Act is exemplary and in the region, this exclusion is found elsewhere only in Lesotho's sexual offences legislation, seemingly modelled in many respects on Namibia's law. The issue of removing consent is primarily concerned with the protection of the survivor in court from 'secondary victimisation'. As was aptly articulated by the Namibian Law Reform and Development Commission, requiring the absence of consent

> puts the complainant "on trial", in effect, by requiring the prosecution to prove beyond a reasonable doubt that the complainant did not consent to the sexual act. As a result, the sexual behaviour or reputation of the complainant can become the focus of the trial rather than the conduct of the accused.[6]

While the South African Law Reform Commission conceded similar arguments the inclusion of the element of consent ultimately secured its way in the final South African Sexual Offences Act to the dismay of advocates for rape survivors. Future efforts towards sexual offences law reform in the region must give careful consideration to the various models in existence and continue to build on progress made towards a redefinition of rape which offers the widest protection to survivors.

Marital rape

An important model element of sexual offences legislation is the removal of the exemption of rape as an offence if occurring within marriage. The former Secretary General noted in his in-depth study that marital rape is not a prosecutable offence in at least 53 States. Examples in Southern Africa of states which have not criminalised marital rape are Tanzania, Botswana, Zambia, and Malawi.

In the sexual offences legislation of Namibia, Lesotho, Swaziland, and South Africa, rape within marriage is illegal. In Zimbabwe marital rape is prohibited however, no prosecution may be instituted against any husband for raping or indecently assaulting his wife without the authorisation of the Attorney General.[7] In Tanzania, rape within a marriage is only illegal if the couple is separated.

International human rights law has long established that the private domain is not exempt from its norms. The UN Declaration on the Elimination of Violence against Women, for example, calls on states to 'exercise due diligence to investigate and punish acts of violence against

[6] Legal Assistance Centre *Rape in Namibia* (2006) p 79.
[7]

women, whether committed by the State or by private actors.'[8] The African Women's Rights Protocol reiterates this,[9] leaving little room for cultural relativist arguments.

Compulsory HIV testing of offenders

A trend in sexual offences legislation in Southern Africa is the provision for compulsory HIV, or blood (presumably for the presence of HIV) testing of the accused. The sexual offences legislation of Lesotho, and South Africa provides for compulsory HIV testing of charged offenders, Swaziland for convicted offenders and Zimbabwe, for charged and convicted offenders.

Mandatory HIV testing infringes on the human rights of alleged offenders. According to UNAIDS and WHO, testing of individuals must be confidential, be accompanied by counselling, and only be conducted with informed consent, meaning that it is both informed and voluntary.[10] During the public consultation process of the drafting of the South African Sexual Offences Bill, which provides that the survivor may apply to a magistrate within 60 days of the offence for an

complainant for using the relevant provision of the law to ascertain his HIV status, thus further victimising a rape survivor.

The provisions regarding compulsory testing of alleged offenders vary within national laws but the common disconcerting thread is the deviance from internationally recognised human rights principles and, despite good intentions, the failure to place the best interests of the survivor at the forefront of the intervention.

Sentencing

Prescribed minimum and maximum sentences vary between states in Southern Africa with respect to sexual offences and are dependant on the circumstances of the offence and whether or not the convicted was a first or repeat offender. Legislating minimum sentences is contentious with concerns ranging from, but not limited to, the integrity of judicial independence, difficulties in determining an appropriate minimum sentence for all offenders without consideration of each case, and contribution to the problem of overcrowding of prisons. Lesotho, Namibia, and South Africa addressed one of the main concerns, that it encroaches on judicial independence, by allowing for discretion by the courts to depart from the minimum sentences where there are 'substantial and compelling circumstances'.[12]

Arguments in favour of minimum sentences are also wide-ranging but at the forefront is the promotion of consistency in sentencing. This is especially important with sexual offences convictions, where certain factors based on prejudicial views about rape and women such as previous sexual history, for example, or a lack of apparent physical harm, are often considered in sentencing and the devastating nature of the crime is minimised. However, as illustrated by one South African example, prescribed minimum sentencing does not always alleviate the intrusion of such prejudices into sentencing whereby a presiding officer may refer to 'substantial and compelling circumstances'. According to the presiding officer in this case, 'the complainant did not sustain any serious injuries' and 'they [the victim and the accused] sat and drank together' and 'went together to the complainant's home.' The sentence therefore diverged from the prescribed minimum. [13]

[12] Such circumstances are limited in the case of South Africa by the Criminal Law (Sentencing) Amendment Act (no 38 of 2007). Neither the previous sexual history of the complainant nor the lack of apparent physical injury to her constitute circumstances warranting departure from the minimum sentence.
[13] Vetton, L and van Jaarsveld F *The (mis)measure of harm: an analysis of rape sentences handed down in the regional high courts of Gauteng Province* (January 2008) p 13 available at http://www.tlac.org.za/images/documents/mismeasure_of_harm.pdf.

foremost concerned with the best interests of the survivor, there would be no reason to make the provision of PEP conditional.

The absence of a comprehensive package of health care is a key feature of sexual offences legislation in the region, and where it is included it is addressed inadequately as in the South African model.

Conclusion

The majority of States in SADC do not have specific sexual offences legislation despite obligations in international law. This discords with the pervasiveness of sexual violence in the region. The Democratic Republic of Congo (DRC) is one such country about which Stephen Lewis recently said that, 'in the vast historical panorama of violence against women there is a level of demonic dementia plumbed in the Congo that has seldom, if ever, been reached before.'[22] While the limitations of the law, with respect to violence against women in particular, are recognised, the enactment of respective legislation is not least an international human rights

state expense is promising in the South African model but needs to be amended to remove limitations and improved upon by those states yet to enact laws on sexual offences. It also needs to be accompanied by a comprehensive package of care.

The absence of a legislative framework that comprehensively addresses violence against women in Southern Africa sends a message of tolerance for crimes which perpetuate gender inequality. Legislation that has been enacted, yet fails to protect the survivor of the offence, reflects a lack of understanding of women's rights in the face of violence, including the right to the highest attainable standard of health. While the emergence of specific sexual offences