission of communications to the African Commission, but the following simplified guidelines will make it much easier for would-be complainants to submit their communications.

The guidelines are in two categories: (inter-State communications) and other (or individual communications)

(A) Guidelines on how to submit communication under article 48 and 49 (Communications from States)

1. **Complaining State(s)** (should state amongst other things, its name, official language, and year in which it ratified the Charter).
2. State Party accused of the violation (state the year the State ratified the African Charter, its official language).
3. Facts constituting the violation (Please explain in as much a factual detail as possible what happened, specifying place, time and dates of the violation, if possible).
4. Exhaustion of local remedies (indicate measures that have been taken to resolve the matter amicable why this measure failed, or why it wasn't used at all. Also indicate measures taken to exhaust local remedies. Please attach all relevant documents).
5. Domestic legal remedies not yet pursued (please give reasons why this has not been done).
6. Other International avenues (state whether the case has also been referred to any other international settlement body either at the UN or within the OAU system).
7. Complaints submitted to the Secretary General of the OAU and to the accused State. These complaint letters should be accompanied by any response from these two sources.

(B) Guidelines on how to submit a communication pursuant to article 55 of the Charter (other communications)

1. **Complainant (s)** (please indicate whether you are acting on your behalf or on behalf of someone else. Also indicate in your communication whether you are an NGO and whether you wish to remain anonymous).

Name

Age

Nationality

Occupation and/or Profession

Address

Discrimination against Women in the Armed Conflict in Colombia, OEA/Ser.L/V/II.124/Doc.6, October 18, 2006, para. 140; IACHR, *Access to Justice for Women Victims of Violence in the Americas*, Inter-Am. C.H.R., OEA/Ser.L/V/II, Doc. 68 (20 January 2007), para. 272; CEDAW Committee, General Recommendation 25, on *Temporary Special Measures*, UN Doc./CEDAW/C/2004/I/WP.1/Rev.1 (2004), section II, para. 12.

Telephone/Fax no

2. **Government accused of the Violation** (please make sure it is a State Party to the African charter).
3. **Facts constituting alleged violation** (Explain in as much a factual detail as possible what happened, specifying place, time and dates of the violation).
4. **Urgency of the case** (Is it a case which could result in loss of life/lives or serious bodily harm if not addressed immediately? State the nature of the case and why you think it deserves immediate action from the Commission).
5. **Provisions of the Charter alleged to have been violated** (if you are unsure of the specific articles, please do not mention any).
6. **Names and titles of government authorities** who committed the violation. (if it is a government institution please give the name of the institution as well as that of the head).
7. **Witness to the violation** (include addresses and if possible telephone numbers of witnesses).
8. **Documentary proofs of the violation** (attach for example, letters, legal documents, photos, autopsies, tape recordings etc., to show proof of the violation).
9. **Domestic legal remedies pursued** (Also indicate for example, the courts you've been to, attach copies of court judgments, writs of habeas corpus etc).
10. **Other International Avenue** (Please state whether the case has already been decided or is being heard by some other international human rights body; specify this body and indicate the stage at which the case has reached).

For further information, please contact:
The African Commission on Human and Peoples' Rights
P O Box 673, Banjul, The Gambia
Tel: 220 392962
Fax: 220 390764

(Source: African Commission for Human and People's Rights, Information Sheet 2, Guidelines for Submission of Complaints, available at:
http://www.achpr.org/files/pages/communications/guidelines/achpr_infosheet_communications_eng.pdf)

5. INTERNATIONAL HUMAN RIGHTS TREATIES

International human rights law addresses itself to States and regulates their conduct with respect to individuals within their territorial control. Accordingly, an individual may bring claims under international human rights law for violations by State actors or for violations resulting out of State failure to protect the treaty rights of the individual. Human rights law does not yet recognise the right of individuals to bring actions directly against the perpetrator, whether public or private actors, before any of the regional or international human rights bodies; claims can only be filed against States. Given that women are often victims of violence by non-State actors, making claims under international human rights law has limited use for women. This presents a real barrier for justice for women, particularly in internal armed conflict situations where women are victims of sexual violence by all parties including the rebel groups.¹⁴³

Despite the limitations of international human rights law, the individual complaints mechanisms of certain human rights treaties are among the few options available to women to pursue justice. The use of such mechanisms therefore needs to be strengthened. The treaty bodies with the most potential to address specific gender related violations and the ones often used by women applicants are the follows:

5.1 UN Convention on Elimination of All Forms of Discrimination against Women (CEDAW)

5.1.1 Substantive protections

The UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)¹⁴⁴ sets out the obligations of State Parties to combat discrimination and promote substantive equality for women. Despite being singularly the most significant human rights treaty focused on women's human rights, the word 'violence' does not appear in it at all. This omission was corrected in 1992 when the CEDAW Committee issued General Recommendation 19.¹⁴⁵ It explains that 'gender-based violence' such as family violence, forced marriage, dowry deaths, acid attacks, female circumcision, sexual harassment, compulsory sterilisation or abortion or conversely denial of reproductive health services, battering, rape and other forms of sexual assault are forms of discrimination that gravely affect women's enjoyment of their human rights and therefore fall clearly within the prohibition of discriminatory conduct in CEDAW.

General Recommendation 19 also specifically addresses the situation of women in armed conflict. References to armed conflict in General Recommendation 19 include:

- a clarification that gender-based violence which impairs or nullifies "the right to equal protection according to humanitarian norms in time of international or internal armed conflict" is prohibited by CEDAW.
- The CEDAW Committee, explaining Article 6 of CEDAW that deals with prohibition of all forms of traffic in women, states that "Wars, armed conflicts and the occupation of territories often lead to increased prostitution, trafficking in women and sexual assault of women, which require specific protective and punitive measures."

¹⁴³ See below, for discussion on the applicability of international humanitarian law.

¹⁴⁴ The text of CEDAW is available at: <http://www2.ohchr.org/english/law/cedaw.htm>. Entered into force 2 September 1981.

¹⁴⁵ Committee on the Elimination of Discrimination against Women, General Recommendation No. 19, Violence against women, (11th Session, 1992) UN Doc. HRI/GEN/1/Rev.1. Available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19>.

General Recommendation 19 imposes several obligations on State Parties to overcome all forms of gender-based violence in the context of an armed conflict. Some of these require States to:

- criminalise gender-based war crimes, crimes against humanity and persecution in their domestic laws;
- ensure that any violations are investigated and perpetrators brought to justice;
- provide complaints mechanisms to women victims and compensation whether the abuse occurred at the hands of the State, an armed group or a private individual;
- create specialised counselling and support services for women victims;
- provide gender-sensitive training for all military personnel and others involved in the conflict;
- have campaigns to counter stereotypical perceptions that encourage, tolerate conflict related violence against women, including those against the ‘enemy women.’¹⁴⁶

The Optional Protocol to CEDAW¹⁴⁷ adopted in 1999 strengthens the mandate of the CEDAW Committee and offers a complaints procedure for individual women or groups of women to petition the Committee about their violation. It has since, significantly added to the jurisprudence of the CEDAW Committee on violence against women.

5.1.2 Admissibility and Procedures

There are no admissibility requirements in addition to those stated in section 3. The procedure provides that once the CEDAW Committee registers a request, it will simultaneously consider the admissibility and merits. A time limit is fixed for the State to submit observations before the matter can be subject to a decision of the Committee. It can make recommendations to the State Party in its decision. The State Party is asked to submit a written report, within six months following the receipt of the decision and possible recommendations of the Committee, with detailed information on the measures taken as a response to these observations and recommendations.¹⁴⁸

Article 8 of the Optional Protocol to CEDAW allows the Women’s Committee to undertake confidential inquiries upon receipt of information of grave or systematic violations. The State Party is requested to cooperate in the examination of the material. One or more members of the Committee are designated to conduct an inquiry and to report to the Committee as a whole. Such an inquiry may include a visit to the territory of the State Party if the State Party gives consent. Article 10 allows State Parties to opt out of these procedures. For the inquiry procedure to be activated the information must relate to multiple violations that are grave and derived from reliable source.¹⁴⁹

5.1.3 Significant Decisions on Violence

The cases of violence that come to the CEDAW Committee have almost always been related to a State failure to protect women from violence by private actors. There are however significant decisions that are positive for women exploring the potential of sending communications to the CEDAW Committee.

i) Domestic violence

Among the oft-cited cases of violence is the above-referred *A.T. v. Hungary*, where the

¹⁴⁶ Making Rights a Reality- Violence Against Women in Armed Conflict, Amnesty International, AI Index: ACT77/050/2004 p. 20 available at <http://www.amnesty.org/en/library/info/ACT77/050/2005>.

¹⁴⁷ The Protocol entered into force on 22 December 2000. Available at: http://www.unhcr.ch/html/menu3/b/opt_cedaw.htm.

¹⁴⁸ Information available at: http://www.claiminghumanrights.org/cedaw_individual_communications.html.

¹⁴⁹ *supra* note 1 at pps.134-135.

applicant was a victim of severe domestic violence. The perpetrator, her common-law husband and father of her two children, had criminal proceedings lodged against him but was never detained. The applicant thus claimed that the State failed to protect her from severe domestic violence despite her repeated requests for assistance. There were no protection or restraining orders available and no shelters equipped to take her and her disabled child. The CEDAW Committee held that Hungary had failed in its obligations under the CEDAW Convention because it had not enacted specific legislation to combat domestic violence and sexual harassment, because no shelters existed for the immediate protection of a woman with a disabled child in the present case, and because there was no injunctive relief, such as a restraining order, available to her.¹⁵⁰ The CEDAW Committee in this case not only affirmed the emerging standards of due diligence responsibility of States to prevent, investigate, prosecute and punish violence by non-State actors; it also itemised a whole range of State responsibilities to protect women against domestic violence, including legislative, administrative, and social welfare changes.¹⁵¹

In *Goekce v. Austria*,¹⁵² and *Fatima Yildirim v. Austria*,¹⁵³ the women on whose behalf the cases had been brought were killed by their respective husbands after a series of violent incidents over a lengthy period. The two women were killed despite their appeals for assistance from law enforcement agencies and the courts on a number of occasions. The CEDAW Committee found a violation of the right to life and physical and mental integrity under Articles 2 (elimination of discrimination) and 3 (equality) of CEDAW, read together with Article 1 (non-discrimination) and General Recommendation 19 (violence against women). The CEDAW Committee considered that given the combination of factors, the police knew, or should have known, that the victims were in serious danger, and therefore the police were accountable for failing to exercise due diligence. In these cases, the CEDAW Committee also held that a perpetrator's right to liberty cannot supersede a woman's human rights to life and to physical and mental integrity.

ii) Failures in judicial response to sexual violence

In *Vertido v. The Philippines*,¹⁵⁴ an important case on sexual violence, the applicant argued that the judiciary had discriminated against her by relying on gender-based myths in its procedures and decisions.

The applicant had brought a rape claim against a colleague and reported the case to police within 48 hours of the incident. After the case was initially dismissed for lack of probable cause, she filed an appeal and secured an order that the accused be charged with rape. After an inordinate delay in the proceedings, the trial court ultimately issued a verdict acquitting the accused. It held that there was reasonable doubt to convict the accused based on evidence presented by the prosecution and that the testimony of the applicant indicated she consented to sexual relations.

The applicant subsequently filed a complaint to the CEDAW Committee in which she argued *inter-alia* that the State failed in its obligation to ensure that women are protected against discrimination by public authorities, including the judiciary. She further alleged that the court had relied on gender-based myths in its judgment and claimed that the acquittal was evidence of the failure of the State to exercise due diligence in punishing acts of violence against women. The CEDAW Committee found the State in violation of its obligations under Articles 2(f) and 5(a) which require State Parties to take appropriate measures to modify or abolish existing State laws, regulations and practices that constitute discrimination against women. Article 5(a) in particular requires State Parties "to modify the social and cultural patterns of conduct of men and women with a view to achieving the elimination of

¹⁵⁰ *A.T. v. Hungary* (CEDAW Comm. No. 2/2003 (2005)) ¶ 9.3.

¹⁵¹ *Ibid.*, 0.6, II General, (a) - (h).

¹⁵² *Goekce v. Austria* (CEDAW Comm. No. 5/2005 (2007)).

¹⁵³ *Yildirim v. Austria* (CEDAW Comm. No. 6/2005 (2007)).

¹⁵⁴ *Vertido v. The Philippines* (CEDAW Comm. No. 18/2008).

prejudices and custom...or the stereotyped roles for men and women”.¹⁵⁵ The decision is significant in that it highlights the obligation of the State to take steps to modify social notions of gender stereotypes and eliminate prejudices and customs that harm women and are at the root cause of all forms of violence against women, and contribute to failures to respond to it.

5.1.4 Limitations and Opportunities

- The CEDAW Committee rendered the communication in *Kayhan v. Turkey*¹⁵⁶ inadmissible on the grounds that sex discrimination was not explicitly raised as an issue in the domestic proceeding although such discrimination was implicit in the facts of the case. Thus if an issue was not raised in the domestic proceedings, it cannot be raised for the first time in a communication with the CEDAW. It needs to be raised at the domestic level and only if it fails, can it be raised again with CEDAW.
- Despite Article 2(e) of CEDAW, which specifically prohibits discrimination by “any person, group or enterprise” to raise a complaint of violation of a treaty right, a woman must establish, like with other treaty bodies, that the violation has been by a State Party. In order to raise ‘private’, or ‘non-State’ violations, it must be shown that the State has failed to act to prevent the harm or to properly investigate, prosecute, punish and provide reparation under national laws. Thus it is a two-step process and a double burden for women to raise violations by non-State actors. One, women need to show that they are victims of conduct amounting to a violation of a treaty right. Two, the applicant must be able to demonstrate that the State is responsible under international law for its failure to exercise due diligence to prevent or prosecute it.
- The CEDAW Committee has done little with regard to enhancing the definition of torture to include sexual violence and violations by non-State actors. Given that CEDAW itself does not contain a specific prohibition against torture, the CEDAW Committee could have taken all opportunities to clarify and affirm that women may be victims of torture and therefore in need of protection or that non-State actors too may be responsible for torture. In the 2005 report of the fact-finding inquiry in Ciudad Juarez, Mexico, the CEDAW Committee adopted the traditional interpretation of torture despite the fact that by then other regional and international bodies had already established rape and other forms of sexual violence as torture. The report speaks of torture as distinct from rape and other forms of sexual violence by private citizens.¹⁵⁷ By not addressing rape as constituting torture, the CEDAW Committee missed an important opportunity to affirm and lend the force of its weight and credibility to the decisions of regional and international bodies.
- The inquiry procedure of the Optional Protocol of CEDAW has been under-utilised. Since the OP-CEDAW came into force, the Committee has conducted only one inquiry in over a decade.¹⁵⁸ The limited use of this procedure may precisely be an opportunity for women to consider activating it, particularly or in addition to when individual applications at other mechanisms fail. Since this procedure relates to multiple violations and not an individual complaints mechanism, groups instead of individual victims may take the initiative to activate the inquiry.

¹⁵⁵ Non-Discrimination in International Law - A Handbook for Practitioners, 2011 Edition, Interights, London, p. 127.

¹⁵⁶ *Kayhan v. Turkey*, CEDAW Comm. No. 8/2005 (27 January 2006).

¹⁵⁷ CEDAW, Report on Mexico produced by the Committee on the Elimination of Discrimination against Women, and Reply from the Government of Mexico, UN Doc. CEDAW/C/2005/OP.8/MEXICO, 27 January 2005 ¶¶ 232, 241, 273, 274.

¹⁵⁸ *Ibid.*

5.2 The United Nations International Covenant on Civil and Political Rights (ICCPR)

5.2.1 Substantive protections

The ICCPR articles most relevant to bring claims to redress violence against women include:

Article 3 - Equality between men and women

Article 6 - Right to Life

Article 7 - Prohibition on torture, cruel, inhuman and degrading treatment and punishment

Article 8 - Prohibition on slavery

Article 9 - Right to liberty

Article 10 - Right to human dignity

Article 14 - Equality before courts and tribunals

Article 26 - Non-discrimination and equality before the law

The treaty established a Human Rights Committee (HRC) to monitor the implementation of the treaty and to consider complaints of violations of treaty rights by the State.

Under Optional Protocol I to the treaty, State Parties may accept the competence of the HRC to hear individual complaints.

5.2.2 Admissibility and Procedure

There are no admissibility requirements other than those mentioned in section 3. The HRC may consider individuals complaints¹⁵⁹, called “communications”, against States Parties to the Optional Protocol I to the International Covenant on Civil and Political Rights. The communication must be submitted by the alleged victim or by someone assigned by the victim to act on his/her behalf.¹⁶⁰

Complaints are submitted in written form to the Committee, registered by the Secretariat and sent to the State Party for its response. If the State Party contests the admissibility of the communication the Committee may decide to consider admissibility separately to the merits (with each party given the opportunity to make written submissions), but does not always do so.

Once parties have provided their written submissions, the communications are examined by the Committee on the basis of the documents that have been submitted in closed session, without an oral hearing.

5.2.3 The General Comments and Decisions of the Human Rights Committee

The HRC has adopted general comments, issued reports and/or otherwise made important findings that impact positively the possibilities of addressing women’s claims of violation of treaty rights, including sexual violence. These range from questions of admissibility to definitions of important concepts of equality and non-discrimination, to clarification on nature and extent of violation and the extent of State obligation to protect and promote civil and political rights.

i) Prohibition of discrimination

In General Comment No.18, the HRC set out a definition of discrimination to clarify Article 26 on ‘non-discrimination and equality.’¹⁶¹ The definition provides, “the Committee

¹⁵⁹ The schematic representation of how the individual complaints procedure works is available at: http://www.claiminghumanrights.org/ccpr_schematic.html.

¹⁶⁰ Information available at: http://www.claiminghumanrights.org/ccpr_individual_communications.html.

¹⁶¹ HRC General Comment No. 18, Non-Discrimination (1989), UN Doc. HRC/GEN/1/Rev, ¶ 1.

believes the term ‘discrimination’ as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms”.¹⁶² The definition is broad, does not require discriminatory intent and encompasses both direct and indirect discrimination. With regard to violations of women’s rights in the area of immigration laws, employment, pensions and matrimonial benefits, the HRC has generally held that laws that discriminate between men and women breach Article 26.¹⁶³

In General Comment No. 28 relating to Article 3 on equality between men and women, the HRC asserts that “Article 2 and 3 [of the ICCPR] requires States parties to take all steps necessary, including the prohibition of discrimination on the ground of sex, to put an end to discriminatory actions both in the public and the private sector[s] which impair the equal enjoyment of rights”.¹⁶⁴

In *Lovelace v. Canada*,¹⁶⁵ Canadian law had removed the applicant’s Native Indian status because she had married a non-Native Indian man. Under the same legislation, the reverse situation would not have resulted in loss of status for a man. The HRC held that ongoing denial of her Indian status and therefore to return to the reserve following her divorce violated her right as a person belonging to a minority and her right to equality and non-discrimination on the basis of sex. The decision implies that the protection of culture cannot discriminate against women on the basis of their sex. This provision is useful to women who experience violation of their rights in the name of culture or religion. The practice of honour crimes that sometimes takes the form of sexual violence is often tolerated in several countries in the name of protecting culture or religion.

ii) Torture of family members of the disappeared

Another pioneering decision from the HRC is application of Article 7 to indirect torture i.e. the suffering endured by persons close to the victim of torture or of enforced disappearance. In *Quenteros v. Uruguay*, the HRC understood ‘the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts. ... In these respects, she too is a victim of the violations of the Covenant suffered by her daughter in particular, of article 7.’¹⁶⁶ The HRC has thus legitimised the claims of many mothers, wives and daughters of victims of torture or disappearance and expanded the torture prohibition for women.

iii) Recognition of due diligence obligations to prevent and respond to harm by non-State actors

The Human Rights Committee has recognised in a number of general comments the positive obligations on States to prevent and respond to violence committed by non-State actors, and the fact that a failure to respond appropriately may amount to a violation by the State itself.

In General Comment No. 31, the Committee explained that the general obligations to

¹⁶² *Ibid.*, ¶ 7.

¹⁶³ *Aumeeruddy-Cziffra v. Mauritius*, HRC Comm. No. 35/1978 (9 April 1981); *Avellanal v. Peru*, HRC Comm.No. 172/1984 (28 October 1988); *Broeks v. The Netherlands*, HRC Comm.No. 172/1984 (9 April 1987); *Pauger v. Austria*, HRC Comm.No. 718/1996 (9 July 1997); *Zwaan de Vries v. The Netherlands*, HRC Comm.No. 182/1984 (9 April 1987).

¹⁶⁴ HRC, General Comment No.28: Equality of Rights Between Men and Women (Article 3) (2000), UN Doc. CCPR/C/21/Rev.1/Add.10 ¶ 4.

¹⁶⁵ *Lovelace v. Canada*, HRC Comm. No. 24/1977 (30 July 1981); *J.L. v. Australia*, HRC Comm. No. 491/1992 (28 July 1992).

¹⁶⁶ *Quinteros v. Uruguay*, HRC Comm. No. 107/1981 (23 July 1983) para 14.

implement the Convention:

are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law. The Covenant cannot be viewed as a substitute for domestic criminal or civil law. However the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities. States are reminded of the interrelationship between the positive obligations imposed under article 2 and the need to provide effective remedies in the event of breach under article 2, paragraph 3. The Covenant itself envisages in some articles certain areas where there are positive obligations on States Parties to address the activities of private persons or entities. For example, the privacy-related guarantees of article 17 must be protected by law. It is also implicit in article 7 that States Parties have to take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power. In fields affecting basic aspects of ordinary life such as work or housing, individuals are to be protected from discrimination within the meaning of article 26.¹⁶⁷

iv) Reproductive Rights

*Karen Noelia Llantoy Huamán v. Peru*¹⁶⁸ concerns a minor who was carrying a foetus with a fatal abnormality. She was denied an abortion despite Peruvian law allowing pregnancy termination for health reasons. The young woman was forced to carry the foetus to term and to feed the baby until its inevitable death several days later. The HRC found a violation of Article 17 (arbitrary interference with privacy) and Article 7 (prohibition of torture), reasoning that the author suffered mental distress due to the refusal of the medical authorities to carry out a therapeutic abortion.¹⁶⁹ It noted the author's particularly vulnerable position as a female minor and the failure of the State to give her adequate medical and psychological support.¹⁷⁰ Peru was consequently found in breach of Articles 24 (right to special measures of protection for minors) and 2 (obligation to ensure and protect rights) of the ICCPR.

5.2.4 Limitations and Opportunities

- Despite the broad scope of Article 7 of the ICCPR, “there have been very few female applicants who have brought proceedings alleging a breach of Article 7 as a result of sexual or other violence outside the traditional construction of torture within State custody”.¹⁷¹ There have been cases before the HRC though these have concerned men

¹⁶⁷ On torture by non-state actors, see also General Comment No. 20 on Article 7: “[i]t is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity” (para. 2). In its General Comment No. 28, the Committee identified domestic violence and other forms of violence against women as contrary to Article 7 of the ICCPR (para. 11).

¹⁶⁸ *Karen Noelia Llantoy Huamán v. Peru*, HRC Comm. No. 1153/2003 (2005).

¹⁶⁹ *Ibid.*, ¶ 6.3-6.4.

¹⁷⁰ *Ibid.*, ¶ 6.5.

¹⁷¹ *supra* note 1 at p. 221.

who have claimed breach of Article 7 through sexual violence on their genitals.¹⁷² There is as much scope for women victims of sexual violence to claim breach of Article 7.

- There is nothing in the rules of the treaty bodies preventing them from allowing for the amendment of a complaint when new information comes to light or to comment on the gendered aspects of a complaint. Yet, in cases that had references to sexual violence against women, the HRC has generally neglected to probe further and draw that fact out exhibiting an overall approach of gender blindness. In *Gedumbe v. Democratic Republic of Congo*,¹⁷³ a male teacher at a consular school in Bujumbura claimed breach of Article 7 when a former ambassador withheld his salary to force him to make his wife available for sex. While the case itself was declared inadmissible because of unsubstantiated facts, the HRC did not comment on the possibility that the wife may have been a victim of slavery and therefore suffered a breach of Article 8.
- Similarly, in *Blanco v. Nicaragua*,¹⁷⁴ the complainant claimed a breach of Article 7 when government forces ransacked his house and beat his pregnant wife to the point of causing her miscarriage. The HRC found a breach of Article 7 as was claimed, but failed to comment on the vicious attack on the wife. In another case of *V.E.M v. Spain*¹⁷⁵, the male complainant claimed he was dismissed from military service because he “tolerated his wife’s dishonourable lifestyle” which constituted an attack on his honour. The complaint did not mention the wife nor was she included as a complainant. The HRC, instead of using the opportunity to question the biased notion that the sexual lives of women have an impact on men’s honour, ignored the reference while declaring the claim inadmissible.
- General Comment 28, in relation to torture, refers to domestic or other types of violence against women, including rape, the denial of access to safe abortion when pregnancy has resulted from rape, forced abortion or forced sterilisation, and the practice of genital mutilation.¹⁷⁶ The inclusion of such a broad range of crimes opens up avenues for claims from many women victims of these varied crimes and not only of rape.
- General Comment 7 clarifies that Article 7 prohibits ill-treatment ‘even when committed by persons acting outside or without any official authority’¹⁷⁷ thereby holding the State responsible for acts of officials beyond their prescribed roles and orders. General Comment 20 goes a step further and includes within State responsibility, acts of officers in their private capacity.¹⁷⁸ For women, who are often ill-treated or tortured for information about their male relatives, such clarifications are important to send claims to the HRC.

5.3 United Nations Convention Against Torture (UNCAT)

The Committee oversees the implementation of the UN Convention Against Torture (CAT Committee).

¹⁷² *Motta v. Uruguay*, HRC Comm. No. 11/1997 (29 July 1980); *Ajaz and Jamil v. Republic of Korea*, HRC Comm. No. 644/1995 (19 March 1997); *Rodriguez v. Uruguay*, HRC Comm. No. 332/1988 (19 July 1994).

¹⁷³ *Gedumbe v. Democratic Republic of Congo*, HRC Comm. No. 641/1995 (10 July 1997).

¹⁷⁴ *Blanco v. Nicaragua*, HRC Comm. No. 328/1988 (10 July 1994).

¹⁷⁵ *V.E.M v. Spain*, HRC Comm. No. 467/1991 (16 July 1991).

¹⁷⁶ HRC, General Comment No.28, Equality of Rights Between Men and Women, para 11.

¹⁷⁷ HRC, General Comment No.7: Torture or Cruel, Inhuman or Degrading Treatment or Punishment, para 2.

¹⁷⁸ HRC, General Comment No.20: Torture or Cruel, Inhuman or Degrading Treatment or Punishment, paras 2 and 13.

5.3.1 Admissibility and Procedure

There are no admissibility requirements in addition to those stated in section 3. Communications or complaints may be sent by the victim herself or on her behalf to the CAT Committee. If the Committee decides that a communication is admissible, the author of the communication and the State Party is informed. The Committee then examines the merits of the communication. The State Party has six months for the submission of its explanations or for the information about the measures it may have taken to remedy the situation. The complainants may also provide further information and be invited, if the Committee deems it necessary, to participate in its meetings. The individual communications are considered in private meetings and all documents are confidential. To protect the person(s) claiming the violation, the Committee may request the State Party concerned to take measures in order avoid irreparable damage to the alleged victim of the violation, pending the final decision of the Committee. When the Committee arrives at a decision, it is transmitted to the complainant and to the State Party concerned. The Committee invites the State Party to inform it of the measures it has taken in the light of that decision.¹⁷⁹

5.3.2 Committee Against Torture (CAT) on Violence Against Women

Although the Special Rapporteur on Torture has recognised sexual violence as a method of physical torture in 1986,¹⁸⁰ the CAT, like the HRC, has been slow to read women's experience of violence as torture, cruel, inhuman and degrading treatment. It has however, in recent times been proactive in expressing concerns about sexual violence in classic contexts for torture such as detention¹⁸¹ and for classic purpose of extracting information from women about male relatives.¹⁸² Since at least 2004, the CAT has expressed concern over a range of different forms of violence such as female genital mutilation,¹⁸³ domestic violence¹⁸⁴ and the sexual harassment of girls¹⁸⁵ in its concluding observations on country reports, indicating that it considers that these may fall within the prohibitions of UNCAT.

However, there have been very few individual complaints of rape or sexual violence as torture before the CAT. Indeed, *Saadia Ali v. Tunisia*¹⁸⁶ is among the cases that is classic in the sense of meeting all the elements of torture as defined in Article 1 of UNCAT. When the complainant, a dual French and Tunisian citizen, criticised a Tunisian court official while attempting to retrieve a document her brother needed for his forthcoming wedding, she was forcibly taken to a basement in the courthouse. A guard in the basement punched and kicked her, ripped off her scarf and dress so she was half-naked in front of about 50 men, dragged her by her hair, and beat her until she lost consciousness. After the incident, the petitioner tried unsuccessfully to file a complaint and seek domestic remedies under Tunisian law. The Committee against Torture found violations of Articles 1 (definition of torture), 12 (prompt and impartial investigation), 13 (right to complain), and 14 (right to

¹⁷⁹ Information available at: http://www.claiminghumanrights.org/cat_conceivable_actions.html.

¹⁸⁰ Report of the United Nations Special Rapporteur on Torture UN Doc.E/CN.4/1986/15, para 119.

¹⁸¹ CAT, Concluding observations on the USA, contained in the Report of Committee against Torture, UN Doc. A/55/44(2000), para 179.

¹⁸² CAT, Concluding observations on the Egypt, contained in the Report of Committee against Torture, UN Doc. A/55/44(2000), para 209; CAT, Concluding observations on the Tunisia, contained in the Report of Committee against Torture, UN Doc. A/54/44(1999), para 99.

¹⁸³ CAT, Concluding observations on the Cameroon, contained in the Report of Committee against Torture, UN Doc. CAT/C/CR/31/6, 5 February 2004, para 7.

¹⁸⁴ CAT, Concluding observations on Greece, contained in the Report of Committee against Torture, UN Doc. CAT/C/CR/33/2, 10 December 2004 para 5(k); Zambia, UN Doc. A/57/44, 25 August 2002, para 7(c).

¹⁸⁵ CAT, Concluding observations on Greece, contained in the Report of the CAT, UN Doc. CAT/C/CR/33/2, 10 December 2004 para 5(h); Egypt, UN Doc. CAT/C/CR/29/4, 23 December 2003 paras 5 (d) and (e).

¹⁸⁶ *Saadia Ali v. Tunisia* (CAT Comm. No. 291/2006 (2008)).

fair and adequate compensation) of the United Nations Convention against Torture (UNCAT).

In *Kisoki v. Sweden*¹⁸⁷ the complainant, a Zairian (now Democratic Republic of the Congo), sought refugee status in Sweden, and this was rejected. In finding that Ms. Kisoki, who was raped at home in front of her children and in prison, was personally at risk of being subject to torture if returned to Zaire, the Committee against Torture took account of all relevant considerations, including Ms. Kisoki's political affiliation and activities, her history of detention and torture and the existence of a consistent pattern of gross, flagrant or mass human rights violations. The Committee found that Ms. Kisoki's forced return to Zaire would violate Article 3 (non-refoulement) of the Convention against Torture (CAT). The Committee, however despite the positive determination of the existence of the risk of torture if Ms. Kisoki would return to Zaire, did not make any reference to the form of torture (i.e. rape) that she had experienced or was at risk of being subjected to. Thus "the sexualized nature of the torture, particularly the rape[s], was erased from the committee's consideration of the issue".¹⁸⁸

The CAT made a similar finding in the later case of *A.S. v. Sweden*,¹⁸⁹ again implying that forced marriage and sexual slavery are forms of torture without necessarily dealing with the gender aspect of the violence as stated in the complaint. The facts of the case were that the applicant was an Iranian citizen, seeking refugee status in Sweden after being forced into a short-term marriage (*sighe* or *muta'a*) where she did not live with her husband, but was at his disposal for sexual services whenever required. When A.S. fell in love with a Christian man, she was caught and arrested by the police and taken to her husband's home, where she was severely beaten by him. Subsequently, she left the country with her son. After the Swedish Immigration Board rejected her case for asylum, she brought the case before the Committee against Torture. The CAT decided that she risked torture and execution upon return to Iran and that forced return would constitute a violation of Article 3 of the CAT (*non-refoulement*). Since the forms of torture she referred to were being forced to remain the 'wife' of the husband, endure his domestic violence and provide him sexual services, it can be concluded that the torture the CAT sought to protect A.S. from, was indeed these forms of gender-based violence.

That rapes by public officials constitute torture has been firmly and explicitly established in two of the more recent cases decided by CAT. One of these cases also held that discrimination on the grounds of gender is one of the impermissible purposes of torture. In *C.T. and K.M. v. Sweden*,¹⁹⁰ Sweden announced the deportation of C.T. and her son, K.M. to Rwanda. C.T. sought to stop the deportation on grounds of breach of Article 3 of the UNCAT as she feared she would be immediately detained and tortured by the Rwandan Directorate of Military Intelligence. She was a political activist in Rwanda; she was raped repeatedly during her detention and had become pregnant with her son as a result of the rapes. Finding in her favour, the CAT held that C.T. was subjected to torture in the past, referring to the fact that she was repeatedly raped by public officials. It also held that her son, who is a product of the rapes she endured, is a constant reminder of those rapes.

In *V.L. v. Switzerland*,¹⁹¹ a woman claimed that prior to her initial departure from Belarus, she had been interrogated and raped by three police officers seeking information on the whereabouts of her husband, who was a political activist and critical of the President of Belarus. The CAT dealt with two important points in its decision in this case. One, it linked the facts of the complaint to the torture definition in Article 1 and held that the rape

¹⁸⁷ *Pauline Muzonzo Paku Kisoki v. Sweden* (CAT Comm. No. 41/1996 (1996)).

¹⁸⁸ Lambert, C, 'Partial Sites and Partial Sightings: Women and the UN Human Rights Treaty System,' in S. Picketing and C. Lambert (eds.), *Global Issues, Women and Justice* (Sydney: Sydney Institute of Criminology Series No. 19, 2004), pps. 152-153.

¹⁸⁹ *A.S. v. Sweden* (CAT Comm. No. 149/1999 (2001)).

¹⁹⁰ *C.T. and K.M. v. Sweden* (CAT Comm. No. 279/2005) ¶ 7.5.

¹⁹¹ *V.L. v. Switzerland* (CAT Comm. No. 262/2005).

constituted torture. Accordingly, it held that the rapes “surely constitute infliction of severe pain and suffering perpetrated for a number of impermissible purposes, including interrogation, punishment, retaliation and discrimination based on gender” and therefore considered that “sexual abuse by the police in this case constitutes torture”.¹⁹² Two, it debunked the notion that torture has to occur in official places of detention, ruling that ‘the complainant was clearly under the physical control of the police even though the acts concerned were perpetrated outside formal detention facilities...’.¹⁹³

5.3.3 Limitations and Opportunities

One of the major limitations of UNCAT to address women’s experience of sexual violence is the restriction in the definition of torture in Article 1. The definition explicitly states that the pain or suffering must have been inflicted or instigated by or with the consent or acquiescence of a public official or by person(s) acting in official capacity. Women’s experience of violence is often at the hands of non-State actors and feminists have criticised this emphasis on violence by public official as excluding women from the highest protection afforded in international law.¹⁹⁴

CAT’s previous case law on the issue shows a rather narrow or a literal approach to the interpretation and application of the public official requirement. In *G.R.B v. Sweden*,¹⁹⁵ the applicant had been raped by members of the non-State group Shining Path and claimed fear of violence or reprisal. The CAT held that if a person claims risks of violence by a non-governmental entity that is not acting with the consent or acquiescence of the government, it does not attract the protection of Article 3 of the UNCAT. The decision has been criticised for not adequately addressing the issue of acquiescence. The CAT did not, in this case, ascertain if the rapes by the non-governmental entity were the result of State inaction to reports of rapes generally and by Shining Path in particular.¹⁹⁶

Similarly, in *S.V. et. al. v. Canada*¹⁹⁷ in which the complainant feared violence from LTTE upon return to Sri Lanka, the CAT held that the government of Sri Lanka did not support the actions of LTTE and therefore did not consent or acquiesce to LTTE’s actions. The fact that LTTE had a quasi-governmental status with complete control over a particular territorial area and therefore could be characterised as “other persons acting in official capacity” was completely missed. In another case of *Elmi v. Australia*,¹⁹⁸ Somali warring factions were indeed characterised as acting in an official capacity because of their effective control of the State and lack of central government. Lack of central government is the norm rather than an exception in States facing armed opposition and such a criteria to establish the official capacity of non-State actors makes applying international human rights laws to situations of internal armed conflicts or States confronting armed opposition extremely difficult.

The existing jurisprudence of the CAT therefore “does not protect women against brutal rapes or mass killings by rebel soldiers, for example, except where it can be said that the soldiers were in effective control of the territory and there was no central government”.¹⁹⁹

¹⁹² *Ibid.*, ¶ 8.10.

¹⁹³ *Ibid.*

¹⁹⁴ Katharine Fortin, Rape as Torture - An evaluation of the Committee against Torture’s attitude to sexual violence, Utrecht Law review, Vol4, Issue 3, December 2008, pp.145.

¹⁹⁵ *G.R.B. v. Sweden*, CAT Comm. No. 83/1997 (15 May 1998).

¹⁹⁶ McCorquodale R. and R. La Forgia, ‘Taking Off the Blindfolds: Torture by Non-State Actors’ (2001) 1 Hum. Rts L. Rev. 189, pps. 209-210.

¹⁹⁷ *S.V. et. Al. v. Canada*, CAT Comm. No. 49/1996 15 May 2001.

¹⁹⁸ *Elmi v. Australia*, CAT Comm. No. 120/1998 14 May 1999.

¹⁹⁹ *Supra note 1* at pp.249.

In a move away from its previously narrow interpretation of the Convention on the issue of torture by non-State actors and the question of the level and extent of State complicity, the CAT issued General Comment No. 2 in 2008 acknowledging that torture *is and can be committed by non-State actors*. It assigns the responsibility of such torture to State failure to “exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors”. It holds the State and its officials accountable “as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts”.²⁰⁰ The Comment reflects the due diligence standards of other treaties such as the ICCPR and the decisions of regional human rights bodies. There are yet opportunities to hold the State accountable for failure to prevent violations by non-State actors and/or effectively investigate and prosecute their actions.

5.4 Special Procedures of the Human Rights Council

‘Special procedures’ is the general name given to the mechanisms established by the Human Rights Council to address either specific country situations or thematic issues in all parts of the world. Special procedures mandates usually call on mandate holders to examine, monitor, advise and publicly report on human rights situations in specific countries or territories, known as country mandates, or on major phenomena of human rights violations worldwide, known as thematic mandates. Currently, there are 36 thematic and 10 country mandates. The Office of the High Commissioner for Human Rights provides these mechanisms with personnel, policy, research and logistical support for the discharge of their mandates.

Various activities are undertaken by special procedures, including responding to individual complaints, conducting studies, providing advice on technical cooperation at the country level, and engaging in general promotional activities.

Special procedures are either an individual (called “Special Rapporteur” or “Independent Expert”) or a working group usually composed of five members (one from each region). The mandates of the special procedures are established and defined by the resolution creating them. Mandate-holders of the special procedures serve in their personal capacity, and do not receive salaries or any other financial compensation for their work. The independent status of the mandate-holders is crucial in order to be able to fulfil their functions in all impartiality.

Most Special Procedures receive information on specific allegations of human rights violations and send urgent appeals or letters of allegation to governments asking for clarification.

(Source: Special Procedures of the Human Rights Council, Office of the High Commissioner of Human Rights, available at <http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx>)

5.4.1 Possibilities and Limitations of the Special Procedures

Since special procedures are mechanisms with an independent mandate, there are several possibilities with regard to their effective use to raise violations of women’s rights. In many cases individuals and NGOs may send an ‘urgent appeal’ (where there is imminent risk of harm) or a letter of allegation (‘where the harm has already occurred’) on individual cases to the Special Rapporteur with the mandate on the thematic issue that is most relevant to the violation. If the facts of the case fall under the competence of the thematic issue of more than one Special Rapporteurs, the letter may be sent simultaneously to several special rapporteurs to explore possibilities of sending a joint communication to the government concerned.

There are no specific admissibility criteria and any individual or a group on behalf of an individual may send the letter. There is no need to exhaust domestic remedies nor is it necessary that the State concerned has signed or ratified any treaty or convention. Sending a communication to a Special Rapporteur does not prevent a person from sending a communication of the same case to any other treaty body mechanism at any time.²⁰¹

Upon receipt of a letter of allegation, the special rapporteur will consider it and if considered credible, forward it to the concerned government for a response. The government may or may not respond to the letter. The fact of the complaint and the response from the government, if any, is published in a combined report produced by the Office of the High Commissioner for Human Rights secretariat each year. Complainants are encouraged to send updates on the allegation if the situation changes.

The special procedures may be effective in case of an imminent threat or danger to the lives of people. An urgent appeal may be sent to the special rapporteur, on which they take action and forward the allegation letter to the concerned government in a matter of days. In short, the special procedures are not bound by the framework, criteria or rules of the treaty body mechanisms and as such do not suffer from the limitations of the treaty bodies.

However, the special procedures have their own limitations. The process of the special procedures is not usually public and the mandate holder does not make a decision or a determination at the end of the process (except in the case of the Working Group on Arbitrary Detention, which has a different procedure). As such, the special procedures are mechanisms that make recommendations to and exert pressure on the government to stop violations and respond to them. However, they cannot themselves provide redress to individual victims.

The country-specific mandate holders do not have a ‘communications’ procedure but they may nevertheless be useful to inform of communications specific to that country. A list with useful links on special procedures is attached as annexure 5A.

Guidance on sending Urgent Appeals and Letter of Allegations to the Special Rapporteur is available at:

http://www.ohchr.org/Documents/HRBodies/SP/LeafletCommunications_en.pdf.

²⁰¹ Although this may not be the case with respect to the Working Group on Arbitrary Detention, which, unlike other special procedures, uses a quasi-judicial adversarial procedure in relation to individual communications.

Annexure 5A: Useful links on Special Procedures

1. A Handbook for NGOs with details on Special Procedures

<http://www.ohchr.org/Documents/Publications/NgoHandbook/ngohandbook6.pdf>

The handbook states that any Special Procedure mandate holder who has the receipt of information about human rights violations within their mandate can accept such complaints/communications.

2. Mandate holders particularly relevant to sexual violence that accept individual complaints include:

- Special Rapporteur on violence against women, its causes and consequences: <http://www.ohchr.org/EN/Issues/Women/SRWomen/Pages/Complaints.aspx>
- Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment: <http://www.ohchr.org/EN/Issues/Torture/SRTorture/Pages/Appels.aspx> and <http://www.ohchr.org/EN/Issues/Torture/SRTorture/Pages/Allegation.aspx>

3. Others which may be relevant depending on the facts include:

- Special Rapporteur on trafficking in persons, especially in women and children: <http://www.ohchr.org/EN/Issues/Trafficking/Pages/complaints.aspx>
- Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context (her work include the link between domestic violence and the right to housing): <http://www.ohchr.org/EN/Issues/Housing/Pages/IndividualComplaints.aspx>
- Special Rapporteur on contemporary forms of slavery: <http://www.ohchr.org/EN/Issues/Slavery/SRSlavery/Pages/SubmittingInformation.aspx>
- Special Rapporteur on extrajudicial, summary or arbitrary executions: <http://www.ohchr.org/EN/Issues/Executions/Pages/Complaints.aspx>
- Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health <http://www.ohchr.org/EN/Issues/Health/Pages/IndividualComplaints.aspx>
- Special Rapporteur on the situation of human rights defenders: <http://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Complaints.aspx>
- Special Rapporteur on the Independence of Judges and Lawyers: <http://www.ohchr.org/EN/Issues/Judiciary/Pages/Complaints.aspx>
- Special Rapporteur on the rights of indigenous peoples: <http://www.ohchr.org/EN/Issues/IPeoples/SRIndigenousPeoples/Pages/SubmittingInformation.aspx>
- Special Rapporteur on the human rights of migrants: <http://www.ohchr.org/EN/Issues/Migration/SRMigrants/Pages/Communications.aspx>

[.aspx](#)

- Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance:
<http://www.ohchr.org/EN/Issues/Racism/SRRacism/Pages/IndividualComplaints.aspx>
- Working Group on Arbitrary Detention:
<http://www.ohchr.org/EN/Issues/Detention/Pages/Complaints.aspx>

4. **For a list of country-specific mandate holders see:**

<http://www.ohchr.org/EN/HRBodies/SP/Pages/Countries.aspx>

6. INTERNATIONAL HUMANITARIAN AND CRIMINAL LAW

6.1 Sexual Violence under International Humanitarian Law

The prohibition of sexual violence as a war crime under international humanitarian law finds articulation in the 1949 Geneva Conventions and the 1977 Additional Protocols.

The key provisions are:

- Under Common Article 3, paragraph 4, of the 1949 Geneva Conventions, States must ensure that women civilians are granted fundamental guarantees, including the prohibition against “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture . . . outrages on personal dignity, in particular humiliating and degrading treatment”.
- Article 27 of Geneva Convention IV provides, in part, that “[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution or any form of indecent assault”.
- Article 76.1 of Protocol I adds: “Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault”.

Since the Geneva Conventions codify the laws of war, they may only be invoked in relation to alleged war crimes. States may set up or authorise national or international courts, commissions or arbitration institutions to adjudicate upon claims of violation of the Geneva Conventions and agree to abide by their decisions.

IHL has been criticised as inherently discriminatory and a legal regime that prioritises male combatants - and often either relegates women to the status of victims, or accords them legitimacy only in their role as child-rearers. Of the 42 specific provisions relating to women within the Geneva Conventions and their 1977 Additional Protocols, almost half deal with women in their roles as expectant or nursing mothers.²⁰²

6.2 Inter-state Cases Using Humanitarian Law

While there have been several cases between States that claim violations of the Geneva Conventions in international courts, cases that consider sexual violence are rare. One such case is the Eritrea Ethiopia Claims Commission (EECC) set up under the Permanent Court of Arbitration (PCA).²⁰³ The Commission was established and operates pursuant to Article 5 of the Agreement signed in Algiers on 12 December 2000 between the Governments of the State of Eritrea and the Federal Democratic Republic of Ethiopia (the “December Agreement”). The Commission was directed to “decide through binding arbitration all claims for loss, damage or injury by one Government against the other, and by nationals (including both natural and juridical persons) of one party against the Government of the other party or entities owned or controlled by the other party that are (a) related to the conflict that was the subject of the Framework Agreement, the Modalities for its Implementation and the Cessation of Hostilities Agreement, and (b) result from

²⁰² Gardam, J. and Jarvis, M. ‘Women, Armed Conflict and International Law, Kluwer Law International, 2001; see also the review of this book in Helen Durham, ‘Women, armed conflict and international law’, in *International Review of the Red Cross*, vol. 84, no. 847, September 2002, p. 655.

²⁰³ The Permanent Court of Arbitration (PCA) is an intergovernmental organization with over one hundred member states. Established in 1899 to facilitate arbitration and other forms of dispute resolution between states, the PCA has developed into a modern, multi-faceted arbitral institution that meet the rapidly evolving dispute resolution needs of the international community. The PCA provides services for the resolution of disputes involving various combinations of states, state entities, intergovernmental organizations, and private parties over issues encompassing territorial, treaty, and human rights disputes between states; as well as commercial and investment disputes, including disputes arising under bilateral and multilateral investment treaties. See: http://www.pca-cpa.org/showpage.asp?pag_id=1027.

violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law”.²⁰⁴

Among other war crimes, the Commission also found evidence that both parties, Eritrea and Ethiopia, “failed to impose effective measures, as required by international humanitarian law, to prevent ‘several’ rapes of civilian women and girls in certain areas”.²⁰⁵ The Commission recognised the seriousness of wartime rape and noted that “this serious violation of international humanitarian law demands serious relief. Neither symbolic nor nominal damages will suffice in the face of the physical, mental and emotional harm known to be suffered by rape victims”.²⁰⁶ The Commission awarded an identical amount of US\$ 2,000,000 each, to Eritrea and Ethiopia in damages for failing to prevent rapes of known and unknown victims. The Commission further expressed hope that both the States will use the funds awarded to develop and support health programs for women and girls in the affected areas.²⁰⁷ Although the awards cancelled themselves out and the victims did not directly benefit from it, the decision is nevertheless important for the recognition of the serious nature of rape and the need therefore for relief that goes beyond symbolism.

6.3 Ad-hoc Criminal Tribunals

The ad-hoc criminal tribunals and courts established since the 1990s such as the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), Special Court for Sierra Leone (SCSL), Special Panels for Serious Crimes in Timor-Leste (SPSC), and the Extraordinary Chambers of the Courts of Cambodia (ECCC) have used the Geneva Conventions as the basis to articulate provisions of war crimes in their respective statutes and build upon it in their case law to address the criminal impact of sexual violence. Some of the crimes of sexual violence are also recognised as crimes against humanity in the statutes of these tribunals.

6.3.1 Judgments on Sexual Violence

There are a number of judgments from such tribunals that advance the laws related to sexual violence and reflect women’s experiences of these crimes. They acknowledge the severity of sexual violence, define various crimes of sexual violence, establish rape as torture and sexual violence as a means of genocide; and apply torture and other provisions to sexual violence where explicit prohibition of sexual violence did not exist. Some of these cases are listed below with relevant quotes and excerpts that could be helpful for advocacy purposes and campaigns for reforms in laws relating to sexual violence. The arguments may also be quoted when prosecuting such or similar crimes against women nationally. Referring to these cases in the context of national or international criminal prosecutions may also assist with the education of judges and other actors.

i) Prohibition of Sexual Violence and Recognition of its Serious Nature

As noted above, the ECCC ruled on the serious nature of sexual violence and the need to go beyond symbolic relief. In the case known as the ‘RUF’ case, the SCSL Trial Chamber observed that “[t]he deliberate and concerted campaign to rape women constitutes an extension of the battlefield to the women’s bodies”.²⁰⁸ Emphasising the importance of codifying the prohibition of sexual slavery in the statute of the SCSL and the ICC, the RUF Trial Chamber said that such inclusion is “designed to draw attention to serious crimes that have been historically overlooked and to recognise the particular nature of sexual violence that has been used, often with impunity, as a tactic of war to

²⁰⁴ Eritrea-Ethiopia Claims Commission, Information available at: http://www.pca-cpa.org/showpage.asp?pag_id=1151.

²⁰⁵ ERITREA ETHIOPIA CLAIMS COMMISSION set up in the Permanent Court of Arbitration, FINAL AWARD, Ethiopia’s Damages Claims between The Federal Democratic Republic of Ethiopia and The State of Eritrea, The Hague, August 17, 2009, p. 27.

²⁰⁶ *Ibid.*, p. 28, ¶ 109.

²⁰⁷ *Ibid.*, p. 28, ¶ 110.

²⁰⁸ *The Prosecutor v. Sesay, Kallon & Gbao*, Case No. SCSL-04-15-T, Judgment (Special Court for Sierra Leone, Trial Chamber I, Mar. 2, 2009), available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=D5HojR8FZ54%3d&tabid=215> (hereinafter the RUF TJ).

humiliate, dominate, and instil fear in victims, their families, and communities during armed conflict”.²⁰⁹

In the *Furundzija* judgment, the ICTY Trial Chamber affirmed that “international criminal rules punish not only rape but also any serious sexual assault falling short of actual penetration. It would seem that the prohibition embraces all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim's dignity”.²¹⁰

ii) No Consent under Coercive Circumstances

The SCSL Trial Chamber in the *RUF* case adopted an assumption of non-consent to rape when circumstances are coercive. With respect to the invasion of Freetown in 1999, it stated that “an atmosphere of extreme violence prevailed during the attack on the Freetown peninsula, noting the lootings, burnings, amputations and killings that occurred simultaneously”, creating circumstances in which “the individuals who were forced to have intercourse were incapable of genuine consent”.²¹¹ Despite the fact that, unlike the definition of rape, the definitions of sexual slavery and forced marriage do not contain element of proving non-consent,²¹² the Trial Chamber nevertheless used a similar analysis to find that genuine consent to sexual slavery and forced marriage was not possible, given the context of a hostile and coercive war environment.²¹³

The Rwanda Tribunal in the *Akayesu* judgment noted that the presence of coercive circumstances implies non-consent. It noted that “coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence...”.²¹⁴

iii) Defining Rape and Sexual Violence

The *Akayesu* judgment held that sexual violence is “not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact”.²¹⁵ The judgment went on to assert that sexual violence falls within the scope of “other inhumane acts”, “outrages upon personal dignity”, and “serious bodily or mental harm” provisions of the ICTR statute, and since those provisions are the same as the Geneva Conventions, sexual violence falls within the scope of these acts where listed as such. In the judgment, the ICTR defined rape “as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive”.

The ICTY, in the *Furundzija* judgment²¹⁶ surveyed the national laws on the crime of rape to arrive at a definition. It held that rape involves penetration, however slight, along with an element of force. It expanded the definition to include forced oral penetration and penetration by objects. The *Furundzija* definition of rape reads:²¹⁷

“The sexual penetration, however slight:

²⁰⁹ *Ibid.*, ¶ 156.

²¹⁰ *The Prosecutor v Furundzija*, ICTY, Trial Chamber judgment Case No. IT-95-17/1, Dec.10, 1998 ¶ 186.

²¹¹ *The Prosecutor v. Sesay, Kallon & Gbao*, Case No. SCSL-04-15-T, Judgment (Special Court for Sierra Leone, Trial Chamber I, Mar. 2, 2009), available at www.sc-sl.org/LinkClick.aspx?fileticket=D5HojR8FZS4%3d&tabid=215, ¶ 1577.

²¹² *Ibid.*, ¶¶ 145 (elements of rape), 158 (elements of sexual slavery), 168 (elements of inhumane acts); AFRC TJ, ¶¶ 693 (elements of rape), 708 (elements of sexual slavery), 698 (elements of inhumane acts).

²¹³ *Ibid.*, ¶¶ 1466, 1470-72, 1581. Inherent within the very concept of slavery is the negation of consent.

²¹⁴ *The Prosecutor v Jean-Paul Akayesu*, ICTR Trial Chamber Judgment, Case No. ICTR-96-4-T, 2 September 1998, ¶ 688.

²¹⁵ *Ibid.*, ¶ 688.

²¹⁶ *The Prosecutor v Furundzija*, ICTY, Trial Chamber judgment Case No. IT-95-17/1, Dec.10, 1998 ¶ 186.

²¹⁷ *Ibid.*, ¶ 185.

- (i) of the vagina or anus of the victim
 - a. by the penis of the perpetrator or any other object used by the perpetrator; or
 - b. of the mouth of the victim by the penis of the perpetrator;
- (ii) by coercion or force or threat of force against the victim or a third person.”

The ICTY Trial Chamber in the *Kunarac* case found the element of force defined in *Furundzija* too narrow and that it did not include other factors that negate or vitiate victims’ ability to consent or simply that the act was without consent.²¹⁸ It therefore added the element ‘the act was without consent’ to the *Furundzija* definition. In addition, it laid down an important principle that wherever the person subjected to the act has not freely agreed to it or is otherwise not a voluntary participant, it constitutes violation of sexual *autonomy* which must be penalised.

From a woman’s perspective, the reference to the violation of sexual autonomy is a milestone not only because the Chamber determined that rape constitutes a violation of sexual autonomy but because of the very fact of recognition of the existence of sexual autonomy for women and that its infringement is a serious violation.

The definition of rape in the ICC Statute (see further below), informed by the developments at the ad-hoc tribunals, is the current standard and is the inspiration for reforms of rape laws in many countries.

iv) Advancing the Definition and Jurisprudence on Sexual Slavery

The *Kunarac* case at the ICTY also laid down jurisprudence on enslavement that other tribunals used for trying sexual slavery. The judgment states that powers of ownership over another person could be exercised in different ways, some of which are “control of someone’s movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour”.²¹⁹

The SCSL Trial Chamber in the *RUF* case elaborated on the definition of sexual slavery. It clarified that the *actus reus* includes a slavery element (exercise of any or all of the powers attaching to the right of ownership) and a sexual element (that the enslavement involved sexual acts).²²⁰ Specifically, the Trial Chamber noted that the list of ways in which power of ownership is exercised is not exhaustive, and went on to adopt the above stated list of indicia of enslavement from the ICTY’s *Kunarac* judgment.

Additionally, the Trial Chamber in the *RUF* case defined “similar deprivation of liberty” to include situations in which victims were not “physically confined, but were otherwise unable to leave as they would have nowhere else to go and feared for their lives”.²²¹ The Trial Chamber also stated that “[t]he duration of the enslavement is not an element of the crime, although it may be relevant in determining the quality of the relationship”.²²² In an earlier case, known as the *AFRC* case, the Trial Chamber had similarly found that the powers of ownership listed in the first element are non-exhaustive, consent or free will of the victim is absent under conditions of enslavement, and ownership may cover situations where individuals are not physically confined but may remain in the control of their captors because they have nowhere else to go and fear for their lives.²²³ The *AFRC*

²¹⁸ *The Prosecutor v. Kunarac and others*, ICTY, IT-96-23 & IT-96-23/1-T, 22 February 2001, ¶ 440, 441.

²¹⁹ *Ibid.*, ¶ 196.

²²⁰ *The Prosecutor v. Sesay, Kallon & Gbao*, Case No. SCSL-04-15-T, Judgment (Special Court for Sierra Leone, Trial Chamber I, Mar. 2, 2009), available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=D5HojR8FZS4%3d&tabid=215> (hereinafter the *RUF TJ*), ¶ 159.

²²¹ *Ibid.*, ¶ 161.

²²² *Ibid.*, ¶ 163.

²²³ *The Prosecutor v. Brima, Kamara & Kanu*, Case No. SCSL-04-16-T, Judgment (Special Court for Sierra Leone, Trial Chamber II, June 20, 2007), available at: <http://www.sc-sl.org/LinkClick.aspx?fileticket=EqikfVSpLWM=&tabid=106> [hereinafter *AFRC TJ*]; ¶ 709.

trial judgment also noted that payment or exchange is not required to establish the exercise of ownership,²²⁴ nor does ownership require confinement to a particular place.²²⁵

These judgments, along with the ECOWAS judgment on slavery (discussed in Section 4 above) help to consolidate international criminal law jurisprudence with respect to the recently codified prohibited act of sexual slavery.

v) Rape as Torture

Several judgments of the ad hoc tribunals have compared rape to torture and found in rape the elements required to prove torture. In the *Delalic* (“*Celebici*”) judgment, the ICTY Trial Chamber stated,

The condemnation and punishment of rape becomes all the more urgent where it is committed by, or at the instigation of, a public official, or with the consent or acquiescence of such an official. Rape causes severe pain and suffering, both physical and psychological. The psychological suffering of persons upon whom rape is inflicted may be exacerbated by social and cultural conditions and can be particularly acute and long lasting. Furthermore, it is difficult to envisage circumstances in which rape, by, or at the instigation of a public official, or with the consent or acquiescence of an official, could be considered as occurring for a purpose that does not, in some way, involve punishment, coercion, discrimination or intimidation... Accordingly, whenever rape and other forms of sexual violence meet the aforementioned criteria, then they shall constitute torture, in the same manner as any other acts that meet these criteria.²²⁶

Another Trial Chamber at the ICTY followed suit in the *Furundzija* judgment affirming the existence of purpose element of torture in the act of rape. It states, “[r]ape is resorted to either by the interrogator himself or by other persons associated with the interrogation of a detainee, as a means of punishing, intimidating, coercing or humiliating the victim, or obtaining information, or a confession, from the victim or a third person”.²²⁷

The Trial Chamber at the ICTR in the *Akayesu* case held similarly, stating, “[l]ike 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”.²²⁸

Note however, that in the *Kunarac* decision, the Yugoslav Tribunal was faced directly with the question of whether the public official requirement was part of the customary international law prohibition of torture, and determined that it was not. According to the Appeals Chambers, although the Trial Chamber was right in the *Furundzija* judgment to note that the definition of torture provided in the Torture Convention “reflected customary international law” in relation to the responsibility of States, this did not mean that “this definition wholly reflects customary international law regarding the meaning of the crime of torture generally”. It found that the Trial Chamber in the *Kunarac* case was therefore right to take “the position that the public official requirement is not a requirement under customary international law in relation to the criminal responsibility of an individual for torture outside of the framework of the Torture Convention”.²²⁹

These judgments have established beyond doubt that rape in the context of wars and conflict, whether or not committed by a State official, may constitute torture. Consequently, it has extended the prohibition of torture to sexual violence.

²²⁴ *Ibid.*

²²⁵ *Ibid.*

²²⁶ *The Prosecutor v. Delalic*, ICTY, Trial Chamber judgment Case No. IT-96-21-T Nov. 16, 1998 ¶ 495, 496.

²²⁷ *The Prosecutor v. Furundzija*, ICTY, Trial Chamber judgment Case No. IT-95-17/1, Dec. 10, 1998, available at <http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf>, at ¶ 163.

²²⁸ *The Prosecutor v. Jean-Paul Akayesu*, ICTR Trial Chamber Judgment, Case No. ICTR-96-4-T, 2 September 1998, ¶ 597.

²²⁹ *The Prosecutor v. Kunarac and others*, ICTY, IT-96-23-A & IT-96-23/1-A, 12 June 2002, paras. 146-148.

vi) Rape as means of Genocide

In the only conviction yet for genocide, the trial chamber at the ICTR found in the *Akayesu* judgment that rape can be a means to commit genocide. The definition of genocide in the ICTR statute is the same as in the Genocide Convention.²³⁰ The judgment provides an important gender analysis while interpreting one of the elements of genocide, that is, “measures to prevent births.” It states:

the measures intended to prevent births within the group, should be construed as sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages. 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.²³¹

Furthermore, the Chamber recognised that the measures to prevent births are not necessarily always physical. It notes that “rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led through threats or trauma, not to procreate”.²³² Extending the understanding of the norms of patriarchal societies to arrive at how they may be employed to prevent or restrict births and that these could also be through psychological means is a significant judicial recognition of sexual violence as a tool of genocide.

6.4 International Criminal Court (ICC)

In recognition of sexual violence as one of the key additions to the modern armoury of weapons of war, the statute of the ICC has expanded the range of sexual violence crimes recognised as war crimes and has made provision in the evidence rules and procedures to ensure effective investigation and prosecution. A similar range of sexual violence crimes has also been recognised as crimes against humanity to ensure accountability when such crimes are widespread or systematic but not in situations of wars or armed conflicts.

The ICC’s Rome statute, the elements of crimes and rules of procedure and evidence have been informed by the jurisprudence of the ad-hoc tribunals. The Rome Statute has also codified existing prohibitions on sexual violence as war crimes as listed in the Geneva Conventions and improved upon them to address some of the critiques that feminists have of the approach to crimes against civilian and combatant women during war. Attached as Annexure 6A to this section is a brief overview of the gender provisions in the Rome Statute.

6.4.1 Jurisdiction and Admissibility

²³⁰ Article 2 of the ICTR statute contains the provisions on Genocide as follows:

1. The International Tribunal for Rwanda shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article
2. 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.

²³¹ *The Prosecutor v Jean-Paul Akayesu*, ICTR Trial Chamber Judgment, Case No. ICTR-96-4-T, 2 September 1998, ¶ 507 & 508.

²³² *Ibid* at 508.

To access justice at the International Criminal Court, it is important to understand the jurisdiction and admissibility rules. These rules help determine whether any situation of genocide, war crimes or crimes against humanity meet the requirements and qualify as a situation about which communications can be sent to the Office of the Prosecutor.

The Court may exercise jurisdiction over genocide, crimes against humanity and war crimes. These crimes are defined in detail in the Rome Statute. In addition, a supplementary text of the “Elements of Crimes” provides a breakdown of the elements of each crime.

The Court has jurisdiction over individuals accused of these crimes. This includes those directly responsible for committing the crimes as well as others who may be liable for the crimes, for example by aiding, abetting or otherwise assisting in the commission of a crime. The latter group also includes military commanders or other superiors whose responsibility is defined in the Statute.

The Court does not have universal jurisdiction. The Court may only exercise jurisdiction if:

- The accused is a national of a State Party or a State otherwise accepting the jurisdiction of the Court;
- The crime took place on the territory of a State Party or a State otherwise accepting the jurisdiction of the Court; or
- The United Nations Security Council has referred the situation to the Prosecutor, irrespective of the nationality of the accused or the location of the crime.

The Court’s jurisdiction is further limited to events taking place since 1 July 2002. In addition, if a State joins the Court after 1 July 2002, the Court only has jurisdiction after the Statute entered into force for that State. Such a State may nonetheless accept the jurisdiction of the Court for the period before the Statute’s entry into force. However, in no case can the Court exercise jurisdiction over events before 1 July 2002.

Even where the Court has jurisdiction, it will not necessarily act. The principle of “complementarity” provides that certain cases will be inadmissible even though the Court otherwise has jurisdiction. In general, a case will be inadmissible if it has been or is being investigated or prosecuted by a State with jurisdiction. However, a case may be admissible if the investigating or prosecuting State is unwilling or unable genuinely to carry out the investigation or prosecution. For example, a case would be admissible if national proceedings were undertaken for the purpose of shielding the person from criminal responsibility. In addition, a case will be inadmissible if it is not of sufficient gravity to justify further action by the Court.

(Source: International Criminal Court, Official Website, About the Court, <http://www.icc-cpi.int/Menus/ICC/About+the+Court/ICC+at+a+glance/Jurisdiction+and+Admissibility.htm>)

6.4.2 Sending Information about a Situation

At a more practical level, victims, survivors, NGOs, other groups or States who would like the ICC to open an investigation into any situation should send a communication to the OTP containing at least the following information:

- **A description of how the situation qualifies to be investigated by the ICC.** Credible NGO or UN reports that provide details as to the context, the nature and extent of the conflict, details of the crimes that are being or have been committed, an overview of the impact on victims and survivors and any information about the alleged perpetrators may be attached or relied upon. At this stage, it need not contain details such as names of victims or victim testimonies but an indication that there are victims and witnesses who are willing to testify or cooperate with the Court may help with the Court’s decision whether to open an investigation.

- **Details of investigation and prosecution or lack thereof of the situation at the national level.** If the person or group sending the communication is claiming the State's inability to hold alleged perpetrators accountable, it is important to include the reasons for such State inability. Examples of how the conflict has destroyed systems and institutions rendering a State effectively unable to proceed will be important in such a case. If the claim is of unwillingness on the part of the State, then details as to how the group sending the communication has reached such a conclusion is crucial. Documentation that shows long ineffective investigations, lack of protection to victims, non-action against alleged perpetrators, public praise of alleged perpetrators or sham investigations or prosecutions may be used to establish unwillingness of the State to provide justice to victims. Biased and selective investigation into some crimes or against some perpetrators may also show lack of will to provide fair and impartial justice.
- **Provide dates that the alleged crimes took place after July 2002** or after the date when the concerned State ratified the ICC treaty. If the situation sought to be investigated is prior to the date the State became party to the treaty, an explanation as to the possibility of the State accepting the jurisdiction of the Court will be helpful. If a UN Security Council referral is sought, the advocacy and communication will have to be directed to the UN Security Council in addition to the communication sent to the Office of the Prosecutor (OTP).

6.4.3 Prosecution of Sexual Violence at the ICC

From the establishment of the Court until May 2012 seven situations had been under investigation. In the fifteen cases already instituted at the ICC, there are twenty-one counts of sexual violence as war crimes and crimes against humanity. Attached to this section as annexure 6B are the details of the counts of sexual violence in the different cases at the ICC.

The ICC has to date issued only one judgment: the *Lubanga* judgment on a case from the DRC. A case based mainly on evidence of sexual violence is also pending against Jean-Pierre Bemba Gombo for crimes of rape and sexual slavery in the Central African Republic. The judgment and the decisions issued thus far in both these cases have, as discussed below, serious implications on gender justice. The issues raised are indicative of the kind of education and advocacy efforts that are required both at the national and international level on investigation and prosecution of sexual violence.

i) Evidence of sexual violence but no accountability for it

The ICC's judgment finding Thomas Lubanga Dyilo guilty of enlisting and conscripting children under the age of fifteen years into the *Force Patriotique pour la Liberation du Congo* (FPLC)²³³ is significant in many ways. It is the first ever verdict issued by the permanent criminal court, it sent a strong message that conscription of children and using them in hostilities is among the most serious of crimes and more importantly it brought to account some of the horrific crimes that mark the conflict that continues in the Eastern Democratic Republic of Congo. From a gender justice perspective however, the trial process of the case is blemished with refusal on the part of the Prosecutor to add sexual violence charges in the indictment and on the part of the Judges of the Trial Chambers for failing to direct the OTP to do so.

Prosecutors of the international criminal tribunals have approached their cases so as to conduct limited investigations resulting in limited charging. The consequence of limiting charges has been that crimes of sexual violence have often been left out of the indictments.²³⁴ While lack of

²³³ ICC Trial Chamber I, Situation in the Democratic Republic of the Congo, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment Pursuant to Article 74 of the Statute, ICC-01/04-01/06, 14 March 2012 [hereinafter, *Lubanga Judgment*].

²³⁴ See, e.g., Nowrojee, 'Your Justice is Too Slow' Will the ICTR Fail Rwanda's Rape Victims?, United Nations Research Institute for Social Development (UNRISD) Occasional Paper Ten, November, 2005 (an earlier version available at <http://genderandsecurity.umb.edu/Nowrojee.pdf>); Staggs and Stepakoff, 'When We Wanted to Talk About Rape': Silencing Sexual Violence at the Special Court for Sierra Leone' *International Journal of Transitional Justice* (2007) 1(3): 355-374 first published online January 1, 2007. See also, B. Van Schaack, 'Obstacles on the Road to Gender Justice: The International

resources and expediency has been cited as the reason,²³⁵ the problem has also been the inability or refusal to recognise the centrality of crimes of sexual violence to the methods and means of wars and conflicts.

Like the *Akayesu* trial at the ICTR²³⁶, in the course of examining the witnesses during the *Lubanga* trial, the judges found that the children, particularly girls, who were conscripted in the armed force were routinely subjected to sexual violence.²³⁷ Unlike the *Akayesu* case however, where the judges directed the Prosecutor to amend the charges and include sexual violence, the judges at the trial chamber of the ICC did not make such a direction. The ICC Prosecutor, while acknowledging the fact of sexual violence in the opening and closing arguments, not only did not apply to amend the charges to include sexual violence, he opposed efforts by the legal representative of the victims to re-characterise the facts to include crimes of sexual violence.²³⁸ The Prosecutor did so on the grounds that such efforts intruded on his ability to perform his duties as assigned in the statute including seeking amendment of charges²³⁹ and that it would be unfair to the accused if he (the accused) was tried and convicted on that basis.²⁴⁰

The prosecutorial discretion of characterising the suffering of the victims as one crime, glossing over other possible characterisations of the facts, deprived victims of a sense of justice for all the other ways in which they suffered. It also arbitrarily prioritised the crime that was charged as the most important, to the exclusion of the other crimes that were committed against the victims. Finally, the fact that the judges took note of the emerging evidence of sexual violence recounted by witnesses during the trial and did nothing about it, and that the Prosecutor acknowledged sexual violence in his opening and closing arguments but did not seek to amend the indictment to include the charges of sexual violence; further sends an unfortunate message that prosecutorial discretion is supreme and cannot be challenged; and that the judges are powerless to intervene. The ICC has thus in its very first verdict fallen short of making good on the promise of gender justice in the Rome Statute.

ii) Accused Considers Rape Not as Serious as Torture

The case against Jean Pierre Bemba²⁴¹ is based primarily on charges of sexual violence. Following the warrant of arrest issued against Bemba by Pre-Trial Chamber III (PTC), the Prosecutor charged Bemba with three counts of crimes against humanity (including rape, murder and torture) and five counts of war crimes (including rape, murder, torture, outrages upon personal dignity, and pillaging) in the Central African Republic.²⁴²

In its Confirmation Decision,²⁴³ the PTC declined to confirm the counts of torture as crimes against humanity and the count of 'outrage upon dignity' as a war crime on the basis that the elements of these crimes are subsumed in the count of rape. The Office of the Prosecutor (OTP) appealed the

Criminal Tribunal for Rwanda as Object Lesson', *Journal of Gender, Social Policy & the Law*, 17, note 2 (2009) On the limited charging in the Lubanga case, see Kambale, 'The ICC and Lubanga: Missed Opportunities' Possible Futures Essay, A Project of Social Science Research Council, March 16, 2012 available at: <http://www.possible-futures.org/2012/03/16/african-futures-icc-missed-opportunities/>.

²³⁵ K. Askin, 'Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles,' 21 *Berkeley Journal of International Law*, (2003): 288-346.

²³⁶ *The Prosecutor v Jean-Paul Akayesu*, ICTR Trial Chamber Judgment, Case No. ICTR-96-4-T, 2 September 1998, para. 41.

²³⁷ Lubanga Judgment, para 16.

²³⁸ Lubanga Judgment, para. 629.

²³⁹ *The Prosecutor v. Lubanga* (ICC), Prosecutor's Application for Leave to Appeal, ICC-01/04-01/06-2074, 12 August 2009, para 24.

²⁴⁰ Lubanga Judgment, para. 629.

²⁴¹ *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05 -01/08.

²⁴² Warrant of Arrest, *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05 -01/08, 10 June 2008 replacing the one issued on 23 May 2008.

²⁴³ Decision on the Confirmation of Charges, *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05 -01/08, 15 June 2009.

confirmation decision to drop charges of torture and outrage upon dignity.²⁴⁴ The Legal Representative for Victims submitted their response to the confirmation decision in support of the Prosecutor's appeal.²⁴⁵ They argued that by recognising those raped only as victims of sexual violence, the Chamber may have violated article 21(3) of the ICC statute that mandates application of all the statutory provisions, rules and regulations in a non-discriminatory manner and with due regard to the existing human rights standards.

Women's Initiatives for Gender Justice (WIGJ) submitted amicus curiae observations²⁴⁶ highlighting, among other things, that the rape of a 10 year old has an additional element of 'lack of consent' that makes it a crime materially different from torture. Similarly, forcing family members to watch the rape of their relatives before themselves being violated is indeed an outrage upon their dignity that they are additionally subjected to that is materially and factually distinct from rape. Both these reported facts belie the PTC's assertion in the confirmation decision that all elements of torture or of outrage upon dignity are subsumed under the charge of rape.

iii) Implications of the Confirmation Decision

Despite confirming the charge of rape, the confirmation decision of the PTC adversely impacts the prosecution of sexual violence crimes and undermines the advances made by the ad-hoc tribunal of ICTY in charging and prosecution of sexual violence crimes. For many years, international women's human rights advocates have argued that rape meets all the elements of torture and should therefore be charged and prosecuted as such. The ICTY has followed through with this in a number of cases and characterised rape as torture. The refusal by the Chamber to confirm the charge of torture, believing it to be subsumed by the count of rape, reverses the progress made on the issue.

The PTC questioned the practice of cumulative charging of offenses on the grounds that it places undue burden on the defence. Cumulative charging is a practice normal to all legal systems where multiple offenses are charged when the alleged facts meet the elements of more than one crime and they are not regarded as compromising the rights of the accused.

By declining to confirm the count of torture and of outrage upon dignity on the grounds that these are subsumed by the count of rape, the Chamber refuses to recognise that circumstances and facts that very clearly meet the elements on one crime may also meet the elements of other crimes or that victims may have perceived them as other crimes in addition to the very obvious crime. For example, while the facts of the case may clearly meet all elements of rape, it may also meet the elements of torture or indeed that the victims may have perceived them as outrage upon personal dignity. By privileging one characterisation of the crime over another, the Chamber is overstretching its authority under Regulation 55. The regulation permits the chamber to "re-characterise a crime to give it most appropriate legal characterisation" may not be read as a mandate to limit its other possible characterisations. Finally, since the Bemba case is the only case before the ICC thus far that deals mostly with crimes of sexual violence, the undercutting in the manner of charging, and therefore its eventual prosecution, sets an unfortunate, unjust and discriminatory precedent contrary to the objectives of the unprecedented gender inclusion in the Rome Statute of the ICC.

iv) Fallout of the Confirmation Decision

Subsequent to the PTC's Confirmation Decision, a hearing was convened to review Bemba's detention as per the rules.²⁴⁷ At this hearing, the Defence made another request for interim release

²⁴⁴ Application for Leave to Appeal the Confirmation Decision, *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05 - 01/08, 22 June 2009.

²⁴⁵ Réponse du Représentant légal des victimes a/0278/08, a/0279/08, a/0291/08, a/0292/08, a/0293/08, a/0296/08, a/0297/08, a/0298/08, a/0455/08, a/0457/08, a/0458/08, a/0459/08, a/0460/08, a/0461/08, a/0462/08, a/0463/08, a/0464/08, a/0465/08, a/0466/08 et a/0467/08 à la demande d'autorisation d'interjeter appel déposée par le Bureau du Procureur à l'égard de la Décision sur la confirmation des charges, Legal Representative for Victims, *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05 -01/08, 26 June 2009.

²⁴⁶ Amicus Curiae Observations of the Women's Initiatives for Gender Justice pursuant to Rule 103 of the Rules of Procedure and Evidence, *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05 -01/08, 31 July 2009.

²⁴⁷ Pre-Trial Chambers - Hearing to review Defence's Application for Interim Release, *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05 -01/08, 29 July 2009.

citing “changed circumstances”. The key “changed circumstances” the Defence cited was that the charges finally confirmed by the PTC “significantly reduced the responsibility and consequently, if convicted, he would face a lighter sentence”. The PTC issued a decision on interim release granting among other things, that Bemba be granted conditional release accepting the arguments of the Defence of ‘changed circumstances’ and adding some grounds of its own.²⁴⁸

Although the Appeals Chamber reversed the PTC’s decision and ordered Bemba’s continued detention,²⁴⁹ the Defence construed the non-confirmation of the counts of torture and of ‘outrage upon dignity’ as somehow having significantly reduced the gravity of the charges against the accused leading to the possible lowering of the eventual sentence against the accused. Consequently, it was construed as a ground for interim release of the accused, driving home the point that international women’s rights advocates have been arguing for a long time. Rape has historically never been considered a war crime or a crime against humanity grave enough to warrant prosecution and punishment of an accused, unlike torture that is historically a *jus cogens* crime evoking the most serious condemnation and sanctions. Thus, when torture was dropped as a charge against the accused, leaving only the count of rape (i.e. of sexual violence historically not considered serious enough), it was construed as a ground for significantly reduced accountability and a possibly lower sentence.

Unfortunately, neither did the PTC in its decision to grant conditional release take this factor into account, nor did the Prosecutor raise it in his appeal against the PTC’s decision,²⁵⁰ nor did the Appeals Chamber allude to the fact of rape being considered a crime of reduced responsibility. It is only the International Women’s Human Rights application for leave to submit *amicus curiae* observations that alludes to the Defence’s application for interim release as a serious fallout of the PTC’s confirmation decision to drop the count of torture.²⁵¹ It is such implications that international women’s rights advocates need to guard against and emphasise the importance of crimes of sexual violence being comparable in gravity to torture and at the same time emphasise the need for cumulative charging of sexual violence crimes as also constituting other grave crimes.

²⁴⁸ Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa, Pre-Trial Chamber, The Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05 -01/08, 14 August 2009.

²⁴⁹ Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II’s “Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa,” Appeals Chambers, The Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05 -01/08, 2 December 2009.

²⁵⁰ Prosecution’s Observations on the “Defence’s Application for Interim Release,” *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05 -01/08, 15 December 2009.

²⁵¹ Application for Leave to Submit Amicus Curiae Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence, International Women’s Human Rights Law Clinic, No. ICC-01/05-01/08, 28 August 2009 available at: <http://www.icc-cpi.int/iccdocs/doc/doc734332.pdf>.

ANNEXURE 6A: Gender Integration in the Statute of the International Criminal Court

Substantive Jurisdiction (Crimes of Sexual & Gender Violence)	Procedures	Structure
<p><u>Rape, Sexual Slavery, Enforced Prostitution, Forced Pregnancy, Enforced Sterilisation and other Sexual Violence.</u> The ICC Statute explicitly recognises rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation and other grave forms of sexual violence as war crimes in international and non-international armed conflict as well as crimes against humanity. (Articles 8(2)(b)(xxii), 8(2)(e)(vi) and 7(1)(g))</p> <p><u>Persecution and Trafficking.</u> In addition to the crimes of sexual and gender violence discussed above, persecution is included in the ICC Statute as a crime against humanity and specifically includes for the first time the recognition of gender as a basis for persecution. The ICC Statute also includes trafficking as a crime against humanity as among the crimes of enslavement. (Articles 7(1)(h), 7(1)(c) and 7(2)(c))</p> <p><u>Genocide.</u> The ICC Statute adopts the definition of genocide accepted in the Genocide Convention. (Article 6)</p> <p><u>Non-discrimination.</u> The Statute specifically states that the application and interpretation of law must be without adverse distinction on the basis of enumerated grounds, including gender. (Article 21(3))</p>	<p><u>Witness Participation and Protection.</u> The Court has an overarching responsibility to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses, taking into account all relevant factors, including age, gender, health and the nature of the crime. The Court may take appropriate protective measures in the course of a trial, including <i>in camera</i> proceedings and allowing the presentation of evidence by electronic means. In addition, the Prosecutor is required to take these concerns into account in both the investigative and the trial stage. (Article 68)</p> <p><u>Victim Witness Unit.</u> The statute provides for the creation of a Victims and Witnesses Unit (VWU) within the Court's registry (in recognition that protection of witnesses should be independent of prosecutorial imperatives). The VWU will provide protective measures, security arrangements, counselling and other appropriate assistance for victims and witnesses who appear before the Court, and others at risk on account of their testimony. (Article 43)</p> <p><u>Participation.</u> The statute explicitly recognises the right of victims/survivors to participate in the justice process, directly or through legal representatives, by presenting their views and concerns at all stages which affect their personal interests. (Article 68(3))</p> <p><u>Reparations.</u> The statute includes a provision enabling the Court to establish principles and, in certain cases, to award reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. (Article 75)</p>	<p><u>Women on the Court.</u> The Statute requires that the need for a "fair representation of female and male judges" be taken into account in the selection process. The same provision applies to the selection of staff in the Office of the Prosecutor and in the Registry. (Article 36(8)(a)(iii); Article 44(2))</p> <p><u>Expertise in Trauma</u> The Registrar is required to appoint staff with expertise in trauma, including trauma related to crimes of sexual violence. (Article 43(6))</p> <p><u>Legal Expertise on Violence Against Women.</u> The statute requires that, in the selection of judges, prosecutors and other staff, the need for legal expertise on violence against women or children must be taken into account. This provision is in recognition of the significance of crimes against women, and the need for expertise at every level to ensure these crimes are effectively investigated and prosecuted. To achieve this it is imperative that individuals with expertise in the investigations and prosecutions of gender crimes are recruited by the Court. (Articles 44(2) and 36(8))</p> <p><u>Legal Advisors on Sexual and Gender Violence.</u> The Prosecutor is required to appoint advisers with legal expertise on specific issues, including sexual and gender violence. This is an important mechanism for ensuring both that gender crimes are properly investigated and prosecuted and victims properly respected and protected. (Article 42(9))</p> <p><u>Trust Fund for Victims</u> The Statute requires the establishment of a Trust Fund for the benefit of victims of crimes within the jurisdiction of the Court, and for their families. (Article 79)</p>

ANNEXURE 6B: Gender Based Violence charges at the ICC as of May 2012

DRC

1. Lubanga - only child recruitment / using children. No counts of sexual violence.
2. Bosco Ntaganda - only child recruitment / using children. No counts of sexual violence.
3. Katanga - sexual slavery as a crime against humanity art 7(1)(g) and as a war crime art. 8(2)(b)(xxii)
4. Ngudjolo - sexual slavery as a crime against humanity art 7(1)(g) and as a war crime art. 8(2)(b)(xxii)

CAR

1. Bemba - rape as a crime against humanity (art 7-1-g) and as a war crime (arts 8(2)(e)(vi)) both confirmed by Pre-Trial Chamber II (torture & outrages against personal dignity rejected). First time a military commander prosecuted for rape on the basis that he knew or should have known that rape was committed by subordinates.

Uganda

1. Joseph Kony:
 - As crime against humanity: rape art 7(1)(g), sexual enslavement and attempted sexual enslavement (arts 7(1)(g), 25(3)(b)).
 - As a war crime: rape and attempted rape (8(2)(e)(vi) and 25(3)(b))
2. Vincent Otti:
 - As crime against humanity: sexual enslavement and attempted sexual enslavement (arts 7(1)(g), 25(3)(b)).
 - As a war crime: rape and attempted rape (8(2)(e)(vi) and 25(3)(b))
5. Raska Lukwiya (deceased): NO counts for sexual violence
6. Okot Odhimabo: NO counts for sexual violence
7. Dominic Ongwen: : NO counts for sexual violence

Sudan

1. Ali Kushayb:
 - Count 10: Rape as an act of persecution, Bindisi town (arts 7(l)(h) and 25(3)(d))
 - Count 13: Rape as a crime against humanity, Bindisi town (art 7(1)(g))
 - Count 14: Rape as a war crime, Bindisi town (arts 8(2)(e)(vi))
 - Count 42: Rape as a crime against humanity, Arawala town (art 7(1)(g))
 - Count 43: Rape as a war crime, Arawala town (arts 8(2)(e)(vi))
 - Count 46: Outrage upon personal dignity of at least 10 women and girls as a war crime art 8(2)(c)(iii)
2. Ahmad Harun:
 - Count 10: Rape as an act of persecution, Bindisi town (arts 7(l)(h) and 25(3)(d))
 - Count 13: Rape as a crime against humanity, Bindisi town (art 7(1)(g))
 - Count 14: Rape as a war crime, Bindisi town (arts 8(2)(e)(vi))
 - Count 42: Rape as a crime against humanity, Arawala town (art 7(1)(g))
 - Count 43: Rape as a war crime, Arawala town (arts 8(2)(e)(vi))
 - Count 46: Outrage upon personal dignity of at least 10 women and girls as a war crime art 8(2)(c)(iii)
3. Al Bashir: rape as crime against humanity (art 7-1-g)
4. Abu Garda : NO

Côte d'Ivoire

1. Laurent Gbagbo: (from the arrest warrant)
 - Rape and other forms of sexual violence as a crime against humanity (art 7(1)(g))

There are no charges of sexual violence in the cases under investigation of the situations in Kenya and Libya.

7. LITIGATION AND ADVOCACY STRATEGIES

Give the different legal possibilities at the national level for redressing sexual violence, it is important to make a strategic choice of the legal action to initiate. In most countries, since sexual assault is a crime within the penal regime, a criminal prosecution is not a matter of choice for the survivor. Like a case of murder or theft, it is the duty of the police to initiate a criminal investigation when the crime is reported and not necessarily by the victim herself. Sometimes, the prosecution is not pursued at the refusal of the victim to cooperate or because of a lack of evidence or other reasons, and at other times, a civil option is not available unless there is a criminal conviction.

The option a survivor may exercise depends on her idea of justice for the violation, the accessibility of a given avenue of justice and the support she has for her case. If she prioritises accountability of those responsible for the violation, she could report the offence and initiate a criminal proceeding. For damages and other forms of reparations, a civil action or application to a quasi-legal institution may be most appropriate. It should be noted that in many legal systems including civil law countries in Africa such as the DRC, awards of reparation or damages are kept pending the outcome of the criminal proceeding and the finding of guilt. Similarly, human rights commissions would often not act on a complaint if there are simultaneous cases pending before other courts.

Filing for a violation of fundamental rights at a constitutional court, in countries where it is an option, would also achieve two objectives. First, it holds the State accountable for a failure in exercising due diligence to prevent sexual violence. Second, it builds case law to reinforce sexual violence as constituting a violation of constitutional rights.

It is important that a survivor approaches the most suitable option of justice and documents the process and experience thereof. It is also important that she appeals to a higher court or pursues alternative processes, should they be available to her, in the event that her first case fails. These steps are important to make a showing of having exhausted domestic remedies (see Section 3 above) if she later seeks justice at the regional or international level.

7.1 Documenting Evidence of Sexual Violence

Before engaging with any legal process, it is important to collect and document evidence of the sexual violence. This is necessary for a case to be successful. Often sexual violence cases are not pursued, are dismissed or end up in acquittal of the perpetrator because of lack of evidence. The victim herself, the lawyer or group working and supporting her must therefore ensure that the evidence is as fool proof as possible. The evidence must moreover meet the evidentiary needs of the respective legal option that the victim intends to pursue. The rules of evidence may be stricter in a criminal or constitutional case than a civil action or a claim before a human rights institution. Regardless, it is prudent to document all possible evidence in the event the victim seeks both criminal accountability and a civil remedy; or if her claims remain unsuccessful at the domestic courts and she intends to pursue her case at the regional or international level.

Unlike cases of assault or murder, evidence in cases of sexual violence is often difficult to document. The survivor may not be aware that she needs to see a medical officer almost immediately after the violence. The medical facility that certifies the violence may be at a distance from the victim making it impossible for her to reach there within the stipulated time. The rules may have only designated a few doctors as qualified to certify sexual assault and such doctors may not be easily accessible to the victims. The trauma she suffers may impair her ability to accurately record details of the violence. The social stigma attached to sexual violence may inhibit her from reporting the crime or recording the violence in the language required by the law resulting in misrepresenting the violence.²⁵² Other impediments include ineffective, inefficient or

²⁵² At a workshop entitled 'Strategic litigation for conflict-related gender based violence in Africa' organized by FIDA-Uganda and REDRESS, April 25-27, 2012, participants from countries such as Sudan, the Democratic Republic of Congo, Burundi, Central African Republic, Kenya, Uganda, raised these issues as some of the impediments that prevent successful investigation and prosecution of sexual violence in their respective countries.

biased investigations by the police that may make evidence gathering difficult or may dilute the quality of the evidence making it difficult to stand the test of the legal action.

7.1.1 Evidence for Prosecution at the National Level

The evidence required to prove a crime beyond reasonable doubt in a criminal prosecution at a national court is often detailed, rigid and of high threshold. The following constitute a non-exhaustive list of the kind of documentation that would help compile and secure evidence of sexual assault. Though the responsibility to gather and document evidence is mainly of the investigative and enforcement agencies, often their callous attitude to sexual violence have resulted in acquittals for lack of evidence. It is therefore helpful if an NGO or a human rights group also documents and/or coordinates with the police on the documentation of the evidence, in which case they need to ensure that the evidence includes most of the following:

- Complete details of name of the victim/survivor, date and place of birth, address, nationality, name and address of the parents of the victim/survivor. A clear proof of identity that certifies most of the personal details such as national identity card, copy of passport, etc. if available, should be attached.
- A report certifying the sexual violence obtained after a medical examination of the survivor conducted (where possible) before she washed herself. Photographic/video evidence that documents any physical harm, if available.
- A DNA test should be conducted where such forensic facilities are available.
- A description of how the survivor came to be in the control of the perpetrator.
- A record as accurate as possible of the date, time and place of the violence. If the victim is unable to identify the place she may describe the process of how she was taken to the place of violence i.e. how long she walked or was driven, what the place looked like, who else was present, what did the place smell like etc.
- A description of the appearance, demeanour and language of the perpetrator(s), and identity if known. In conflict areas, perpetrators of an armed force or rebel group may be identifiable from their uniforms or other markers that identify their group. It may also be that a person not active in the conflict takes advantage of the situation and commits sexual assault. In which case, a near accurate description of the person(s) would be useful. When attacked by more than one perpetrator it may be relevant to document details as to what language they spoke and how they referred to each other.
- If there are any eyewitnesses to the violence, her/his statements also need to be recorded in similar details as above.
- A detailed description of the physical and mental harm the survivor suffered as a result of the violence and the subsequent economic, social, psychological loss it may have caused her, and any documents showing this.

The enforcement/investigation agencies, police, lawyers or NGO working with the survivor may need to pay attention to gender issues and generally be gender-sensitive when recording survivor's testimony or otherwise documenting the sexual violence. These include: having a woman or a gender-sensitive person record the testimony, ensuring that the survivor is always accompanied by a person for moral support, noting that the survivor may not be comfortable using explicit language to refer to body parts and that there may therefore be a need to decipher the meaning of the survivor's language and her choice of words to refer to the criminal act.

7.1.2 Evidence of Sexual Violence for International Courts

At an international court or tribunal, there is a tendency to take a less rigid approach to issues of admissibility of evidence in view of the context, nature and extent of the crime. The ECCC

recognised that “rape is such a sensitive matter in Ethiopian and Eritrean culture that victims are extremely unlikely to come forward, and that evidence is likely to be far less detailed and explicit than for non-sexual offenses. The Commission, accordingly, does not require evidence of a pattern of frequent or pervasive rape as the basis for State responsibility”.²⁵³

Such an open approach to evidence has been codified in Articles 69.3 and 69.4 of the Rome Statute of the ICC, which indicates that the ICC will take a liberal approach to the issues of admissibility of evidence. In the absence or sometimes destruction of documentary evidence of crimes against humanity, the practice in international courts and tribunals is to rely on evidence of witness testimony, either oral or sworn statements, and to admit practically any evidence that has probative value.

The rules of evidence of sexual violence in the ICC are thus more gender friendly than the evidentiary requirements in some national laws or the practice in States where the rules of evidence are already gender inclusive. The ICC rules relevant to prosecution of sexual violence are:

- **No need for corroboration:** Rule 63 expressly prohibits the Court from requiring corroboration of a victim’s testimony
- **Consent:**
 - Rule 70 (a) - consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim’s ability to give voluntary and genuine consent.
 - Rule 70(b) - consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent.
 - Rule 70(c) - consent cannot be inferred by reason of the silence of, or lack of resistance by a victim to the alleged sexual violence.
- **Sexual Conduct:**
 - Rule 70(d) - credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness.
 - Rule 71 - Evidence of prior or subsequent sexual conduct of a victim or a witness shall not be admitted.

7.1.3 Evidence showing Sexual Violence Nexus to ‘attack’

For prosecution of sexual violence as crimes against humanity or war crimes, it is necessary to also show the nexus of the criminal act or the sexual violence with the overall ‘attack’, or ‘conflict’.

- **Evidence of Rape as Crimes Against Humanity:** In the *Katanga* case, the ICC Chamber relied on a combination of witness statements and NGO reports to find that a sufficient nexus existed between the acts of rape and the widespread ‘attack’ directed against the civilian population of the Central African Republic. The Chamber noted that that rapes were committed when civilians resisted the looting of their goods, or that repeated acts of rape were used as a method to terrorise the population or that rapes occurred in certain localities. Relying on witness statements and NGO reports,²⁵⁴ the Chamber found that rape was a common practice following an attack and that those combatants who forced women to engage in sexual intercourse intended to commit such acts by force or threat of force.

²⁵³ Eritrea Ethiopia Claims Commission, set up in the Permanent Court of Arbitration, Partial Award, Civilians Claims, Ethiopia’s Claim 5 between The Federal Democratic Republic of Ethiopia and The State of Eritrea, The Hague, December 17, 2004, page 19, para 85.

²⁵⁴ The NGO reports relied upon include: AI report, “Central African Republic, Five months of war against women,” November 2004; ‘Federation Internationale des Ligues des Droits de l’Homme’ (FIDH) report, “Central African Republic, forgotten, stigmatized - the double suffering of victims of international crimes,” October 2006.

- **Evidence of Sexual Slavery as Crimes Against Humanity:** In the same case, the Chamber also found information to satisfy the elements of sexual slavery from witness testimonies. They found that the rebel forces: 1) abducted women and/or girls from villages or areas surrounding the camps for the purpose of using them as their “wives”; 2) forced and threatened women and/or girls to engage in sexual intercourse with combatants and to serve as sexual slaves for combatants and commanders alike; and 3) captured and imprisoned women and/or girls to work in a military camp servicing the soldiers.²⁵⁵ In these testimonies, the Chamber also found substantial grounds to believe that during the attack on Bogoro, women were captured, raped and subsequently abducted by Ngiti attackers. The women were taken to camps where they were kept as prisoners in order to provide domestic services, including cooking and cleaning, and to engage in forced sexual acts with combatants and commanders.

7.2 Basic Information in a Witness Statement

Given the heavy reliance on witness statements in the ICC, the documenting of such statements must be meticulous and thorough. The key contents of such statements must include:

- 1) **Proof of Identity:** A document that provides clear information about the name and address of the person, her/his date and place of birth, name and address of her/his parents and information as to its authenticity, including the signature and stamp of the issuing authority. This could be established by producing or attaching any of the following documents to the statement:

- copy of passports
- national identity cards
- birth certificates
- voting cards
- driving licenses
- student cards
- employee cards
- tax documents

Where these documents have been destroyed during the war or conflict, the following documents may also serve the purpose:

- documents from a local authority
- camp registration cards
- cards from a humanitarian agency
- demobilisation cards
- documents attesting to a lost identification document

- 2) **Information about the Crime**

A) Factual information that includes:

- **When the event took place** - the exact date and time or the date and time to the best of the victim’s recollection. Details of the timing help to provide supporting information that the events the victim is referring to actually took place (i.e. if an armed group raped during an attack, others may have reported that an armed group was in the area at this time).
- **Where the event took place** - specify the name of the (nearest) village/town/city and the province in which it is located. Details of location also help to provide supporting information that the events the victim is alleging happened actually took place.

²⁵⁵ At para. 434.

- **What the victim was doing at the time** (e.g. crimes against humanity as defined in the statute of the ICC are conducted against civilians, so if the victim is a civilian, she/he should explain that)
 - **What happened and how it happened** - there may be a need to have a local person to decode the language and the victim's choice of words, particularly if she is relating sexual violence.
 - Witness statements may be supported by **factual documents** such as police or prosecutors' reports, hospital records, detailing the physical and psychological injuries suffered by the victim and the treatment that the victim received, photographs of injuries, video recordings of the crime/injuries suffered.
 - **NGO or UN reports or other secondary reports** may also support the factual evidence and offer useful historical analysis of conflict in a particular region as well as corroborate a witness' timeline of events. These may also assist the court, for example, in identifying particular cultural practices, which may be relevant to the interpretation of the crimes.
- B) Other evidence
- Reports and/or **witness statements by third party observers** are useful to corroborate a victim's timeline of events.
 - Reports and/or **testimony from a doctor** can help to prove the physical and psychological injuries suffered by the victim and the likely future effect of that harm on the victim.
 - Testimony from an **expert as to particular customs** within a certain community may be useful to explain to the judges from an objective standpoint the relevant issue.
 - **Testimony as to economic data** may be required if, for example, a victim alleges that he/she can no longer work as a result of the harm suffered and that this has caused financial loss.
 - **Testimony from a gender expert** as to the meaning and import of the victims choice of words to relate sexual violence, how the victim perceives the violence, its social impact and the life-long consequences on her.

7.3 Litigation strategies

7.3.1 Domestic litigation strategies

These are discussed in Section 2. However, for any given case of sexual violence, the strategies that may be engaged are often based on the following:

- **The priorities of the victim/survivor and her needs and aspirations about justice:**

In countries where the victim/survivor has an option, she may choose a civil option that may provide her compensation or other forms of reparation instead of (or in addition to) a criminal prosecution. It may be that the knowledge of the crime of sexual violence triggers investigation and prosecution where the victims have no say except as a witness.

The victim/survivor may choose a speedy justice process and opt for making a submission before the national human rights commission or other quasi-legal mechanism with powers to provide compensatory awards.

The victim/survivor may choose to participate in a process to change a rule, law or policy on issues of sexual violence and file a petition for violation of constitutional rights or challenge the constitutional validity of any rule, law or policy that discriminates against women.

- **The opportunities and challenges of criminal prosecution:**

Given that evidence is difficult to obtain, crimes of sexual violence are among the most difficult crimes to prosecute. If the victim/survivor is willing to go through the lengthy and often cumbersome process, criminal prosecution either through the State or through a private prosecution, where such an option is available, may be an appropriate option to consider. For private prosecutions, the costs and availability of other resources may be a consideration in the strategy.

Where the lawyer or the NGO groups working with the victim/survivors are not the ones prosecuting, they may need to be vigilant about the charging and the characterisation of the crime. Lawyers or prosecutorial authorities may be inclined to accept guilty pleas for lower charges and/or sentences for sexual violence. Based on what is considered serious in a national criminal system, the lawyers may persuade the perpetrator to accept a charge with a lesser consequence and punishment than the one with a higher punishment. Such strategic legal choice in the course of the prosecution may leave the victims/survivors disappointed and victims and their lawyers should be advised to maintain contact with prosecutors so that they can provide their views on such developments.

In criminal systems that have recognised torture as a crime, it may be that the facts of the case fall within the definition of both torture and rape and may therefore be charged as both. The value of doing so is in extending the severity of torture to sexual violence. If the facts of the case fall within the definition of other crimes of comparable gravity, there may be a need to charge with both or the one considered most grave, bearing in mind the possibility that sexual violence may be the charge considered grave in that system.

- **Strategic litigation to change rules or the law on sexual violence:**

It is possible that existing laws or rules on prosecution of sexual violence are such that they make it difficult to prosecute sexual violence or lower courts may have dismissed the case on technical grounds. Examples are rules that require reporting of cases within a certain number of days or rules that authorise only certain medical officers to certify the violence. Such rules may also constitute a violation of the constitutional rights of equality in law and the right not to be discriminated against. If victims are consistently denied justice on these grounds, a strong case may be developed to challenge these rules in the higher or constitutional courts.

Sexual violence cases may also be used to influence law reform through strategic litigation in the higher courts. When a case forms the basis for strategic litigation, its purpose is larger than justice for the individual victim or survivor. The victim or survivor needs to be suitably informed and indeed support the larger goal of changes in rules or law reform.

7.3.2 Litigation Strategies at the Regional or International Level

Bringing a case to the regional or international level involves decisions that answer key questions such as:

- **Why has the need arisen to bring a case before an international mechanism?**

A need arises to bring a case to an international treaty body mechanism when the complainant has exhausted all domestic remedies or believes there is no effective remedy nationally and is keen to pursue justice elsewhere. In addition, there could be a belief that an international remedy will support advocacy efforts for a change in law or policy or a need is felt for international pressure to enforce implementation of a law or a specific human rights standard.

- **What are the justice goals of sending a complaint to a treaty body?**

The possible justice goals *inter alia* may be: to get an acknowledgment and validation of the violation suffered by the victim, to get recognition of the different types of rights violated, to get specific remedy and compensation from the State concerned, to bring international attention to rights violated by the State, to enforce due diligence standards, to lend gravity to crimes of sexual violence, to use the decision of the treaty body to change laws on sexual violence, and to get enforcement agencies in a State to take crimes against women and others seriously.

- **How to choose between different mechanisms?**

The choice of treaty body to send a complaint to depends on whether the State alleged to bear responsibility for the violation has accepted the individual complaints procedure of a treaty body. Among the most common treaty body mechanisms where complaints of violations of women's rights or of sexual violence could be sent, as discussed in the manual, are the African Commission and Court that oversee compliance with the ACHPR and the Protocol on Women's Rights, the Human Rights Committee established as a supervisory mechanism to violations of the ICCPR, the Committee Against Torture to redress violation of the UNCAT and the CEDAW Committee for violation of rights in the CEDAW.

If the State concerned is a signatory to only one of the above mechanisms, the choice is restricted to that one. If the State concerned has not accepted any individual complaints procedures it is still possible to approach the UN Human Rights Council Special Procedures. If the State is a signatory to more than one mechanism, then the choice may depend on the treaty rights that are violated the most. It must however be borne in mind that this may not always be the obvious choice and even if a particular treaty is most violated in a case, it may be strategic to approach another treaty body.

Other considerations in the choice of mechanism to approach may be the time or the number of years it takes for a case to complete, the kind of remedies that can be expected, and the importance the State accords to a specific treaty body's recommendations.

- **What is the strategic advantage of approaching one treaty body over the other?**

In situations where the State is signatory to more than one treaty body's complaints procedures, the decision on which treaty body to approach is based on an assessment of the strategic advantage of one treaty body procedure over the other.

As discussed above, since sexual violence is now recognised as torture when it can be said that the State or its officials are involved, either directly or for reasons of failure to exert due diligence, complainants from Africa may approach the African Commission for redress of sexual violence as torture, or of violation of any other rights under the Women's Protocol. Alternatively, they may choose to approach the HRC, the CAT or the CEDAW Committee. These treaty bodies have the potential to access the State's due diligence responsibilities in a case which may be used to strengthen a State's due diligence compliance nationally.

If the complainant is alleging violation of rights of life or dignity as a result of sexual violence, the African Commission or the HRC may be an appropriate mechanism to approach.

From the facts of sexual violence, if a case has to be made of systematic discrimination against women, the CEDAW Committee may be the best to approach. Alternatively, complaints may also be brought to the African Commission for violations of rights under the Protocol, including violations of rights to peace and security. Indeed, given that there are many conflict-ridden countries in Africa, women from States that have ratified the Protocol must proactively explore using its provision to litigate sexual violence as violations of right to peace and security.

The choice between two competing mechanisms may ultimately be down to the accessibility, the regional proximity, the resources available, the length of time it takes to get a decision,

the decision patterns of a treaty body mechanism, the relative authority of the recommendations of the treaty body, the probability of enforcement of any compensation awards of the mechanism and/or the potential impact of the decision nationally.

- **What is the possible fallout of sending a complaint to a treaty body?**

There is often fallout from sending a complaint to a treaty body and these may be severe in case of one mechanism as compared to another. Some of the known fallouts of bringing complaints are a witch-hunt of the victim or the group assisting the victim to send complaints which in some cases have led to severe reprisals, a State's unresponsiveness causing prolonged delay in the conclusion of the case, withdrawing of NGO and other status of the groups doing human right litigation, introduction of new laws and policies that strengthen control over human rights activities and regulate their existence. Awareness of the potential for such fallout may help the victim/survivor or the groups/NGOs to better deal with them.

- **What advocacy and campaign options can be employed to enforce, popularise or otherwise use the decision of the treaty body nationally?**

National advocacy using international instruments or decisions of the treaty bodies are discussed in detail in the next section. The following are some of the ways a decision may be used:

- The decision may help initiate or strengthen existing campaigns on law reform on issues of sexual violence.
- The decision may be quoted extensively in national litigation at all the levels that would assist with education of judicial and other law officers.
- The decision may be summarised, published and distributed to a wider audience as ways to raise awareness of sexual violence as a violation of human rights.
- The decision may be used for education of law enforcement agencies on how to strengthen the due diligence responsibility of the State.
- The decision may be popularised through the trainings, workshops and other events of local and national human rights organisations and NGOs.

The above strategies are broadly the ones that assist with planning and effective execution of human rights litigation on sexual violence. However, given that the violation is sexual violence, there may be local specificities that may also need to be considered and highlighted. Such specificities may either hinder access to international mechanisms (e.g. where the victim/survivor is part of the cultural practice where women are subordinated and kept out of public discourse and therefore not available to the same extent as witnesses) or promote access to such mechanisms (existence of local women's council that supports and encourages women to come forward and testify).

7.4 National Advocacy

To address individual complaints or prosecution against individuals, regional and international mechanisms are options where victims and survivors are unable to obtain justice domestically. However, these systems are physically remote from the victims and the situation about which redress is sought. It is important therefore for the long term if human rights and women's rights activists campaign to bring the standards set in the human rights mechanisms home.

National advocacy campaigns for ratification of regional or international treaties and law reform have the potential to change laws, rules and procedures relating to investigation and prosecution or other remedies for sexual violence or other forms of violence against women. The process of ratifying a regional or an international treaty often requires States to pass legislation to nationally implement the provisions of the treaties. Campaigns to ratify regional/international treaties and passing domestic legislation are therefore opportunities to advocate for inclusion of best standards in defence of human rights and in its practice. For example, several countries that have ratified the International Criminal Court treaty have adopted the Rome Statute of the treaty *en masse*, resulting in domestic recognition of crimes of sexual violence as war crimes, crimes against

humanity and a means to commit genocide.²⁵⁶

Local activists and lawyers may also make it a practice to cite the articles of treaties and conventions that have been ratified by their States, the decisions of human rights bodies or jurisprudence from regional or international tribunals to support their cases locally. Such an exercise serves dual purposes. One, to strengthen the case locally and demonstrate that there has been, based on the facts of the case, not only a violation of national laws but also violation of regional and international conventions that the State has accepted to honour and implement. Two, to educate the local legal fraternity and popularise among them the rights and obligations related to women's rights under the regional and international instruments. Even if some of the decisions and judgments of regional and international bodies are not directly binding, the local courts and judges may well find the information useful to apply the reasoning of the decisions of the regional and international mechanisms to the cases before them.

7.4.1 National Courts Applying International Standards

National courts in several countries have applied the articles and standards set in international or regional treaties to the cases before them making such standards part of the national jurisprudence and legal practice. The Supreme Court in India used the CEDAW provisions of non-discrimination on the basis of sex, in the *Vishaka v. State of Rajasthan* case to lay down guidelines on sexual harassment at workplace.²⁵⁷ The High Court in Zambia cited the full text of Article 4 of the African Women's Rights Protocol in the decision of a case of a young schoolgirl R.M., who was raped by her teacher. The judge awarded significant damages to the victim, referred the case to the Director of Public Prosecution to initiate a criminal proceeding against the teacher and directed the Ministry of Education to put regulations in place to protect girls in school.²⁵⁸

In Botswana, a landmark case of *Attorney General (Botswana) v. Unity Dow* concerned discriminatory aspects of section 4 of the Botswana Citizenship Act 1984.²⁵⁹ Section 4 granted citizenship by birth and descent to all children of Botswanan fathers regardless of the citizenship of their mother but denied citizenship to children of Botswanan mothers who were married to non-citizens. The provision had the effect of depriving two of the applicant's children of Botswanan citizenship because their father was a non-citizen.

The applicant claimed that Section 4 discriminated against her on the grounds of sex in breach of relevant provisions of the Botswana constitution. Much of the judgments of both the High Court and Court of Appeal concern the interpretation of Section 15 of the Constitution, which prohibited discriminatory laws on a number of grounds but omitted discrimination on the basis of sex. The High Court adopted an aggressive interpretation of Section 15. It found that the fact that Botswana was party to a number of international human rights instruments (including CEDAW, the ACHPR and others) that clearly prohibit discrimination on grounds of sex indicated that the Constitution was not intended to omit discrimination on grounds of sex even if the international instruments were not incorporated into domestic law. The High Court could not accept that Botswana would deliberately discriminate against women in its legislation while internationally supporting non-discrimination against women and it interpreted the Constitution accordingly. By contrast, the Court did not give similar weight to local customary law, which suggested a contrary interpretation. The Court of Appeal followed the High Court in holding that the Citizenship Act breached, among other rights, the right not to be subjected to degrading treatment and the right not to be discriminated against on the grounds of sex.²⁶⁰

The above cases are examples of where national courts took note of the fact of violation of

²⁵⁶ The legislation implementing the Rome Statute of the International Criminal Court in New Zealand, Canada, South Africa and Uganda are examples of domestic recognition of international standards.

²⁵⁷ *Vishaka v State of Rajasthan*, Judgment, Supreme Court of India, [1997] VII AD SC53.

²⁵⁸ Solidarity for African Women's Rights - A Guide to Using the Protocol on the Rights of Women in Africa available at: http://www.soawr.org/resources/Manual_on_Protocol_on_Women_Rights_in_Africa.pdf, ¶ 39.

²⁵⁹ (124/1990) (CA No. 4/1991).

²⁶⁰ Non-Discrimination in International Law - A Handbook for Practitioners, 2011 Edition, Interights, London, page 134, ¶ 134.

international law in the petitions before them and ruled to change laws, rules and policies on issues of importance to women. It is for this reason that human rights lawyers and advocates need to take every opportunity to cite international obligations and quote from decisions of international courts and tribunals to strengthen their cases in national courts. It raises the possibility of the courts taking note of the violations and thereby ruling to reform national laws on issue of all forms of violence against women.

8. CONCLUSION

For victims and survivors of sexual violence, justice is best served when they can easily access the local avenues of justice, participate in them and feel vindicated with the ruling or the judgments that are issued by the local institutions or courts. Different legal regimes have multiple avenues of justice that are open to the victim/survivor to access. For women however, access is fraught with several impediments. These range from lack of rights awareness, non-existence of substantive laws that recognise sexual violence as a serious crime, difficult procedural and evidentiary rules for litigating sexual violence, overall lack of resources; to gender bias of enforcement, and legal and judicial officers that discriminate against or generally work against women. Nevertheless, women seeking justice for sexual violence have little option but to work through these impediments for seeking justice nationally.

Working through the impediments in the legal process nationally is also important to document and demonstrate having exhausted domestic remedies. In the event the domestic process is flawed and justice is denied, having exhausted domestic remedies opens up the possibilities of approaching regional or international human right mechanisms. Documentary and other evidence of sexual violence therefore needs to be appropriate, adequate and complete. While human rights mechanisms may take a liberal approach to evidence and difficulties of documenting evidence of sexual violence, it may need to also meet the high evidentiary threshold of an international criminal process.

Regional and international human rights treaty bodies have advanced the realm of understanding of rights of women and recognised its violations as a serious breach. The articulation in the Women's Protocol of the extent to which women enjoy or rather should enjoy rights and protection of law at all times, but particularly in times of conflict, is unprecedented. Yet, the fact that there is no petition sent to the African Commission alleging violation of rights in the Women's Protocol is telling. Of all the human rights treaty mechanisms therefore, women victims and survivors of sexual violence from Africa need to explore sending communications for violations of rights in the Women's Protocol and establish jurisprudence that women from around the world could benefit from.

In the meanwhile however, the case law jurisprudence established by regional and international courts and tribunals and human rights treaty bodies are available to be used as a basis for litigating sexual violence. International criminal prosecution of sexual violence is possible only when it is committed as part of a widespread or systematic attack or during wars and genocide; and is therefore not available as an option for justice for an individual case of sexual violence. International law, as established in the statutes of international courts and tribunals and through jurisprudence, is, however, the standard for national law reform on prosecution of sexual violence in many countries.

The case law discussed in this Manual shows that some of the human rights treaty body mechanisms have adopted a gender perspective when interpreting the provisions of the treaties in the general comments and made it clear that it is possible for women to approach these mechanisms. Lack of justice for sexual violence could form the basis of a petition to the CEDAW Committee. In the absence of explicit prohibition of sexual violence, the torture prohibition could be activated in petitions to the African Commission, HRC or the CAT Committee. Furthermore, such cases need not necessarily relate to violence committed by State officials: States have and will continue to be held accountable for a lack due diligence in preventing or responding to sexual violence committed by private or non-State actors. Breach of the rights to life or to dignity, are other protections that may be claimed in a petition of sexual violence to the African Commission or the HRC. These mechanisms however remain un-utilised or under-utilised to redress gender-based violations, including sexual violence.

Advocacy and campaigns are important means to strengthen enforcement of existing laws on sexual violence that are gender inclusive or to initiate law reforms where the laws themselves are barriers to justice to women victims and survivors of sexual violence. Awareness and education at all levels is important to transform social attitudes of gender bias that effectively prevent access to avenues of justice or provide effective justice where access is not an issue. Women's rights and human

rights advocates have an important role to play in raising such awareness and in educating legal and judicial officers in the course of litigating sexual violence.

Wide and varied strategies could be employed with different degrees of success in pursuit of the overall goal of justice to victims or survivors of sexual violence. A criminal prosecution could potentially hold the perpetrator accountable for sexual violence. However, criminal prosecution makes the victim or the survivor a witness to the often lengthy legal drama between the State and the perpetrator and has no or a limited (in civil legal systems) role to play as a witness in the process. A civil suit too may take a long time but the victim may end up being compensated for the harm she suffered and therefore may feel vindicated sooner than in a criminal process.

In any litigation strategies that the rights advocate employs, using decisions of the international human rights treaty bodies or jurisprudence of the international courts and tribunals may strengthen the case and drive home the point of sexual violence as an important breach of basic and fundamental rights. Additionally, it may also educate about the State's non-compliance with its international obligations and may hold the State accountable for failure to exercise due diligence. That sexual violence can also amount to torture is another important lesson that judicial officers in national legal systems need to learn from the international human rights standards and apply to cases before them.

Women and human rights advocates in Africa and elsewhere are already engaged in the strategies discussed in this Manual individually or separately. Putting it all together in one document helps give a broad sense of all the available strategies and the potential and limitations of each one of them, thereby helping decide which are best suited for a case or a situation at hand. In the course of doing so, the key decisions and judgments referred to highlight the developments made in international law on justice for sexual violence. Appropriate, adequate, accurate and complete documentation and evidence are important to fully explore all available domestic remedies and eventually to access regional and international mechanisms. Finally, advocacy and campaigns have tremendous potential to bring developments in international law to bear in national laws and policies to redress sexual violence. For ultimately, it is the easy access to justice and possibility of effective remedy at the local and national level that victims and survivors need to ensure justice and accountability for sexual violence.

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Darfur: Women's sacrifice

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In Sissi camp, more than forty women and girls were raped by Janjaweed militiamen, while they had moved away from the camp to collect wood or to gather fodder. Seven young victims are gathered here in the hut built by UNICEF, in the heart of the camp: the youngest is eight years old, the oldest is 11. Sissi camp hosts less than 7,000 displaced people.
October, 2004, West Darfur-Sudan