When Rights are Wronged:
Gender-Based Violence & Human Rights in Africa

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1. Introduction

During November 2001, a group of Government Experts met in Addis Ababa, Ethiopia, to discuss a draft version of the Protocol to the African Charter of Human Rights on the Rights of Women. This Draft Protocol contains detailed provisions on the protection of women's freedom from violence, and in theory, could represent a significant victory in the battle to end gender-based violence in Africa.

However, the stark realities currently confronting African women demand an incisive re-evaluation of the value and potential impact of using a human rights framework to address gender-based violence.

In order to analyse gender-based violence in Africa, this paper investigates violence and its origins in ideology. It scrutinises the genesis and development of both the generic human rights framework and women's rights in particular, and centrally examines the obligations on different actors operating on different levels generated by the formal recognition of these rights in international human rights law. This enquiry includes the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Declaration on the Elimination of Violence Against Women, the Beijing Platform for Action and the Southern African Development Community (SADC) Gender Declaration. Using methods of analysis derived both from the areas of human rights jurisprudence and political economy, the paper seeks to show that a human rights framework, while it may be applied to great effect in certain domestic milieu, is also limited in a number of significant respects.

Ultimately the authors demonstrate that the implementability of African women's rights will depend on more than the mere enumeration of such rights in regional and international human rights instruments and argue that, while recourse to legal interventions could be a critical part of any form of social change activism, it should be considered as only one component of multi-faceted local and international activisms to end gender-based violence.

2. Gender-based violence

To understand gender-based violence, and why it happens, one has to understand violence, and why violence happens. As a starting point, the following working definition of 'violence' is offered: *the harmful action or actions of one person or group against another person or group*. Looking at this definition one can see that it speaks of one person or group, versus or against another person or group. Us and Them. Us versus Them. Polar opposites. Binary oppositions.
The construction of binary oppositions may stem from a particular identity formation, the ways in which people are taught to view themselves and the world. The conventional modern formation of identity is premised on an understanding of “I am because I am not”. So one can find statements such as, "I am female because I am not male"; "I am black because I am not white"; "I am African because I am not European or North American". This construction of Self fundamentally needs an Other against which to measure itself and its value. In an intrinsically competitive environment, if the Self is to succeed and be valued, it needs to transcend or overpower the Other, and if the Self is to be valued and triumph, the Other of necessity needs to be devalued. This process can be termed ‘Othering’.

Such identity construction premised on polarity or ‘Othering’ fosters conflict over access to and control of resources. In this way power also becomes a resource, as in ‘power to’ and ‘power over’. This belief system, based on "I am because I have and you don’t", can be juxtaposed with one in which there is a more equitable distribution of resources, i.e. a more ‘diffuse’ form of power. Power as a relation between people became a contest over resources because it is premised on a flawed belief system centred on Othering and the devaluation of the Other.

2.1 Othering and oppressions

Our understanding of the origins of Othering and oppressions centres on the explication of two fundamental belief systems. Riane Eisler [1995], based on the work of anthropologist Marija Gimbutas, posits two models, the partnership model and the dominator model. When Eisler refers to the dominator model, she means ‘either patriarchy or matriarchy - the ranking of one half of humanity over the other’. She describes the partnership model, on the other hand, as one in which social relations are primarily based on the principle of linking rather than ranking.

In this model - beginning with the most fundamental difference in our species, between male and female - diversity is not equated with either inferiority or superiority. [1988:xvii]

Eisler continues to argue that the dominator model is based on domination and force and the power to take life (death, killing), rather than the power to give life (birth) as in the partnership model, where actualisation and maximisation of individuals' potentials are primordial.

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1. According to the Oxford English Reference Dictionary polarity implies two poles with contrary qualities, two opposite tendencies/opinions, while dualism implies being twofold, duality; theory regarding two independent underlying principles, e.g. mind and matter, form and content, theological forces of good and evil equally balanced in the universe, Christ as both divine & human. So what we have is polarity and what we are striving (back) towards is duality.
Western and modern thinking and beliefs are premised on the dominator model. Societies based on this paradigm are intrinsically unequal, hierarchical and oppressive. A historical precedent is found in the shift in ancient Aztec society from partnership to dominator models. More recently, modern European imperialism, which constructed the present state system in Africa, provides further examples.

Significantly, the discourse of colonisation similarly operates on a system of binary oppositions, such as female-male, black-white, infidel-believer or barbarity-civilisation. This particular way of constructing personal and group identity fosters conflict rather than cooperation, and by its very nature leads to violence. Think, for example, of the Hutu and Tutsi in the Great Lakes.

However, while one bears in mind that colonisation of Africa engendered much violence, one must also not forget that some African forebears traded in other Africans, as the histories of slavery evince. Some Africans, who operated on the construct of “I am because I am not”, also oppressed and waged wars against their kinsfolk whom they felt threatened by and whose property they wished to confiscate, practices which were exploited and exacerbated by colonisation, and which continue to this day.

2.2 Partnership and ‘matriarchy’

The dominator model can be juxtaposed with the partnership model, ancient and indigenous ways of thinking that preceeded colonisation, found in societies such as that of the Khoisan of Southern Africa, the Toltecs of Latin America, and almost the entire East where Buddhism was and is still widely practiced.

Anne Baring and Jules Cashford [1991:157], in their narration of the migrations and invasions into Europe by Aryans and Semites during the Bronze and Iron Ages, are effectively describing the shift from a partnership to a dominator model:

Both invading peoples introduced the idea of an opposition between the powers of light and darkness, imposing this polarity on the older view in which the whole contained both light and darkness in an ever-changing relationship.

The partnership model is premised on harmony and balance, on mutual respect for, and interdependence of, each other and the environment, on cooperation rather than conflict. It is personified in the yin/yang symbol, which epitomises a harmonious integration of all elements into one being, all dancing fluidly together.

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2. Whether the identities of ‘Hutu’ and ‘Tutsi’ in Rwanda are based on caste or class, ethnicity, or on resources, and whether their identities preceded colonisation, is contested by Rwandans themselves, most of who argue that their ethnic identities are colonial constructs.

3. While we acknowledge that Buddhism is not entirely unproblematic, especially in the context of gender relations, the scope of this chapter precludes a more detailed exploration of this aspect.
to create a dynamic organism. It perhaps embodies a different tenet like, "I am because I care; I am because I belong". This sense of caring community in ancient societies is something Carol Lee Flinders has also touched on in her forthcoming book, *Reclaiming a Life of Value*. In the partnership model peace and respect are fundamental organising principles, where power is cooperatively shared.

In this model matriarchy is not necessarily the opposite of patriarchy. Ancient matriarchal societies were not hierarchical, oppressive and violent (towards men). Instead, they have been shown to be cooperative and peaceful, societies in which men and women were equal and equitably shared resources, even as females were key leaders, spiritually and otherwise, of their societies. Hence the term ‘matriarchy’ to describe ancient cooperative societies as the antithesis of patriarchy is erroneous, and various scholars have posited alternative terms, agreeing in essence that prepatriarchal societies were both matrilineal and matrilocal (with patriarchal societies being patrilineal and patrilocal).

### 2.3 The origins of gender oppression

Ancient societies were not always patriarchal or necessarily gendered. African history records the matriarchal rule of, for example, Amanitare and other ancient Nubian queens, as well as the rule of Ashanti in North Ghana. Katarina Tomasevsky refers to the civilian rule of Neber in Egypt during the Old Kingdom (c. 3100-2345 BC). She argues that indigenous Egyptian society was strongly matriarchal:

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4. It is useful to note that Gimbutas, Eisler and others who have studied ancient Europe and the Middle East assume time frames going back to 6000 BC at their earliest. However, more recent excavations in Africa (arguably the birthplace of humankind), including the very recent discoveries at the Sterkfontein Caves in South Africa, show evidence of an intelligent, creative and cooperative indigenous society dating back to more than 70,000 BC.

5. As to the relations between women and men in Old Europe, the archeological evidence suggests that there was no apparent social superiority of males over females, and, generally, the distribution of goods in the cemeteries of Old Europe points to an egalitarian and clearly non-patriarchal society (Baring and Cashford, 1991:56).

6. The National Centre for Women Development in Abuja, Nigeria, has a display of prominent women throughout recorded history, including Moremi of Ife, Mai Bintu the ‘King’ of Hunters, Fatima Mohammed Nur (first woman to memorise the entire Koran), Chief Mercy Eneli (the premier Ibo female in the cabinet of Igwe the Kingmaker), Maira Aisa Kili Ngirmaramma (1501-1558, who ruled Kanem-Borno for 7 years, 7 months and 7 days), Queen Amina of Zaria, and Emotan of Benin (who ruled the old Benin Empire), as well as various female chiefs from the 19th century forward.

7. To more accurately describe patriarchy, Eisler proposes the term *androcracy* (Greek *andros* = man; *cratos* = rule), and she depicts the prepatriarchal non-hierarchical social constructions as *gylany* (Greek *gyne* = woman; *an* from *andros* and *l* as a linking of the two genders) [1995: 105].
Some historians argue that women may, in fact, have ‘discovered’ agriculture in prehistoric times. There are even instances of matrilineal and matriarchal societies in Malaysia, Java, the Philippines, and India. [1993:1,2].

In the context of gender, the dominator model presupposes a rigid distinction between the two genders. There are countless examples of modern colonisers imposing and maintaining this separation to the expense of the partnership model of thought.

In Burma, for example, British colonisers noted how ‘barbaric’ the native Burmese were because their genders were not rigidly separated and hierarchised. So too the Khoisan of Southern Africa. In both cases the colonisers, aided by the requirements of capitalism, worked immensely hard at inculcating gender distinctions in these societies and communities, with horrific results. Heike Becker has shown in her studies of gender-based violence and the San that both colonisation and capitalism (as well as apartheid in Southern Africa) caused and exacerbated gender-based violence in the Khoisan communities in Southern Africa, through the introduction and fostering of rigid and controlled gender distinctions.

Especially in Africa, the impact of colonialism, grounded in monotheistic and patriarchal religious systems extended beyond the imposition of rigid gender polarities to also subvert traditional constructions of family and partnerships. The Judeo-Christian and colonial model of heterosexual, male-dominated families can be contrasted with indigenous African family practices such as woman-to-woman ‘marriage’.

While studies about marriages between women have always been limited, Anthonia Uzuegbunam [2001] documents this phenomenon amongst the Igbo in Nigeria, and traces documents relating cases from the 1930s. She asserts that marriages between women are common in East, Southern and West Africa, as well as Sudan [2001:3]. She argues that these marriages are initiated by women who are not able to bear children, who join in a (traditional) union with a younger woman who bears the family children after insemination by a carefully selected man. According to Uzuegbunam -

... woman–woman marriage in Igboland is portrayed as a flexible option available to women to pursue any number of interests, political, social, economic and personal. The guiding principles therefore are flexibility, heterogeneity and ambiguity. [2001:11]

She asserts that these relationships are more egalitarian than conventional heterosexual ones, and that the childbearing partner enters entirely freely into the union, and continues to explain that -

... woman–woman marriage in Igboland is not like lesbianism where love and sexual relations are exchanged by same male sex [sic]. Rather, woman–woman

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8. Tomasevsky emphasises that the subjugation of women did not begin ‘until the advent of the religions, and became more intense as the centuries rolled on’.
marriage has stories of love, children, companionship, commitment, sexual freedom, vulnerability and empowerment. The woman initiator invites a male with the arrangement for procreation and for pleasure. [2001:11]

This centuries-old practice of woman-woman marriage, with its intrinsic mutuality and egalitarianism, has been steadily eroded by the colonisation of indigenous African societies.

Man’s fear of penetration and/or violation by the ‘impure’ (bisexual) Other, does seem to cast some light on the reason(s) for his rejection of her. A useful analogy can be drawn between black and white, or colonised and coloniser. The need to increase and maintain the distance between these opposites stems from the fear of the (strangeness/difference of the) Other. However, one could ask what the origin(s) of this fear is. The answer could be found in dominant ideology itself. Ideology is advanced by (a group of) individuals (whether they are autonomous or form classes and/or genders) and those individuals would wish to perpetuate their own (positions of) power and privileged access to resources. If they create a new market (or dumping ground) for commodities through colonisation, they would need to subjugate the colonised Other, and the ideology of fear (and hierarchical oppositions) lends itself well to this form of exploitation. So too with the oppression of woman.

3. Models of violence

This section provides a closer examination of violence. Johan Galtung\footnote{Galtung's work originated during the sixties through the eighties in development / underdevelopment studies, before he made his mark in Peace Studies during the 1990s. His conceptualisation of violence drew on the work of other peace researchers, including Robert Johanssen.} constructed a model of violence consisting of three key forms of violence, which can be depicted as the three corners of a triangle, with no one corner static. In other words, the triangle can be rotated in any direction, with any one corner at its peak, at any time in history.

The three corners of the triangle are:
1. Direct or personal violence;
2. Structural or institutional violence; and
3. Cultural violence.
Direct/ personal violence

Structural violence

Cultural violence

With direct or personal violence is meant a direct assault on a person or group, whether physical, verbal or psychological, for example a man hits a woman.

With structural violence is meant violence that is embedded in the very structures or institutions of our societies. Most obvious examples of this include poverty, starvation and exploitation. Further examples include gender discrimination and other forms of sexism, as well as racism and xenophobia, along with homophobia. Excessively high maternal and infant mortality rates are forms of structural violence because they are easily avoidable, and affect only specific sectors of the population, i.e. the most marginalised.

With cultural violence is meant violence that is perpetuated through our cultures and ways of thinking and being that is used to justify direct or structural violence, for example some men argue that a husband is fully entitled to rape his wife, or force her to have sex against her will. A further example of this would be “victim blaming” in the case of rape.10

As one can see from this analysis of violence, gender cuts across it, and gender discrimination and gender-based violence can be found in each form of violence: direct/personal, structural/institutional, and cultural.

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10 A man rapes a woman, which would be direct / personal violence. She lays a charge and finds herself in court confronted by legal mechanisms that are not necessarily designed to protect her, such as overworked and disinterested (often male) police, prosecutors and judges, which is a form of structural violence. Then she is cross-examined by an often male defence attorney for the perpetrator, who asks her questions like what she was wearing at the time of the rape, why she was at that place at that time, etc, making her feel as if she asked to be raped and as if she deserved the rape. Hence the term 'victim blaming'.
The antithesis of violence, of course, is peace, and the three forms of violence outlined above would also have corresponding forms of peace. If one eliminates physical assault (including physical forms of gender-based violence) one will experience personal/direct peace. If one eliminates structural violence (including sexism, racism and homophobia) and transform institutions appropriately, one will experience structural peace. And if one eradicates cultural violence (including ways of thinking and being) one will experience cultural peace.

Thus it appears that none of these forms of violence, and their respective antitheses, are entirely isolated from the other. For example, one cannot eliminate gender-based violence without transforming institutions, as well as ways of thinking and being. And if one changes cultures of violence into cultures of balance and harmony in line with a partnership model, one will necessarily eliminate gender-based violence since there will no longer be polar opposites, distrust and devaluation of Others.

4. Gender-based violence

This understanding of violence and peace now allows a more in-depth examination of the concept of ‘gender-based violence’. According to the Committee on the Elimination of Discrimination Against Women (General Recommendation No 12), gender-based violence is defined as:

violence that is directed against a woman because she is a woman, or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, and threats of such acts, coercion or arbitrary deprivation of liberty.

The Declaration on the Elimination of Violence Against Women notes three key spheres in which gender-based violence may occur or which may perpetrate and/or condone such violence: the family, the community and the state. December Green adds one further site of gender-based violence, i.e. the economy. The concept of gender-based violence should accordingly be broadened to also include the notion of economic abuse, which has been defined in the South African Domestic Violence Act [1998] to include ‘the unreasonable deprivation of economic or financial resources or the unreasonable disposal of household effects in which the victim / survivor has an interest’.
Gender-based violence therefore occurs through the act of being gendered. Through the kinds of identity construction where the Self cannot exist without the Other, and where the Self cannot be valued without devaluing the Other, women are valued as less than men. (It may be useful to note that men too get raped, especially during times of conflict. This is because these more vulnerable men are made into the Other, and so feminised or turned into surrogate women. This happens in prisons throughout the world, in gangs and in other areas of conflict.)

The CEDAW definition above focuses on women as the subjects of gender-based violence; however, it should be recognized that such violence also affects men, not only as potential victims, but also when they act as perpetrators.

It is ironic that the dominator model, and the ways in which it articulates itself in the construction of contemporary societies, brutalises everyone, even the dominant or oppressor. If one is taught violence, control and domination as a way of life, one becomes brutalised by it, on all sides of the equation. In this way even oppressors are victimised by the system and their own violent behaviours (whether physical, institutional and/or cultural), since they cannot perceive of a more harmonious and compassionate existence. This is most readily evident in cases of family violence, especially in intensely patriarchal contexts where the role of father and provider turns on itself when the patriarch murders the entire family he is meant to protect. So too when fathers rape daughters as an expression of their right of ownership over female offspring. It is also commonly known that a large proportion of perpetrators of incest are themselves survivors of such violence. The same can be said about war, where no party involved in the conflict is left unscathed by the violence, murder and carnage.

Violence, murder and rape exact a toll on the psyche of both perpetrator and survivor/victim, and everyone is (re-)brutalised in the process, even spectators through vicarious trauma, as those working to combat gender-based violence will attest. As Jane Bennett puts it:

Both women and men are vulnerable to the way dominant norms of gender relation, within their contexts, are working. Within South Africa, men are as likely to become blunt assailants of women (and often, of men), as women are to become victims of sexual abuse, domestic battery, economic abuse, and incest. Clearly, those who actively assault retain responsibility for their violence - that is a matter of principle and law. But the challenge for South Africans committed to the transformation of oppressive social norms is to untangle both 'victim' and 'perpetrator' from their terrible interlock of violence, no matter how shocking the 'perpetration' or how resonant the 'victimhood/survivorship'. [2000:4]

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14. South Africa is an example of a particularly patriarchal society where family murder by a patriarch is routine, especially amongst sectors of society that are highly militarised and/or hierarchised, e.g. the police force.

15. The excessively high levels of generic societal violence in South Africa, as well as the pandemic of gender-based violence in the country, is said to be one legacy of apartheid, where white boy-soldiers were systematically brutalised in a similar way to the liberation movements’ (largely black) youthful combatants. The Vietnam War is said to have had similar effects in both the USA and Vietnam.
Gender-based violence, as is commonly known, is not about sex or about conflict. It is about control and about power, in keeping with the dominator model. Vicky Randall asserts that "if woman is associated with nature as opposed to culture, and culture is compelled to maintain itself, it follows that culture will devalue the nature it seeks to transcend, and hence man will subordinate woman" [1982:23].

Gender-based violence is fundamentally premised on the ideology of male control over women’s productive and reproductive powers, of male control over women’s skills and resources, and especially of control over our power to produce future generations of producers. It is also about male control over women’s sexuality, which is the key aspect of reproductive powers.

Women’s productive powers include agricultural labour, wage labour in domestic service and other industries, as well as the informal sector (e.g. selling goods for small profits). Women’s reproductive powers centre on our abilities to give birth and raise children, children who constitute the next generation of producers. And hence this particular function is of critical importance to patriarchy, and control of not only the present productive capacity, but that of future generations too, is very important.

As consumers, women buy and use commodities in the home. Hence women are also caught up in the endlessly repetitive task of using (if not producing) and reproducing (by baking, cooking, etc.) the commodity, and are at least equally alienated from the product. Women also support the production process, apart from their ‘invaluable’ roles as consumers, through their domestic work, thus freeing men for labour in the production process and the public sphere. So too women reproduce the labour force by bearing the next generation of workers (and consumers or surplus accumulators).

A critical psychological dimension of the control of women’s sexuality is male insecurity about the origins of their children. Women become impregnated, and without complex and expensive medical tests, a man will never know certainly whether he is the actual father of his female partner’s children. This is prominent in male anxiety over and control of female sexuality. But far more fundamental in this dominator model is the need to limit women’s mobility and choice to ensure their consistent producing and reproducing (of future generations of producers, reproducers and surplus accumulators).

So too, with the kind of identity formation discussed earlier of Self-Other, with women devalued as lesser beings than men, women’s sexuality is also devalued and of less consequence than that of men.
According to some writers, there are four clear indicators of gender-based violence. In societies where these circumstances prevail, gender-based violence is more likely to occur and/or to occur in more severe forms. The indicators are:
1. Economic inequality;
2. Existing patterns of using physical violence to resolve conflicts;
3. Male authority and control over decision-making (and excluding women from this process);
4. Restrictions on women’s ability to leave the family setting.

All four indicators fit in with the dominator model, from inequality (economic and other forms); employing violence (physical, structural and cultural) as conflict resolution methods; male control over women and others; as well as restrictions on women's (and others') mobility and freedom. In this sense, since violence generically, and gender-based violence specifically, function on the three axes of Galtung's triangle of violence / peace (personal / direct / physical, structural / institutional, and cultural), it is imperative that attention be paid to factors that exacerbate and contribute to violence, from issues of development and poverty, to HIV/AIDS. And hence even the International Monetary Fund's Structural Adjustment Programmes or SAPs (with decreased state spending on social security) contribute to gender-based violence, as Heidi Hudson [1998:70] has shown in Zimbabwe, where the first two years of the introduction of SAPs led to health spending being cut by a third and the maternal mortality rate (a form of gender-based violence) doubled.

5. The human rights framework

5.1 The genesis of human rights

The concept of human rights has its origins in the 17th century, in the notion of ‘natural rights’ articulated in the writings of the liberal philosophers like John Locke and Jean Jacques Rousseau.

The ideology of rights was adopted and adapted during the 18th century in the American colonies and in revolutionary France, and articulated in the American Declaration of Independence and the French Declaration of the Rights of Man and the Citizen. The US Constitution and Bill of Rights also embraced the ideology of rights between 1789 and 1791 [Henkin, 2000:6].

It is important to note how John Locke, for example, used the embryonic discourse of Rights to argue for early capitalist imperialism, of which colonisation

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16. Locke’s two Treatises on Government arguably form the basis of modern European democracy.
17. Rousseau’s work, including the Contrat Social or Social Contract, on the foundations of society, served as the philosophical basis for the French Revolution.
is a part. Locke's argument in support of the European expropriation of Native land in North America, was based on the Right to agricultural exploitation of land for both profit and personal use, and used the Bible as justification. In Locke's own words:

As much land as a man tills, plants, improves, cultivates, and can use the product of, so much is his property. He by his labour does, as it were, enclose it from the common... He that, in obedience to this command of God, subdued, tilled and sowed any part of [land], thereby annexed to it something that was his property... It is labour, then, which puts the greatest part of value upon land... Right and conveniency went together. [1690:132,137,141]

He contended that the nomadic and environmentally responsible traditions of indigenous North Americans meant that they did not use the land to its fullest potential and that this was immoral and unchristian. And that the Bible preached the need for men (no irony intended) to till the soil. George Sabine summarises Locke's views on 'the natural right to property': "man has a natural right to that with which he has 'mixed' the labor of his body, as for example by enclosing and tilling the land" [1961:527]. Since European colonisers needed the land for Christian agricultural use, this justified the expropriation of native land.

Documents such as the French Declaration of the Rights of Man and of the Citizen led to universal suffrage for all male descendants of Europeans. The title of this early Bill of Rights embodies no small irony: 'he' does not include 'her' and epitomises the phallogocentric universalism, which equates man with humanity and thus ignores and excludes women. It took more than a century for women to gain suffrage in Europe, and even longer for the Others, the colonised, to gain independence, and suffrage, from colonial countries.

In the nineteenth century, English and continental philosophers rejected the notion of 'natural rights'. Jeremy Bentham, for example, referred to these rights as 'nonsense upon stilts'. However, as Louis Henkin notes:

Concern for individual human welfare seeped into the international system in the eighteenth and nineteenth centuries in other discrete, specific respects. In the nineteenth century, European (and American) States abolished slavery and slave trade. Later, states began to pursue agreements to make war less inhumane, to outlaw some cruel weapons to safeguard prisoners of war, the wounded, civilian populations. [2000:208]

Subsequent to the First World War, the emergence of the League of Nations saw an increased awareness of human rights concerns. It was however only in the aftermath of the Second World War that theories of natural rights were revived. While developments following WWI, such as the foundation of the League of Nations, laid some basis for this recognition, the adoption of the United Nations

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18. Many other writers shared this view, including E A Walker, who stated the following: "many [colonies] were planted in vacant or very sparsely peopled lands; some were secured by treaty, ...; some were annexed at the request of the inhabitants; some were won by downright invasion" [nd: 38].
The Charter in 1945 can really be marked as the watershed moment. This Charter declared it to be one of the purposes of the UN to promote and encourage respect for human rights – this was the first use of the term ‘human rights’ in a major international treaty.

The Universal Declaration of Human Rights followed the Charter in 1948, and can be described as the first and one of the most significant instruments of international human rights.

5.2 ‘Rights’ and ‘international human rights’

In determining the potential use of international or regional human rights frameworks to address gender-based violence, one has to look more closely at what ‘having a right’ means.

Henry Shue explains that a right "provides the rational basis for a justified demand" [1980:13]. This is echoed by Eugene Kamenka, who states that rights are claims that have achieved a special kind of endorsement or success: "legal rights by a legal system; human rights by widespread sentiment or an international order" [1988:127].

The notion of the individual having a ‘justified demand’ or an ‘endorsed claim’ requires as a necessary corollary that the state has certain duties or obligations. For example, a woman’s right not to be subjected to cruel and unusual punishment implies that the state has a duty not to subject her to cruel and unusual treatment. Shue proposes that every basic right assumes three types of duties, all of which must be complied with if the right is to be fully honoured. Firstly, there is a duty to avoid violation of the right in question, secondly a duty to protect against violation of the right, and finally a duty to aid those whose rights have been violated. This implies that the individual, vested with certain rights, would have a ‘justified’ demand against the state for complying with the duties corresponding to these rights.

Having said this, one can appreciate that the term ‘international human rights’ is somewhat misleading – since one cannot really talk about an individual claiming rights against some international body. Rather, ‘international human rights’ refers to an international movement to promote, protect and assert international responsibility for national human rights [Henkin, 2000:8]. The international human rights movement has sought to establish international human rights norms – minimum standards that national societies are expected to satisfy – and to have states assume legally binding obligations to meet these standards. The Tanzanian High Court has described this in succinct terms: "The principles enunciated in the above named [international human rights] documents are a standard below which any civilised nation will be ashamed to fall."19

5.3 The development of ‘women’s rights’

The formalisation of international human rights standards clearly represented a major advance. A startling observation about the primary documents is that they appear not to specifically address women’s concerns. The Universal Declaration of Human Rights and subsequent instruments (such as the International Covenant on Civil and Political Rights) are framed broadly enough to accommodate the rights and interests of women. However, these rights have not been developed from the perspective of women. Therefore, as Charlotte Bunch observes, there is no significant body of international law and practice in the area of women’s rights.

The dominant definition of human rights and the mechanisms to enforce them are ones that pertain primarily to the types of violations that the men who articulated the concept most feared. [1995:13]

While the list of formal international human rights instruments since 1945 making provision for the protection of women’s rights appears formidable, women’s rights were initially marginalised and remained outside the mainstream of international human rights protection – again, a process of relegation to the position of Other.

Elisabeth Friedman [1995] describes the emergence and consolidation of a global women’s human rights movement that during the 1970s and 1980s increasingly drew on the power of the international human rights framework. One of the most important developments in this regard was the Convention on the Elimination of All Forms of Discrimination Against Women\(^20\).

Article 1 of the Convention defines discrimination against women as any distinction, exclusion or restriction made on the basis of sex that has the effect of impairing the enjoyment by women of human rights and fundamental freedoms. (This definition is a good description of the process of Othering that is referred to above.) For this reason, it is important that States Parties to the Women’s Convention condemn discrimination against women in all its forms and agree to pursue a policy of eliminating discrimination against women\(^21\).

The UN World Conference on Human Rights, held in Vienna in 1993, marked a turning point in the history of non-recognition of women’s specific interests in international human rights discourse. The Vienna Declaration and Programme of Action clearly points out that women’s rights are to be recognised and protected as human rights. Significantly, the Declaration also acknowledges that violence against women is a serious violation of fundamental human rights.

\(^20\) This Convention (referred to here as ‘the Women’s Convention’) was adopted by the UN General Assembly on 18 December 1979 and entered into force on 3 September 1981.

\(^21\) Article 2.
The years since 1993 have seen the emergence of a number of specialised documents addressing women’s concerns, and gender-based violence has featured prominently in these developments.

The first encouraging advance in this regard was the compilation of a General Recommendation by the Committee tasked with overseeing the implementation of the Women’s Convention, CEDAW. This Convention does not include any article specifically addressing violence against women (although certain of its provisions may arguably be made applicable to such violence). The Committee therefore provided guidelines for the interpretation of the Convention to cover violence against women first in its General Recommendation No 12 and then in more detail in General Recommendation No 19 in 1992.\(^{22}\)

The Committee made it clear that the definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately.\(^{23}\) Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.

CEDAW also emphasises that in addition to liability for violence committed by state actors, states may also under general international law and specific human rights covenants be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation. A number of measures that should be taken by states to address gender-based violence are then set out in detail.

These state duties were elaborated on and concretised in subsequent documents, including:
- the Declaration on the Elimination of Violence Against Women [1993]; and
- the Beijing Declaration and Platform for Action [1995], which sets out in more detail the measures to be taken by governments, non-governmental organisations and civil society to address violence against women.

The Draft Protocol on the Rights of Women in Africa follows the example of the Violence Declaration and the Beijing Platform by enumerating a list of measures that State Parties should take in respect of violence against women. However, the Draft Protocol as accepted at the experts’ meeting in November 2001 did not specifically entrench women’s right to freedom from violence as is done in comparable documents such as the Convention of Belem do Para.\(^{24}\)

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\(^{22}\) Fayeeza Kathree [1995:426] notes that the pressure exerted by women's organizations brought about the adoption of General Recommendation No 19.

\(^{23}\) General Recommendation No 19 Par 6.

\(^{24}\) The Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belem do Para) explicitly states in art 3 that every woman has the right to be free from violence in both the public and private spheres.
In the Southern African (SADC) region, an Addendum on the Prevention and Eradication of Violence Against Women to the SADC Gender Declaration was adopted in 1998. This Addendum recognises that violence against women reflects the unequal relations of power between women and men, resulting in the domination and discrimination of women by men. States resolve to take measures in a number of areas, including legal, social, economic, political and cultural measures, service provision, education, awareness and awareness building, integration of programmes and budget allocation.

The cumulative effect of these documents is to firmly entrench in international law not only the fact that women have a right to be free from all forms of violence, but also that states have significant duties to ensure the realisation of these rights.

5.4 International human rights law: the darker side

Despite their unequivocal condemnation of gender-based violence and the clarity of the guidance provided to governments, the documents outlined above have arguably not significantly contributed to the reduction of systemic patterns of gender-based violence.

The first difficulty that arises around the enforcement of the instruments listed above is simply the question of their legal status in international law.

The Women’s Convention is the only legally binding document among those listed above. This implies that where a state has ratified the Convention, it can be held liable for non-compliance. However, the Committee tasked with overseeing implementation of the Convention is limited in its resources as well as its implementation mechanisms. In the event of a finding that a state has failed to comply with the Convention, punitive measures are extremely limited. When it comes to gender-based violence, the fact that the most significant measures are contained in Recommendation No 19, rather than in the Convention itself, further limits their potential impact. The impact of the Convention itself has further been eroded by the registration of numerous reservations by states.

The Declaration on the Elimination of Violence Against Women may be seen as a statement that sets out a common international standard that UN member states should follow. However, its provisions are not legally binding on states. The Beijing Platform and the SADC Gender Declaration also fall into this category, and are therefore subject to the same limitation.

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25. Once the draft African Protocol has been accepted and enters into force, its provisions will be binding on states that ratify it.
A further difficulty is the extent of what is required from states. If one looks at measures such as the allocation of resources, provision of services, evaluation of existing law and enactment of new legislative measures, it appears that a significant commitment in all spheres of government (legislature, executive and the judiciary) is required. From the perspective of those working to end gender-based violence, this is not asking too much; however, for governments in Africa, with failing infrastructures and economies in disarray, compliance with these standards may simply appear to be one more unrealistic demand on ever-dwindling resources.

Furthermore, the philosophy underlying international human rights law implies that states are heavily invested in maintaining their position in the international community – in other words, that they place a high premium on being seen to comply with international human rights standards. Henkin accurately describes the driving force behind the implementation of international human rights as ‘mobilising shame’ [2000:24]. However, this mechanism may not be effective, for example, where armed conflict is present and there is already a high incidence of human rights violations, or in the case of so-called ‘rogue states’ that are not greatly interested in maintaining the approval of the international community. Sadly, the African continent provides too many examples of both of these situations.

It is therefore not unduly pessimistic to say that the development in international human rights law of a right to be free from violence is currently of little more than symbolic value for many African women.

6. Women’s rights on national level

In spite of the somewhat bleak picture painted above, international human rights law may contribute to the development of women’s rights on a national level.

The potential impact of international human rights standards will depend firstly on the extent to which these standards have been absorbed in the law of the country concerned. Many countries have constitutional provisions stating that in order for an international instrument that has been ratified by a state to become part of the law of that state, such an instrument has to be incorporated in domestic law through, for example, national legislation.

Unincorporated international instruments may however have an indirect influence on the interpretation and application of law. Countries following the common law legal tradition share a legal presumption of statutory interpretation that statutes should be interpreted in a manner that is consistent with international law.

A further way in which international law may influence domestic law is through the consideration of international law when interpreting constitutional rights. This consideration of international law may either be a formal requirement, as found,
for example, in the South African Constitution\textsuperscript{26} or through ‘a judiciary, which is prepared to be open to international influences’ [Byrnes, 1997:49].

A good example of the latter is the judgment of the Botswana Supreme Court of Appeal in \textit{Unity Dow v The Attorney General of the Republic of Botswana}\textsuperscript{27}. The challenge here was against certain provisions of the Botswana Citizenship Act 1984, which (in brief) provided that children born in Botswana would be citizens if at the time of birth their father was a citizen, or, in the case of children born out of wedlock, their mother was a citizen. Ms Dow, a Botswana citizen, was married to a US citizen, and the couple had three children. One child was born prior to the marriage, and therefore had Botswana citizenship. The two children born after the marriage, however, were disqualified because their father was not a Botswana citizen.

Ms Dow argued that the Citizenship Act contravened various rights under the Constitution, including the rights to liberty and protection from discrimination on the basis of sex.

The Supreme Court of appeal ruled in favour of Ms Dow. One of the court’s findings was that although international treaties were not binding in Botswana unless enacted by Parliament, the courts should not interpret legislation in a manner that conflicted with Botswana’s international obligations unless it was impossible to do so. In this regard, the court referred to the African Charter on Human Rights (which Botswana had ratified) and the Women’s Convention (which it had not).

The consideration of international standards also led to positive results in the South African case of \textit{S v Baloyi}\textsuperscript{28}, where the constitutionality of a key provision of the 1993 Prevention of Family Violence Act was challenged. The appellant had been convicted of breaching an interdict issued in terms of the Act, and contended that the relevant section of the Act was unconstitutional in that it placed an onus on a person accused of breaching an interdict to disprove his guilt and thus violated the constitutionally entrenched presumption of innocence.

The Constitutional court recognised that there was a need for appropriate legislation to reduce and prevent family violence, and based this recognition firstly on its interpretation of the rights to freedom from violence and to equality and non-discrimination. Secondly, the court also referred to South Africa’s international obligations, arising from, amongst others, the Declaration on the Elimination of Violence Against Women, such as the duty to pursue policies to eliminate violence against women and the undertaking by states to pass legislation to punish violence against women. The court took this context into

\textsuperscript{26} Section 39 (1)(b).
\textsuperscript{27} [1992] LRC (Const) 623 (CA of B).
\textsuperscript{28} 2000 (1) BCLR 86 (CC).
consideration in its reaching ultimate conclusion that the provision was not unconstitutional.

A further example of the domestic impact of international human rights norms is found in the Tanzanian case of *Ephrahim v Pastory*\(^{29}\). Ms Pastory had inherited a piece of land from her deceased father, and she subsequently sold this land. Under Haya customary law, women did not have the power to sell clan land – this power rested with men. Pastory’s nephew accordingly challenged her right to sell the clan land, and sought to have the sale declared void. The Tanzanian High Court eventually found that the Haya custom that denied women the right to own and dispose of clan land violated the Tanzanian Bill of rights as well as the Women’s Convention and other international human rights instruments.

These examples provide compelling evidence of how women’s rights may be concretised by means of a human rights framework. However, the impact of international standards on national level is not limited to litigation.

Sylvia Tamale [20001:99] recounts how Ugandan women used strategies of lobbying and campaigning during the Constituent Assembly, which debated and drafted the new Ugandan Constitution in 1995. The women delegates to the Assembly formed a women’s caucus and ‘recruited’ sympathetic male delegates to augment their numbers. The caucus, working closely with the Ugandan women’s movement, campaigned to incorporate women’s rights into the new Constitution. The minimum standards and yardstick informing their proposals was the Women’s Convention. Tamale explains that the result was that Art 33 of the Ugandan Constitution, articulating women’s rights, fully reflects the spirit of the Convention.

The effect of activism was also recognised by the International Tribunal for Rwanda in the case of *The Prosecutor v Akayesu*\(^{30}\). Akayesu, former mayor of the Taba commune, was accused of allowing police and others under his authority to rape and torture mostly Tutsi women who had sought his protection. The indictment initially did not include charges of sexual violence despite evidence of mass rapes. The Coalition on Women’s Human Rights in Conflict Situations, which included Rwandan and international women’s rights groups, submitted a brief to the Tribunal, urging the prosecution to include charges relating to rape in the indictment. The indictment was accordingly amended, and these charges formed the basis of a landmark conviction. The Tribunal recognised the role of women’s activism:

> ... the Chamber takes note of the interest shown in this issue by non-governmental organisations, which it considers as indicative of public concern over the historical exclusion of rape and other forms of sexual violence from the investigation and prosecution of war crimes.\(^{31}\)

\(^{29}\) Ephrahim v Pastory and Kaizingele [1990] LRC (Const) 757 (HC of Tanzania).

\(^{30}\) Trial Chamber, International Criminal Tribunal for Rwanda, 1998 Case No ICTR-96-4-T.

\(^{31}\) Par 417.
7. Rethinking activisms

While one should welcome the development of a formal human rights framework, especially in the African context, women's rights activists should also guard against complacency. One should acknowledge that human rights emerged from a fragmented and imperfect paradigm. Although the crystallisation of women's rights standards does in theory allow for creative approaches to expand the boundaries of legal rules, so-called ‘test case’ litigation as a strategy is not without its flaws. Not only is such litigation, or indeed, all litigation, out of reach of the majority of African women, but the nature of litigation also holds inherent dangers. Litigation, with its inherently adversarial nature, relies on and enforces the systems of binary opposition that underlie unequal power relations in the first place. This is an example of what Audre Lorde [1984:110] termed using ‘the master’s tools’ to ‘dismantle the master’s house’. Furthermore, as Carol Smart points out, rights tend to ‘oversimplify complex power relations’ [1989:144].

Strategies founded in the human rights framework, whether in the form of litigation or other forms of engagement with the legal system, should therefore form part of a range of options for activism. More importantly, it is necessary to re-examine the basic philosophies underlying activism. Existing ways of thinking are too often premised on polarity, the kind of thinking and activism that engenders conflict rather than cooperation, and which prohibits or inhibits efforts to seek true transformative solutions for social change.

Activism can be viewed as inherently adversarial, where two sets of 'enemies' square off in battle, with neither side able to claim victory without defeat of the other, in other words a perpetuation of the dominator model, which by its very nature perpetuates violence in a continuous cycle, as evinced by the current conflict between Israel and Palestine. Mohandas (Mahatma) Gandhi's concept of satyagraha (truth-force 32), in which a non-violent mass campaign of non-compliance is waged, was originally conceptualised as an alternative to the idea of 'passive resistance', which implies passivity and victimhood over agency and action. Instead, satyagraha is designed as not merely an alternative to violence or force, but as superior to it33. In the words of Geoffrey Ashe:

The Satyagrahi - in theory - not only consents to suffer at the wrongdoer's hands, but conquers through suffering... Yet his [sic] victory is not the opponent's defeat. It is the opponent's conversion... Victory does not mean that one side triumphs at the other's expense, but that both sides are reconciled in a new harmony, with the Wrong cancelled... Gandhi, British-conditioned, believed in the reign of law as a moral concept. But - he insisted - some laws can and should be broken, in the name of a higher law with which they conflict. [1968:101]

32. The Hindi word satya means love or deity.
33. Cf e.g. *Gandhi* by Geoffrey Ashe. And one of many of Gandhi's own writings, including "Civil Disobedience and Non-Violence".
This expression of Gandhi’s *satyagraha* is certainly in keeping with a partnership model. Nelson Mandela, first President of a democratic South Africa since 1994, transitioned from an adversarial position during the 1960s, with the formation of the African National Congress’ (ANC) military wing, Umkhonto we Sizwe (MK), to a philosophical and political perspective perfectly typical of the partnership model more latterly during his 27 years of imprisonment by the apartheid regime. Since the 1980s Mandela consistently sought reconciliation through dialogue and negotiation with his erstwhile oppressors, eventually leading to a government of national unity, based on proportional representation, including the former apartheid leader as one of two Deputy Presidents, and senior cabinet positions for leaders of opposition parties, in the first democratic government of 1994.

Mandela’s selfless desire to seek alternatives to apartheid without wreaking vengeance on perpetrators of brutality led him to a search for common ground, reconciliation and nation building across ethnicities. Thus both Gandhi and Mandela embody the principles of partnership, and both have proven to be formidable activists in the struggles for equity, justice and peace. Both viewed human rights through the prism of the partnership model, which allows for more creative ways of including human rights in activisms.

A key activist who embodies the principles of the partnership model in her struggle for justice and peace is Aung San Suu Kyi, who quoted her father during a speech to a mass rally during 1988: "Democracy is the only ideology which is consistent with freedom. It is also an ideology that promotes and strengthens peace. It is therefore the only ideology we should aim for" [1991:200].

Aung San Suu Kyi’s methods of resistance included several hunger strikes while unlawfully imprisoned for several years by the military dictatorship in Burma. Her struggle for human rights is firmly located in the principles of democracy, non-violence and collective discipline, as Philip Kreager summarises in Aung San Suu Kyi’s book:

> These principles reflect the inspiration which Aung San Suu Kyi derived from her study and reflection on Gandhi’s philosophy and practice of non-violent civil disobedience... Under such severe pressures [imprisoned, killed or driven into hiding], and against tremendous odds, Aung San Suu Kyi's reasoned insistence on the sole legitimacy of non-violent means and the priority of human rights has proven the only enduring answer: by her example, and her prevention of bloodshed, she was able to establish a real alternative for the people, who otherwise face only submission. [1991:287,288]

Aung San Suu Kyi also modelled her activism on the ideas espoused by Martin Luther King. Firmly rooted in the intrinsic egalitarianism of Buddhism, she noted the absence of hierarchical structures in precolonial Burmese society. She is a Nobel Peace Laureate (1991) along with other notable activists such as South Africa’s Albert Luthuli, Desmond Tutu and Nelson Mandela.
These examples of non-violent strategies illustrate that activism does not need to be violent in order to be effective. To achieve reconciliation between conflicting parties, one needs a redistribution of power, i.e. one party has to voluntarily relinquish some of its power and resources. The dominant party often needs to be forced to agree to redistributive justice. However, that force does not need to be violent, as argued above.

8. Conclusions

When examining newly emergent human rights documents, such as the Protocol on African Women's Rights, it is therefore important to look beyond the substance of the norms or principles encapsulated in these documents and to also recognise, firstly, the need to test the traditional boundaries of these rights. As Bunch emphasises, human rights are not static:

> While these concepts began in a particular historical moment and were defined in terms of the needs of a limited sector of the population, their dynamism and ongoing relevance stem from the fact that more people are claiming them, and in the process, expanding the meaning of 'rights' to incorporate their own hopes and needs. [1995:13]

Secondly, one should also recognise that addressing gender-based violence through the human rights paradigm can only be truly effective when used in conjunction with, and supported by, local and international activisms founded in the so-called partnership model. The construction of identities based on polar opposites, and creation of Self versus Other, engenders oppression, inequality and violence. To get away from this, to get to the root of the violence in all societies, one needs to begin thinking of more harmonious ways of thought and living and being. And move away from domination towards partnership.

While patriarchy, and the dominator model, has been around for thousands of years, evidence of societies modelled on the partnership model clearly shows that patriarchal rule is not inevitable, and that other more cooperative possibilities do exist. Historical reflections of non-patriarchal societies and periods of rule help support a belief in, and conception of, forms of existence and societies that transcend patriarchal rule.

One should remind oneself that change is possible. Think, for example, of Chinese foot binding, which is now extinct, thanks to socialism. The practice of facial scarring of women in the Sudan and some parts of South Africa, traditionally used as a form of adornment like modern day cosmetics or makeup,

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34. It may be appropriate to acknowledge that both models, when used in this contrasting way, are in themselves binary oppositions.
35. Think also of times when patriarchy did not exist, for example the time of Amanitare. She was one of several ancient African queens who ruled but was eventually deposed by others hungrier for power.
is now almost extinct. As are other practices from some ethnic groups in South Africa, like the severing of a finger or part of a finger.

We therefore believe that the key to success is to move away from the adversarial nature of the prevailing dominator system, with its inherent violence and oppression, and to move towards partnership by embracing the timeless values of *satyagraha*. In the words of Ang Suu Kyi:

> If a people or a nation can reach their objectives by disciplined and peaceful means, it would be a most honourable and admirable achievement… Those who have the greater strength should show restraint and tolerance towards those who have less strength… Democracy is an ideology that allows everyone to stand up according to his beliefs. They should not be threatened or endangered… Do not because of your greater strength be vengeful towards those who are of weaker strength. [1991:201,204]
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