

Protocol on the Rights of Women in Africa: Protection of women from sexual violence during armed conflict

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Summary

Sexual violence during armed conflict is prohibited by international humanitarian law. International tribunals have held that sexual violence can constitute torture, crimes against humanity and genocide. The Protocol on the Rights of Women deals quite extensively with the protection of women in armed conflicts. However, there are no clear guidelines for states on how to implement these obligations.

1 Introduction

There is increasing evidence of a link between sexual violence against women and the process of armed conflict in Africa. These violations of women's rights are of serious concern and affect the whole continent. For example, the flow of refugees across borders affects countries whether they are part of the conflict or not.¹ Even though the international community has established two criminal tribunals to prosecute these crimes in Africa — the International Criminal Tribunal for Rwanda

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¹ See the Preamble of the Protocol relating to the Establishment of the Peace and Security Council of the African Union (adopted in Durban, South Africa, July 2002 and entered into force in December 2003), where member states are concerned 'by the fact that conflicts have forced millions of our people, including women and children, into a drifting life as refugees and internally displaced persons, deprived of their means of livelihood, human dignity and hope' (PSC Protocol).

(ICTR)² and the Special Court for Sierra Leone (SCSL)³ — there still is no change in the situation regarding armed conflicts in Africa. There are continuing reports of sexual violence against women in the ongoing armed conflicts in Burundi,⁴ the Democratic Republic of Congo,⁵ Sudan⁶ and Uganda.⁷ The question to be asked, is: Can the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Women's Protocol)⁸ change the situation?

Against the background of the relationship between sexual violence during armed conflict and international humanitarian law, this article analyses the Women's Protocol.

The next section analyses the relationship between sexual violence against women during armed conflict and international humanitarian law. The basic presumption is that sexual violence constitutes a crime against humanity, war crimes and genocide under international humanitarian law.

² The International Criminal Tribunal for Rwanda (ICTR) was established for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for Genocide and other Violations in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994, SC Res 955 (8 November 1994). The Statute of the ICTR is attached to SC Res 955 as an annexure. The ICTR has convicted perpetrators of sexual violence during the genocide in Rwanda. See eg *Prosecutor v Akayesu* judgment 2 September 1998, Case ICTR-96-4; *Prosecutor v Musema* judgment 27 January 2000, Case ICTR-96-13.

³ The Special Court for Sierra Leone was created as a result of an Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone (16 January 2002). It is mandated to try those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996. It is reported that throughout the ten-year civil war, thousands of Sierra Leonean women were subjected to widespread and systematic sexual violence, including rape and sexual slavery. Human Rights Watch "'We'll kill you if you cry': Sexual violence in the Sierra Leone conflict' (2003) 15 *Human Rights Watch* 25.

⁴ See Human Rights Watch 'Everyday victims: Civilians in the Burundian war' (2005) 15 *Human Rights Watch* <http://www.hrw.org/reports/2003/burundi1203/burundi1203.pdf> (accessed 1 March 2006).

⁵ See Human Rights Watch 'Seeking justice: The prosecution of sexual violence in the Congo war' (2005) 17 *Human Rights Watch* <http://www.hrw.org/reports/2005/drc0305/drc0305text.pdf> (accessed 1 March 2006).

⁶ See Human Rights Watch 'Sexual violence and its consequences among displaced persons in Darfur and Chad' (2005) *Human Rights Watch* Briefing Paper, 12 April 2005.

⁷ See R Logh & E Denholm 'Violence against women in Northern Uganda' (2005) Amnesty International Index AFR 59/001/2005, 17 July 2005.

⁸ See Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted in Maputo in July 2003, and entered into force on 25 November 2005 after 15 ratifications.

2 The relationship between sexual violence against women during armed conflict and international humanitarian law

2.1 Sexual violence as a crime against humanity

The Nuremberg Charter⁹ marks the beginning of the modern notion of crimes against humanity.¹⁰ The rationale for crimes against humanity was to ensure that the types of acts amounting to war crimes could also be punished when the nationality of the victim and the perpetrator are the same.¹¹ However, rape and other forms of sexual violence were not listed as 'crimes against humanity' in article 6(c)¹² of the London Charter, nor in article 5(c)¹³ of the Tokyo Charter.¹⁴ Only Control Council Law 10 expressly referred to rape in its provisions.¹⁵ However, both Charters contained the term 'other inhumane acts', affording protection to women from sexual violence during armed conflict.¹⁶ This has been affirmed by the European Commission on Human Rights in

⁹ Annex to Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis (London Agreement), London, 8 August 1945, 82 UNTS 279, 59 Stat 1544, EAS 472 Reprinted in (1945) 39 *American Journal of International Law* 257 (Supp) (Nuremberg Charter or London Charter).

¹⁰ See KD Askin *War crimes against women: Prosecution in international war crimes tribunals* (1997) 140; MC Bassiouni *Crimes against humanity in international criminal law* (1999) 1.

¹¹ See JG Gardam & MJ Jarvis *Women, armed conflict and international law* (2001) 197.

¹² Art 6(c) of the Nuremberg Charter defines crimes against humanity as 'murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated'.

¹³ Art 5(c) of the Tokyo Charter defines crimes against humanity as 'murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated'. Charter of the International Military Tribunals for the Far East, 19 January 1946 TIAS 1589 (Tokyo Charter).

¹⁴ As above.

¹⁵ See art 2(c) of the Allied Control Council Law 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Humanity, 20 December 1945, Official Gazette of the Control Council for Germany 3, Berlin, 31 January 1946, which defines crimes against humanity as '[a]trocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated' (Control Council Law 10) (my emphasis).

¹⁶ See Y Kushalani *Dignity and honour of women as basic and fundamental human rights* (1982) 20, arguing that 'the civilised nations of the world' would have no difficulty in recognising rape as an 'inhumane act'. Also see Bassiouni (n 10 above) 344; Askin (n 10 above) 180; Gardam & Jarvis (n 11 above) 198.

Cyprus v Turkey,¹⁷ which held that widespread rape (in an international conflict between Turkey allied with Turkish Cypriots and Greek Cypriots) constituted torture and inhuman treatment under article 3 of the European Human Rights Convention.¹⁸ Furthermore, the Secretary-General's commentary on the conflict in the former Yugoslavia stated that¹⁹

crimes against humanity refer to inhumane acts of a very serious nature, such as . . . rape committed as part of a widespread, or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds . . . such inhumane acts have taken the form of the so-called 'ethnic cleansing' and widespread and systematic rape and other forms of sexual assault, including enforced prostitution.

Rape is included as a crime against humanity in the Statutes²⁰ of the International Criminal Tribunal for the Former Yugoslavia (ICTY)²¹ and the ICTR.²² Hence, in *Furundzija*, the ICTY Trial Chamber classified 'serious sexual assault' as a crime against humanity by way of inhumane acts.²³ Further, the ICTR Trial Chamber found in *Akayesu* that forced public nudity constituted a crime against humanity by way of other inhumane acts.²⁴ However, the Statutes of these Tribunals only refer to the term 'rape' as a crime against humanity without defining it or referring to other forms of sexual violence. This raises questions as to whether 'other forms of sexual violence' constitute 'crimes against humanity'.

¹⁷ See *Cyprus v Turkey*, App Nos 6780/74, 6780/75, decision of 17 July 1976, 4 *European Human Rights Reports* 482, paras 358-74 (1982).

¹⁸ Art 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, provides that '[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment'.

¹⁹ See United Nations Secretary-General's Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Former Yugoslavia, UN Doc S/25704 (1993), reprinted in (1993) 32 *International Legal Materials* 1159 para 48.

²⁰ See art 5 of the ICTY Statute where it states that the ICTY 'shall have the power to prosecute persons responsible for . . . crimes . . . committed in armed conflict, whether international or internal in character, and directed against any civilian population: . . . (g) rape'. Also, art 3 of the ICTR Statute stipulates that 'the [ICTR] shall have the power to prosecute persons responsible for the following crimes when committed as part of the widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: . . . (g) rape'. It should be noted that the ICTR Statute does not require the existence of an armed conflict for the prosecution of crimes against humanity.

²¹ The ICTY was established to prosecute 'Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991' SC Res 827 (25 May 1993). The Statute of the ICTY is contained in UN Doc S/25704 Annex (3 May 1993).

²² n 2 above.

²³ See *Prosecutor v Furundzija* Case No IT-95-17/1, judgment of 10 December 1998 para 175.

²⁴ *Akayesu* (n 2 above) para 697.

The Rome Statute of the International Criminal Court contains a much broader definition of crimes against humanity than those in the Statutes of the Tribunals. Article 7 states that²⁵

[a] 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population with knowledge of the attack: . . . (g) rape, sexual slavery, enforced prostitution, forced pregnancy,²⁶ enforced sterilisation, or any other form of sexual violence of comparable gravity . . .

Hence, there is no doubt that 'crimes against humanity' also include rape and other forms of sexual violence when committed as part of a 'widespread' or 'systematic attack' against women during armed conflict.²⁷

The term 'widespread' was defined in the *Akayesu* judgment to mean 'massive, frequent, large-scale action carried out collectively with considerable seriousness and directed against the multiplicity of victims'.²⁸ This means that a single isolated act of sexual violence during armed conflict may not be considered as a crime against humanity, as it will not satisfy the requirement of 'widespread' or 'systematic'.²⁹ Both tribunals have found that sexual violence can constitute torture and slavery as crimes against humanity.³⁰

2.2 Sexual violence as a war crime

2.2.1 The Hague Conventions

Although rape has long been considered a war crime under customary international law, the 1899³¹ and 1907³² Hague Conventions did not

²⁵ Art 7(g) of Rome Statute.

²⁶ Art 7(2)(f) of the Rome Statute defines the term 'forced pregnancy' to mean 'the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law'.

²⁷ It should be noted, however, that crimes against humanity may be committed during peace time. See *Prosecutor v Tadic*, Interlocutory Appeal Decision on Jurisdiction, 2 October 1995, IT-94-1-AR72 para 141, where the Appeals Chamber affirmed that crimes against humanity no longer require a nexus with armed conflict (*Tadic* judgment on jurisdiction).

²⁸ *Akayesu* (n 2 above) para 580.

²⁹ See *Prosecutor v Tadic* Case IT-94-1, opinion and judgment (7 May 1997) paras 646-647.

³⁰ See *Akayesu* (n 2 above) para 597 (rape as a form of torture); *Furundzija* (n 23 above) para 163 (rape as a form of torture); and *Prosecutor v Kunarac, Kovac, and Vukovic* Case IT-96-23 (*Foca* case) 22 February 2001, para 542 (sexual violence as a form of slavery), where the Trial Chamber states that 'it is now well established that the requirement that the acts be directed against a civilian "population" can be fulfilled if the acts occur in either a widespread basis or in a systematic manner. Either one of these is sufficient to exclude isolated or random acts.'

³¹ Convention with Respect to the Laws and Customs of War on Land, Annex of Regulations, 29 July 1899.

³² Convention Respecting the Laws and Customs of War on Land, Annex of Regulations, 18 October 1907 (1907 Hague Convention).

explicitly list rape and sexual violence as war crimes. However, the protection of women from sexual violence during armed conflict is subsumed in article 46 of the 1907 Hague Convention.³³ This article states that ‘family honour and rights, the lives of persons . . . must be respected’.³⁴ Kushalani³⁵ explains that the protection of ‘family honour and rights’ is a ‘euphemism’ of the time, which encompasses a prohibition of rape and sexual assault, and this provision is mandatory.³⁶ Therefore, this article affords protection to women during armed conflict.

However, the notion of a link between rape and honour has been criticised by advocates of women’s rights. Copelon³⁷ argues that the concept of rape as a crime against dignity and honour as opposed to a crime of violence is a core problem. She maintains that where rape is treated as a crime against honour, the honour of women is called into question and virginity or chastity is often a precondition.³⁸ She further argues that honour reinforces the social view that the raped woman is dishonourable.³⁹ In addition, Niarchos⁴⁰ lists the pitfalls in linking rape and honour as follows:⁴¹

First, reality and the woman’s true injury are sacrificed: rape begins to look like seduction with ‘just a little persuading’ rather than a massive and brutal assault on the body and psyche . . . by presenting honour as the interest to be protected, the injury is defined from society’s viewpoint, and the notion that the raped woman is soiled or disgraced is resurrected . . . on the scale of wartime violence, rape as a mere injury to honor or reputation appears less worthy of prosecution than injuries to the person.

It is submitted that because violence against women was largely ignored during that time, the provisions of the Hague Convention are of significance. In addition to article 46, the Preamble of the 1907 Hague Convention states that where people are not protected by the Hague Convention, they remain under the protection of customary

³³ Bassiouni explains that the general nature of the article should not be taken to mean that it does not prohibit acts of sexual violence, especially in light of the 1907 Hague Convention’s governing principles of the ‘laws of humanity’ and ‘dictates of the public conscience’. See Bassiouni (n 10 above) 348.

³⁴ Art 46 1907 Hague Convention (n 32 above).

³⁵ Kushalani (n 16 above).

³⁶ n 35 above, 10-11.

³⁷ See R Copelon ‘Gendered war crimes: Reconceptualising rape in time of war’ in A Stiglmeier (ed) *Mass rape: The war against women in Bosnia-Herzegovina* (1994) 197 200.

³⁸ As above.

³⁹ As above.

⁴⁰ See CN Niarchos ‘Women, war, and rape: Challenges facing the International Criminal Tribunal for the Former Yugoslavia’ (1995) 17 *Human Rights Quarterly* 649 674.

⁴¹ As above.

international law,⁴² thus emphasising and affirming pre-existing customary international law, which was general and prohibited sexual violence.⁴³ Hence, this Convention is of significance because it protects women in its provisions and it also extends the protection to customary international law.

2.2.2 The Geneva Conventions and Additional Protocols

In their provisions, the Geneva Conventions⁴⁴ and their Additional Protocols⁴⁵ distinguish between international and non-international armed conflict.⁴⁶ The need to differentiate between the two categories is due to the regulations afforded to them by international law. International humanitarian law applies different rules depending on the nature of the armed conflict.⁴⁷ Therefore, the protection afforded to those affected by international armed conflict differs from the protection afforded to those affected by internal armed conflict. The distinction is based on the premise that non-international armed conflict raises questions of sovereign governance and not international regulation.⁴⁸

Of significance is the striking difference in the application of international humanitarian law between the two categories. In an international

⁴² The Preamble states that '[u]ntil a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity, and the dictates of the public conscience'; Hague Convention (1907) (n 32 above).

⁴³ As above.

⁴⁴ The Conventions (Geneva Conventions) signed at Geneva on 12 August 1949, consist of the following: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, including Annex I, 75 UNTS 31; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 UNTS 85; Convention (III) Relative to the Treatment of Prisoners of War, including Annexes I-IV, 75 UNTS 135; Convention (IV) Relative to the Protection of Civilian Persons in Time of War, including Annexes I-III, 75 UNTS 287.

⁴⁵ Protocol [I] Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3, entered into force 7 December 1978; Protocol [II] Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 1977, 1125 UNTS 609, entered into force 7 December 1978.

⁴⁶ Wars between two or more states are considered to be international armed conflicts and war-like clashes occurring on the territory of a single state are non-international armed conflicts. See H Glasser *International humanitarian law: An introduction* (1993) 21.

⁴⁷ See JG Stewart 'Towards a single definition of armed conflict in international humanitarian law: A critique of internationalized armed conflict' (2003) 85 *International Review of the Red Cross* 313.

⁴⁸ Stewart (n 47 above) 320.

armed conflict, the 'grave breaches'⁴⁹ of the Geneva Conventions become applicable, in addition to other provisions of international humanitarian law applying to such armed conflicts.⁵⁰ Only article 3 common to the Geneva Conventions and Additional Protocol II apply to non-international armed conflict.

There is an argument that suggests correctly that customary international law has developed to a point where the gap between the two regimes is less marked. For example, the then President of the ICTY, Cassese, argued that 'there has been a convergence of the two bodies on international law with the result that internal strife is now governed to a large extent by the rules and principles which had traditionally only applied to international conflicts . . .'⁵¹ It is submitted that the harm felt by women who have been sexually assaulted during internal armed conflict is no different from those assaulted during an international armed conflict.

It is therefore necessary to evaluate the protection afforded to women from sexual violence by the Geneva Conventions and Additional Protocols during international and non-international armed conflict.

The protection of women from sexual violence during international armed conflicts

Under the Geneva Conventions, only 'grave breaches' explicitly incorporate penal sanctions.⁵² Rape and other forms of sexual violence are not explicitly identified by the Geneva Conventions as a class of 'grave breaches', but they are subsumed in offences that are explicitly identified as 'grave breaches'.⁵³ Article 147 of the Geneva Convention IV provides that⁵⁴

[g]rave breaches . . . shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health . . . not justified by military necessity and carried out unlawfully and wantonly.

⁴⁹ The grave breaches are the principal crimes under the Geneva Conventions. See T Meron *War crimes law comes of age* (1998) 289.

⁵⁰ Meron (n 49 above) 286.

⁵¹ See the 'Memorandum of 22 March 1996 to the Preparatory Committee for the Establishment of the International Criminal Court' in L Moir *The law of internal armed conflict* (2000) 51. Also see K Parker 'Human rights of women during armed conflict' in KD Askin & DM Koenig (eds) *Women and international human rights law* (1999) 283 290.

⁵² Meron (n 49 above) 350.

⁵³ See JG Gardam 'Gender and non-combatant immunity' (1993) 3 *Transnational Law and Contemporary Problems* 360 361. Also see Bassiouni (n 10 above) 350; NNR Quéniwet *Sexual offences in armed conflict and international law* (2005) 100.

⁵⁴ Art 147 Geneva Convention IV.

The Geneva Conventions neither define rape and sexual violence nor do they identify their elements. However, the Commentary of the Geneva Convention IV⁵⁵ provides a broad interpretation of inhuman treatment. It provides that '[t]he aim of the Convention is certainly to grant civilians in the enemy hands a protection which will preserve their human dignity, and prevent them being brought down to the level of animals'.⁵⁶ Further, the Commentary stipulates that a conclusion is that 'by 'inhuman treatment' the Convention does not mean only physical injury or injury to health'.⁵⁷ More specifically, the Commentary defines 'inhuman treatment' as treatment contrary to article 27 of the Geneva Convention IV,⁵⁸ which provides that 'women shall be especially protected against any attack of their honour, in particular against rape, enforced prostitution, or any form of indecent assault'.⁵⁹ Consequently, sexual violence is incorporated by reference under 'inhuman treatment' and therefore constitutes a 'grave breach' of the Geneva Conventions.⁶⁰

In addition, sexual violence at times amounts to an act of torture as provided by section 147 of the Geneva Convention.⁶¹ The ICTY Trial Chamber held in *Celebici*⁶² that⁶³

[r]ape causes severe pain and suffering both physical and psychological . . . it is difficult to envisage circumstances where in which rape by, or at the instigation of a public official . . . could be considered as occurring for a purpose that does not, in some way, involve punishment, coercion, discrimination or intimidation.

Accordingly, the Trial Chamber held that 'whenever rape and other forms of sexual violence meet the aforementioned criteria, then they shall constitute torture, in the same manner as any other acts that meet these criteria'.⁶⁴

⁵⁵ See J Pictet (ed) *International Committee of the Red Cross, Commentary: IV Geneva Convention* (Geneva Convention IV Commentary).

⁵⁶ n 55 above, 598.

⁵⁷ As above.

⁵⁸ As above.

⁵⁹ Art 27 Geneva Convention IV.

⁶⁰ See *Cyprus v Turkey* (n 17 above).

⁶¹ Art 147 Geneva Convention IV. On torture, see eg MacKinnon contending that while men are tortured in a particular way, women suffer rape as a method of torture. She notes that torture is widely recognised as a core violation of human rights. See CA MacKinnon 'On torture: A feminist perspective on human rights' in KE Mahoney & P Mahoney (eds) *Human rights in the 21st century: A global challenge* Part 1 21; B Stephens 'Humanitarian law and gender violence: An end to centuries of neglect?' (1999) 3 *Hofstra Law and Policy Symposium* 87 95, arguing that rape entails the intentional infliction of severe physical and mental pain and suffering.

⁶² See *Prosecutor v Delalic & Others* judgment of 16 November 1998, Case IT-96-21 (*Celebici*).

⁶³ n 62 above, para 495.

⁶⁴ n 62 above, para 496.

In addition, the Commentary to article 147 of the Geneva Convention (IV) stipulates that torture is 'more than a mere assault on the physical or moral integrity of a person'.⁶⁵ It notes that torture is defined as 'the infliction of suffering on a person to obtain from that person, or from another person, confessions or information. What is important is not so much the pain itself as the purpose behind its infliction.'⁶⁶ Further, according to the *Aide-mémoire* of the International Committee of the Red Cross (ICRC), 'willfully causing great suffering' means 'suffering inflicted without the ends in view for which torture is inflicted or biological experiments carried out. It would therefore be inflicted as a punishment, in revenge or for some other purpose, even pure sadism.'⁶⁷ Rape and sexual violence are certainly attacks upon physical integrity, health and human dignity.⁶⁸ Thus, sexual violence which amounts to torture also constitutes a grave breach of the Geneva Convention IV.

In addition to article 147 of the Geneva Convention IV, articles 11 and 85 of the Additional Protocol I expand the definition of 'grave breaches'. Article 11 states that⁶⁹

[t]he physical or mental health and integrity of persons who are in the power of the adverse party or who are interned, detained or otherwise deprived of liberty . . . shall not be endangered by any unjustified act or omission.

Further, article 11(4) defines 'grave breaches' of Additional Protocol I as⁷⁰

[a]ny wilful act or omission which seriously endangers the physical or mental health or integrity of any person who is in the power of a party other than the one on which he depends and which . . . violates any of the prohibitions in paragraphs 1 and 2 . . . shall be a grave breach of this Protocol.

In addition, article 85 of Additional Protocol I states that grave breaches are, in addition to those listed in article 11, certain acts which are 'committed willfully . . . and causing . . . serious injury to body or health'⁷¹ as well as 'other inhuman and degrading practices involving outrages upon personal dignity based on racial discrimina-

⁶⁵ See Geneva Convention IV Commentary (n 53 above) 598.

⁶⁶ As above. See also KD Askin 'Women and international human rights law' in Askin & Koenig (n 51 above) 41 80, where she argues that torture is not limited to physical torture in cases of sexual violence; Stephens (n 61 above), arguing that the view that rape be coupled with violent injury reflects the failure to understand the violent nature of rape and the physical and mental injury it inflicts.

⁶⁷ See (1992) ICRC, *Aide-mémoire* quoted in Bassiouni (n 10 above) 353; T Meron 'Rape as a crime under international humanitarian law' (1993) 87 *American Journal of International Law* 426.

⁶⁸ See Quénivet (n 53 above) 100; Gardam & Jarvis (n 11 above) 201.

⁶⁹ Art 11 Additional Protocol I.

⁷⁰ Art 11(4) Additional Protocol I.

⁷¹ Art 85(3) Additional Protocol I.

tion'.⁷² These provisions therefore expand the scope of 'grave breaches'.⁷³ Hence, sexual violence is considered a grave breach and should be prosecuted as such.

A more specific prohibition against rape and sexual violence of civilians can be found in article 76 of Additional Protocol I. Article 76 states that '[w]omen shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault'.⁷⁴ The Commentary on article 76 stipulates that this provision is largely a repetition of paragraph 2(b) of article 75 of the Additional Protocol I (which provides for fundamental guarantees), with the addition of a reference to rape.⁷⁵ It proceeds to state that the provision 'applies both to women affected by the armed conflict and to others; to women protected by the Fourth Convention and to those who are not'.⁷⁶ This provision is significant because it affords protection to all women,⁷⁷ rather than protecting only women 'in international armed conflicts in enemy hands, or in the hands of a party of which they are not national'.⁷⁸ Thus, this Convention has been viewed as not applicable when a warring party violates the rights of its citizens.⁷⁹

The protection of women from sexual violence during non-international armed conflicts

Article 3 common to the Geneva Conventions does not mention rape and other forms of sexual violence.⁸⁰ It mentions 'outrages upon personal dignity, in particular humiliating and degrading treatment'.⁸¹ The

⁷² Art 85(4)(c) Additional Protocol I.

⁷³ The Commentary on the Additional Protocols declares that '[t]he qualification of grave breaches is extended to acts defined as such in the Conventions'. See Y Sandoz *et al Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) 992 para 3468 (Commentary to the Additional Protocols).

⁷⁴ Art 76(1) Additional Protocol I.

⁷⁵ See Commentary to the Additional Protocols (n 73 above) 892 para 3150.

⁷⁶ n 73 above para 3151.

⁷⁷ Also see art 75(1) of Additional Protocol I, which states that '[i]n so far as they are affected by a situation referred to in article 1 of this Protocol, persons who are in the power of a party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each party shall respect the person, honour, convictions and religious practices of all such persons.'

⁷⁸ Many provisions, including the provisions for humane treatment set out in art 27 of Geneva Convention IV, apply only to persons.

⁷⁹ Bassiouni (n 10 above) 360.

⁸⁰ Art 3(1) of the Geneva Conventions prohibits '(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture . . . (c) outrages upon personal dignity, in particular humiliating and degrading treatment'.

⁸¹ Art 3(1)(c) Geneva Conventions.

Commentary on article 3 is also silent on whether these crimes fall under either of the provisions in the Geneva Conventions. However, the Commentary acknowledges the fact that⁸²

it would never be possible to catch up with the imagination of future torturers who wished to satisfy their bestial instincts; and the more specific and complete the list tries to be, the more restrictive it becomes. The form of wording adopted is flexible and at the same time precise.

In the light of the identical terms used in other provisions of the Geneva Conventions and the Additional Protocol I, it is argued that the act of sexual violence clearly violates article 3 common to the Geneva Conventions.⁸³

Further, common article 3 includes sexual violence as a grave breach by reference to article 27, in the same way article 147 of the Geneva Convention IV 'grave breaches' provision does.⁸⁴ The Commentary on common article 3 specifies that article 27 of the Geneva Convention IV is applicable. For that reason rape and sexual violence fall under the 'grave breaches' of the Geneva Conventions.⁸⁵

In addition, articles 4 and 13 of Additional Protocol II expand the authority of common article 3. Article 4 of Additional Protocol II provides that civilians 'are entitled to respect for their person, honour and convictions . . .' and that they shall be treated humanely in all circumstances. Article 4(2)(e) states that 'outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault' are prohibited at any time and at any place.⁸⁶ Further, article 13(2) provides that

[t]he civilian population as such, as well as individual civilians shall not be the object of the attack. Acts or threats of violence the primary of which is to spread terror among the civilian population are prohibited.

Hence, the protection provided under these articles corresponds to the protection offered by article 27 of the Geneva Convention IV,⁸⁷ and therefore constitutes grave breaches.⁸⁸

⁸² See Geneva IV Commentary (n 55 above) 38-39.

⁸³ Bassiouni (n 10 above) 359.

⁸⁴ n 83 above, 359-60.

⁸⁵ The Commentary to Geneva Convention IV states that it should be noted that the acts prohibited items (a) to (d) are also prohibited under other articles of . . . Geneva Convention [IV], in particular articles 27, 31 to 34, and 64 to 77. See Geneva IV Commentary (n 55 above) 40.

⁸⁶ Art 4(2)(e) Additional Protocol II. Also see Kushalani (n 16 above) 153, where she asserts that outrages upon the dignity and honour of women during armed conflict are grave breaches of humanitarian law, war crimes, and violations of a peremptory norm of international law.

⁸⁷ As above.

⁸⁸ Bassiouni (n 10 above) 360.

2.2.3 The International Criminal Tribunals and the International Criminal Court

The statutes of the International Criminal Tribunals for the Former Yugoslavia⁸⁹ and Rwanda⁹⁰ have provisions of a similar nature as the Geneva Conventions and the Additional Protocols on the protection of women from sexual violence during armed conflict.

Article 8(2)(b)(xxii) of the Rome Statute provides that individuals can be prosecuted for

committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2(f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions.

Furthermore, article 8(2)(e)(vi), which concerns internal armed conflict, uses terms that are identical to the terms used in article 8(2)(b)(xxii) as serious violations of article 3 common to the Geneva Conventions. Hence, sexual violence against women during armed conflict constitutes a grave breach of the Geneva Conventions.⁹¹

2.3 Sexual violence as genocide

Following the conflicts in the former Yugoslavia⁹² and Rwanda,⁹³ for the first time consideration was given to the relationship between sexual violence and genocide, with significant support that sexual violence could constitute genocide if the other elements of the crime are

⁸⁹ See art 2 of the ICTY Statute: 'grave breaches of the Geneva Conventions' and art 3 'violations of the laws or customs of war'.

⁹⁰ See art 4 of the ICTR Statute: 'violations of common article 3 of the Geneva Conventions and Additional Protocol II'.

⁹¹ See WA Schabas *An introduction to the International Criminal Court* (2004) 63. Also see Quéniévet (n 53 above) 101; Gardam & Jarvis (n 11 above) 203.

⁹² About 20 000 women in the former Yugoslavia are victims of rape. These women were raped by the Serbian, Croatian and Muslim military groups, although most perpetrators were Serbian. In these instances, rape was seen as a weapon of war to fulfil the policy of ethnic cleansing. See European Community Investigative Mission into the Treatment of Muslim Women in the former Yugoslavia, para 14 <http://www.womenaid.org/press/info/humanrights/warburtonfull.htm> (accessed 31 March 2006).

⁹³ During the Rwandan genocide, rape and other forms of sexual violence were directed primarily against Tutsi women as a direct result of both their gender and ethnicity. The sexual violence perpetrated against these women by the Hutu extremists was used as means to dehumanise and subjugate all Tutsi. In some instances, even Hutu women were targeted for their affiliation with the political opposition, marriage to Tutsi men or perceived protection of Tutsi. See Human Rights Watch 'Shattered lives: Sexual violence during the Rwandan genocide and its aftermath' *Human Rights Watch Women's Rights Project* 22 <http://www.hrw.org/reports/1996Rwanda.htm> (accessed 1 March 2006).

present.⁹⁴ In the former Yugoslavia and Rwanda, sexual violence against women was used to⁹⁵

humiliate, subordinate, or emotionally destroy entire communities; to cause chaos and terror; to make people flee; and to ensure the destruction or removal of an unwanted group by forcible impregnation by a member of a different ethnic group.

On rape as genocide, MacKinnon argues that⁹⁶

it is rape as an instrument of forced exile, rape to make you leave your home and never want to go back. It is rape not to be seen and heard and be watched and told to others: rape as spectacle. It is rape to drive a wedge through a community, to shatter a society, to destroy a people. It is rape as genocide.

The Women's Protocol is the only treaty that criminalises sexual violence as genocide.⁹⁷ The reason for the lack of treaties criminalising sexual violence as such is because sexual violence in this instance is not considered as an attack directed at a woman alone, but against the ethnicity group to which the woman belongs.⁹⁸ Therefore, the

⁹⁴ On rape as genocide, see J Webb 'Genocide treaty cleansing: Substantive and procedural hurdles in application of the Genocide Convention to the alleged crimes in the former Yugoslavia' (1993) 23 *Georgia Journal of International & Comparative Law* 377 392; C Chinkin 'Rape and sexual abuse of women in international law' (1994) 5 *European Journal of International Law* 326; K Fitzgerald 'Problems of prosecution and adjudication of rape and other sexual assaults under international law' (1997) 8 *European Journal of International Law* 638; P Goldberg & N Kelly 'International human rights and violence against women' (1993) 6 *Harvard Human Rights Journal* 195; Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994), UN SCOR, Annex 134-46, UN Doc S/1994/1405 (1994) relating to the 1994 conflict in Rwanda and stating that in some instances, sexual violence can constitute genocide; also Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), UN Doc S/1994/674/Add 2 (28 December 1994), relating to the former Yugoslavia, and stating that the Genocide Convention covers rape and sexual assault. .

⁹⁵ See J Campanaro 'Women, war, and international law: The historical treatment of gender-based war crimes' (2001) 89 *Georgia Law Journal* 2557 2570.

⁹⁶ CA MacKinnon 'Rape, genocide and women's human rights' in Stiglmeier (n 37 above) 184 190.

⁹⁷ Art 11 Women's Protocol.

⁹⁸ The Draft Code of Crimes against Peace and Security of Mankind of the International Law Commission states that the intention must be to destroy the group and not merely one or more individuals who are coincidentally members of a particular group. The prohibition must be committed against an individual because of his membership in a particular group and as an incremental step in the overall objective of destroying the group. It is the membership of the individual in a particular group rather than the identity of the individual that is the decisive criterion in determining the immediate victims of the crime genocide. The group itself is the ultimate target of this type of massive criminal conduct. However, the Draft Code does not mention rape as genocide; it maintains that the bodily harm or the mental harm inflicted must be of such a serious nature as to threaten the destruction of the group in whole or in part. The phrase 'imposing measures' is used to indicate the necessity of an element of coercion. See para 17 of the Draft Code of Crimes against Peace and Security of Mankind of the International Law Commission http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_4_1996.pdf (accessed 1 March 2006).

woman is afforded protection as a member of a group. Article 2 of the Genocide Convention⁹⁹ comprises the list constituting the crime of genocide as:¹⁰⁰

- (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.

The first jurisprudence on the issue of sexual violence constituting genocide came from the ICTR, where the Trial Chamber in the *Akayesu* judgment held that sexual violence may constitute genocide on both a physical and mental level.¹⁰¹ The Trial Chamber found that '[s]exual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole'.¹⁰² It went further and held that '[s]exual violence was a step in the process of destruction of the Tutsi group — destruction of the spirit, of the will to live, and of life itself'.¹⁰³ According to the Trial Chamber in *Akayesu*, causing serious bodily or mental harm to members of the group does not necessarily mean that the harm is permanent and irremediable.¹⁰⁴

Hence, there is no doubt that rape and other forms of sexual violence can constitute the crime of genocide if the required elements of genocide are satisfied.

3 The Women's Protocol and sexual violence during armed conflict

3.1 The provisions of the Women's Protocol

The Women's Protocol defines the term 'violence against women' to mean¹⁰⁵

all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and *during situations of armed conflicts or of war*.

⁹⁹ Convention on the Prevention and Punishment of the Crimes of Genocide, GA Res 260 A(III) (9 December 1948), entered into force 12 January 1951 (Genocide Convention).

¹⁰⁰ Art 2(a) to (e) Genocide Convention.

¹⁰¹ *Akayesu* (n 2 above) paras 731-734.

¹⁰² *Akayesu* (n 2 above) para 731.

¹⁰³ *Akayesu* (n 2 above) para 732.

¹⁰⁴ *Akayesu* (n 2 above) para 502.

¹⁰⁵ Art 1 Women's Protocol (my emphasis).

Further, article 11(3) stipulates that state parties undertake¹⁰⁶

to protect asylum seeking women, refugees, returnees and internally displaced persons against all forms of violence, rape and other forms of sexual exploitation, and to ensure that such acts are considered war crimes, genocide and/or crimes against humanity.

It is, however, unclear whether this protection is also afforded to women who do not fall under this provision. An inference can, nevertheless, be drawn from the provisions of article 11(2), which provides that state parties shall 'protect civilians including women, irrespective of the population to which they belong'. Hence, it is argued that these provisions include the protection of all women from sexual violence during armed conflict and such crimes can be considered to constitute war crimes, genocide and/or crimes against humanity.

However, the Women's Protocol does not define these crimes. By virtue of the provisions of article 11(2), which provides that state parties will act 'in accordance with the obligations incumbent upon them under the international humanitarian law', it is assumed that the definition of such crimes is that which is accorded by international humanitarian law.¹⁰⁷

3.2 Obligations of states under the Women's Protocol

War crimes, genocide and crimes against humanity constitute peremptory norms (*jus cogens*) of international law from which no state can derogate.¹⁰⁸ Since sexual violence during armed conflict constitutes

¹⁰⁶ Art 11(2) Women's Protocol.

¹⁰⁷ See K Kindiki 'The normative and institutional framework of the African Union relating to the protection of human rights and the maintenance of peace and security: A critical appraisal' (2003) 3 *African Human Rights Law Journal* 97 108, where he is of the view that it may be difficult to develop other definitions, since these terms have already been defined in the Statute of the International Criminal Court.

¹⁰⁸ See MC Bassiouni 'Universal jurisdiction for international crimes: Historical perspectives and contemporary practice' (2001) 42 *Virginia Journal of International Law* 81 108, where he lists the *jus cogens* international crimes as piracy, slavery, war crimes, crimes against humanity, genocide, apartheid and torture. Also see MC Bassiouni & EM Wise *Aut Dedere Aut Judicare: The duty to extradite or prosecute under international law* (1995) 52, where they argue that a number of rules prohibiting international offences such as aggression, genocide and serious breaches of international humanitarian law are widely held to constitute rules of *jus cogens*; Bassiouni (n 10 above) 217, where he argues that since World War II a number of international and regional instruments along with numerous UN resolutions reaffirm and provide support for the assertion that the protected interests whose violations are criminalised in crimes against humanity have become *jus cogens*; and Meron (n 49 above) 233, where he argues that the core prohibitions of crimes against humanity and the crime of genocide constitute *jus cogens* norms; MC Bassiouni 'Accountability for international crime and serious violations of fundamental human rights: Searching for peace and achieving justice: The need for accountability' (1996) 59 *Law and Contemporary Law Problems* 9 17, where he contends that crimes against humanity, genocide, war crimes and torture are international crimes that have risen to the level of *jus cogens*.

crimes against humanity, war crimes and genocide, it is therefore argued that these crimes have the status of *jus cogens*. Crimes that have acquired such status give rise to obligations *erga omnes*.¹⁰⁹ amongst states. Simply stated, where there are gross human rights violations in a state, if such violations include any of these crimes, the whole international community is affected and is obliged to act.¹¹⁰ Furthermore, these crimes have acquired the status of customary law,¹¹¹ which means that even in the absence of a treaty agreement states are still bound by the provisions of the treaty prohibiting such crimes. The obligations of the treaty only bind the non-contracting state in so far as the provisions of the treaty are considered to have become customary international law. Therefore, states do not have the right to provide blanket amnesty to transgressors of *jus cogens* international crimes,¹¹² particularly leaders and senior executors.¹¹³ Instead, they have an obligation to see to it that all the legal consequences pertaining to these crimes are carried out in good faith.¹¹⁴

Article 11(1) of the Women's Protocol provides that state parties undertake 'to respect and ensure respect for the rules of international humanitarian law applicable in armed conflict situations, which affect the population, particularly women'. Furthermore, the Women's Protocol provides that state parties undertake to 'protect . . . women, irrespective of the population to which they belong, in the event of armed

¹⁰⁹ The doctrine of obligations *erga omnes* was introduced in the *obiter dictum* of the International Court of Justice (ICJ) in the *Barcelona Traction* case. The ICJ held: 'An essential distinction should be drawn between the obligations of a state towards the international community as a whole, and those arising *vis-à-vis* another state in the field of diplomatic protection. By their very nature the former are the concern of all states. In view of the importance of the rights involved, all states can be held to have a legal interest in their protection; they are obligations *erga omnes*.' See *Barcelona Traction Light and Power Co Ltd (Belgium v Spain)*, 1970 ICJ Rep 3, 32 judgment of 5 February.

¹¹⁰ Bassiouni (n 10 above) 212, where he says that the first criterion of an obligation rising to the level of *erga omnes* is, in the words of the Court, 'the obligations of a state towards the international community as a whole'. Meron argues that when a state breaches an obligation *erga omnes*, it injures every state including those not specially affected. See T Meron *Human rights and humanitarian norms as customary law* (1989) 191. Hence, if a state fails to adhere to its duties under international law, to prevent or to prosecute crimes that have acquired the *jus cogens* status or to extradite the perpetrators, for example, will constitute a breach of obligations *erga omnes*.

¹¹¹ Meron (n 110 above) 3.

¹¹² Crimes against humanity, genocide, war crimes and torture are international crimes that have risen to the level of *jus cogens*. See Bassiouni (1996) (n 108 above) 9 17.

¹¹³ Bassiouni is of the view that there must be prosecution for at least the four *jus cogens* crimes of genocide, crimes against humanity, war crimes and torture as there can be no impunity for such crimes. See n 112 above 20; also see N Roht-Arriaza 'State responsibility to investigate and prosecute grave human rights violations in international law' (1990) 78 *California Law Review* 449 475 n 137.

¹¹⁴ Art 26 Vienna Convention on the Law of Treaties of 1969, 1155 UNTS 331.

conflict'.¹¹⁵ The state parties will do so 'in accordance with the obligations incumbent upon them under the international humanitarian law'.¹¹⁶ Under international humanitarian law, war crimes, genocide and crimes against humanity give rise, for example, to universal jurisdiction,¹¹⁷ the obligations of states to prosecute or extradite,¹¹⁸ and the right to compensation.¹¹⁹

3.3 Implementation of the Women's Protocol

Article 26 of the Women's Protocol provides that state parties shall

ensure the implementation of this Protocol at national level, and in their periodic reports submitted in accordance with article 62 of the African Charter on Human and Peoples' Rights, indicate the legislative and other measures undertaken for the full realisation of the rights herein recognised

and that state parties undertake to 'adopt all necessary measures and in particular shall provide budgetary and other resources for the full and effective implementation of this Protocol'. Article 62 of the African Charter on Human and Peoples' Rights (African Charter) provides that¹²⁰

each state party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognised and guaranteed by the present Charter.

This article is silent on the issue of who is to receive and review the report. However, subsequent to the African Commission on Human and Peoples' Rights' (African Commission) recommendation to be

¹¹⁵ Art 11(2) Women's Protocol.

¹¹⁶ As above.

¹¹⁷ Art 49 of Geneva Convention I, art 50 of Geneva Convention II, art 129 of Geneva Convention III, and art 146 of Geneva Convention IV establish that 'persons alleged to have committed or to have ordered to be committed grave breaches are subject to the jurisdiction of all the state parties'. On universal jurisdiction, see generally G Bottini 'Universal jurisdiction after the creation of the International Criminal Court' (2004) 36 *New York University Journal of International Law and Politics* 503; T Meron 'Internationalisation of internal atrocities' (1995) 89 *American Journal of International Law* 554; M Scharf 'Universal jurisdiction: Myths, realities and prospects: Application of treaty-based universal jurisdiction to nationals of non-party states' (2001) 35 *New England Law Review* 377.

¹¹⁸ Art 49 Geneva Convention I, art 50 Geneva Convention II, art 129 Geneva Convention III, and art 146 Geneva Convention IV; art 88 Additional Protocol I. Also see generally Bassiouni & Wise (n 108 above).

¹¹⁹ Art 3 of the Hague Convention IV of 1907 states that '[a] belligerent [p]arty which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces'.

¹²⁰ See art 62 of the African Charter on Human and Peoples' Rights adopted by the Organisation of African Unity in Nairobi, Kenya, in June 1981 and entered into force in October 1986.

mandated to receive such reports,¹²¹ the Assembly of Heads of State and Government of the Organisation of African Unity (OAU) entrusted the African Commission with not only such a mandate, but also with the responsibility for preparing guidelines on the form and content of the periodic reports.¹²² From this provision, it seems that the reports on women's issues will form part of the reports that member states are obliged to submit to the African Commission. However, these measures are viable for the prevention of sexual violence against women or for the after effects of sexual violence. It is unrealistic to expect a state involved in armed conflict to comply with such an obligation.

Article 27 of the Women's Protocol provides that '[t]he African Court on Human and Peoples' Rights shall be seized with matters of interpretation arising from the application or implementation of this Protocol'. It is not clear what 'matters of interpretation' entails. In the case of sexual violence against women during armed conflict constituting international crimes, it is assumed that 'matters of interpretation' means that the African Court on Human and Peoples' Rights in Africa¹²³ is empowered legally to condemn states for violations of international humanitarian law as provided by the Geneva Conventions and Additional Protocols and the Genocide Convention.¹²⁴

Further, the Protocol establishing the African Court empowers the Court to grant remedies, including payment of fair compensation or reparation, where it finds a violation of a human and peoples' right.¹²⁵ The Court may also take provisional measures in cases of extreme gravity or urgency to avoid irreparable harm.¹²⁶ Furthermore, the Protocol provides that the execution of the orders of the Court shall be monitored by the Council of Ministers.¹²⁷ The African Charter did not grant these powers to the African Commission, which undermined the effective operation of the human rights system under the African Charter. It

¹²¹ See Recommendation on Periodic Reports, First Annual Activity Report of the African Commission on Human and Peoples' Rights, 1987-1988, ACHPR/RPT/1st, Annex IX, in R Murray & M Evans (eds) *Documents of the African Commission on Human and Peoples' Rights* (2001) 168.

¹²² See the 24th ordinary session of the Assembly of Heads of States and Governments of the OAU.

¹²³ The African Court is established by the Protocol to the African Charter on Human and Peoples' Rights Establishing the African Court on Human and Peoples' Rights, OAU Doc OAU/LEG/EXP/AFCHPR/PROT (III), which came into force on 25 January 2004. The judges of the Court have been appointed. See the Assembly of AU 6th ordinary session held on 23-24 January 2006, in Khartoum, Sudan, Assembly/AU/Dec 100(VI) (African Court Protocol).

¹²⁴ See AP van der Mei 'The new African Court on Human and Peoples' Rights: Towards an effective human rights protection mechanism for Africa?' (2005) 18 *Leiden Journal of International Law* 113 119.

¹²⁵ Art 27 African Court Protocol.

¹²⁶ As above.

¹²⁷ Art 29 African Court Protocol.

is argued that, by vesting the powers of interpretation in the African Court, the Women's Protocol intends that this Court should exercise all these powers.

4 International crimes and the African Union

The African Commission functions within the political framework of the African Union (AU). The African community has demonstrated that it takes international crimes seriously, as it has introduced the right of the AU to exercise humanitarian intervention in states in whose territory such crimes are committed.¹²⁸ Article 4(h) of the Constitutive Act of the AU¹²⁹ provides, as one of the principles of the AU, 'the right of the Union to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity'. The Constitutive Act does not define these crimes, but article 3(h) of the Constitutive Act provides that one of the objectives of the AU shall be to 'promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments'. It is assumed that 'other relevant human rights instruments' include international treaties and instruments. Hence, the definition of these crimes is to be in accordance with international law.¹³⁰

The right to humanitarian intervention is not defined in the Constitutive Act, but the Peace and Security Council (PSC) Protocol provides clarification. The PSC was established by the AU because the Heads of States were¹³¹

concerned about the continued prevalence of armed conflict in Africa and the fact that no internal factor has contributed more to . . . the suffering of civilian population than the scourge of conflicts within and between our states.

One of the principles guiding the PSC is the 'right of the Union to intervene in a member state . . . in accordance with article 4(h) of the Constitutive Act'.¹³² Its powers include making recommendations to the Assembly 'pursuant to article 4(h) of the Constitutive Act . . . in respect of grave circumstances, namely war crimes, genocide and crimes against humanity as defined in international conventions and instruments'.¹³³ Article 13(1) provides that 'in order to enable the

¹²⁸ Art 4(h) Constitutive Act of the African Union.

¹²⁹ See the Constitutive Act of the African Union, adopted in Lome, Togo, July 2002 and entered into force in May 2001.

¹³⁰ These crimes have already been dealt with in part 3 of this article.

¹³¹ See the Preamble of the PSC Protocol (n 1 above).

¹³² Art 4(j) PSC Protocol.

¹³³ Art 7(e) PSC Protocol.

[PSC] to perform its responsibilities with respect to . . . [an] intervention pursuant to article 4(h) . . . of the Constitutive Act, an African Standby Force shall be established'.¹³⁴ This provision clarifies any doubts on whether or not the right to humanitarian intervention includes the use of force.

Furthermore, article 4(j) of the Constitutive Act provides for the 'right of the member states to request intervention from the Union in order to restore peace and security'.¹³⁵ This means that the Constitutive Act does not restrict the right to request humanitarian intervention of the AU to the member state concerned.¹³⁶ The Constitutive Act is the first international instrument to provide for a right to humanitarian intervention.¹³⁷

However, it is unclear whether the AU is prepared to exercise the right to humanitarian intervention based purely on sexual violence against women during armed conflict. It is argued that the law is clear that the AU may exercise the right to humanitarian intervention in cases of war crimes, genocide and crimes against humanity. Sexual violence during armed conflict constitutes such crimes.

5 Conclusion

The Women's Protocol is clear on the law that sexual violence against women during armed conflict will not be tolerated. The act of sexual violence during armed conflict is a violation of international humanitarian law and may constitute international crimes as it has been shown above. Perpetrators of such crimes have been prosecuted and convicted by the international criminal tribunals. Would-be-perpetrators of such crimes in Africa know exactly what they will be getting themselves into should they commit such crimes. The Women's Protocol is therefore of significance to Africa.

The Women's Protocol recognises that sexual violence against women during armed conflict can constitute war crimes, crimes against humanity and genocide. Such crimes, as *jus cogens*, are considered to be of concern to the international community as a whole. States owe it

¹³⁴ Art 13(1) PSC Protocol.

¹³⁵ Art 4(j) Constitutive Act.

¹³⁶ See B Kioko 'The right of intervention under the African Union's Constitutive Act: From non-interference to non-intervention' (2003) 85 *International Review of the Red Cross* 807 817.

¹³⁷ On the African Union's right to humanitarian intervention, see NJ Udombana 'When neutrality is a sin: The Darfur crisis and the crisis of humanitarian intervention in Sudan' (2005) 27 *Human Rights Quarterly* 1149 1175; Kioko (n 136 above); Kindiki (n 107 above); A Abass & M Baderin 'Towards effective collective security and human rights protection in Africa: An assessment of the Constitutive Act of the new African Union' (2002) 49 *Netherlands International Law Review* 1.

to their nationals as well as to the whole community to protect women from sexual violence during armed conflict, including exercising the right to humanitarian intervention in a state where such crimes are being committed. The Women's Protocol, however, does not give clear guidelines as to how the obligations of the state have to be implemented. How this issue is to be resolved with the coming into operation of the African Court remains to be seen.