

**A critical reflection on the  
African Women's Protocol as a means to combat HIV/AIDS among women in  
Africa**

**Submitted in partial fulfilment of the requirements of the degree  
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Centre for Human Rights, Faculty of Law, University of Pretoria**



**prepared under the supervision of  
Prof. Letetia van der Poll  
at the Faculty of Law, University of the Western Cape**

**27 October 2006**

## DECLARATION

I, Rebecca AMOLLO, declare that the work presented in this dissertation is original. It has never been presented to any other university or institution. Where other people's works have been used, references have been provided, and in some cases, quotations made. In this regard, I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the LLM Degree in Human Rights and Democratisation in Africa.

Signed.....

Date.....



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Supervisor: Prof. Letetia van der Poll

Signature.....

Date.....

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## DEDICATION

This work is dedicated to the memory of Baba and Mama (RIP). Your early departure was a passage for me to another world. Even in your silence, you inspired me.

This work is also for my great and beloved brothers, Dennis O, Basil O, Dannie O, Philip O, and to my angelic sisters, Cathy O and Gloria O. But for you, I cannot not live.

Becca O.



## PREFACE

Tell me why as a woman  
I have all this burden  
When God, the Constitution and the  
United Nations all tell me  
You and I are equal in all respects?

**Melanesian poet, Agnes Dewenis  
(Altman, 2001, 122)**

The toll on women and girls...presents Africa and the world with a practical and moral challenge, which places gender at the centre of human condition. The practice of ignoring gender analysis has turned to be lethal.



**Stephen Lewis, 2001**

Where, after all, do human rights begin? In small places close to home – so close and so small that they cannot be seen on any map of the world. Yet they *are* the world of the individual person: the neighbourhood he lives in; the school or college he attends; the factory, farm or office where he works. Such are the places where every man, woman, and child seek equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerted citizen action to uphold them close to home, we look in vain for progress in the larger world.

**Eleanor Roosevelt, Remarks at the United  
Nations, March 27, 1958**

These quotes continuously remind me that there is something we cannot ignore: the peculiar plight of women in the fight against the HIV/AIDS pandemic. That what is considered private is actually public, and that we must rise above the artificial boundaries and tackle the real issues. Tackle HIV/AIDS in a gendered style, in all spheres, especially in homes.

## LIST OF ABBREVIATIONS

ACRWC	African Charter on the Rights and Welfare of the Child
AIDS	Acquired Immune Deficiency Syndrome
ARVs	Anti-retrovirals
AU	African Union
CC	Constitutional Court
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CESCR	Covenant on Economic, Social and Cultural Rights
CESR	(UN) Committee on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
CRR	Centre for Reproductive Rights
EHRR	European Human Rights Reports
FGM	Female Genital Mutilation
GC	General Comment
GIPA	Greater Involvement of People Living with HIV/AIDS
GR	General Recommendation
HIV	Human Immuno-deficiency Virus
ICCPR	Covenant on Civil and Political Rights
ICPD	International Conference on Population and Development
ICTR	International Criminal Tribunal for Rwanda
IMF	International Monetary Fund
IPPF	International Planned Parenthood Federation
MDGs	Millennium Development Goals
NEPAD	New Partnership for Africa's Development
NGO	Non governmental organisation
OAU	Organisation of the African Unity
PAP	Papanikolaou
PEP	Post-exposure Prophylaxis
PHC	Primary Health Care
PMCT	Prevention of Mother-to-Child- Transmission
SA	South Africa
SADC	Southern African Development Community
SAPs	Structural Adjustment Programmes
SARDC	Southern African Research and Documentation Centre

STD/Is	Sexually Transmitted Diseases/ Infections
TAC	Treatment Action Campaign
TASO	The AIDS Support Organisation
UN	United Nations
UNAIDS	Joint United Nations Programme on HIV/AIDS
UNC	United Nations Charter
UNFPA	United Nations Fund for Population
UNGA	United Nations General Assembly
UNICEF	United Nations Children Fund
UNIFEM	United Nations Development Fund for Women
USA	United States of America
VCT	Voluntary Counselling and Testing
WHO	World Health Organisation



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#### 1.1 The synergy: Cairo and Beijing Processes

In 1994, thousands of policy makers and activists gathered in Cairo for what turned out to be a watershed moment: the International Conference on Population and Development (ICPD). ICPD heralded an era that recognises sexual and reproductive rights as central to the human rights of women. It put the concept of sexual and reproductive health at the centre of discussion and it received great attention.<sup>1</sup> The Cairo accord was unique and unprecedented. For the first time, all nations agreed that every human being on the planet, man, woman and child, has the right to sexual and reproductive health. Following shortly after Cairo was yet another moment of accord: the Beijing Conference.<sup>2</sup> It added momentum to the programmes developed at Cairo, thus the Beijing and Cairo processes. Hence, in discussing the sexual-rights approach to combating HIV/AIDS, special regard must be had to the Programme of Action of the International Conference on Population and development (the Cairo Programme),<sup>3</sup> a follow up to the Cairo Programme-Cairo Plus Five,<sup>4</sup> the Beijing Declaration and Platform of Action of the Fourth World Conference on Women (the Beijing Platform),<sup>5</sup> and a follow up to the Beijing Platform-Beijing Plus Five,<sup>6</sup> that produced documented authoritative statements on the meaning and scope of the right to health especially as it applies to the health of women. It is important to note that the Cairo and Beijing processes were preceded by the Vienna Conference which

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<sup>1</sup> UN International Conference on Population and Development, held in Cairo, 5- 13, September 1994.

<sup>2</sup> Fourth World Conference on Women, Beijing, China, 4-15 September 1995.

<sup>3</sup> Cairo Programme-UN, Population and Development, i. Programme of Action Adopted at the International Conference on Population and Development, Cairo, 5-13 September 1994.

<sup>4</sup> United Nations Key actions for the further implementation of the Programme of Action of the International Conference.

<sup>5</sup> United Nations Report of the Fourth World Conference on Women (1995).

<sup>6</sup> United Nations Report of the Ad Hoc Committee of the whole of the Twenty-Third Special Session of the General Assembly (2000).

emphasised the rights of women as human rights.<sup>7</sup> Other important international and regional developments in this regard are discussed later down.<sup>8</sup>

## **1.2 The African Women's Protocol: a beacon of hope for African Women**

Coming after the above synergy in the area of women and sexual health, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (hereafter referred to as the African Women's Protocol)<sup>9</sup> has been hailed for its empathetic and specific focus on issues affecting most women in Africa.<sup>10</sup> The African Women's Protocol espouses health and reproductive rights, and specifically mentions HIV/AIDS.<sup>11</sup> It also provides for the elimination of harmful practices,<sup>12</sup> the right to education and training,<sup>13</sup> right to positive cultural context<sup>14</sup> and the prohibition of child marriages,<sup>15</sup> among others. All these rights are of great relevance to the sexuality of women and can be utilised to combat HIV/AIDS.

## **1.3 Conceptual paradigm: sex and sexuality**

This is a women's study. It adopts a sexual and reproductive rights paradigm. The unequal power between women and men is often expressed in sexual relationships

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<sup>7</sup> The Second World Conference on Human Rights was held in Vienna from 14 to 25 June 1993. The conference came up with the Vienna Declaration and Programme of Action.

<sup>8</sup> See chap.2.

<sup>9</sup> Adopted in Maputo in July 2003 and entered into force 25 November 2005, available at <http://www.africa-union.org> (accessed 10 March 2006).

<sup>10</sup> See R Karugonjo-Segawa 'The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2005) Research Partnership, Danish Research Institute for Human Rights; SA Kaniye-Ebeku 'A New Hope for African Women: Overview of Africa's Protocol on Women's Rights (2004) *Nordic Journal of African Studies* 13 264, available at <http://www.njas.helsinki.fi/pdf-files/vol13num3/ebeku.pdf> (accessed 12 April 2006; F Banda 'Blazing a trail: The African Women's Protocol comes into force' (2006) 50 *Journal of African Law* 72.

<sup>11</sup> Art.14(1) & 14(2).

<sup>12</sup> Art.5.

<sup>13</sup> Art.12.

<sup>14</sup> Art.17.

<sup>15</sup> Art.6(b).

and is further related to the societal context determining the extent to which individuals are in the position to make sexual choices, and to enjoy the right to choose when, where and with whom to engage in sexual activity. Flowing from this paradigm, follows the definition of some terms crucial in this study:

### 1.3.1 Conceptual clarification

- **Adolescents:** Adolescents have been defined by the World Health Organisation (WHO) as persons being between the ages of 10 and 19.<sup>16</sup>
- **Gender:** The term gender refers to the socially constructed roles of women and men that are ascribed to them on the basis of their sex.<sup>17</sup>
- **Reproductive health:** Reproductive health has been postulated to mean a state of complete physical, mental and social well-being and not merely the absence of diseases or infirmity, in all matters relating to the reproductive system and to its functions and processes. The definition also entails peoples' ability to have a satisfying and safe sex life with the capability to reproduce and the freedom to decide if, when to do so. The right covers the rights to information, access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of people's choice for regulation of fertility, which are not against the law. The right further entails access to appropriate health care services that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant.<sup>18</sup>
- **Sex:** Refers to physical and biological characteristics of men and women.<sup>19</sup>

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<sup>16</sup> WHO, *The health of Young People* (Geneva: WHO, 1993) 1.

<sup>17</sup> W Benedek; E Kisakye, & G Obertleimer (2002) *Human Rights of Women: International instruments and African experiences* 21.

<sup>18</sup> UN, Department of Public Information, Platform for Action and Beijing Declaration. Fourth World Conference on Women, Beijing China, 4-15, September 1995 (New York: UN, 1995), para 94.

<sup>19</sup> n 17 above.

- **Sexual health:** Until recently, sexual health was generally understood to be an integral a part of reproductive health.<sup>20</sup> A new focus by WHO adds that it entails rights like the right to the highest attainable standard of sexual health, and to access to sexual and reproductive services.<sup>21</sup> This new focus suggests strongly that reproductive health is part of sexual health. Sexual health also has been posited as encompassing the enjoyment of mutually fulfilling sexual relationships without coercion, discrimination and violence. It also entails safety from Sexually Transmitted Diseases and success in preventing pregnancy.<sup>22</sup>
- **Trafficking:** Trafficking has been defined as the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the use of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the use of power of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation is defined to include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery, servitude or the removal of organs.<sup>23</sup>
- **Women:** According to the African Women's Protocol, 'women' mean persons of female gender, including girls.<sup>24</sup>
- **Young people:** Young people have been defined to mean men and women aged 15 to 24. These are also referred to as youth.<sup>25</sup> The terms youth, young women and adolescents are used interchangeably in this study.

<sup>20</sup> Department of Reproductive Health and Research, World Health Organisation 'Progress in Reproductive Health Research: Sexual health-a new focus for World Health Organisation' (2004), available at [www.who.org](http://www.who.org) (accessed 10 August 2006).

<sup>21</sup> As above.

<sup>22</sup> MF Fathalla (1997) *From Obstetrics and Gynaecology to Women's Health: the Road ahead* 33.

<sup>23</sup> Art.3(a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime. United Nations (2000).

<sup>24</sup> Art.1(k).

<sup>25</sup> n 18 above.

## 1.4 'Sexing' and 'gendering' the problem in Africa

Sub-Saharan Africa has just over 10 per cent of the world's population, but is home to more than 60 per cent of all people living with HIV AIDS (25.8 million).<sup>26</sup> In 2005, an estimated 3.2 million people in the region became infected. An estimated 4.6 per cent of women and 1.7 per cent of men were living with HIV in 2005. The increase in the proportion of women being affected by the epidemic continues. In 2005, 17.5 million women were living with HIV-one million more than in 2003.<sup>27</sup> Thirteen and a half million of these women live in sub-Saharan Africa. It is estimated that over one third of those presently infected are women and over one-half are youth under the age of 25. A large proportion of these youth are infected during adolescence.<sup>28</sup>

AIDS has been described as having the face of a woman.<sup>29</sup> The factors that make young women vulnerable and on which HIV also thrives are poverty, culture, homelessness, social and geographical mobility, sexual violence, power imbalance, civil unrest and, in particular, the way societies construct gender, masculinity and femininity (gender and power imbalances).<sup>30</sup>

AIDS has also been described as a 'biologically sexist' organism for reasons like the fact that its per-exposure transmission is higher from a man to a woman.<sup>31</sup> This is further exacerbated by culturally-sanctioned practices like dry sex, physiological factors like menstruation, co-efficiency with other Sexually Transmitted Diseases and Infections (STD/Is) which thrive more in women, and cross-generational sex.<sup>32</sup>

It is this very '*toll on women and girls*' that seems to be the persistent challenge in addressing and responding to HIV and AIDS realities. Infection rates remain to be on

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<sup>26</sup> WHO/UNAIDS, AIDS epidemic update Special Report on HIV Prevention, 2006, available at <http://www.who.int/hiv/epi-update2005-en.pdf> (accessed 3 September 2006).

<sup>27</sup> As above.

<sup>28</sup> As above.

<sup>29</sup> J Simmons, P Farmer & B G Schoef 'A Global Perspective' in P Farmer; M Connors & J Simmons (eds) (1996) *Women, Poverty and AIDS: sex, drugs and structural violence* 39.

<sup>30</sup> P Smyre (1993) *Women and Health* 98. See also, Farmer et al (n 29 above).

<sup>31</sup> Simmons (n 29 above) 39. Certain studies suggest that transmission from a man to a woman is five times more efficient than from woman to man. Other investigations have prompted researchers to argue that HIV is up to 20 times more efficiently transmitted from men to women than vice versa.

<sup>32</sup> As above.

the rise, prevention messages seem to bypass the ones it is meant to *'protect'*, stigma and discrimination experienced by people living with, and affected by, HIV and AIDS prevail, instead of subside, and it is women and girl children who remain, and are increasingly, the ones who are disproportionately impacted upon and affected by the pandemic.

It is within this context of the persistent feminisation of the HIV and AIDS pandemic that this study, based on the normative provisions of the African Women's Protocol, focuses on gender, sex and sexuality in the context of HIV and AIDS. The regime of the African Women's Protocol embodies a framework that can be utilised to combat HIV/AIDS amongst women in Africa by addressing some of the most important issues that need to be tackled if women are to live through the epidemic. The study therefore seeks to demonstrate this potential.

### **1.5 Research question**

How can the African Women's Protocol be utilised to combat HIV/AIDS among women in Africa?

### **1.6 Literature review**

Being a relatively new instrument, there is a dearth of literature on the African Women's Protocol. This is especially so in regard to its normative framework which the author pursues as the crux of the study. Much of the analysis will therefore be based on the potentials and possibilities the author envisages in the African Women's Protocol based on the literature available on HIV/AIDS, women and sexual and reproductive rights.

Much of the literature analyses sexual health as an integral part of reproductive rights and yet a new focus by WHO shows that reproductive rights are inversely, a part of sexual health.<sup>33</sup> The author therefore draws inspiration and analogously utilises the literature available on reproductive health. The author adopts the new focus which views sexual health as a separate area of work in its own right.

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<sup>33</sup> n 20 above.



The Convention on the Elimination of all forms of Discrimination Against Women (hereinafter referred to as CEDAW)<sup>34</sup> has been hailed for its 'women-specific' framework especially in as far as it relates to discrimination against women.<sup>35</sup> CEDAW has however not escaped blame for being 'unafrikan' because of its 'omission' of most issues that affect women in Africa.<sup>36</sup> It is such inadequacy that propels the current study to explore the possibilities that the African Women's Protocol promises.

The African Charter on Human and Peoples' Rights (hereinafter referred to as the African Charter)<sup>37</sup> is the main instrument recognising and protecting the rights of peoples in Africa. It guarantees the protection of the family and within this protection prohibits discrimination against women.<sup>38</sup> This provision has however been considered insufficient in its protection of women who make up the majority of Africa's population.<sup>39</sup> The current author cannot agree more. The African Charter defines human rights standards in terms of discrete violations in the public realm, whereas most violations of women occur in private relations.<sup>40</sup> Its regime therefore

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<sup>34</sup> Adopted in December 1979. It entered into force on 18 December 1981.

<sup>35</sup> Karugoyo-Segawa (n 10 above).

<sup>36</sup> As above.

<sup>37</sup> Also sometimes called the 'Banjul Charter' was adopted by the African Union in Nairobi, Kenya, in June 1981 and entered into force in October 1986.

<sup>38</sup> Art.18.

<sup>39</sup> WILDAF 'The African Charter on Human and Peoples' Rights and the Additional Protocol on Women's Rights', available at <http://wildaf.org.zw/news4.html> (accessed 25 January 2001) in MS Nsibirwa 'A brief analysis of the Draft Protocol to the African Charter in Human and Peoples' Rights' (2001) 1 *African Human Rights Law Journal* 40. See also J Oloka-Onyango 'Beyond the rhetoric reinvigorating the struggle for economic, social and cultural rights in Africa' (1995) 26 *California Western International Law Journal* 1; W Benedek and W Heinz (eds.) (1992) *Regional Systems of Human Rights in Africa, America and Europe: Proceedings of a Conference* (Friedrich Naumann, Stiftung) 17; CA Odinkalu 'Implementing Economic, Social and Cultural Rights under the African Charter on Human and Peoples' Rights' in M Evans & R Murray (eds.) (2000) *The African Charter on Human and Peoples' Rights: The System in Practice 1986-2000* 178-218; CE Welch 'Human Rights and African Women: A comparison of Protection under Two Major Treaties' (1993) 15 *Human Rights Quarterly* 549; E Delpont 'The African regional system of Human Rights-Why a protocol on the rights of women', available at <http://www.powa.co.za/documents/sadc%20intro%20african%20system%20and%20draft%20protocol.doc> (accessed 5 September 2006).

<sup>40</sup> J Oder 'Reclaiming women's social and economic rights in Africa: The protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2004) 5 *ESR Review* 5.

does not serve to protect women from challenges such as that which HIV/AIDS presents. As a protocol to the African Charter, the African Women's Protocol can be utilised to fill the gaps in the parent instrument.

New approaches to HIV/AIDS now locate within the human rights discourse.<sup>41</sup> Mann<sup>42</sup> propounded the complementary approach to health and human rights. He argued that health and human rights are complementary approaches to the central problem of advancing human well-being.<sup>43</sup> Otto expressed support for this approach.<sup>44</sup> He argued that this perspective grounds health within a broader context of political, social and economic determinants and fundamentally challenges its traditional conceptualisation as a relatively autonomous sphere of scientific investigation, medical expertise and specialist application.

Cook, Dickens and Fathalla ably demonstrate the integrated approach.<sup>45</sup> The authors convincingly show how human rights standards can be used to benefit reproductive health. They argue that interests relating to reproductive and sexual health may be protected through specific human rights. They add that most countries have committed themselves to respect individual's human dignity and physical integrity through their own national constitutions and other laws, and their membership in regional and international human rights conventions.<sup>46</sup>

I am in agreement with an integrated approach between HIV/AIDS and health and human rights. The realisation of sexual rights and the fights against HIV/AIDS among women in Africa can only be achieved through an integrated approach of sexual and

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<sup>41</sup> The early approach was to define and 'own' the problem as a health issue and belonging to the sphere of bio-medicine only. For a discussion on the development of the rights-based approach, See, generally, J Mann 'Health and Human Rights: If Not Now, When, Human Rights and the New Public Health' (1997) 2 *Health and Human Rights* 118. Dr Jonathan Mann was the director of the World Health Organisation and is renowned for his pioneering work in the field of health, human rights and more recently, HIV/AIDS; M Kirby 'The never ending paradoxes of HIV/AIDS and human rights' (2004) 4 *African Human Rights Law Journal* 163.

<sup>42</sup> Mann (n 41 above).

<sup>43</sup> As above.

<sup>44</sup> D Otto 'Linking Health and Human Rights: A critical Legal Perspective' (1995) 1 *Health and Human Rights* 274.

<sup>45</sup> RJ Cook; BM Dickens & MF Fathalla (2003) *Reproductive Health and Human Rights: Integrating Medicine, Ethics and the Law* 283.

<sup>46</sup> As above, 158.

reproductive health and human rights. This forms the pith of this work as I traverse the provisions of the African Women's Protocol as a backdrop that can be utilised to prevent women from HIV infection and to empower them to live amidst the pandemic. The above contributions however do not focus much on the peculiarities in Africa. The situation in Africa presents unique scenarios expressed in culture, religion, education and other gender related aspects that very much influence women's accessibility to sexual and reproductive rights. These specific aspects of Africa should inform all discussion on the subject, an approach that the current author leans towards and intends to traverse.

More pertinently for this study, the above authors make tremendous contributions to the subject, but their writings predate the regime that is governed by the African Women's Protocol.<sup>47</sup> This instrument has provided fairly elaborate standards reflective of the specific aspects of women's rights in Africa and specifically on sexual and reproductive rights. The language of the African Women's Protocol is demanding and should be respected.<sup>48</sup> It is no wonder that it has been described as embodying a robust and unapologetic provision on reproductive and sexual health.<sup>49</sup>

According to the World Health Organisation,<sup>50</sup> sexual rights embrace human rights that are already recognised in national laws, international human rights documents and other consensus documents. They include the right of all persons, free of coercion, discrimination and violence. The other body of rights constituting sexual rights include the rights to the highest attainable standard of sexual health, and to access to sexual and reproductive health care services, to seek, receive and impart information related to sexuality, to sexuality education, to respect for bodily integrity, to choose their partners, to decide to be sexually active or not, to consensual relations, to decide whether or not, and when to have children; and to pursue a satisfying, safe and pleasurable sexual rights.<sup>51</sup> All these rights are all directly or indirectly present in the African Women's Protocol and form the normative foundation upon which this thesis builds.

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<sup>47</sup> n 9 above.

<sup>48</sup> See preambular paragraphs and the use of words like, 'combat', 'eliminate', 'prohibit', 'condemn', 'specific positive action'.

<sup>49</sup> Per C Ngwena while delivering a lecture on the right to health and reproductive rights at the University of Pretoria on 17 March 2006.

<sup>50</sup> n 20 above.

<sup>51</sup> As above.

## **1.7 Delimitation of study**

The reason for the focus on women has already been highlighted in this chapter (see part 3). The focus on Africa is partly because the African Women's Protocol is a regional document whose application can only be within the African context but more importantly because the continent is faced with the HIV/AIDS pandemic in a manner that threatens to sustain itself due to many factors, notably poverty. Some cultural, religious and social intricacies also prevail in Africa which spurs the author towards looking at the case of Africa.

## **1.8 Research Methodology**

This study is informed by a radical feminist legal thought and uses feminist tools of analysis. It is of a norm setting and critical character. It is largely non-empirical but to some extent empirical research is used. The primary sources used are: treaties, consensus documents, legislation and case law where applicable. The secondary sources are: books, academic articles, journals and all related literature. In doing both, the author uses internet and library.

## **1.9 Challenges**

Being a normative study of a relatively new instrument, this study confronts the author with the herculean task of taking part in the process of developing the body of literature on the instrument. There is a dearth of literature on the normative framework of the African Women's Protocol which will then require a higher degree of creativity (one in which I gratefully partake).

## **1.10 Overview of chapters**

The study is stratified into four chapters. Chapter one provides the background to the study. It also contextualizes the study and sets its paradigm. Chapter two explores the current normative regimes, regional and international that are relevant to the analysis of the study. It is mainly critical, pointing out their inadequacies and a few strengths in relation to confronting the challenges faced by young women in Africa in the face of HIV/AIDS. It suggests a few recommendations. Chapter three explores the possibilities for solutions under the transformative provisions of the African

Women's Protocol. This chapter is the heart and pith of the study. Chapter four discusses the practical challenges that the normative approach may encounter, especially because of the nature of some of the rights pivotal to the study: socio-economic rights. Chapter four also discusses legal, regulatory and policy recommendations. The chapter concludes by calling upon states to respect their obligations under the African Women's Protocol.



**THE INTERNATIONAL AND REGIONAL NORMATIVE FRAMEWORK**

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**2.1 Introduction**

The United Nations Charter (UNC) in its preamble proclaims faith in fundamental human rights and the equal rights of women and men: the promotion of the respect and for human rights and fundamental freedoms for all without distinction on a number of grounds including sex.<sup>52</sup> This commitment to women's equal rights formed the basis upon which a comprehensive body of human rights law was subsequently developed to promote women's equality and non-discrimination, and to ensure their full enjoyment of human rights. On the basis of this background, this chapter discusses the human rights global efforts on the right to health within the context of HIV/AIDS amongst women (see part 2.2). This part illustrates the missed chances and omissions of most instruments in addressing the issue. The chapter then discusses the regional efforts within the same context (see part 2.3). The chapter further discusses the positive changing trends at both global and regional levels (see part 2.4) and concludes that much as earlier efforts did not specifically or even address the issue at all, there is now a growing body of human rights documents at both levels that can be utilised together with the African Women's Protocol to address the issue (see part 2.5).

**2.2 The global human rights efforts**

The array of human rights instruments and documents that deal with the right to health, and impliedly, albeit loosely, sexual health, is vast. At an international level, the following treaties contain provisions that address the right to health:

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<sup>52</sup> The United Nations Charter, preambular para 2. The UNC was adopted by the San Francisco Conference on 26 June 1945 at San Francisco. It entered into force on 24 October 1945.

## 2.2.1 The Universal Declaration of Human Rights

The earliest modern human rights instrument—the Universal Declaration of Human Rights (hereafter referred to as the Universal Declaration),<sup>53</sup> proclaims the right to health.<sup>54</sup> It does not however map out its normative framework. The language of the Declaration is one of aspirations and ideals and were therefore not binding.<sup>55</sup> It lacked normative force. Nonetheless, it set the impetus that led to the development human rights. In respect of socio economic rights, including the right to health, this lacuna has been primarily filled by the International Covenant on Economic, Social and Cultural Rights (CESCR).<sup>56</sup>

## 2.2.2 The International Covenant Economic, Social and Cultural Rights

The CESCR put into normative form what the Universal Declaration had merely proclaimed. It provides that each state party to the present Covenant undertakes to take steps individually and through international assistance and co-operation especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means including particularly the adoption of legislative measures.<sup>57</sup>

The CESCR further contains a provision that has been lauded by many as the most important provision for the realisation of the right to health.<sup>58</sup> It provides for the right to the highest attainable standard of physical and mental health. In spite of the clarity

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<sup>53</sup> Adopted and proclaimed by the UN General Assembly in resolution 217 A (III) of 10 December 1948 at Paris.

<sup>54</sup> Art.25.

<sup>55</sup> R Roemer 'The Right to health care' in HL Fuenzalida-Puelma & SS Connor (eds) (1998) *The right to health in the Americas: A comparative study* 17-23; H Hannum 'The UDHR in national and international law' (1998) 3 (2) *Health and Human Rights* 145.

<sup>56</sup> The CESCR was adopted by the UN General Assembly in resolution 2200 A (XXI) of 16 December 1966 at New York.

<sup>57</sup> Art. 2 (1).

<sup>58</sup> AR Chapman 'Core obligations related to the right to health and their relevance for South Africa' in D Brand & S Russell (eds) (2002) *Exploring the content of socio-economic rights: South African and international perspectives* 40.

thus derived in regard to state obligations, governments and judiciaries in many countries still tend to view the entire CESC with clouded judgment, only giving priority to norms dealing with misguided notions of progressively.<sup>59</sup>

The Committee on ESCR<sup>60</sup> has made several important pronouncements which are very useful within the context of combating HIV/AIDS using human right standards, especially as regards state obligations. The Limburg Principles on the Implementation of CESC<sup>61</sup> and the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights<sup>62</sup> have also been useful in clarifying the normative content of CESC, and developing criteria for identifying violations of socio-economic rights in domestic legal spheres. In its General Comments,<sup>63</sup> the Committee has elucidated on the requirements under article 2 and 12 of the CESC. The Committee has emphasised that article 2 is central to the understanding of the nature and extent of states' obligation under the various provisions of CESC.<sup>64</sup> That article 2 imposes obligations of conduct as well as result.<sup>65</sup> The obligation of conduct requires the state to take action reasonably calculated to realise the enjoyment of a

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<sup>59</sup> See the *Shiomi* case, Supreme Court of Japan (1989). The court argued that Article 9 of CESC did not provide for a concrete right to be granted to individuals immediately. This is clear from article 2; Yuji Iwasawa, *The Relationship Between International Law and National Law: Japanese Experiences*, 64BRIT.YB.INT'L L.333 (1993) in S Leckie 'Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights' (1998) 20 *Human Rights Law Quarterly* 81.

<sup>60</sup> The Committee on ESCR is the primary organ responsible for monitoring the implementation of rights under the CESC.

<sup>61</sup> The Limburg Principles were developed in 1986 by a group of Experts in international law under the auspices of the International Commission of Jurists. The Principles can be found in the 'Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (1987) 9 *Human Rights Quarterly* 122.

<sup>62</sup> The Maastricht Guidelines were similarly developed in 1997 on the Limburg Principles in respect of the nature and scope of state violations of economic, social and cultural rights, and appropriate responses and remedies. V Dankwa et al 'Commentary to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' (1998) 20 *Human Rights Quarterly* 705. The Maastricht Guidelines can be found in 'the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' (1998) 20 *Human Rights Quarterly* 691.

<sup>63</sup> General Comment No 3, The nature of States parties' obligations (art.2, Para 1 of the Covenant) ( 5<sup>th</sup> session, 1990) [UN Doc E/1991/23] Para 1.

<sup>64</sup> n 62 above.

<sup>65</sup> As above.



particular right.<sup>66</sup> That the obligation of result requires the state to achieve a specified target as a measure of the standard of realisation of a particular right.<sup>67</sup> That the obligation 'to take steps 'in article 2(1) is mandatory.<sup>68</sup> The Committee further clarified that it is not open to a state party to choose not to take steps. The state however has discretion in the choice of appropriate means for satisfying the right in question. What is crucial is not so much the form of the measure, but its effectiveness.<sup>69</sup>

In its General Comment 14,<sup>70</sup> the Committee on ESCR has attempted to clarify the obligations of states parties in respect of the right to health under article 12 of CESCR.<sup>71</sup> According to this General Comment, the obligation to respect the right to health in article 12 requires the state, mainly to refrain from adversely interfering with the right to health by denying or limiting equal access for all persons to preventive, curative and palliative health services.<sup>72</sup> The Committee further noted that the right to health is connected to other rights such as the right to life, non-discrimination, dignity, equality and liberty.<sup>73</sup> It further observes that health care services should be guaranteed for all on a non-discriminatory basis, taking into account the situation of the most vulnerable and marginalised members of society, such as women and people living with HIV/AIDS.<sup>74</sup>

### **2.2.3 The Convention on the Elimination of all forms of Discrimination against Women**

Lauded for its comprehensive and extensive protection of women from all forms of discrimination, CEDAW has played a great role in advancing the human rights of women. Despite her excellent provisions on violence against women, CEDAW has been lambasted for being 'unafrikan' and for 'omitting' the most pertinent issues for

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<sup>66</sup> n 62, para 7.

<sup>67</sup> As above.

<sup>68</sup> n 62 above, para 2.

<sup>69</sup> n 62 above, 113.

<sup>70</sup> General Comment No 14, The right to the highest attainable standard of health ( art.2 of the Covenant) (22<sup>nd</sup> session, 2000) [UN Doc E/C 12/2000/4].

<sup>71</sup> As above.

<sup>72</sup> n 70 above, para 34.

<sup>73</sup> As above, para 3.

<sup>74</sup> As above, para 9.

African women.<sup>75</sup> Right from its embryonic articles, CEDAW does not even feature women and girls or gender in its definition.<sup>76</sup> One might rightly argue that it is implied, but its subsequent provisions do not bear out the assumption. In this omission, CEDAW leaves out a significant group in the face of the HIV/ AIDS challenge - young women.

Interestingly, the first draft of CEDAW did not mention reproductive health in its text. It was only inserted after a proposal from the General Assembly's Third Committee that deals with social, humanitarian, and cultural matters.<sup>77</sup> CEDAW also missed an opportunity to include HIV/AIDS in its protection of women. This can be attributed to the period and circumstances of drafting the convention. At the time HIV/AIDS had not reached epidemic level,<sup>78</sup> or if it had, the world had not yet been awakened to the need to include it within the human rights discourse. After all the rights-based approach to HIV/AIDS only got attention in 1997 about 18 years into the life of CEDAW.<sup>79</sup>

Over the years however, the Committee on the Elimination of Discrimination Against Women (hereafter referred to as CEDAW),<sup>80</sup> has attempted to repair the omissions through its General Recommendations. The Committee decided to adopt the practice of issuing General Recommendations on specific provisions of the Convention and on the relationship between the Convention articles and 'cross cutting themes'. Of particular importance to this study, the Committee has issued General Recommendations on the use of affirmative action measures to achieve representation of women in international work,<sup>81</sup> on violence Against Women,<sup>82</sup> on

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<sup>75</sup> See n 10 above.

<sup>76</sup> Compare with Art.1(k) of the African Women's Protocol.

<sup>77</sup> A Hendriks (1995) 'The Right to Health-Promotion and Protection of Women's Right to Sexual and Reproductive Health under International Law: the Economic Covenant and the Women's Convention.' *The American University Law Review* 44 (4): 1123-1128.

<sup>78</sup> AIDS was first recognized as a distinct clinical syndrome in 1981. See Centers for Disease Control, 1981.

<sup>79</sup> Mann (n 41 above).

<sup>80</sup> This is the monitoring and implementing body of CEDAW. It is established under Art.17 of CEDAW.

<sup>81</sup> General Recommendation No 8 (7th session, 1988).

<sup>82</sup> General Recommendation No 12 (8th session, 1989).

Female Circumcision,<sup>83</sup> on the Avoidance of discrimination against women in national strategies for the prevention & control of Acquired Immunodeficiency Syndrome (AIDS),<sup>84</sup> on Violence Against Women,<sup>85</sup> on Equality in marriage and family relations,<sup>86</sup> on measures to be taken to implement equality in women's political & public life,<sup>87</sup> and on Women and Health.<sup>88</sup>

More specifically, in its General Recommendation 24, CEDAW made enormous contribution by elucidating the obligations imposed by the right to health in the particular context of article 12 of CEDAW.<sup>89</sup> The Committee noted that states are under an obligation to ensure that policies and laws facilitate equal access to health care for women in a non-discriminatory manner. According to the Committee, health care services must be gender sensitive and take into account the peculiar needs of women.<sup>90</sup> This General Comment added impetus to the recognition of the importance of the right to health in respect of the particular circumstances of women and their historically vulnerable position. Its focus is the elimination of discrimination and the achievement of equality for women in the sphere of health.<sup>91</sup>

The regime of CEDAW can be bolstered into action and relevance to women in Africa by a combined application of its provisions alongside the African Women's Protocol in the arena of HIV/AIDS. After all, both instruments are women specific and address issues of discrimination, violence and other important rights for this discourse. A complementary approach will work perfectly. The package will then be complete.

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<sup>83</sup> General Recommendation No 14 (9th session, 1990).

<sup>84</sup> General Recommendation No 15 (9th session, 1990)

<sup>85</sup> General Recommendation No 19 ( 11<sup>th</sup> session ,1992)

<sup>86</sup> General Recommendation No 21 (13th session, 1994).

<sup>87</sup> General Recommendation No 23 (16th session, 1997).

<sup>88</sup> General Recommendation No 24 (20th session, 1999).

<sup>89</sup> As above.

<sup>90</sup> As above, para 18.

<sup>91</sup> Cook et al (n 45 above) 198-202.

## 2.2.4 The Convention on the Rights of the Child

A reflection on how the Convention on the Rights of the Child (hereafter referred to as CRC)<sup>92</sup> has so far protected women who many of them include children (adolescents and young women), is pertinent. As argued by some writers,<sup>93</sup> girl children face a double jeopardy of discrimination because of the intersection between age and gender. This was, for, example, regrettably manifested in a report by the Ghanaian government submitted pursuant to Article 44 of the CRC in which it was said that age is not a category to benefit from non-discrimination.<sup>94</sup>

The CRC does not have provisions on issues that have great implications for the protection of girls within the African context and which inextricably put them at risk of HIV/AIDS. These include: measures to eliminate Female Genital Mutilation (FGM), special measures for the education of girls coming from marginalised and disadvantaged groups, rights of pregnant children to continue with school after birth, protection of internally displaced children, social security and child soldiers. It therefore missed the peculiarities of an African child. This could partly be because Africa was underrepresented at the drafting stage with only five countries from the continent, notably Maghreb countries which have their own concerns compared to Sub-Saharan Africa where HIV/AIDS is more prevalent.<sup>95</sup>

In one of its General Comments,<sup>96</sup> the CRC recognised that the trend of infection among young people was alarming. That the vast majority of infected women do not know that they are infected and many unknowingly infected their children.<sup>97</sup> The

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<sup>92</sup> The CRC was adopted by the UN General Assembly on 20 November 1989. It entered into force on 2 September 1990. Art.1 of CRC defines a child as every human being below the age of 18 years.

<sup>93</sup> U Ewelukwa 'The Girl Child, African States, and International Human Rights Law Toward a New Framework for Action' in O Nnaemeka & J Ezeilo J (eds.)(2005) *Engendering Human Rights, Cultural and Socio Economic Realities in Africa* 133.

<sup>94</sup> United Nations, Initial reports of States parties due in 1992: Ghana.19/12/85.CRC /C/3/Add.39 (Para 40).

<sup>95</sup> See, generally, BM Dawit on the history of the drafting of the CRC 'The Legal Protection of Children', available at <http://elearn.uwc.ac.za> (accessed 29 July 2006).

<sup>96</sup> General Comment No 3, 2003 on HIV/AIDS and the Rights of the Child (32nd session).

<sup>97</sup> As above.

Committee further lamented that adolescents are also vulnerable to HIV/AIDS because their first sexual experience may take place in an environment in which they have no access to proper information and guidance. It said children who use drugs are at more risk.<sup>98</sup>

In another General Comment,<sup>99</sup> the Committee on the CRC stressed among many things that states parties have an obligation to ensure that all human beings below eighteen years enjoy all the rights set in the Convention without discrimination, including, race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property disability, birth or other status. That these rights included adolescent's sexual orientation and health status (including HIV/AIDS and mental health).<sup>100</sup> The Committee further recognised that all adolescents subject to discrimination are made more vulnerable to abuse, other types of violence and exploitation. That further, their health and development are put at greater risks. That they are entitled to special attention and protection from all segments of society.<sup>101</sup> In this regard, therefore, it can be said that the CRC has played a positive role in the bid to combat HIV/AIDS among young women. The Committee would however have done better if it had interlinked all the rights it discussed in the above General Comment to HIV/AIDS. Then, it would have set a better standard for state parties obligation under the CRC. It dealt with HIV and adolescents in a rather cursory manner.

Other important international developments of relevance to this study are the International Guidelines on HIV/AIDS and Human Rights and its Revised Guideline 6<sup>102</sup> which, *inter alia*, enjoins states to take necessary measures in ensuring equity in the availability and accessibility of quality goods, services and HIV/AIDS, prevention and treatment, including access to anti-retroviral drugs for all persons, and the WHO's new approach to sexual rights which categorises what constitutes sexual rights to include the right to the highest attainable standard of sexual health, and to

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<sup>98</sup> As above.

<sup>99</sup> General Comment 4, 2003 on adolescent health and development, CRC/GC/2003/4).

<sup>100</sup> As above.

<sup>101</sup> As above.

<sup>102</sup> Adopted at the third International Consultation on HIV/AIDS and Human Rights (Geneva 25 July 2002), organized by the Human Rights Office of the United Nations High Commissioner for Human Rights and Joint United Nations Programme on HIV/AIDS.

access to sexual and reproductive health care services.<sup>103</sup> This language and phraseology is akin to that under the CESCRC thereby highlighting its importance in the bid to realise sexual rights. The WHO has also developed several indicators for reproductive health.<sup>104</sup>

## 2.3 Efforts at the African level

### 2.3.1 The African Charter on Human and Peoples' Rights

Feminist writers and others have argued that international law is male biased.<sup>105</sup> That the dominant discourse which takes place thus fails to take into account those outside its parameters, and hence there are viewpoints which are neglected from the mainstream debate. The argument is that such marginalised viewpoints are those of women and that international human rights law as is presently formulated does not take into account their situation.<sup>106</sup> Ginther therefore argues that the dominant group then commands the discourse on human rights and international law.<sup>107</sup>

As mentioned earlier,<sup>108</sup> the protection of women, especially in regard to HIV/AIDS, in the African Charter is dismal, if not absent. This is partly explainable considering the circumstances under which the Organisation of African Unity (OAU) (now the African Union) was formed. The principle objectives of the OAU were to defend the sovereignty and territorial integrity of its member states and to rid Africa of colonialism and racialism.<sup>109</sup> Hence, unlike, for example, the Council of Europe the protection of human rights was not on top of the OAU agenda at this time.<sup>110</sup>

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<sup>103</sup> n 20 above.

<sup>104</sup> World Health Organisation Reproductive health indicators for global monitoring: Report of the Interagency Meeting (2001).

<sup>105</sup> See the seminal article by H Charlesworth; C Chinkin & S Wright, S 'Feminist approaches to international law' (1991) 85 *American Journal of International Law* 613.

<sup>106</sup> S Harding (1986) *The science question in feminism* 186.

<sup>107</sup> K Ginther 'Re-defining international law from the point of view of decolonisation and development of African regionalism' (1982) 26 *Journal of African Law* 49.

<sup>108</sup> See n 39 above.

<sup>109</sup> On the objectives of the OAU, see GJ Naldi (1999) *The Organisation of African Unity* (2<sup>nd</sup> edn, London: Mansell) 2-8; Amate (1986) *Inside the OAU: Pan-Africanism in Practice* (London:

Some writers have recently argued that while the drafters of the African Charter never anticipated the existence of the HIV/AIDS pandemic, the substantive provisions of the African Charter are to some extent flexible enough to address the denial of human rights as a result of HIV/AIDS.<sup>111</sup> That the right to equality and the entitlement to equal protection of the law under article 3 of the Charter can be utilised in this regard.<sup>112</sup> I agree with this position but hasten to add that this is only in a very legalistic sense, a terrain that many women in the continent cannot easily benefit from.

### 2.3.2 The African Charter on the Rights and Welfare of the Child

Despite being drafted and entering into force at a time when HIV/AIDS was competing with malaria in wiping off children in Africa, the African Charter on the Rights and Welfare of the Child (ACRWC)<sup>113</sup> does not address HIV/AIDS in its text. It is only within the Guidelines on State Reporting to the Committee on the Rights of the Child and Welfare of the Children that mention is made of HIV/AIDS.<sup>114</sup> Even so, it is given very little attention under the guidelines. The implications of such inadequacy require no further elaboration, especially in a continent that harbours the highest number of those affected.<sup>115</sup>

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Macmillan) 61-3; T.O. Elias (1988) *Africa and the Development of International Law* (2<sup>nd</sup> edn by R. Akinjide, Dordrecht, Boston, London: Martinus Nijhoff) 124-9 in G J Naldi (2002) 'Future trends in human rights in Africa: The increased role of the OAU?' in Evans (n 41 above) 2.

<sup>110</sup> As above.

<sup>111</sup> S Gumedze 'HIV/AIDS and human rights: The role of the African Commission on Human and Peoples' Rights (2004) 4 *African Human Rights Law Journal* 181 191.

<sup>112</sup> As above. See *Purohit and Moore v The Gambia* Communication 241/2001.

<sup>113</sup> The Charter was adopted on 11 July 1990. It entered into force on 29 November 1999.

<sup>114</sup> Guidelines for Initial Reports of States parties (Prepared by the African Committee of Experts on the Rights and Welfare of the Child pursuant to the provision of Article 43 of the African Charter on the Rights and Welfare of the Child. See guideline 17 on health. Cmtee/ACRWC/211.Rev.2, available at <http://www.africa-union.org/child/Guidelines> (accessed 22 July 2006).

<sup>115</sup> n 26 above.

## 2.4 Changing trends at the global and regional level

### 2.4.1 Global trends: Cairo, Beijing and other developments

In addition to human rights treaties, the right to health has also been addressed in international debates. Some of these debates have culminated in documented consensus statements that have come to be regarded as authoritative.<sup>116</sup> Notable among these are the Programme of Action of the International Conference on Population and Development<sup>117</sup> as well as the Declaration and Programme for Action of the fourth World Conference.<sup>118</sup> The two conferences have come to be referred to as the Cairo and Beijing Processes. They set the momentum for the realisation of sexual and reproductive rights as pivotal in the human rights of women.<sup>119</sup> They were preceded by the developments at the Vienna Conference.<sup>120</sup>

The Action for the Further Implementation of the ICPD observes that governments should ensure that prevention and services for STDs and HIV/AIDS are an integral component of reproductive and sexual health programmes at the primary health-care level.<sup>121</sup> That gender, age-based and other differences in vulnerability to HIV infection should be addressed in prevention and education programmes and services.<sup>122</sup>

The Cairo Programme has suffered a few setbacks in the recent past. The Holy See has criticised the Beijing Declaration, arguing that it was marked by 'exaggerated individualism' and that it gave 'disproportionate attention' to sexual and reproductive health while neglecting the concept of family as a 'fundamental societal unit'.<sup>123</sup> The

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<sup>116</sup> B Toebes 'Towards an improved understanding of the international human right to Health' (1999) 21 *Human Rights Quarterly* 664; Cook et al (n 45 above) 225-228.

<sup>117</sup> n 4 above.

<sup>118</sup> n 5 above.

<sup>119</sup> Cook et al (n 45 above) 11.

<sup>120</sup> n 7 above.

<sup>121</sup> UN Follow-up meeting of the ICPD held in New York between March and June 1999, para 68.

<sup>122</sup> As above.

<sup>123</sup> Countdown 2015, 'Sexual and Reproductive Rights For all', available at [www.freechoicesaveslives.org](http://www.freechoicesaveslives.org) (accessed 17 August 2006).



US has since then also retreated from the Programme of Action following pressure from religious and social groups.<sup>124</sup> The good news is that the regime envisioned in the African Women's Protocol is very close to those under ICPD and Beijing. The Cairo agenda can therefore still go on.

Other important international developments that can be built upon to realise the implementation of HIV/AIDS related programmes and targets are the Millennium Development Goals (MDGs)<sup>125</sup> and the Declaration of Commitment on HIV/AIDS.<sup>126</sup> This Declaration and the MDGs can be used together with the African Women's Protocol to provide realistic avenues for change in the fight against the pandemic.

#### **2.4.2 Regional changes: Special Rapporteur and other developments**

I agree with Murray that although the African Charter only dismally protects women, there is every evidence and effort to bring women issues on board.<sup>127</sup> There is a demonstrable willingness by the African system and the African Commission to bypass the dichotomies, which is pivotal to the protection of the rights of women. The African Commission's approach to women's rights indicates both an attempt to highlight the concerns and also to mainstream debate into its existing procedures.<sup>128</sup> Some of the major changes within the continent that should provide a springboard to the implementation of the African Women's Protocol include the appointment of a Special Rapporteur on the Rights of Women whose mandate was to study women's

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<sup>124</sup> Center for Reproductive Rights, *The Holy See at the United Nations: An Obstacle to Women's Reproductive Health Rights* (2000), available at [www.crlp.org/pub-bp-holysee.html](http://www.crlp.org/pub-bp-holysee.html) (accessed 19 August 2006).

<sup>125</sup> UN Millennium Development Goals, available at [www.un.org/millenniumgoals](http://www.un.org/millenniumgoals) (accessed 11 July 2006). On the human rights aspects of the MDGs, see P Alston 'Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Goals' (2005) 6 *Human Rights Quarterly* 755.

<sup>126</sup> The Heads of State and Government and Representatives of States and Governments assembled at the UN for a special session of the General Assembly. This took place from 25-27 June 2001. This was in accordance with Resolution 55/13.

<sup>127</sup> R Murray, 'The African Commission on Human and Peoples' Rights and international law' in R Murray 'A feminist perspective on reform of the African human rights system' (2002) 2 *African Human Rights Law Journal* 205 206.

<sup>128</sup> As above.

rights in Africa.<sup>129</sup> The Rapporteur would also assist governments in preparing policies to protect women's rights in Africa. Also important, is the emerging work of the Pan-African Parliament and NEPAD.<sup>130</sup> Their work is gaining momentum, and human rights issues are playing a central role. Some critics have however lambasted NEPAD for focusing on promoting economic growth and political stability, and that its activities do not adequately integrate HIV/AIDS issues into its key areas of focus.<sup>131</sup>

Other developments at the African Union include the Tunis Declaration on AIDS and the Child in Africa,<sup>132</sup> in which African states committed themselves to addressing HIV/AIDS as it affects children, the Abuja Declaration on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases,<sup>133</sup> in which African states also undertook to fight HIV/AIDS, Tuberculosis and Malaria. African states also more recently declared to address gender related issues in the Solemn Declaration on Gender Equality.<sup>134</sup>

It is instructive to mention the establishment of the African Human Rights Court.<sup>135</sup> This court will complement the protective mandate of the African Commission on Human and Peoples' Rights, the quasi-judicial implementation body of the African Charter on Human and Peoples' Rights. The African Human Rights Court is also

<sup>129</sup> J Harrington 'Special Rapporteurs of the African Commission on Human and Peoples' Rights' (2001) 2 *African Human Rights Law Journal* 247 265; E. Luswata Kawuma (2003) 'Reinvigorating Women's Rights in Africa: The case for the Special Rapporteur and Additional Protocol'. Masters Thesis, Universit e Catholique d'Afrique Central Yaound e (unpublished).

<sup>130</sup> The NEPAD Document is available at <http://www.nepad.org/AA0010101.pdf> (accessed 12 July 2006). The NEPAD website <http://www.nepad.org> also contains other NEPAD texts such as the communiqu es, legal instruments and reports.

<sup>131</sup> For a critique on human rights in NEPAD, see generally, E Baimu 'Human rights in NEPAD and its implications for the African human rights system' (2002) 2 *African Human Rights Law Journal* 301.

<sup>132</sup> Adopted by the OAU at the Assembly of Heads of State and Governments in Tunis, Tunisia-AHG/Decl 1 (XXX) 1994, a Resolution on Regular Reporting of the Implementation Status of OAU Declarations on HIV/AIDS in Africa.

<sup>133</sup> Adopted at the Thirty-second Ordinary Session of the Heads of State and Governments of the OAU Assembly-AHG/Res 247 (XXXII) 1996, available <http://www.onusida-aoc.org/Eng/Abuja%Declaration.htm> (accessed 20 September 2006).

<sup>134</sup> Adopted in Maputo by the AU Assembly of Heads of State and Government in Addis Ababa, Ethiopia, in July 2004.

<sup>135</sup> The Court is established under the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights which entered into force on 25 January 2004.

mandated under the African Women's Protocol as the forum for interpreting matters arising from its application and implementation of the African Women's Protocol.<sup>136</sup>

## 2.5 Conclusion

Despite the failure to directly address sexual health and HIV/AIDS in their texts, which can be attributed to the time of their drafting, the above instruments and the later interpretations by their respective monitoring bodies can be used together with the African Women's Protocol to achieve this end. The nature of state obligation embedded in the conventions and elucidated in General comments and Recommendations are the most useful. The growth of the body of human rights in the region is a springboard for the implementation.



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<sup>136</sup> Art.27.

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## CHAPTER THREE

### EXPLORING THE POTENTIALS AND POSSIBILITIES UNDER THE AFRICAN WOMEN'S PROTOCOL

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#### 3.1 Introduction

The African Women's Protocol represents a radical and fundamental shift from an era that sought to regulate and shroud women's sexuality in myth. A move from an era that required regulation of women's sexuality through campaigning rhetoric and legal prohibitions.<sup>137</sup> The African Women's Protocol has made a direct provision on health and reproductive rights within which it has made specific mention of HIV/AIDS.<sup>138</sup> This chapter commences with a brief history of the African Women's Protocol, showing the role of NGOs and civil society in its adoption (see part 3.2). The chapter proceeds to look at an overview of the provisions in the African Women's Protocol, highlighting the broad array of both civil-political and socio-economic rights (see part 3.3). The chapter then discusses how the rights under the African Women's Protocol can be utilised to empower women to prevent and live amidst the epidemic (see part 3.4). The chapter highlights some of the weaknesses of the African Women's Protocol (see part 3.5), and concludes by applauding the regime of the African Women's Protocol in providing a framework that can be utilised to fight the epidemic from a human rights point of view (see part 3.6). In discussing all the above, I make a few recommendations.

#### 3.2 The history of the African Women's Protocol

Realising the inadequacy of the African Charter in protecting women (see 3.2.1), the African system decided to remedy the 'omission'. In this context, over a decade ago,

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<sup>137</sup> For a discussion on how law sought to regulate sexuality, see, generally, C Smart (ed.) (1992), *'Regulating Womanhood: Historical Essays on Marriage, Motherhood and Sexuality.'*

<sup>138</sup> Art.14(2).

non-governmental organisations (NGOs) expressed concern about the abuses of women's rights on the continent, which resulted in the initiation of work on a protocol on the rights of women by the African Commission on Human and Peoples' Rights, at its 17th Session in 1995. In the same year, the Organisation for African Unity (OAU) Assembly endorsed a recommendation by the African Commission on the elaboration of such a protocol. The process was accelerated by the appointment of a Special Rapporteur on Women's Rights and civil society organisations that participated in the elaboration of the African Women's Protocol.<sup>139</sup>

The African Women's Protocol was eventually adopted in Maputo in July 2003 and it entered into force on 25 November 2005, 30 days after the deposit of the fifteenth instrument of ratification.<sup>140</sup> The following twenty countries have ratified the instrument: Benin, Burkina Faso, Cape Verde, Comoros, Djibouti, The Gambia, Libya, Lesotho, Mali, Malawi, Mozambique, Mauritania, Namibia, Nigeria, Rwanda, South Africa, Senegal, Seychelles, Zambia and Togo.<sup>141</sup>

### 3.3 Overview of the African Women's Protocol

The African Women's Protocol contains both civil and political rights<sup>142</sup> and social, economic and cultural rights.<sup>143</sup> It is the first human rights instrument to have substantial provisions on reproductive rights and even more importantly for this study, to confront HIV/AIDS head-on. In brief, the African Women's Protocol requires states to: ensure that the right to health of women, including sexual and reproductive health is respected and promoted;<sup>144</sup> provide adequate, affordable, and accessible health services to women;<sup>145</sup> establish and strengthen prenatal, delivery, and post natal health and nutritional needs services for women during pregnancy and while

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<sup>139</sup> Keynote address by H.E. Mrs. Julia Dolly Joiner Commissioner for Political Affairs, Commission of the African Union, during a symposium on the African Union's Protocol on The Rights of Women in Africa on 21 January 2006, Khartoum, The Sudan, available at [www.africanunion.org](http://www.africanunion.org) (accessed 12 March 2006).

<sup>140</sup> Available at [www.africanunion.org](http://www.africanunion.org) (accessed 12 March 2006).

<sup>141</sup> As at 9 August 2006, available at [www.wildaf-ao.org/eng](http://www.wildaf-ao.org/eng) (accessed 25 October 2006).

<sup>142</sup> Arts.2,3,4,8 & 9.

<sup>143</sup> Arts.5,6,12,13,15,16,17,18 & 19.

<sup>144</sup> Art.14.

<sup>145</sup> Art.14(2)(a).

breastfeeding;<sup>146</sup> prohibit all medical and scientific experiments on women without their consent;<sup>147</sup> guarantee women's right to consent to marriage;<sup>148</sup> set the minimum age of marriage at 18 years;<sup>149</sup> ensure equal rights of men and women in marriage;<sup>150</sup> protect women against all forms of violence during armed conflict and consider such acts war crimes;<sup>151</sup> enact and enforce laws prohibiting all forms of violence against women, unwanted or forced sex;<sup>152</sup> and reform laws and practices that discriminate against women.<sup>153</sup>

### 3.4 Utility of the rights in combating HIV/AIDS

Earlier rights-based approaches to HIV/AIDS had to identify rights that can be used to combat HIV/AIDS.<sup>154</sup> The courts too have had to find rights which could be implied to benefit HIV positive people.<sup>155</sup> Others have clustered rights that can be used to realise sexual and reproductive health.<sup>156</sup> The African Women's Protocol has however provided directly on HIV/AIDS<sup>157</sup> which makes the discourse easier. In any case, clustering of rights is fluid and can be arranged in different ways depending on the issues at stake and people's perceptions. The interrelated, indivisible, mutual, symbiotic and supportive nature of rights cannot be over emphasised. Separately

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<sup>146</sup> Art.14(2)(b).

<sup>147</sup> Art.4(2)(h).

<sup>148</sup> Art.6(a).

<sup>149</sup> Art.6(b).

<sup>150</sup> Art.6(a).

<sup>151</sup> Art.11.

<sup>152</sup> Art.4(2)(a).

<sup>153</sup> Art.2.

<sup>154</sup> Eg, C Kisoona; M Caesar & Jithoo T (2002) *Whose Rights: AIDS Review* 31.

<sup>155</sup> Eg in *D v United Kingdom* (1997) 24 EHRR 423, the European Court on Human Rights held a violation of the right to human dignity a purported deportation of an HIV-positive immigrant to his country of origin where treatment could not be guaranteed. See also, *Hoffman v South African Airways* 2001 (1) SA 1(CC); 2000 (11) BCLR 1211 (CC).

<sup>156</sup> International Planned Parenthood Federation (IPPF) *Charter on Sexual and Reproductive Rights* (London, IPPF, 1998); CEDAW General Recommendation No.24; Special Rapporteur on Violence against Women (1999b), paras 3-4. See also Centre for Reproductive Rights (CRR) and International Programme on Reproductive and Sexual Health Law University of Toronto *Bringing Lives to Bear: An analysis of the Work of the United Nations Treaty Monitoring Bodies on Reproductive and Sexual Rights* (New York, CRR, 2001) 14-15.

<sup>157</sup> Art.14(1)(d),(e).

expressed rights are not insulated from others, but interact dynamically with and inform other rights.

### **3.4.1 Direct rights relating to sexual and reproductive health**

Article 14 of the African Women's Protocol provides:

1. States parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted. This includes:

- (a) the right to control their fertility;
- (b) the right to decide whether to have children, the number of children and the spacing of children;
- (c) the right to choose any method of contraception;
- (d) the right to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS;
- (e) the right to be informed on one's health status and on the health status of one's partner, particularly if affected with sexually transmitted infections, including HIV/AIDS, in accordance with internationally recognised standards and best practices;
- (f) the right to have family planning education.

2. States parties shall take all appropriate measures to:

- (a) provide adequate, affordable and accessible health services, including information, education and communication programmes to women especially those in rural areas;
- (b) establish and strengthen existing pre-natal, delivery and post natal health and nutritional services for women during pregnancy and while they are breastfeeding;
- (c) protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.

- **Right to choose any method of contraception**

The African Women's Protocol provides that states parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted.<sup>158</sup> That this includes, among others, the right to chose any method of contraception.<sup>159</sup>

Since 2000, a number of agencies around the world have called for a better collaboration between family planning and AIDS programs because avoiding pregnancy can help reduce perinatal transmission rates.<sup>160</sup> In this context, it is important that women living with HIV be informed on issues related to contraceptive methods and HIV/AIDS (such as possible interactions between hormonal contraceptives and drugs used to treat opportunistic infections; that they retain the right to make informed decisions about contraceptive use) that is, not be forced to use contraceptive methods controlled by health-care providers, such as injectables and Norplant.<sup>161</sup> The insistence on these methods can however be attributed to trends in globalisation which is discussed in the next chapter (see chap.4 part 4.2).

Family planning associations and governmental reproductive health programmes often have non-HIV-specific printed materials available, and access to supplies in rural areas still leaves a lot to be desired. However, the range of contraceptive options can be limited and little information appears to be available regarding contraception in the context of HIV infection. Health care providers' preferences still determine how much and what kind of information women receive about contraception.<sup>162</sup>

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<sup>158</sup> Art.14(1).

<sup>159</sup> Art.14(1)(c).

<sup>160</sup> M de Bruyn *Reproductive rights for women affected by HIV/AIDS – A project to monitor Millennium Development Goals 5 and 6*, 4.Chapel Hill, NC, 1 Ipas, available at [www.ips.org](http://www.ips.org) (accessed 12 August 2006).

<sup>161</sup> For a discussion on prescriptive provision of family planning methods, See NK Purewal 'New Roots for Rights: Women's Response to Population and Development Policies in S Rowbotham & S Linogle *Women resist globalisation: mobilising for livelihood and rights* Zed Books, London New York. 108.

<sup>162</sup> United Nations, New York (2004) *Population, Reproductive Rights and Reproductive Health with Special Reference to HIV/AIDS: A Concise Report*. 63.



There has been criticism of use of condoms as a male controlled method.<sup>163</sup> When the issue of family planning is discussed with women living with HIV, emphasis continues to be placed on use of the male condom.<sup>164</sup> In a recent study, it was found that women were encouraged by health care workers to use condoms because they protect from new strains of HIV.<sup>165</sup> I argue that if women are empowered, they can negotiate the use of condoms. A possible way of empowering women in that regard is through strengthening education, information and communication services as envisaged under the African Women's Protocol.<sup>166</sup> This is discussed later in this chapter (see part 3.4.2(i),(ii)).

Reproductive health services have largely been oriented towards serving needs of pregnant married women.<sup>167</sup> Consequently, young people, especially sexually active women, do not seek such services for reasons that include inconvenient schedules and locations, lack of privacy and confidentiality, fear of social stigma, judgemental attitudes of service providers, and unaffordable fees. Lack of access to health services becomes a serious threat to adolescent reproductive health, particularly of young women, owing to their physiological vulnerabilities to STIs and HIV infections. The situation of adolescents is discussed further down in this chapter (see chap.3, part 3.4.2).

States and other stakeholders should take note that the protection and application of the right to comprehensive, quality reproductive health-care services becomes extremely crucial as the HIV epidemic continues to spread fastest among young people and women. It has become evident over the last two decades that every aspect of reproductive health-care has a strategic role to play in AIDS prevention and care. The African Women's Protocol enjoins the states parties to take all appropriate measures to provide adequate, affordable and accessible health services, including information, education and communication programmes to women especially those in rural areas.<sup>168</sup> Women should therefore be enabled by the state to be able to make

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<sup>163</sup> de Bruyn (n 160 above) 5.

<sup>164</sup> As above.

<sup>165</sup> As above.

<sup>166</sup> Art.14(2)(a).

<sup>167</sup> United Nations (n 162 above) 63.

<sup>168</sup> Art.14(2)(a).

choices in contraceptive methods and provided information on how these interact with HIV/AIDS.

- **Right to self-protection and to be protected from STIs and HIV/AIDS**

The African Women's Protocol provides that states parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted.<sup>169</sup> That this includes among others the right to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS.<sup>170</sup> It has been established that there is a strong correlation between conventional STI and HIV transmission.<sup>171</sup> Both ulcerative and non-ulcerative STIs have been shown to increase the risk sexual transmission of HIV. In addition, HIV infection complicates the management, control of other STIs such as chancroid, genital herpes and genital warts. WHO estimates the largest number of new STI infections occurred in Asia, followed by sub-Saharan Africa.<sup>172</sup>

The African Women's Protocol calls upon states parties to take appropriate measures to, *inter alia*, provide adequate, affordable and accessible health services to women, especially those in rural areas.<sup>173</sup> It has been found that the prevention tools that are important in helping women avoid HIV infection are Voluntary Counselling and Testing (VCT) and Post-exposure Prophylaxis (PEP).<sup>174</sup> State parties are therefore enjoined to enable women to learn whether they are HIV-positive or not at a time of their choice and not only when they are pregnant. Expansion of VCT to reach women outside the ante-natal care setting is therefore of great importance, particularly since counselling before pregnancy can help HIV-positive women consider their options for parenting and HIV-negative women consider their options for safer options for protecting themselves against transmission.

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<sup>169</sup> Art.14(1).

<sup>170</sup> Art 14(1) (d).

<sup>171</sup> United Nations (n 162 above) 53.

<sup>172</sup> As above.

<sup>173</sup> Art.14(2)(a).

<sup>174</sup> de Bruyn (n 160 above) 3.

The Committee on Social, Economic and Cultural Rights recommended steps that can be taken to achieve effective provision of services.<sup>175</sup> The Committee stressed the requirements of availability, accessibility, acceptability and quality.<sup>176</sup> It explained that 'availability' requires that the public health care facilities, goods and services be available in sufficient quantity. 'Accessibility' has the overlapping dimensions of non-discrimination, physical accessibility, economic accessibility and information accessibility.' 'Acceptability' requires that the health care services that are offered be ethically and culturally acceptable. 'Quantity' ensures that it is not mere quantity that matters. Services must also be medically appropriate and of good quality.<sup>177</sup>

An illustrative case of the obligation placed upon states to provide services in a manner reasonable is the South African case of *Minister of Health and Others v Treatment Action Campaign and Others*.<sup>178</sup> This was an appeal by the government against the decision of the High Court in *Treatment Action Campaign and Others v Minister of Health and Others*.<sup>179</sup> The case is popularly referred to as the TAC case. The applicants had challenged the decision of government to confine the dispensation of Nevirapine to 18 pilot sites only (two of each of the country's nine provinces) for the purpose of prevention of mother-to-child-transmission of HIV (PMCT).

Among many arguments by the applicant was the government's failure to provide universal access to anti-retroviral therapy in the public health sector to prevent mother-to-child transmission of HIV. That it constituted a series of breaches of the Constitution,<sup>180</sup> which enjoins states to respect, protect, promote and fulfil the rights in the Bill of Rights. The applicant also argued that the government was in breach of its obligation under the Constitution,<sup>181</sup> which guarantees everyone access to health care services, including reproductive health. The government argued that it had confined Nevirapine to the 18 sites because it had reservations about the safety and

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<sup>175</sup> n 70 above.

<sup>176</sup> As above.

<sup>177</sup> n 63 above, para 12.

<sup>178</sup> 2002 10 BCLR 1033 (CC).

<sup>179</sup> 2002 4 BCLR 356 (T).

<sup>180</sup> Sec.7(2) of the Constitution of the Republic of South Africa. Act 108 of 1996.

<sup>181</sup> Sec.27.

wished to monitor its side effects.<sup>182</sup> The government also argued that it wished to study the social, economic and public health implications of providing a nationwide programme.<sup>183</sup>

The appeal was determined by the application of the provision on the rights to access to health care services, including reproductive health care.<sup>184</sup> The Court held that while government was better placed than the courts to formulate and implement policy on HIV/AIDS, including measures for PMCT, it had failed, nonetheless, to adopt a reasonable measure to achieve the progressive realisation of the right of access to health care services.<sup>185</sup> According to the court, the reasons given by government to justify limiting its Nevirapine programme to the pilot sites had failed to distinguish between the need to evaluate a programme for PMCT, and the need to provide access to health care services required by those who need did not have access to the pilot sites.<sup>186</sup> The *TAC* case relied on the groundbreaking case of *Government of South Africa v Grootboom* (popularly referred to as the *Grootboom* case),<sup>187</sup> in which the court stressed, *inter alia*, that the state is no longer at liberty to ignore the needs of those who are in a crisis and in desperate need in favour of long-term strategies.<sup>188</sup>

Some critics have lambasted the *TAC* case for summarising the exclusion of women from benefiting from HIV/AIDS treatment, and thus being discriminatory.<sup>189</sup> The case, nevertheless demonstrates the level of state obligation required in the realisation of socio-economic rights, as is the case of provision of preventive services in regard to HIV/AIDS. It establishes a standard that should take into account the immediate

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<sup>182</sup> *TAC* (n 178 above) para 11.

<sup>183</sup> As above, para 14.

<sup>184</sup> Sec.27.

<sup>185</sup> *TAC* (n 178 above) para 80.

<sup>186</sup> As above, para 67.

<sup>187</sup> 2000 3 BCLR 227 (c).

<sup>188</sup> As above, para 68; S Liebenberg 'The rights to social assistance: The implications of *Grootboom* for policy reform in South Africa' (2001) 17 *South African Law Journal on Human Rights* 232 254.

<sup>189</sup> For a critique on the *TAC*, See, generally, E Durojaye 'Advancing gender equity in access to HIV treatment through the Protocol on the Rights of Women in Africa' (2006) 6 *African Human Rights Law Journal* 188 198. See also, E Baimu 'The government's obligation to provide anti-retrovirals to HIV-positive pregnant women in an African human rights context: The South African *Nevirapine* case' (2002) 2 *African Human Rights Law Journal* 160.

needs of the most vulnerable and needy. No wonder Ngwena described *TAC* as a bold decision in that it 'countermanded government policy and effectively prescribed what it deemed to be equitable health policy'.<sup>190</sup>

I suggest that states party to the African Women's Protocol should construe their obligations in a similar style. Such an approach would serve well to cater for women as a vulnerable group in the context of HIV/AIDS. It is worth noting that rural are given specific mention under the African Women's Protocol,<sup>191</sup> making it even more contextual. The contextual and transformative approach applied by South African jurisprudence in regard to socio-economic rights is discussed as a way forward in chapter four (see chap.4, part 4.4.1).

- **Right to be informed of one's status and status of one's partner**

The African Women's Protocol calls upon states parties to ensure that the right to health of women, including sexual and reproductive health is respected and promoted.<sup>192</sup> That this includes among others the right to be informed of one's health status and status of one's partner.<sup>193</sup>

Traditionally the right to information has been understood to guarantee freedom to seek, receive, and impart information and ideas free from government interference.<sup>194</sup> However, some commentators now argue that the right has evolved to the point where governments have concrete and immediate obligations to provide information that is necessary for the protection and promotion of reproductive health, not just to restrain from interfering with it.<sup>195</sup>

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<sup>190</sup> C Ngwena 'Access to anti-retroviral therapy to prevent mother-to-child transmission of HIV as a socio-economic right: An application of section 27 of the Constitution' (2003) 18 *South African Public Law* 83.

<sup>191</sup> Art.14(2)(a).

<sup>192</sup> Art.14(1).

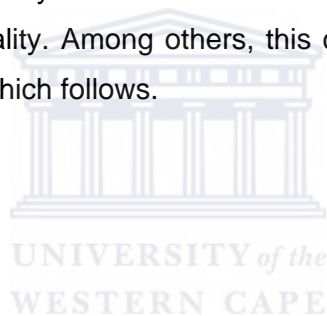
<sup>193</sup> Art.14(1)(e).

<sup>194</sup> S Colivier (ed.)(1995) *The Right to Know: Human Rights and Access to Reproductive Health Information* 39.

<sup>195</sup> As above.

The claim that governments have positive duties to ensure access to information that is necessary for individuals to protect their health was supported by the decision of the European Court of Human Rights.<sup>196</sup> The court held that a government ban on counselling and on circulation of information on where to find legal abortion services in another country violated the right to impart and receive information.<sup>197</sup> The court emphasised the connection between limited access to information and health risk.<sup>198</sup>

The obligation upon states here is that they should be able to provide the information that women need in order to protect themselves, including information about their partners. This is by no means one of the most challenging provisions for any government.<sup>199</sup> Some authors have criticised this provision as assuming a marriage based on equal power between spouses, which is not often the case.<sup>200</sup> It has been shown that attempts by women to ask their husbands to use condoms can lead to violence.<sup>201</sup> This delicate position leaves states with the task of empowering women as the one only way in which they can be enabled to negotiate condom use and other matters related to their sexuality. Among others, this can be through education and information, a discussion of which follows.



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<sup>196</sup> *Open Door Counselling and Dublin Well Women v. Ireland* (1992), 15 EHRR 244 (European Court of Human Rights).

<sup>197</sup> As above.

<sup>198</sup> As above, para 77.

<sup>199</sup> There is a delicate balance to be drawn between protecting the right to privacy and confidentiality of a person diagnosed as being HIV positive and those with whom she may have (unprotected) sexual intercourse thus opening them up to infection. Shisano & Zungu-Dirwayi, 'HIV/AIDS in South Africa: Entitlement and Rights to Health-Implications of the 2002 HIV Survey' in J Murison et al (eds) (2004) *Remaking Law in Africa: Transitionalism Persons and Rights*, 313, in F Banda (2005) *Women, Law and human rights: an African perspective* 192.

<sup>200</sup> Cf 'Gender Imbalance Contributing to the Spread of AIDS-Legislator' *Herald* (Harare, 14 October 2003), available at <http://www.allafrica.com/stories/printable/200310140275.html> (accessed 8 July 2006).

<sup>201</sup> Cf Southern African Research and Documentation Centre (SARDC) *Beyond Inequalities: Women in Zambia* (1998) in Banda (n 199 above) 193.

### 3.4.2 Axiomatically related rights

- **Information, Education and Training**

It is important to note that the African Women's Protocol provides for the right to information and education within two contexts. It provides for education and information within the prevention context, loosely referred to as sexual health education,<sup>202</sup> and education and training in 'their own right'.<sup>203</sup> The two contexts are mutually inclusive and can both be applied to build the capacity of women in order to enable them negotiate their sexuality in an informed manner.

#### **(i) Information and Education in the preventive context**

The African Women's Protocol enjoins states party to take all appropriate measures to provide adequate, affordable and accessible health services, including information, education and communication programmes to women especially those in rural areas.<sup>204</sup> The meanings of 'adequate', 'affordable' and 'accessible' have already been clarified above.<sup>205</sup>

A study by UNICEF showed that many young women do not know how AIDS is transmitted or how to use a condom.<sup>206</sup> That only 50 per cent in sub-Saharan Africa knew these facts.<sup>207</sup> States party should ensure that sexual education reaches everyone, in particular young people, both in and out of school, and hard to reach groups. Acting on social and legal obstacles will require proactive bold policy decisions at the national level and local levels so that broad policy decisions at the national and local levels may receive legitimacy and support. Framing education programmes around human rights principles reduces exclusion of ordinary

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<sup>202</sup> Art.14(2)(a).

<sup>203</sup> Art.12.

<sup>204</sup> Art.14(2)(a).

<sup>205</sup> n 63 & n 70 above.

<sup>206</sup> Data prepared by UNICEF for the United Nations Statistics Division; Millennium Indicators Database, available at <http://www.millenniumindicators.un.org/> (accessed 14 August 2006).

<sup>207</sup> As above.

marginalised groups. In addition, sexual health education must take into account the local dynamics of the epidemic, to ensure that messages and interventions address both the risk and the vulnerability factors of most 'identifiable groups'.<sup>208</sup>

Wide scale information and skills-building programmes that involve public and private sectors are needed to match the epidemic's scale. They must use all avenues of education, engaging the strengths of community institutions such as schools, local governments, churches and mass media. Uganda's effectiveness in reducing its HIV prevalence over a period of 10 years was largely due to preventive education campaigns that mobilised leaders at all levels and in all sectors.<sup>209</sup> South Africa has, for example, made life skills and HIV/AIDS information programmes a part of its core efforts to prevent transmission of HIV. HIV/AIDS education is now a compulsory part of the school curriculum. This initiative of the Education in conjunction with the Department of Health is aimed at providing information about HIV, among other programmes. Topics covered in this programme include self-esteem, understanding sexuality, preventing HIV and prevention of STDs.<sup>210</sup> Other countries should emulate this.

With regard to recent trends in sexual initiation, some studies have documented a postponement of the onset of sexual activity in several countries.<sup>211</sup> Expanded education, delayed marriage and increased awareness of health and social risks of early sexual initiation may account for part of this trend. There is recent evidence that in Uganda, one of the African countries most severely affected by the HIV/AIDS epidemic and where a vigorous prevention programme has been implemented, delayed sexual initiation among both women and men has contributed significantly to the recent drop in youth's HIV infection rates.<sup>212</sup>

Courts have generally tended to favour sex education in schools, for example, the European Court of Human Rights addressed the human rights dimensions of a state

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<sup>208</sup> Smyre (n 30 above) 65.

<sup>209</sup> As above.

<sup>210</sup> AIDS Law Project, Regional Audit on HIV/AIDS, Human Rights and Other Relevant Issues, 18.

<sup>211</sup> Blanc & Way (1998) *Sexual behaviour and contraceptive knowledge and use among adolescents in developing countries*. *Studies in Family Planning*, in United Nations (n 162 above) 43.

<sup>212</sup> UNAIDS, 1998.



requiring a sex education curriculum to be taught in its schools.<sup>213</sup> The parents challenged sex education on religious and moral grounds. The court required sensitivity to parents' views, but upheld a compulsory sex education course in the state's schools because the 'curriculum is conveyed in an objective, critical and pluralistic manner [and does not] pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions'.

States party are therefore called upon to ensure sexual health education among women. Armed with the necessary information concerning HIV/AIDS, women can be in position to negotiate their sexuality. In this way, they can go a long way to protect themselves from infection in an informed manner.

## **(ii) Education and Training 'in their own right'**

On education and training, the African Women's Protocol obliges states parties to take all appropriate measures to eliminate all forms of discrimination against women and guarantee equal opportunity and access in the sphere of education and training;<sup>214</sup> eliminate all stereotypes in textbooks, syllabuses and the media, that perpetuate such discrimination;<sup>215</sup> protect women, especially the girl-child from all forms of abuse, including sexual harassment in schools and other educational institutions and provide for sanctions against the perpetrators of such practices;<sup>216</sup> provide access to counselling and rehabilitation services to women who suffer abuses and sexual harassment;<sup>217</sup> integrate gender sensitisation and human rights education at all levels of education curricular including teacher training.<sup>218</sup> The African Women's Protocol further enjoins states to take specific positive action to promote literacy among women;<sup>219</sup> promote education and training for women at all levels<sup>220</sup> and promote the enrolment and retention of girls in schools and other

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<sup>213</sup> *Kjeldson v. Denmark* (1976) 1 EHRR, para. 53.

<sup>214</sup> Art.12(1)(a).

<sup>215</sup> Art.12(1)(a).

<sup>216</sup> Art.12(1)(c).

<sup>217</sup> Art.12(1)(d).

<sup>218</sup> Art.12(1)(e).

<sup>219</sup> Art.12(2)(a).

<sup>220</sup> Art.12(2)(b).

training institutions and the organisation of programmes for women who leave school prematurely.<sup>221</sup>

New analyses suggest that if all children received a complete primary education, around 700,000 cases of HIV in adults could be prevented-seven million in a decade.<sup>222</sup> In 17 countries in Africa, studies have shown that better-educated girls tended to delay having sex and were more likely to insist that their partner use a condom.<sup>223</sup> Research from Nigeria, Bangladesh and Mexico confirms that educated women tend to communicate more with their husbands, to be more involved in family decisions and to be more respected: more able in other words to plan what happens in their lives.<sup>224</sup> A number of studies have also shown that education plays an influential role in the timing and context of young people's sexual initiation.<sup>225</sup> The association between women's higher educational level and later onset of sexual activity is well established in sub-Saharan Africa, although the association between education and premarital sexual behaviour varies across countries.<sup>226</sup>

However, knowledge is not enough on its own to change behaviour. Education is necessary to give people the skills they require to be able to act on the skills they acquire. There is thus a strong relation between girls' access to education and literacy and their capacity to protect and improve their sexual health. In any case, states do not have to restrict their programmes within formal schools because education does not take place only in schools. Great changes have been brought about in many communities by adult education programmes, discussion groups, mother's clubs, agricultural extension work, and health worker training.<sup>227</sup> The above provision on education is quite broad and comprehensive providing all avenues for

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<sup>221</sup> Art.12(2)(c).

<sup>222</sup> Global Campaign for Education 'Learning for All Will Save Millions of Young People From HIV/AIDS' in Facts & Figures on HIV/AIDS. Global and Regional Statistics. *Worldwide Trends*, available at <http://www.unifem.org/gender-issues/hiv-aids/facts-figures> (accessed 14 August 2006).

<sup>223</sup> World Bank. 2002. Education and HIV AIDS: A Window for Hope in n 181 above.

<sup>224</sup> N Sadik *Investigating in Women: The focus of the 90s*, New York, UNFPA, 1989 22 in Smyre (n 30 above) 42.

<sup>225</sup> Blanc (2000) *The Relationship between Sexual behaviour and Level of Education in Developing Countries*. Geneva: UNAIDS in United Nations (n 161 above) 43.

<sup>226</sup> Gaga & Meekers (1994) *Sexual activity before marriage in sub-Saharan Africa. Social biology in United Nations* (n 162 above) 43.

<sup>227</sup> Smyre (n 30 above) 43.

the advancement of women. The holistic nature of the African Women's Protocol would therefore mean that states are supposed to ensure that education is delivered in the broadest way possible. It is beyond the scope of this study to explore all the contours of the African Women's Protocol provisions on education. Suffice is to say that education is empowering and should be advanced in order to arm with women with life skills that can enable them live amidst the pandemic.

- **Violence**

The African Women's Protocol has defined violence against women as all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threats to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflict or of war.<sup>228</sup> States parties are enjoined to take appropriate and effective measures to: enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether in the violence takes place in private or public;<sup>229</sup> adopt such other legislative, administrative, social and economic measures as may be necessary to ensure the prevention, punishment and eradication of all forms of violence against women;<sup>230</sup> identify the causes and consequences of violence against women and take appropriate measures to prevent and eliminate such violence;<sup>231</sup> actively promote peace education through curricular and social communication in order to eradicate elements in traditional and cultural beliefs, practices and stereotypes which legitimize and exacerbate the persistence and tolerance of violence against women;<sup>232</sup> punish the perpetrators of violence against women and implement programmes for rehabilitation of women victims;<sup>233</sup> establish mechanisms and accessible services for effective information, rehabilitation and reparation for victims of violence against women;<sup>234</sup> and provide adequate budgetary

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<sup>228</sup> Art.1(j).

<sup>229</sup> Art.4(2)(a).

<sup>230</sup> Art.4(2)(b).

<sup>231</sup> Art.4(2)(c).

<sup>232</sup> Art.4(2)(d).

<sup>233</sup> Art.4(2)(e).

<sup>234</sup> Art.4(2)(f).

and other resources for the implementation and monitoring of actions aimed at preventing and eradicating violence against women.<sup>235</sup>

Violence against women in its many forms, especially from an intimate partner, has an impact on their reproductive and sexual health. The links between violence and sexual health are both direct and indirect. Violence can be an important in acquiring an STI. Forced sex can increase the risk of HIV transmission through abrasions and cuts if the partner is infected with HIV.<sup>236</sup> States should therefore pursue all means to eliminate and eliminate violence as a means to combat HIV/AIDS among women.

- **Sexual violence**

Emphasis on the impact of HIV/AIDS is in no way to suggest that sexual violence would be acceptable if the danger of contracting HIV/AIDS were not a factor. Although rape is traditionally uncommon in sub-Saharan Africa,<sup>237</sup> there are increasing reports of the rape of young women by older men in HIV incidence countries.<sup>238</sup> Rape and violence against women is particularly marked in South Africa.<sup>239</sup> This has been linked to the effects of apartheid-inspired violence, which so brutalised the black community that aggression became the norm.<sup>240</sup> In South Africa,

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<sup>235</sup> Art.4(2)(1).

<sup>236</sup> WHO, 2004 'Sexual health-a new focus for WHO', available at [www.who.org](http://www.who.org) (accessed 1 September 2006).

<sup>237</sup> Smyre (n 30 above) 99.

<sup>238</sup> B Rwezaura 'Protecting the Rights of the Girl Child in Commonwealth Jurisdictions' in A Brynes; J Connors & L Bik (eds.) (1997) *Advancing the Human Rights of Women: Using International Human Rights Standards in Domestic Litigation*. 144. Cf CEDAW General Recommendation No. 24 para 12 (b). Sexual violence.

<sup>239</sup> Research conducted in the Gauteng region of South Africa revealed that a woman was killed by her partner every four days. L Vetten 'Research into Preventing Intimate Femicide in the Gauteng Province' (2003) 45 *Women's Health Project Review* 14 14. See also Amnesty International 'Kenya: Rape-The Invisible Crime' 14-15, in Banda (n 199 above) 169.

<sup>240</sup> S Armstrong 'Rape in South Africa: An Invisible Part of Apartheid's legacy' in C Sweetman and F de Selincourt (eds) (1994) *Population and Reproductive Rights* 35 36, in Banda (n 199 above) 171.

for example, there is a belief that having sex with a virgin reduces the risk of infection.<sup>241</sup>

States that have identified these violent practices have to meet their treaty obligation by engaging in awareness programmes and punish perpetrators, for example, South Africa has now embarked on *the Life Skills Education Project* which has been strengthened through *Integrated Strategy for Children*, in conjunction with the Department of Health. This is aimed among others at developing skills, attitudes and motivational support.<sup>242</sup> Such initiatives can help in changing attitudes towards traditional beliefs like the fact that having sex with virgins can cure HIV/AIDS. This is a good example that other countries should emulate.

Another major avenue presenting a big challenge in the fight against HIV/AIDS is sexual violence during armed conflict. There is an increasing evidence of a link between violence against women and the process of armed conflict in Africa. For example the flow of refugees across borders which affects countries whether they are part of the conflict or not.<sup>243</sup> In this regard, the African Women's Protocol provides that state parties undertake to protect asylum seeking women, refugees, returnees and internally displaced persons against all forms of violence, rape and other forms of sexual exploitation, and to ensure that such acts are considered war crimes, genocide and/or crimes against humanity.<sup>244</sup> This makes the African Women's Protocol the only treaty that criminalises sexual violence as genocide. Dyani argues that provision includes the protection of women from sexual violence during armed

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<sup>241</sup> R Jewkes 'Child sexual abuse and HIV infection' (2004) in L Richter; A Dawes & C Higson-Smith (eds. (2004) *Sexual abuse of young children in southern Africa* 133.

<sup>242</sup> AIDS Law Project (n 210 above) 18.

<sup>243</sup> 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).

<sup>244</sup> Art.11(3).

conflict and that such crimes can be considered to constitute war crimes, genocide and/or crimes against humanity.<sup>245</sup>

As stated earlier,<sup>246</sup> part of the explanation for the high rate of sexual violence is rooted in the gendered construction of men and women's sexuality. States should therefore embark on sustained programmes of awareness to cultivate changes in attitudes and stereotypes labelled against both men and women. This can be done through information, education and communication programmes as discussed under the role of education and information above (see part 3.4.2). States should also facilitate the administration of ARVs to rape survivors and provide a comprehensive package for victims of sexual assault, including counselling, testing for HIV and STDs. States should also provide preventive services like Papanikolaou (PAP) and strengthen rehabilitation programmes.<sup>247</sup>

- **Harmful cultural practices**

The African Women's Protocol calls upon states parties to prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards.<sup>248</sup> That states parties shall take all necessary legislative and other measures to eliminate such practices, including: creation of public awareness in all sectors of society regarding harmful practices through information, formal education and outreach programmes;<sup>249</sup> prohibition, through legislative measures backed by sanctions, of all forms of genital mutilation, scarification, medicalisation and para-medicalisation of female genital mutilation and all other practices in order to eradicate them;<sup>250</sup> provision of necessary

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<sup>245</sup> N Dyani 'Protocol on the Rights of Women in Africa: Protection of women from sexual violence during armed conflict' (2006) 6 *African Human Rights Law Journal* 166 181. 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.

<sup>246</sup> See chap. One part 1.3.

<sup>247</sup> On the duty of the state to provide Anti-retrovirals to survivors of rape, among other categories, see P de Vos 'So much to do, so little done: The right of access to anti-retroviral drugs. Post Grootboom (2003) 7 *Law, Democracy and Development* 83.

<sup>248</sup> Art.5.

<sup>249</sup> Art.5(a).

<sup>250</sup> Art.5(b).

support to victims of harmful practices through basic services such as health services, legal and judicial support, emotional and psychological counselling as well as vocational training to make them self-supporting;<sup>251</sup> and protection of women who are at risk of being subjected to harmful practices or all other forms of violence, abuse and intolerance.<sup>252</sup>

One of the most common cultural practices in Africa is FGM. Estimates of the worldwide prevalence of FGM range from 85 million to 114 million, with an annual increase of about 2 million. About 6000 girls are circumcised every day.<sup>253</sup> FGM practice is common in mostly East and West Africa.<sup>254</sup> Other harmful practices that make women susceptible to HIV infection are dry sex, virginity testing, scarification of the skin and other skin piercing procedures utilised in health, therapeutic, ceremonial and aesthetic practices which carry the potential risk of HIV infection through blood if hygienic instruments are not used.<sup>255</sup>

### (i) Female Genital Mutilation

As noted in UN Fact Sheet No. 23 on Harmful Traditional Practices, FGM is a traditional practice that has become synthesised over time from various values.<sup>256</sup> While noting all the reasons for FGM, the practice can be summed up as stemming initially from women (and men) strictly and unquestioningly complying with all the dictates of tradition within their communities.<sup>257</sup> In other words, tradition exercises a powerful influence that obstructs efforts to limit or eradicate FGM. It is a catch-all notion for all the causes of FGM and is the predominant reason cited for maintaining it. That because of their lack of choice and the powerful influence of tradition, girls

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<sup>251</sup> Art.5(c).

<sup>252</sup> Art.5(d).

<sup>253</sup> N Toubia (1994) 'Female Genital Mutilation and the Responsibility of Reproductive Health Professionals' *Int. J. Gynecol. Obstet.* 46 127-35 in Cook et al (n 45 above) 29.

<sup>254</sup> As above.

<sup>255</sup> L Lirette, *HIV/AIDS and human rights in SADC. HIV/AIDS and human rights in South Africa* (2004) 33. Centre for the Study of AIDS and the Centre for Human Rights, University of Pretoria.

<sup>256</sup> United Nations (1995) 10 in P Corrine, 'Understanding the Sociocultural and Traditional Context of Female Circumcision and the Impact of the Human Rights Discourse' in Nnaemeka (n 93 above) 226.

<sup>257</sup> K Thomas (1998) 69, in Corrine (n 256 above) 226.

accept circumcision as a necessary, even, natural part of their life and adopt rationales given for its existence.<sup>258</sup>

### **(ii) Dry sex**

Another cultural practice that is rampant in some parts of sub-Saharan Africa is dry sex in which men prefer to have sex in a dry condition of the vagina.<sup>259</sup> This has the effect of trauma causing tears in the vaginal skin (mucosa) and easily allows the HIV to enter.<sup>260</sup> This may occur at first intercourse particularly in the case of girls and young adolescents penetrated by mature men. The dry condition of the vagina is preferred because the vagina is tight. There is no foreplay. Thus in the presence of high levels of background infection, these conditions, taken together with the likelihood of acquiring other STDs from sexually experienced male partners help to explain the high susceptibility of young females, many of whom become infected at first coitus.<sup>261</sup>

### **(iii) Virginit testing**



Virginit inspections have been a subject of heated debate in South Africa since their resurgence in the 1990s as a 'traditional' response to the HIV/AIDS pandemic.<sup>262</sup> The WHO<sup>263</sup> includes virginit testing in its definition of sexual violence. As such it can be seen as a form of abuse which is directly related to the HIV/AIDS pandemic. Leclerc-

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<sup>258</sup> For a discussion of tradition as the bastion of FGM, See, generally, A Francis (1997) 'Female Circumcision: Rite of Passage or Violation of Rights?' *International Family Planning Perspectives* 23 (3): 130-133.

<sup>259</sup> As above.

<sup>260</sup> Brooke, *AIDS, Gender, and Sexuality during Africa's Economic Crisis*, in *African Feminism: The Politics of Survival in Sub-Saharan Africa* 310-311, 315-30 (Gwendolyn Mikell, ed. 1997) in CG Bowman & A Kuenyehia (2003). *Women and Law in sub-Saharan Africa* 280. See also Lirette (255 above) 33

<sup>261</sup> As above.

<sup>262</sup> Jewkes (n 241above) 137. They have been most widespread in Kwazulu-Natal, but there is also growing activity in the schools in the Eastern Cape and Mpumalanga.

<sup>263</sup> WHO (2002) in Jewkes (n 241 above) 136.



Madlala<sup>264</sup> argues that, 'examining girls to determine their virginity status is another thread to reinforce a web of meaning that places women and women's sexuality at the centre of the current AIDS epidemic'. In addition, being declared a virgin may also convey an additional risk of rape. The possibility that people who want to rape virgins to cleanse themselves from HIV may attack these girls or women has been raised as a concern around virginity testing in the hearings of the South African Gender Commission for Equality.<sup>265</sup>

- **Discrimination and stigma**

The African Women's Protocol obliges states to combat all forms of discrimination against women through legislative, institutional and other measures.<sup>266</sup> Human rights scholars and feminists have all but exhausted their lexicon of epithets in their attempt to drive the point home so that the impasse of discrimination can be ended. I see no further purpose in yet another pronouncement to that effect, save in the particular context of this study.

The persistence of HIV/AIDS related stigmatisation over the course of the pandemic has led to increasing efforts to examine how stigma affects prevention and treatment efforts and how it might be tackled. It is more lamentable when the stigma is directed by a health care-giver to a person living with AIDS. For example, a study in Lesotho and South Africa revealed that health workers are very rude and dismissive to patients.<sup>267</sup> This was mentioned specifically within the context of STIs and PAP smears. They revealed patients' HIV status without their consent; made them feel stigmatised by other patients; denied them attention during consultation; are reluctant to give them injections and fail to offer counselling or provide enough support.<sup>268</sup>

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<sup>264</sup> Leclerc-Madlala (2002) 536-7 in Jewkes (n 241 above) 137.

<sup>265</sup> Jewkes (n 241 above) 138.

<sup>266</sup> Art.2.

<sup>267</sup> de Bruyn (n 160 above) 48.

<sup>268</sup> As above, 50.

According to Cook,<sup>269</sup> it is not enough for the health care system to be properly in place and for it to provide modern services. That people's perceptions of the services and their rightful expectations also matter. She stresses that among other important criteria in assessing the performance of the health care system, and the respect paid to the right to health, are respect for the dignity of the person, not humiliating or demeaning persons, confidentiality or the right to determine who has access to one's personal health information, access to social support networks.<sup>270</sup> Cook<sup>271</sup> also argues that if health care facilities, personnel and resources are to be accessible, governments must do more than simply provide them as bulk services. That accessibility requires that the delivery and administration of health care is organised in a fair, non-discriminatory manner, with special attention to the most vulnerable and marginalised.

Health Departments concerned about ensuring compliance with the right to non-discrimination in access to health services will need to assess the different ways in which women's rights might be violated within health care context. Governments are under obligation to facilitate changes in service delivery, through among others, training health-care providers. People affected by HIV/AIDS need to be aware of the right to health and the corresponding obligation of health care systems to provide care and treatment. They also need to know that violations of this human right can be reported so that people who are denied proper care can seek fulfilment of their rights through national, regional and international systems.

- **The double jeopardy of adolescents**

At the International Conference in Cairo in 1994,<sup>272</sup> adolescents were identified as a particularly vulnerable group and their reproductive health needs were addressed as a separate section of the Programme for Action.<sup>273</sup> The growing concern about the

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<sup>269</sup> Cook (n 45 above) 44.

<sup>270</sup> As above.

<sup>271</sup> RJ Cook 'Exploring fairness in health care reform' (2004) 29 *Journal of Juridical Science* 1.

<sup>272</sup> n 1 above.

<sup>273</sup> United Nations, 1995a, chap. I, resolution 1, annex, chap. VII, sect. E.

reproductive health of adolescents and youth derives from the sheer size of their cohorts.<sup>274</sup>

As earlier argued by one writer,<sup>275</sup> girl children face a double jeopardy of discrimination because of the intersection between age and gender. Discrimination based on age is a common violation of women's sexual rights.<sup>276</sup> Young women often suffer in communities that deny or impede the expression of natural adolescent sexuality. Prevention campaigns are still missing too many young people. Recent surveys in 17 countries show that more than half the adolescents questioned could not name a single method of protecting themselves against HIV/AIDS.<sup>277</sup> In many HIV-affected countries, still less than 50 per cent of young people use condoms in relationships of risk, a proportion too low to drastically reduce the incidence of new infections.<sup>278</sup> A recent study in South Africa of adolescents aged 16-17 years revealed that many adolescents do not use a barrier contraceptive.<sup>279</sup>

Protecting adolescents' wellbeing requires ensuring that they have access to comprehensive reproductive-health services including: factual information about reproductive physiology and sexuality; contraceptive information and methods to help them prevent unwanted pregnancy; services for detection and treatment of sexually transmitted infections. But even knowledge has been substantially increased. 'Knowing' is not necessarily 'doing'. Many young people do not connect knowledge and risk perception with behaviour. They should be helped to connect the knowledge to the realities. The African Women's Protocol does not comprehensively and specifically address the situation of adolescents.

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<sup>274</sup> IPAS News, 14 August 2006, available at <http://www.ipas.com> (accessed 14 August 2006).

<sup>275</sup> n 93 above.

<sup>276</sup> UN, Committee on the Elimination of Discrimination against Women, Concluding Observations on Dominican Republic (New York: UN, 1998, para. 332. UN Doc. A/53/38

<sup>277</sup> United Nations Children's Fund (2000).

<sup>278</sup> As above.

<sup>279</sup> K Peltzer & S Pender 'Sexuality of 16 to 17 year-old South Africans in the context of HIV/AIDS.' *Social Behaviour and Personality*, 2006.34(3) 239-256-Society for Personal Research(Inc), available at <http://www.sbp-journal.com> (accessed 4 September 2006).

- **Marriage**

On marriage, the African Women's Protocol provides that states parties shall enact appropriate national legislative measures to guarantee, *inter alia*, for free and full consent of both parties,<sup>280</sup> sets a minimum age of 18 for marriage,<sup>281</sup> and encourages monogamy.<sup>282</sup>

Research reveals that marriage is proving to be a serious factor for HIV infection for women.<sup>283</sup> Studies in Kenya and Zambia have shown that younger women married are at a higher risk of HIV infection than their unmarried counterparts.<sup>284</sup> A recent study in South Africa has revealed that women beaten and/or dominated by their partners are about twice as likely to become infected by HIV as those who are not.<sup>285</sup> This is usually because of the inequities that exist in marriage. The construct of women as sexual property is most clearly pronounced in the marriage relationship.<sup>286</sup> Other issues in the arena of marriage presenting challenges are polygny, child marriages, and bride wealth and levirate unions.

### **(i) Polygny**



There have been debates on whether polygny (in common parlance referred to as polygamy) is a violation of women's rights. Those who support the idea argue that it facilitates the enjoyment by women.<sup>287</sup> Those who oppose it point to the fact that the

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<sup>280</sup> Art.6 (a).

<sup>281</sup> Art.6 (b).

<sup>282</sup> Art.6 (c).

<sup>283</sup> JR Glyn et al (2003) 'Why Do Young Women Have a Higher Prevalence o HIV Than Young Men? A study in Kisumu, Kenya and Ndola, Zambia,' JAIDS 15 (Suppl. 4) S 51, in Ipas news, available at [www.ipas.com](http://www.ipas.com) (accessed 14 August 2006). See also E Harvey & J Kehler 'Sex and Sexuality in the context of HIV and AIDS'. A publication of the AIDS Legal Network, November 2005, available at [www.aln.org.za](http://www.aln.org.za)(accessed 15 July 2006).

<sup>284</sup> As above.

<sup>285</sup> KL Dunkle et al 'Gender-Based Violence, Relationship Power, and Risk of HIV infection in Women Attending Ante-natal Clinics in South Africa.' (2004) *The Lancet*, (9419): 14.

<sup>286</sup> A Armstrong et al 'Uncovering Reality: Excavating Women's Rights in the African Family' (1993) 7 *International Journal of Law, Policy and the Family* 314 in Banda (n 199 above) 117.

<sup>287</sup> Nhlapo argues that a woman may see her human dignity as being enhanced by marriage. See, T Nhlapo 'African Family Law Under an Undecided Constitution: the Challenge for Law Reform in South Africa' in J Eekelaar and T Nhlapo (eds) (1998 617 628-29, in Banda (n 199 above) 116.

custom is degrading to women and violates their rights vis-à-vis equality with that of men.<sup>288</sup> Debates during the drafting of the African Women's Protocol show that the debate rages on. A compromise was reached upon to the effect that monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including in polygamous marital relations, are promoted and protected.<sup>289</sup>

Whatever the compromise or justifications for polygny, its implications for HIV infections should be reflected upon seriously. The position taken by Ethiopia on polygny bears a lot of relevance to the link between HIV and polygny.<sup>290</sup> Polygny involves more than one sexual partner for one man. This brings HIV infection closer to all the other partners, in this case, women. Peoples' sexual behaviours are one of the most clandestine aspects of their lives. One person's sexual act has far reaching implications for all who have sexual relations with him or her. If the African Women's Protocol could take such an unfair position, it can be said that in that regard, it disappoints some women. It renders the provision anti-thetical to the postulates of the whole African Women's Protocol, especially the equality and non-discrimination provisions. It does not properly contextualise the vulnerability of women to HIV infection in polygynous unions and therefore fails the test of transformation. It is a bone of contention that I do not seek to resolve.

## **(ii) Early/child marriages**

The African Women's Protocol sets the minimum age for marriage at 18.<sup>291</sup> Many young girls are forced into polygynous marriages by their parents in many instances for economic gain in form of bride wealth.<sup>292</sup> According to a report,<sup>293</sup> child marriage

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<sup>288</sup> D Jackson (2003) *Twa Women, Twa Rights in the Great Lakes Region of Africa*. 12, in Banda (n 199) 116.

<sup>289</sup> Art.6(c).

<sup>290</sup> See IRIN news 'Ethiopia: Government Criticises Attitude Towards Women's Rights, Addis Ababa (25 June 2003), available at [http://www.irinnews.org/report.asp?ReportID=34974&SelectRegion=Horn\\_of\\_Africa](http://www.irinnews.org/report.asp?ReportID=34974&SelectRegion=Horn_of_Africa) (accessed 16 August 2006). The Ethiopian government has condemned it as a practice that exacerbates the vulnerability of Ethiopian women. This was said in the context of the increase of in the spread of the HIV virus.

<sup>291</sup> n 281 above.

<sup>292</sup> See, generally Gaye and Njie, in Banda (n 199) 118.

puts girls at risk of infection. Worldwide, 82 million girls, mostly from poor countries, will marry before their 18th birthday and face a higher probability of becoming infected with HIV compared to their unmarried peers.<sup>294</sup>

Gender differentials in age at marriage are largest in Africa, where they average 5 years, compared with 3.2 years in Asia and 2.8 in Europe and Northern America and in Latin America and the Caribbean.<sup>295</sup> What compounds the situation is the large age differentials between spouses which contributes to unequal power relations, reinforce women's dependency and often constrain women's decision-making on issues concerning their sexual and reproductive health. It restricts women's ability to make sexual choices and negotiate conditions of sexual intercourse, including the use of sex.<sup>296</sup>

Early marriage means adolescent child bearing. Child bearing below 18 entails a risk of maternal death that is much greater than the average. Early child bearing may also truncate a young woman's educational career, and threaten her economic prospects, earning capacity and overall well-being. Young mothers may pass on to their children a legacy of poor health, deficient education and subsistence living, creating a hard-to-break cycle of poverty.<sup>297</sup> The implications of poverty in the face of HIV/AIDS cannot be over emphasised. States party to the African Women's Protocol should enforce comprehensive and effective mechanisms to eradicate the unfortunate practice of child marriages.

In its General Recommendation on health,<sup>298</sup> CEDAW links FGM and polygny, marital rape to the risk of contracting HIV/AIDS and other STDs.<sup>299</sup> In addition to

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<sup>293</sup> UNFPA, available at <http://www.unfpa.org/adolescents/gender/html> (accessed 14 August 2006).

<sup>294</sup> As above.

<sup>295</sup> In several African countries such as Burkina Faso, Congo, Cote d'Ivoire, the Gambia, Guinea, Mali and Mauritania, the average gap between male and female mean age at marriage is above seven years. See, United Nations (n 162above) 10.

<sup>296</sup> Mensch et al (1998) *The Uncharted Passage: Girls' Adolescence in the Developing World*, in n 162 above, 10. See also E Delport 'HIV/AIDS: A challenge to the successful implementation of the protocol' (2005) in *Pambazuka News*, available at <http://www.pambazuka.org/index.php?id=29499> (accessed 2 July 2006).

<sup>297</sup> United Nations (n 162 above) 18.

<sup>298</sup> General Recommendation 14.

pushing for the 'enactment and effective enforcement of laws that prohibit FGM and marriage of the girl children',<sup>300</sup> the General Recommendation also calls for gender sensitivity in the design of health policies and training of health personnel to include 'comprehensive, mandatory, gender sensitive courses on women's health and human rights, in particular gender based violence'.<sup>301</sup> The framework of the African Women's Protocol is broad and comprehensive enough to cover these avenues. What remains is for states party to honour their obligations under this instrument.

- **Trafficking**

The African Women's Protocol provides against trafficking, but does not define it.<sup>302</sup> It enjoins states parties to take appropriate and effective measures to prevent and condemn trafficking in women prosecute perpetrators of such trafficking and protect those women who are most at risk.<sup>303</sup> Trafficking has been defined earlier in this study.<sup>304</sup> Factors on the supply side, such as natural disasters, vulnerabilities arising from personal problems, discriminatory cultural practices and gender based discrimination, may place women seeking physical and economic security at risk of being trafficked. On the demand side, restrictive laws, need for cheap labour and the presence of trafficking rings (with connections to corrupt public officials) facilitate the entry of trafficked women into work sectors that may endanger their health, for example HIV/AIDS.<sup>305</sup>

In Africa, Sita<sup>306</sup> identifies two main types of trafficking: trafficking in children mainly for domestic labour and farm labour across and within national borders; and

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<sup>299</sup> As above, para 18.

<sup>300</sup> As above, para 15(d).

<sup>301</sup> As above, para 31(f).

<sup>302</sup> Art.4(2)(g).

<sup>303</sup> As above.

<sup>304</sup> n 23 above.

<sup>305</sup> S Williams & R Masika (2002) 'Editorial', *Gender and Development* 10 (1) in S Meena (2004) 'Trafficking in Women: Causes, Consequences and Responses' in *Gender and Human Rights in the Commonwealth. Some Critical issues for action in the decade 2005-2015* 142.

<sup>306</sup> M Sita (2003). 'Trafficking in Women and Children: Situation and some trends in African Countries', Paper presented at the PNI Workshop on trafficking in human beings, especially women and children, 12 session of the Commission on Crime Prevention and Criminal Justice, Vienna, 15 May, in Meena (n 305 above) 145.

trafficking in women and children for sexual exploitation mainly outside the region. Ghana has been identified as a country of origin where 'connection men' or traffickers are sighted frequently at border crossings. A corresponding increase in fake visas has also been noted.<sup>307</sup> States should honour their obligations under the African Women's Protocol by devising means of monitoring their borders and immigration services to ensure that women, especially girls are not exploited in this manner. Economic empowerment should also be considered, as the main predisposing factor to trafficking is poverty. Legislative measures, especially immigration laws, are pertinent in this regard.

- **Participation and decision-making**

The African Women's Protocol obliges states parties to take specific action to promote participative governance and the equal participation of women in the political life of their countries through affirmative action, enabling legislation and other measures to ensure that, among others, women are equal partners with men at all levels of development and implementation of state policies and development programmes.<sup>308</sup> The African Women's Protocol further provides that states parties shall ensure increased and effective representation and participation of women at all levels of decision-making.<sup>309</sup> It would be naive to think that women's issues are apolitical. The policies adopted by governments other groups help or hinder that process. And no policy is worth any more than the political will or commitment behind it. The policies that have an impact on women's health may relate directly to health, or they may be policies in any of the other areas that help determine the status of women.<sup>310</sup> Inspiration can be drawn from the Greater Involvement of People Living with HIV/AIDS (GIPA) Principle adopted by the UNAIDS and other UN and non-governmental agencies. They recognised that measures to tackle HIV/AIDS will not succeed unless the people most directly affected by the pandemic are fully involved in all aspects of programs.<sup>311</sup>

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<sup>307</sup> International Organization of Migration (2001). 'New IOM Figures on the Global Scale of Trafficking', *Trafficking in Migrants* 23, April.

<sup>308</sup> Art.9(1)(c).

<sup>309</sup> Art.9(2).

<sup>310</sup> Smyre (n 30 above) 35.

<sup>311</sup> This was reiterated at the high level UNGASS in June 2005 to review progress in combating HIV/AIDS. See Bruyn (n 160 above) 9.



### **3.5 The missing links**

For purposes of this study, one cannot afford to be ungrateful to the above provisions in the bid to combat HIV/AIDS. Their effectiveness would however be enhanced if the African Women's Protocol had provided more substantively on HIV/AIDS, especially by linking it to other aspects of reproductive rights like family planning. The African Women's Protocol should have also addressed the right to religion specifically. It should have also provided more substantially on adolescents and referred to the disproportionate impact of globalisation on women. The African Women's Protocol should have also provided for state obligations in regard to regulation of substances (drugs) as it is increasingly becoming a major risk factor.<sup>312</sup>

### **3.6 Conclusion**

The opportunities presented by the African Women's Protocol cannot afford to be passed up. States, non-governmental organisations and all stakeholders should seek to maximise the potential of its regime and framework by broadening their strategic usage of rights claims. Women affected by HIV/AIDS and indeed all individuals concerned about HIV/AIDS and women may all find within the African Women's Protocol new and transformative sources of legal arms with which to further the recognition of hitherto gender-based harms and inequality. It is in this respect that the gender blindness of the fight against HIV/AIDS can be challenged more effectively on both regional and home territory.

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<sup>312</sup> For a discussion on the role of drugs in the transmission of HIV among especially young women, See, generally Farmer et al (n 31 above). See also, Richter et al (n 268 above).

CHALLENGES, RECOMMENDATIONS AND CONCLUSION

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**4.1 Introduction**

As stated earlier,<sup>313</sup> the methodology of this study is of a norm setting character. This immediately spells challenges in implementation as states will always avail themselves with predictable excuses like lack of resources, progressive realisation and the fact that they are doing their best to give meaning to their obligations under the African Women's Protocol. This chapter highlights some of the challenges to the rights-based approach, including: globalisation and neo-liberal trends, culture and tradition, the constraints of enforcement, democracy and rule of law and the place of socio-economic rights (see part 4.2) This chapter then makes legal, regulatory and policy recommendations (see part 4.3) highlighting the South African (see part 4.3.2) and Ugandan (see part 4.3.5) examples and calls for a gendered approach in all efforts (see part 4.5). The chapter concludes with a call for more ratifications of the African Women's Protocol and a reminder to states of their moral and legal obligations under the African Women's Protocol (see part 4.6).

**4.2 Challenges**

Globalisation and neo-liberal trends pose a threat to the implementation of socio-economic rights. Neo-liberalism requires that certain forms of state expenditure are to be favoured over others.<sup>314</sup> There has been a marked shift in health policies by

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<sup>313</sup> Chap.1.7.

<sup>314</sup> Purewal (n 161 above); M Pieterse 'Beyond the welfare state: Globalisation of neo-liberal culture and the constitutional protection of social and economic rights in South Africa' (2003) 1 *Stellenbosch Law Review* 3; R McCorquodale & R Fairbrother 'Globalisation and human rights' (1999) 21 *Human Rights Quarterly* 735 751 7. For a useful exposition of the dominant actors (concerned with human rights and economic globalisation respectively) in the international arena,

governments undergoing Structural Adjustment Programmes (SAPs) from basic health care to contraceptive services delivery. The privatisation of health services is a further more recent trend in both developing and developed countries like, making it difficult for people to claim rights to basic health care.<sup>315</sup>

Education is another sphere that has been affected by cuts in government expenditure with illiteracy and drop-out rates rising. Decreasing numbers of girl children attending school have been an inevitable knock-on effect of government cuts on education. Reductions in school enrolment for girls often result in earlier marriages of girls. Illiteracy disempowers women from gaining information about reproductive health and general health services and has obvious repercussions upon the household's awareness of its choices, reducing its chances of ensuring the best quality of life for its family members.

Globalisation has set in prescriptive population programmes which have shown a consistently unapologetic commitment to population reduction at any cost. The tendency for uncritical prescription has resulted in a denial of choice for the recipients of population policy. This has ranged from incentive and disincentive schemes, selective 'encouragement' of particular types of contraception to the more extreme cases of coercive tactics.<sup>316</sup> This prescriptive approach has failed to take into account the very important intersection between the provision of reproductive health services and HIV/AIDS. Global reproductive health and AIDS discourses compete with each other to understand how combating the AIDS epidemic and promoting women's reproductive health and rights intermingle, compete and/or complement each other in an African setting.<sup>317</sup> AIDS policies and population policies have not

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see Mishra *Globalisation and the Welfare State* (1999) 122-123; R Shamir 'Corporate social responsibility: a case of hegemony and counter hegemony' in, B de Souza Santos; A Cesar & R Garavito (eds) (2005) *Law and Globalisation from below: towards a cosmopolitan legality* 92. S W Harcourt 'An analysis of reproductive health: myths, resistance and new knowledge' in W Harcourt (1997) *Power, Reproduction and Gender: The inter-generational Transfer of Knowledge* 8.

<sup>315</sup> Purewal (n 161 above) 102.

<sup>316</sup> Purewal (n 161 above) 108.

<sup>317</sup> J Horn, 'Not Culture, But Gender: Reconceptualising Female Genital Mutilation/Cutting', in W Chavkin & E Chesler (eds) (2005) *Where Human Rights Begin: Health, Sexuality and Women in the Millennium*. 96.

been brought together under the rubric of reproductive health; instead we find competing bureaucracies at all levels of implementation. When AIDS interventions have been linked to family planning at the local level, well-intentioned AIDS interventions have sometimes been considered suspect because of associations between expatriate-associated health projects and racism, mistrust, and misbelieve.<sup>318</sup>

In Uganda, for example, success in the HIV/AIDS policy has been important for donors and international assistance is critical to health care provision in the country. However, the implementation of reproductive health has been limited and its non-AIDS related components have been largely unsuccessful.<sup>319</sup> This approach is retrogressive in light of the importance of the inextricable interaction between these two areas of women's health.

Other challenges that have to be surmounted in order to achieve the realisation of the postulates of the African Women's Protocol are: the resilient bane of culture and tradition, the constraints of enforcement, the place of socio-economic rights and lack of the rule of law and democracy.

### **4.3 Recommendations**

Ratifying countries have recognised the importance of respecting the rights of women by being party to the African Women's Protocol. Much of the success will rely on the commitment of states to give meaning to its provisions. Issues relating to women and HIV/AIDS are multifaceted and require multidimensional approaches involving change of attitude, among others. Efforts should involve religion, culture, education, government and all sectors because gender related issues are buttressed in almost all spheres of life.

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<sup>318</sup> As above, 108.

<sup>319</sup> As above, 96.

### 4.3.1 Legal and judicial reform

Member states are encouraged to amend their constitutions to ensure that they are complying with the African Women's Protocol. This should be followed by amending and adopting specific laws to give effect to their obligations under the African Women's Protocol. Laws or policies that discriminate against women in the area of civil rights restrain them from voicing their views on decisions that are crucially important to them, and keep them from making their full contribution to development. Marriage, divorce and inheritance laws, especially customary law, have much to do with a woman's economic, social and psychological status and thus with her health.

Similarly, judicial reform should entail means that will enable women and girls to challenge laws and policies before the courts (opportunities to do this should be made available). Laws are important to the extent that they provide a springboard for action, for example, in Zimbabwe, *Chihowa v Mangwende*<sup>320</sup> was possible because of the successful passage of Legal Age for Majority Act in 1982. Even in the infamous case of *Magaya v Magaya*,<sup>321</sup> the Supreme Court of Zimbabwe noted that such a ruling was not possible with respect to deaths occurring after the promulgation of the Administration of Estates Amendment Act.<sup>322</sup> These two cases suggest that struggles for meaningful legal reform are important and vigilance in monitoring the application and interpretation of new non-discriminatory laws is even more important.<sup>323</sup> There is an urgent need for reform in legislative and judicial approaches to customary law.<sup>324</sup>

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<sup>320</sup> 1987 (1) ZLR 228 (SC).

<sup>321</sup> 1999 (1) ZLR 100.

<sup>322</sup> Act 6 of 1997.

<sup>323</sup> Other cases that have addressed non-discrimination in laws are *Bhe v Magistrate Khayelitsha and Others* CCT-49-03 and *Unity Dow v The Attorney General* (1992) LRC (const) 623.

<sup>324</sup> For a discussion on the need for legislative and judicial reform, See, generally, C Himonga 'Legislative and Judicial Approaches to the Reform of the Customary Law of Marriage and Succession in South Africa: Implications for the Advancement of Women's Rights' (paper presented at the Conference on Advancing Women's Rights hosted by the Women's Law Centre, Cape Town 30-31 2003) available at [http://www.wlc.co.za/conference2003/2003conference\\_himonga.php](http://www.wlc.co.za/conference2003/2003conference_himonga.php) (accessed 7 July 2006).

#### 4.3.2 Transformative and comprehensive approaches: South African example

South Africa could be cited as a model state in sub-Saharan Africa in terms of the progressive legislation it has enacted,<sup>325</sup> its rapidly growing rich legal environment, and a far-reaching Bill of Rights.<sup>326</sup> South Africa has a supreme Constitution with a justiciable Bill of Rights that offers civil and political rights as well as social and economic guarantees.<sup>327</sup> The Constitution also makes provision for a Commission for Gender Equality to promote the achievement of gender equality.<sup>328</sup> Women in abusive relationships were recently afforded additional legal protection when amended legislation on domestic violence was accepted in Parliament.<sup>329</sup> Pregnant women are provided with free health care and those who choose to terminate their pregnancy may now freely exercise an informed choice.<sup>330</sup> South Africa also passed a Children's Act which among other things outlaws virginity testing of children.<sup>331</sup> It is worth noting that there is currently a Sexual Offences Bill being debated in the South African Parliament.<sup>332</sup>

The Constitution of South Africa explicitly provides for the right to reproductive autonomy.<sup>333</sup> This provision secures freedom and security of the person, including the right to 'bodily and psychological integrity'<sup>334</sup> and specifically includes the right to

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<sup>325</sup> Among the prominent legislative enactments are: the South African Schools Act 84 of 1999, the Employment Equity Act 55 of 1998 and the Medical Schemes Act 131 of 1998 that prohibits unfair discrimination on listed grounds including state of health.

<sup>326</sup> Chap.2 of the Constitution of the Republic of South Africa (n 180 above).

<sup>327</sup> As above. See L Feris 'The Right to Access to Reproductive Health Care in the South African Constitution: A Real Victory for Women?' in Nnaemeka (n 93 above) 81. See also C van Wyk 'The enforcement of the right of access to health care in the context of HIV/AIDS and its impact on the separation of powers' (2003) 66 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg (THRHR)* 389.

<sup>328</sup> Sec.187.

<sup>329</sup> The Domestic Violence Act 116 of 1998. Previously, Prevention of Family Violence Act 133 of 1993.

<sup>330</sup> GN 6571 Government Gazette 1 July 1994 No. 15817 in Feris (n 327 above) 81.

<sup>331</sup> Sec.12 (4) of the Children Act 38 of 2005.

<sup>332</sup> Criminal Law (Sexual Offences) Amendment Bill 2003.

<sup>333</sup> Sec.12.

<sup>334</sup> Sec.12 (2).

'make decisions concerning reproduction'.<sup>335</sup> At a base level, this provision means that women should be able to make these kinds of decisions without any without any interference by the state or other parties, such as for instance a spouse or partner. The right can furthermore only be optimally exercised in an environment where society provides for the necessary resources and infrastructure to make these decisions. Thus, for example, indigent women should be provided with education on family planning and fertility control and should have access to medical services.<sup>336</sup>

The Constitutional Court of South Africa has transcended the traditional boundaries of a strict interpretation of state duty that has always paid undue regard to the doctrine of separation of powers. The argument here is not against the doctrine of separation of powers, but rather a progressive and transformative interpretation of law. South African courts have adopted a most transformative style of interpretation, taking into account the particular context of the society.<sup>337</sup> The decision in *TAC*,<sup>338</sup> in which the South African Constitutional Court held that failure on the part of the South African government to make available Nevirapine amounted to a breach of the Constitution,<sup>339</sup> is a model for holding African governments accountable for their failure or unwillingness to provide comprehensive treatment programmes for HIV/AIDS. The *TAC* case drew its inspiration from an earlier case of *Grootboom*<sup>340</sup> in which the court adopted the reasonability test in finding the government policy and programmes on housing unreasonable and not meeting the needs of those most urgently in need. The situation of women in the face of the epidemic requires a robust and pragmatic judiciary that is willing to take governments head on in the realisation of socio-economic rights. It requires judicial activism. Other African countries ought to adopt this style. The African Human Rights Court should borrow a leaf from these transformative, contextual and bold approaches. Issues concerning women have to be contextualised because of the interplay of factors like history, religion and culture.

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<sup>335</sup> Sec.12 (2) (a).

<sup>336</sup> Feris (n 327 above) 83.

<sup>337</sup> The Constitutional Court has also expressed their preference for this method of interpretation and Chaskalson CJ has stated as follows in *S V Makwanyane* 1995 (6) 665 (CC) on 676-677: '...the Constitution must not be construed in isolation, but in its context, which includes the history and background to the adoption of the constitution, other provisions in the constitution itself and, in particular, the provisions of chapter 3 of which it is part.'

<sup>338</sup> 2002 10 BCLR 1033 (CC).

<sup>339</sup> Sec.27.

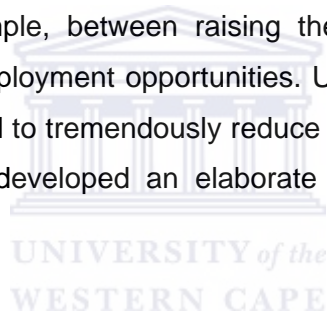
<sup>340</sup> 2000 3 BCLR 227 (C).

### 4.3.3 Regulatory measures

Having amended the laws and adopted specific ones, member states should put in place regulatory measures, whereby specific groups, such as professionals, women groups and cultural leaders, to mention a few, will be targeted for training and awareness.

### 4.3.4 Policy measures

All policies that raise the status of women and protect their rights contribute to their good health (in the HIV context). People who want to press for action on women's health need to be aware that some policies are mutually reinforcing, that is, they are more effective when used in combination with each other. Such a synergistic relationship exists, for example, between raising the legal age of marriage and increasing education and employment opportunities. Uganda is one of the countries in the continent that managed to tremendously reduce its HIV infection.<sup>341</sup> Cameroon is also a country that has developed an elaborate system of implementation of HIV/AIDS policy.<sup>342</sup>



### 4.3.5 The Ugandan example

Three unwritten policies are the key elements of Uganda's creative response to the epidemic and distinguish it from the limited capacity of other states in dealing with the epidemic: leadership, diversity of approach and openness.<sup>343</sup> Museveni's leadership on AIDS was linked to democratisation and the reconstruction of local government as a means of rebuilding social cohesion in the country.<sup>344</sup> Diversity refers to the variety of approaches used and the differing scales of their implementers. Messages are often tailored to very specific local clientele, and it is just this diversity that has

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<sup>341</sup> See Horn (n 317 above)

<sup>342</sup> For a discussion on HIV/AIDS policy in Cameroon, see AN Atangcho 'HIV/AIDS law and policy in Cameroon: Overview and challenges' (2006) 6 *African Human Rights Law Journal* 85.

<sup>343</sup> Parkhurst (2001) 78-80 in Horn (n 317 above) 100.

<sup>344</sup> A De Waal (2003) 'How Will HIV/AIDS Transform African Governance?' *African Affairs* 102:1-23 in Horn (n 317 above) 100.



provided 'something' for 'everyone' in the fight against AIDS. Ugandan NGOs, such as The AIDS Support Organisation (TASO), are regularly cited as models for community-based service provision.<sup>345</sup> Uganda did not push any single approach too strongly and thus avoided much of the potential backlash from conservatives that might have been associated with such controversial activities as aggressive condom promotion.<sup>346</sup> Kirumira<sup>347</sup> points to Uganda's open policy toward the pandemic as perhaps the most vigorous IEC (Information, Education and Communication) and program support services for HIV/AIDS prevention and control in sub-Saharan Africa. Transparency would mean that the process of forming budgets and actual spending of funds allocated to AIDS interventions needs to be transparent.

#### **4.4 Other important policy recommendations**

Other important policy recommendations include: affirmative action, economic empowerment, political factors-policy decision, implementing Primary Health Care, promoting Information, Education and Communication, eradication of discrimination in access to health care, involving the youth, improving the quality of health services (access to youth friendly services), special needs and special programming and linking reproductive health and HIV/AIDS services.

#### **4.5 Gendered approaches: the appropriate way to go**

All the above recommendations must be within the particular circumstances of women. Services must respond to their specific needs. A gendered perspective will constructively influence the priorities and advance treatment, prevention and containment. Any discussion on AIDS, women and Africa is characterised by the serious level of violence perpetrated against women; traditional and cultural practices which detract their right to self-determination; limited access to prevention mechanisms, especially those that are confidential and accessible to women and

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<sup>345</sup> J De Jong (2003) 'Making an impact in HIV and AIDS: NGO experiences of Scaling up' in Horn (n 317 above) 100.

<sup>346</sup> Parkhurst (n 343 above) 78-80.

<sup>347</sup> Kirumira (2001) in Horn (n 317 above) 101.

economic conditions that add to their vulnerability. Our focus should therefore be on the synergistic effects of social, cultural, economic and political afflictions and their impact on the transmission. States should exercise political will and vision, participatory leadership, accountability to the constituency, participation of women on the basis of informed opinions and choices, and respect of the rule of law.

#### **4.6 Conclusion: honouring the promise**

The normative framework of the African Women's Protocol is laudable and radical in nature. It is transformative because the drafters seem to be aware of the grave impact of the pandemic on the people in the region, particularly women. I call upon states that have not ratified to do so and call upon other international and regional human rights bodies to emulate the framework of this instrument. A formal right without more may be quite empty if the substantive reality of women's lives is such that they are not in position to make use of the rights.

Lest the postulates of the African Women's Protocol be relegated to a mere paper tiger, the obligations that ratifying states undertook during its adoption and ratification must be respected. All efforts must be marshalled. Money must be set aside and targets set. The ultimate test lies in the implementation as a real means to combat HIV/AIDS and indeed in improving the quality of life, for not only women, but also children and men. This can only occur if the rights in the African Women's Protocol precipitate concrete changes in social policies and laws so that they are responsive to the needs of women. African states should bear in mind that if we are to constitute ourselves as a society that respects human dignity, we are committed to redressing the social and economic conditions of those whose capacity for development and agency is stunted by poverty, culture, religion and gender. By failing to do so, we undermine the very foundations of our humanity. This is not only a moral obligation and political imperative, but also a treaty obligation. The ball is in their court. Let us see the states play.

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**Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa**

**Adopted in Maputo in July 2003. Entered into force 25 November 2005.**

The States Parties to this Protocol,

CONSIDERING that Article 66 of the African Charter on Human and Peoples' Rights provides for special protocols or agreements, if necessary, to supplement the provisions of the African Charter, and that the Assembly of Heads of State and Government of the Organization of African Unity meeting in its Thirty-first Ordinary Session in Addis Ababa, Ethiopia, in June 1995, endorsed by resolution AHG/Res.240 (XXXI) the recommendation of the African Commission on Human and Peoples' Rights to elaborate a Protocol on the Rights of Women in Africa;

CONSIDERING that Article 2 of the African Charter on Human and Peoples' Rights enshrines the principle of non-discrimination on the grounds of race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status;

FURTHER CONSIDERING that Article 18 of the African Charter on Human and Peoples' Rights calls on all States Parties to eliminate every discrimination against women and to ensure the protection of the rights of women as stipulated in international declarations and conventions;

NOTING that Articles 60 and 61 of the African Charter on Human and Peoples' Rights recognise regional and international human rights instruments and African practices consistent with international norms on human and peoples' rights as being important reference points for the application and interpretation of the African Charter;

RECALLING that women's rights have been recognised and guaranteed in all international human rights instruments, notably the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women and its Optional Protocol, the African Charter on the Rights and Welfare of the Child, and all other international and regional conventions and covenants relating to the rights of women as being inalienable, interdependent and indivisible human rights;

NOTING that women's rights and women's essential role in development, have been reaffirmed in the United Nations Plans of Action on the Environment and Development in 1992, on Human Rights in 1993, on Population and Development in 1994 and on Social Development in 1995; RECALLING ALSO United Nations Security Council's Resolution 1325 (2000) on the role of Women in promoting peace and security;

REAFFIRMING the principle of promoting gender equality as enshrined in the Constitutive Act of the African Union as well as the New Partnership for Africa's Development, relevant Declarations, Resolutions and Decisions, which underline the commitment of the African States to ensure the full participation of African women as equal partners in Africa's development;

FURTHER NOTING that the African Platform for Action and the Dakar Declaration of 1994 and the Beijing Platform for Action of 1995 call on all Member States of the United Nations, which have made a solemn commitment to implement them, to take concrete steps to give greater attention to the human rights of women in order to eliminate all forms of discrimination and of gender-based violence against women;

RECOGNISING the crucial role of women in the preservation of African values based on the principles of equality, peace, freedom, dignity, justice, solidarity and democracy;

BEARING IN MIND related Resolutions, Declarations, Recommendations, Decisions, Conventions and other Regional and Sub-Regional Instruments aimed at eliminating all forms of discrimination and at promoting equality between women and men;

CONCERNED that despite the ratification of the African Charter on Human and Peoples' Rights and other international human rights instruments by the majority of

States Parties, and their solemn commitment to eliminate all forms of discrimination and harmful practices against women, women in Africa still continue to be victims of discrimination and harmful practices;

FIRMLY CONVINCED that any practice that hinders or endangers the normal growth and affects the physical and psychological development of women and girls should be condemned and eliminated;

DETERMINED to ensure that the rights of women are promoted, realised and protected in order to enable them to enjoy fully all their human rights;

HAVE AGREED AS FOLLOWS:

### **Article 1 : Definitions**

For the purpose of the present Protocol:

- a. "African Charter" means the African Charter on Human and Peoples' Rights;
- b. "African Commission" means the African Commission on Human and Peoples' Rights;
- c. "Assembly" means the Assembly of Heads of State and Government of the African Union;
- d. "AU" means the African Union;
- e. "Constitutive Act" means the Constitutive Act of the African Union;
- f. "Discrimination against women" means any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life;
- g. "Harmful Practices" means all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity;
- h. "NEPAD" means the New Partnership for Africa's Development established by the Assembly;
- i. "States Parties" means the States Parties to this Protocol;
- j. "Violence against women" means 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;
- k. "Women" means persons of female gender, including girls;

## **Article 2 : Elimination of Discrimination Against Women**

1. States Parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures. In this regard they shall:
  - a. include in their national constitutions and other legislative instruments, if not already done, the principle of equality between women and men and ensure its effective application;
  - b. enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination particularly those harmful practices which endanger the health and general well-being of women;
  - c. integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life;
  - d. take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist;
  - e. support the local, national, regional and continental initiatives directed at eradicating all forms of discrimination against women.
2. States Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.

## **Article 3 : Right to Dignity**

1. Every woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights;
2. Every woman shall have the right to respect as a person and to the free development of her personality;
3. States Parties shall adopt and implement appropriate measures to prohibit any exploitation or degradation of women;

4. States Parties shall adopt and implement appropriate measures to ensure the protection of every woman's right to respect for her dignity and protection of women from all forms of violence, particularly sexual and verbal violence.

#### **Article 4 : The Rights to Life, Integrity and Security of the Person**

1. Every woman shall be entitled to respect for her life and the integrity and security of her person. All forms of exploitation, cruel, inhuman or degrading punishment and treatment shall be prohibited.
2. States Parties shall take appropriate and effective measures to:
  - a. enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public;
  - b. adopt such other legislative, administrative, social and economic measures as may be necessary to ensure the prevention, punishment and eradication of all forms of violence against women;
  - c. identify the causes and consequences of violence against women and take appropriate measures to prevent and eliminate such violence;
  - d. actively promote peace education through curricula and social communication in order to eradicate elements in traditional and cultural beliefs, practices and stereotypes which legitimise and exacerbate the persistence and tolerance of violence against women;
  - e. punish the perpetrators of violence against women and implement programmes for the rehabilitation of women victims;
  - f. establish mechanisms and accessible services for effective information, rehabilitation and reparation for victims of violence against women;
  - g. prevent and condemn trafficking in women, prosecute the perpetrators of such trafficking and protect those women most at risk;
  - h. prohibit all medical or scientific experiments on women without their informed consent;
  - i. provide adequate budgetary and other resources for the implementation and monitoring of actions aimed at preventing and eradicating violence against women;
  - j. ensure that, in those countries where the death penalty still exists, not to carry out death sentences on pregnant or nursing women.

- k. ensure that women and men enjoy equal rights in terms of access to refugee status, determination procedures and that women refugees are accorded the full protection and benefits guaranteed under international refugee law, including their own identity and other documents;

#### **Article 5 : Elimination of Harmful Practices**

States Parties shall prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards. States Parties shall take all necessary legislative and other measures to eliminate such practices, including:

- a. creation of public awareness in all sectors of society regarding harmful practices through information, formal and informal education and outreach programmes;
- b. prohibition, through legislative measures backed by sanctions, of all forms of female genital mutilation, scarification, medicalisation and para-medicalisation of female genital mutilation and all other practices in order to eradicate them;
- c. provision of necessary support to victims of harmful practices through basic services such as health services, legal and judicial support, emotional and psychological counselling as well as vocational training to make them self-supporting;
- d. protection of women who are at risk of being subjected to harmful practices or all other forms of violence, abuse and intolerance.

#### **Article 6 : Marriage**

States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that:

- a. no marriage shall take place without the free and full consent of both parties;
- b. the minimum age of marriage for women shall be 18 years;
- c. monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including in polygamous marital relationships are promoted and protected;

- d. every marriage shall be recorded in writing and registered in accordance with national laws, in order to be legally recognised;
- e. the husband and wife shall, by mutual agreement, choose their matrimonial regime and place of residence;
- f. a married woman shall have the right to retain her maiden name, to use it as she pleases, jointly or separately with her husband's surname;
- g. a woman shall have the right to retain her nationality or to acquire the nationality of her husband;
- h. a woman and a man shall have equal rights, with respect to the nationality of their children except where this is contrary to a provision in national legislation or is contrary to national security interests;
- i. a woman and a man shall jointly contribute to safeguarding the interests of the family, protecting and educating their children;
- j. during her marriage, a woman shall have the right to acquire her own property and to administer and manage it freely.

#### **Article 7 : Separation, Divorce and Annulment of Marriage**

States Parties shall enact appropriate legislation to ensure that women and men enjoy the same rights in case of separation, divorce or annulment of marriage. In this regard, they shall ensure that:

- a. separation, divorce or annulment of a marriage shall be effected by judicial order;
- b. women and men shall have the same rights to seek separation, divorce or annulment of a marriage;
- c. in case of separation, divorce or annulment of marriage, women and men shall have reciprocal rights and responsibilities towards their children. In any case, the interests of the children shall be given paramount importance;
- d. in case of separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of the joint property deriving from the marriage.



## **Article 8 : Access to Justice and Equal Protection before the Law**

Women and men are equal before the law and shall have the right to equal protection and benefit of the law. States Parties shall take all appropriate measures to ensure:

- a. effective access by women to judicial and legal services, including legal aid;
- b. support to local, national, regional and continental initiatives directed at providing women access to legal services, including legal aid;
- c. the establishment of adequate educational and other appropriate structures with particular attention to women and to sensitise everyone to the rights of women;
- d. that law enforcement organs at all levels are equipped to effectively interpret and enforce gender equality rights;
- e. that women are represented equally in the judiciary and law enforcement organs;
- f. reform of existing discriminatory laws and practices in order to promote and protect the rights of women.

## **Article 9 : Right to Participation in the Political and Decision-Making Process**

1. States Parties shall take specific positive action to promote participative governance and the equal participation of women in the political life of their countries through affirmative action, enabling national legislation and other measures to ensure that:
  - a. women participate without any discrimination in all elections;
  - b. women are represented equally at all levels with men in all electoral processes;
  - c. women are equal partners with men at all levels of development and implementation of State policies and development programmes .
2. States Parties shall ensure increased and effective representation and participation of women at all levels of decision-making.

## **Article 10 : Right to Peace**

1. Women have the right to a peaceful existence and the right to participate in the promotion and maintenance of peace.
2. States Parties shall take all appropriate measures to ensure the increased participation of women:

- a. in programmes of education for peace and a culture of peace;
  - b. in the structures and processes for conflict prevention, management and resolution at local, national, regional, continental and international levels;
  - c. in the local, national, regional, continental and international decision making structures to ensure physical, psychological, social and legal protection of asylum seekers, refugees, returnees and displaced persons, in particular women;
  - d. in all levels of the structures established for the management of camps and settlements for asylum seekers, refugees, returnees and displaced persons, in particular, women;
  - e. in all aspects of planning, formulation and implementation of post conflict reconstruction and rehabilitation.
3. States Parties shall take the necessary measures to reduce military expenditure significantly in favour of spending on social development in general, and the promotion of women in particular.

#### **Article 11 : Protection of Women in Armed Conflicts**

1. States 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.
2. States Parties shall, in accordance with the obligations incumbent upon them under the international humanitarian law, protect civilians including women, irrespective of the population to which they belong, in the event of armed conflict.
3. States Parties undertake to protect asylum seeking women, refugees, returnees and internally displaced persons, against all forms of violence, rape and other forms of sexual exploitation, and to ensure that such acts are considered war crimes, genocide and/or crimes against humanity and that their perpetrators are brought to justice before a competent criminal jurisdiction.
4. States Parties shall take all necessary measures to ensure that no child, especially girls under 18 years of age, take a direct part in hostilities and that no child is recruited as a soldier.

## **Article 12 : Right to Education and Training**

1. States Parties shall take all appropriate measures to:
  - a. eliminate all forms of discrimination against women and guarantee equal opportunity and access in the sphere of education and training;
  - b. eliminate all stereotypes in textbooks, syllabuses and the media, that perpetuate such discrimination;
  - c. protect women, especially the girl-child from all forms of abuse, including sexual harassment in schools and other educational institutions and provide for sanctions against the perpetrators of such practices;
  - d. provide access to counselling and rehabilitation services to women who suffer abuses and sexual harassment;
  - e. integrate gender sensitisation and human rights education at all levels of education curricula including teacher training.
2. States Parties shall take specific positive action to:
  - a. promote literacy among women;
  - b. promote education and training for women at all levels and in all disciplines, particularly in the fields of science and technology;
  - c. promote the enrolment and retention of girls in schools and other training institutions and the organisation of programmes for women who leave school prematurely.

## **Article 13 : Economic and Social Welfare Rights**

States Parties shall adopt and enforce legislative and other measures to guarantee women equal opportunities in work and career advancement and other economic opportunities. In this respect, they shall:

- a. promote equality of access to employment;
- b. promote the right to equal remuneration for jobs of equal value for women and men;
- c. ensure transparency in recruitment, promotion and dismissal of women and combat and punish sexual harassment in the workplace;
- d. guarantee women the freedom to choose their occupation, and protect them from exploitation by their employers violating and exploiting their fundamental rights as recognised and guaranteed by conventions, laws and regulations in force;

- e. create conditions to promote and support the occupations and economic activities of women, in particular, within the informal sector;
- f. establish a system of protection and social insurance for women working in the informal sector and sensitise them to adhere to it;
- g. introduce a minimum age for work and prohibit the employment of children below that age, and prohibit, combat and punish all forms of exploitation of children, especially the girl-child;
- h. take the necessary measures to recognise the economic value of the work of women in the home;
- i. guarantee adequate and paid pre and post-natal maternity leave in both the private and public sectors;
- j. ensure the equal application of taxation laws to women and men;
- k. recognise and enforce the right of salaried women to the same allowances and entitlements as those granted to salaried men for their spouses and children;
- l. recognise that both parents bear the primary responsibility for the upbringing and development of children and that this is a social function for which the State and the private sector have secondary responsibility;
- m. take effective legislative and administrative measures to prevent the exploitation and abuse of women in advertising and pornography.

#### **Article 14 : Health and Reproductive Rights**

1. States Parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted. This includes:
  - a. the right to control their fertility;
  - b. the right to decide whether to have children, the number of children and the spacing of children;
  - c. the right to choose any method of contraception;
  - d. the right to self protection and to be protected against sexually transmitted infections, including HIV/AIDS;
  - e. the right to be informed on one's health status and on the health status of one's partner, particularly if affected with sexually transmitted infections, including HIV/AIDS, in accordance with internationally recognised standards and best practices;
  - f. the right to have family planning education.
2. States Parties shall take all appropriate measures to:

- a. provide adequate, affordable and accessible health services, including information, education and communication programmes to women especially those in rural areas;
- b. establish and strengthen existing pre-natal, delivery and post-natal health and nutritional services for women during pregnancy and while they are breast-feeding;
- c. protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.

#### **Article 15 : Right to Food Security**

States Parties shall ensure that women have the right to nutritious and adequate food. In this regard, they shall take appropriate measures to:

- a. provide women with access to clean drinking water, sources of domestic fuel, land, and the means of producing nutritious food;
- b. establish adequate systems of supply and storage to ensure food security.

#### **Article 16 : Right to Adequate Housing**

Women shall have the right to equal access to housing and to acceptable living conditions in a healthy environment. To ensure this right, States Parties shall grant to women, whatever their marital status, access to adequate housing.

#### **Article 17 : Right to Positive Cultural Context**

1. Women shall have the right to live in a positive cultural context and to participate at all levels in the determination of cultural policies.
2. States Parties shall take all appropriate measures to enhance the participation of women in the formulation of cultural policies at all levels.

#### **Article 18 : Right to a Healthy and Sustainable Environment**

1. Women shall have the right to live in a healthy and sustainable environment.
2. States Parties shall take all appropriate measures to:

- a. ensure greater participation of women in the planning, management and preservation of the environment and the sustainable use of natural resources at all levels;
- b. promote research and investment in new and renewable energy sources and appropriate technologies, including information technologies and facilitate women's access to, and participation in their control;
- c. protect and enable the development of women's indigenous knowledge systems;
- d. (c. sic.) regulate the management, processing, storage and disposal of domestic waste;
- e. (d. sic.) ensure that proper standards are followed for the storage, transportation and disposal of toxic waste.

#### **Article 19 : Right to Sustainable Development**

Women shall have the right to fully enjoy their right to sustainable development. In this connection, the States Parties shall take all appropriate measures to:

- a. introduce the gender perspective in the national development planning procedures;
- b. ensure participation of women at all levels in the conceptualisation, decision-making, implementation and evaluation of development policies and programmes;
- c. promote women's access to and control over productive resources such as land and guarantee their right to property;
- d. promote women's access to credit, training, skills development and extension services at rural and urban levels in order to provide women with a higher quality of life and reduce the level of poverty among women;
- e. take into account indicators of human development specifically relating to women in the elaboration of development policies and programmes; and
- f. ensure that the negative effects of globalisation and any adverse effects of the implementation of trade and economic policies and programmes are reduced to the minimum for women.

## **Article 20 : Widows' Rights**

States Parties shall take appropriate legal measures to ensure that widows enjoy all human rights through the implementation of the following provisions:

- a. that widows are not subjected to inhuman, humiliating or degrading treatment;
- b. a widow shall automatically become the guardian and custodian of her children, after the death of her husband, unless this is contrary to the interests and the welfare of the children;
- c. a widow shall have the right to remarry, and in that event, to marry the person of her choice.

## **Article 21 : Right to Inheritance**

1. A widow shall have the right to an equitable share in the inheritance of the property of her husband. A widow shall have the right to continue to live in the matrimonial house. In case of remarriage, she shall retain this right if the house belongs to her or she has inherited it.
2. Women and men shall have the right to inherit, in equitable shares, their parents' properties.

## **Article 22 : Special Protection of Elderly Women**

The States Parties undertake to:

- a. provide protection to elderly women and take specific measures commensurate with their physical, economic and social needs as well as their access to employment and professional training;
- b. ensure the right of elderly women to freedom from violence, including sexual abuse, discrimination based on age and the right to be treated with dignity.

## **Article 23 : Special Protection of Women with Disabilities**

The States Parties undertake to:

- a. ensure the protection of women with disabilities and take specific measures commensurate with their physical, economic and social needs to facilitate their access to employment, professional and vocational training as well as their participation in decision-making;

- b. ensure the right of women with disabilities to freedom from violence, including sexual abuse, discrimination based on disability and the right to be treated with dignity.

#### **Article 24 : Special Protection of Women in Distress**

The States Parties undertake to:

- a. ensure the protection of poor women and women heads of families including women from marginalized population groups and provide them an environment suitable to their condition and their special physical, economic and social needs;
- b. ensure the right of pregnant or nursing women or women in detention by providing them with an environment which is suitable to their condition and the right to be treated with dignity.

#### **Article 25 : Remedies**

States Parties shall undertake to:

- a. provide for appropriate remedies to any woman whose rights or freedoms, as herein recognised, have been violated;
- b. ensure that such remedies are determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by law.

#### **Article 26 : Implementation and Monitoring**

1. States 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, indicate the legislative and other measures undertaken for the full realisation of the rights herein recognised.
2. States Parties undertake to adopt all necessary measures and in particular shall provide budgetary and other resources for the full and effective implementation of the rights herein recognised.



### **Article 27 : Interpretation**

The African Court on Human and Peoples' Rights shall be seized with matters of interpretation arising from the application or implementation of this Protocol.

### **Article 28 : Signature, Ratification and Accession**

1. This Protocol shall be open for signature, ratification and accession by the States Parties, in accordance with their respective constitutional procedures.
2. The instruments of ratification or accession shall be deposited with the Chairperson of the Commission of the AU.

### **Article 29 : Entry into Force**

1. This Protocol shall enter into force thirty (30) days after the deposit of the fifteenth (15) instrument of ratification.
2. For each State Party that accedes to this Protocol after its coming into force, the Protocol shall come into force on the date of deposit of the instrument of accession.
3. The Chairperson of the Commission of the AU shall notify all Member States of the coming into force of this Protocol.

### **Article 30 : Amendment and Revision**

1. Any State Party may submit proposals for the amendment or revision of this Protocol.
2. Proposals for amendment or revision shall be submitted, in writing, to the Chairperson of the Commission of the AU who shall transmit the same to the States Parties within thirty (30) days of receipt thereof.
3. The Assembly, upon advice of the African Commission, shall examine these proposals within a period of one (1) year following notification of States Parties, in accordance with the provisions of paragraph 2 of this article.
4. Amendments or revision shall be adopted by the Assembly by a simple majority.
5. The amendment shall come into force for each State Party, which has accepted it thirty (30) days after the Chairperson of the Commission of the AU has received notice of the acceptance.

### **Article 31 : Status of the Present Protocol**

None of the provisions of the present Protocol shall affect more favourable provisions for the realisation of the rights of women contained in the national legislation of States Parties or in any other regional, continental or international conventions, treaties or agreements applicable in these States Parties.

### **Article 32 : Transitional Provisions**

Pending the establishment of the African Court on Human and Peoples' Rights, the African Commission on Human and Peoples' Rights shall be seized with matters of interpretation arising from the application and implementation of this Protocol.

