

9-1-2009

Introduction to the Symposium Issue: Reproductive and Sexual Health and the African Women's Protocol

Charles Ngwena

Follow this and additional works at: <http://scholarlycommons.law.wlu.edu/crsj>

 Part of the [Health Law Commons](#), [Human Rights Law Commons](#), and the [Women Commons](#)

Recommended Citation

Charles Ngwena, *Introduction to the Symposium Issue: Reproductive and Sexual Health and the African Women's Protocol*, 16 Wash. & Lee J. Civ. Rts. & Soc. Just. 1 (2009).

Available at: <http://scholarlycommons.law.wlu.edu/crsj/vol16/iss1/3>

This Article is brought to you for free and open access by the Law School Journals at Washington & Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Journal of Civil Rights and Social Justice by an authorized administrator of Washington & Lee University School of Law Scholarly Commons. For more information, please contact osbornecl@wlu.edu.

Introduction to the Symposium Issue: Reproductive and Sexual Health and the African Women’s Protocol

Charles Ngwena*

Table of Contents

I. Introduction	1
II. The Contributions	5

I. Introduction

As commentators have observed,¹ the beginnings of the African human rights system did not align themselves in any pointed way with the goals of respecting, protecting, and fulfilling human rights on the African continent as this was not a founding focus under the first African inter-governmental organization—the Organization of African Unity (OAU).² The OAU Charter of 1963, that later established the African Charter on Human and Peoples’ Rights in 1981 (African Charter)³—the main

* Professor, Department of Constitutional Law, University of the Free State; Visiting Fellow, Harvard Human Rights Program, Harvard Law School; Formerly, Scholar-in-Residence 2008–2009, Washington and Lee University School of Law.

1. See FRANS VILJOEN, *INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA*, 163–64 (2007) (indicating that even the brief references to human rights within the OAU Charter were designed as anti-colonial gestures, establishing rights previously denied during colonial times); VINCENT O. ORLU NMEHIELLE, *THE AFRICA HUMAN RIGHTS SYSTEM: ITS LAWS, PRACTICE, AND INSTITUTIONS*, 75–82 (2001) (suggesting that the African States initially relied on international human rights standards as its general guidelines instead of fashioning new mandatory standards).

2. See Charter of the Organization of African Unity, May 25, 1963, 479 U.N.T.S. 39 [hereinafter OAU] (listing as the purposes for the Organization the unity, cooperation, and sovereignty of the African States as well as the eradication of colonialism and the promotion of international cooperation).

3. See African [Banjul] Charter of Human and Peoples’ Rights, June 27, 1981, 21 I.L.M. 58 [hereinafter African Charter] (affirming and certifying the underlying “principles of human and peoples’ rights and freedoms contained in the declarations, conventions and other instruments adopted by the Organization of African Unity . . .”). The African Charter entered into force on October 21, 1986.

instrument around which the African regional system is organized—was first and foremost an anti-colonial instrument.⁴ It was primarily a tool for organizing the African continent around the political emancipation and independence of African countries and the consolidation of sovereignty.⁵ Though human rights made an entry into the OAU Charter, they only did so in a peripheral way.⁶ Frans Viljoen notes that not only did the OAU's Charter and its organs make human rights such a low priority that human rights were actually harmed:

By prioritizing the sovereign equality and respect for sovereignty and territorial integrity of new member states, the OAU Charter provided a very heavy anchor to stabilize and solidify the position of fledgling African states in the sea of international relations. To this should be added the principle of non-interference in the international affairs of states. It should come as no surprise that the Charter did not explicitly include human rights as part of the OAU's mandate. The OAU member states were only required to have 'due regard' for the human rights set out in the Universal Declaration. Bolstered by the principle of non-interference, the OAU in subsequent years turned a blind eye to allegations of human rights violations in member states.⁷

But much has changed and is still changing under the African human rights system since the founding of the OAU.⁸ The transformation of the OAU to the African Union (AU)⁹ has been marked by many significant

4. See NMEHIELLE, *supra* note 1, at 80–81 ("[A]t the time the [OAU] Charter was adopted, African States were not prepared to allow any organ other than their domestic institutions to deal with matters that touched on the protection of human rights.")

5. See African Charter at 81 (commenting that the OAU "originally failed to provide for early ways of dealing with home-grown [human rights] violations . . . [and] sacrificed [human rights agreements] on the altar of the national sovereignty of independent African states"); U. OJI UMOZURIKE, *THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS*, 25 (1997) (comparing the OAU Charter's "paucity of references to human rights . . ." with its "distinctly anti-colonialist and anti-apartheid" aims).

6. See NMEHIELLE, *supra* note 1, at 81 (commenting that the OAU Charter Preamble referenced the Charter of the United Nations and the Universal Declaration of Human Rights, which is an agreement with the international distaste for colonialism and an extension of obligation to Member States of the OAU to respect human rights); UMOZURIKE, *supra* note 5, at 25 ("There is no mention of human rights as an objective or as desirable but the principles of self-determination as well as non-intervention are recognized.")

7. VILJOEN, *supra* note 1, at 163.

8. See NMEHIELLE, *supra* note 1, at 71 (commenting that the increased efforts by individual OAU Member States to protect human rights indicates high prospects for human rights in Africa generally).

9. See Constitutive Act of the African Union, July 11, 2000, 2158 U.N.T.S. 3 (acknowledging in its preamble the invaluable role of the OAU in the development of Africa).

developments attesting to the gradual maturation of the African human rights system.¹⁰ At a regional treaty level, at least, human rights are no longer a peripheral concern on the African continent.¹¹ The last thirty years or so especially have seen the "winds of change"¹² blow across Africa, not least in the numbers and types of regional human rights instruments that have been adopted.¹³ The adoption of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Women's Protocol)¹⁴ by the AU on July 11, 2003 at Maputo, Mozambique, pursuant to Article 66 of the African Charter, is a part of these winds of change. The Women's Protocol came into force on November 25, 2005.¹⁵

This Special Issue of *The Washington and Lee Journal of Civil Rights and Social Justice* sets out to explore the significance and implications of the Women's Protocol with a particular focus on reproductive and sexual health. The focus on reproductive and sexual health is intended to contribute towards promoting understanding of the state obligations imposed by the Woman's Protocol and the individual rights that it finds as part of an educative process about a relatively new regional human rights

10. See Chris Maina Peter, *Human Rights in Africa: A Comparative Study of the African Human and People's Rights Charter and the New Tanzanian Bill of Rights*, 7 (1990) ("The adoption of the African Charter on Human and People's Rights . . . was the crescendo of sporadic and sometimes uncoordinated attempts by different interest groups in Africa to create a legal mechanism that would guarantee fundamental rights and freedoms to the common people."); Umozurike, *supra* note 5, at 27–28 (noting that the human rights situation in Africa had garnered international attention as various European states "sought to extend their metropolitan standards of human rights to their erstwhile colonies in some of which serious violations had been committed").

11. See GINO J. NALDI, *THE ORGANIZATION OF AFRICAN UNITY: AN ANALYSIS OF ITS ROLE* 157 (2d ed. 1999) (commenting that the "Banjul Charter attracted a remarkable degree of consensus and entered into force within a relatively short period of time").

12. See VILJOEN, *supra* note 1, at 169–70 (describing how more countries found themselves according greater freedom to their citizens as the winds of change swept across Africa from the 1990s and onward).

13. See NMEHELLE, *supra* note 1, at 158–59 (explaining that Articles 60 and 61 of the African Charter, which allow the incorporation of international principles on human rights, "can be regarded as the two omnibus articles of the Charter . . . and bring the African human rights mechanism within the positive influence of the UN").

14. See Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, *adopted* July 11, 2003, reprinted in Martin Semalulu Nsibirwa, *A Brief Analysis of the Draft Protocol to the African Charter on Human and People's Rights in Africa*, 1 AFR. HUM. RTS. L.J. 40, 53 (2001) [hereinafter Women's Protocol] (recognizing the important role of women in African society as well as the increasing international attention paid to women's rights).

15. VILJOEN, *supra* note 1, at 268.

instrument.¹⁶ The focus comes out of a realization that there is ample evidence to suggest that reproductive and sexual rights are being denied on a significant scale in Africa.¹⁷ The unmet needs in contraceptive care, high levels of unsafe abortion, high incidence of early or coerced marriages, prevalence of female genital mutilation, deteriorating access to health care services including reproductive health services, the prevalence of sexual violence and exploitation, pandemic levels of HIV/AIDS, and laws and customs that discriminate on the grounds of gender and sexual orientation all testify to Africa's failure to effectively realize reproductive and sexual rights for its people.¹⁸ It is vitally important to promote understanding of the Women's Protocol and its intersection with prevailing reproductive and sexual health challenges *inter alia* as part of holding African governments accountable.

The Special Issue is a product of the contributions made by delegates who were invited to share their expertise by participating in the Symposium on *Reproductive and Sexual Health and the African Protocol*. The Symposium was convened at the Washington and Lee University School of Law with the financial and administrative support of the *Journal of Civil Rights and Social Justice* and the Frances Lewis Law Center. The theme of the Symposium was conceived as part of my visit to Washington and Lee School of Law as a Scholar-in-Residence in Spring of 2009 at the invitation of the then-Director of the Frances Lewis Law Center, Professor Louise Halper. It is particularly sad to note that Professor Halper passed away untimely and was not there to witness the occasion of the Symposium—an event to which she had devoted many hours of planning.

The Symposium itself could not have taken place without the support of academic colleagues—Dean Bob Danforth and Professors Johanna Bond, Mark Drumbl, Tim Jost, and Ann Massie—of Washington and Lee School of Law who gave generously of their time to organize and support the event. Equally, the Symposium owes its being and success to the unstinting administrative support rendered by Wendy Rice and the technical

16. See *id.* at 271 (suggesting that the Women's Protocol compelled Member States for the first time to truly evaluate women's rights within the broader context of the human rights as described in the African Charter).

17. See *id.* at 267 ("NGOs working in the field of women's rights have over many years expressed concern about the pervasive abuse of women's rights by state parties . . .").

18. See *id.* at 271–72 (describing the many women's rights that the Women's Protocol addressed and noting that the treatment was more thorough and wide-ranging than any previous attempts).

support of the Technology and Media Center of the Washington and Lee School of Law.

II. *The Contributions*

The six contributions in this Special Issue come from experts in the field. Though they cover different dimensions of the Women's Protocol, they are all interrelated. The contributions all converge on promoting the understanding of the Women's Protocol and how it can be used as a tool for respecting, protecting and fulfilling women's reproductive and sexual health as human rights.

In *An Introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, Frans Viljoen builds a historical as well as a judicial context for the Women's Protocol.¹⁹ The paper begins by locating the Women's Protocol as a complimentary, rather than isolated, development in the changing African human rights system; there is a rising visibility of the institutionalization of a rights-based approach to gender, emanating from the United Nations as well as from the African regional and sub-regional levels.²⁰ The author sees strengths as well as weaknesses in the provisions of the Women's Protocol. As part of the strengths, Viljoen argues that the Women's Protocol speaks with a clearer voice than the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) on issues concerning African women, and offers more extensive substantive rights in a number of areas, including a broader scope for socio-economic rights, and a pre-emptive multidisciplinary approach to domestic implementation that does not rely solely on formal legal redress following the violation of a human right.²¹ Among the weaknesses identified by Viljoen are the lack of clear provisions for the African Commission on Human and Peoples' Rights protective mandate, and more generally, the poor record of the African

19. See Frans Viljoen, *An Introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, 16 WASH. & LEE J.C.R. & SOC. JUST. (2010) (providing a framework for analysis of the Women's Protocol by describing its historical context).

20. See *id.* (describing the Women's Protocol as one of the instruments adopted by the AU that did not come to be adopted in isolation from the broader political, legal and social background).

21. See *id.* (describing how the Women's Protocol provides specificity by expanding on the scope of protected rights beyond those provided for under CEDAW).

Commission in implementing the reporting obligations of member states.²² He argues that the weaknesses are redeemable and that in the final analysis, the Women's Protocol has a great potential to advance the human rights of women.²³

In *Stereotyping Women in the Health Sector: Lessons from CEDAW*, Simone Cusack and Rebecca Cook highlight the importance of developing a framework for understanding gender stereotyping as a part of promoting the reach of the equality and non-discrimination provisions of the Women's Protocol in the health sector.²⁴ The authors point out that like CEDAW,²⁵ in its substantive provisions, the Women's Protocol requires States Parties to eliminate stereotypes that are wrongful and discriminatory.²⁶ Using theoretical frameworks drawn from the interpretation and application of the provisions of CEDAW, Cusack and Cook examine how gender stereotyping can impede access to health care, reproductive health care in particular.²⁷ The authors also explore the obligation of domestic states to eliminate wrongful gender stereotyping and highlight how the obligations to respect, protect, and fulfill can be used to combat wrongful gender stereotyping.²⁸ As a part of illustrating wrongful stereotyping, Cusack and Cook discuss the adverse impact on women and their reproductive health that emanates from three types of stereotypes—stereotype of women as primarily

22. *See id.* (discussing the lack of unified reporting procedure arising from the potential overlap in the reporting obligation).

23. *See id.* (stating that the potential of the Women's Protocol "has remained largely untapped" and its potential effect depends on the better communication to increase the knowledge and awareness of its content).

24. *See* Rebecca Cook & Simone Cusack, *Stereotyping Women in the Health Sector: Lessons from CEDAW*, 16 WASH. & LEE J.C.R. & SOC. JUST. (2010) (explaining the need to give a greater priority to combating wrongful stereotyping against women to prevent violation of their human rights in the context of health care).

25. *See* Convention on the Elimination of All Forms of Discrimination against Women art. 2, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW] (setting an agenda to condemn discrimination against women in all its forms by pursuing all appropriate means to eliminate discrimination against women).

26. *See* Cook & Cusack, *supra* note 24, at (explaining how the Women's Protocol requires States Parties to eliminate wrongful gender stereotyping, similar to Article 5(a) of CEDAW which requires State Parties to take all appropriate measures to eliminate prejudice based on a stereotyping concerning the inferiority or superiority of either of the sexes).

27. *See id.* ("[E]xamining how women are stereotyped in the health context can provide important insights that foster understanding of how, and in what ways, women are disadvantaged in relation to the availability, accessibility, acceptability and quality of health care services and information.").

28. *See id.* (stating that such methods "will make it more likely that wrongful gender stereotyping will be eliminated in the health context").

mothers, stereotype of women as weak and vulnerable, and stereotype of women as incompetent decision-makers.²⁹

In *Health and Reproductive Rights in the Protocol to the African Charter: Competing Influences and Unsettling Questions*, Rachel Rebouché examines the drafting of the Women's Protocol with a view that highlights the main philosophical influences underpinning the drafting processes as well as critically appraising the processes.³⁰ The paper begins by describing the drafting process and ends by examining the processes successes and shortcomings.³¹ Rebouché's main thesis is that the Protocol has significant shortcomings that can primarily be tied to a drafting process that was fragmented not only in terms of time but, even more significantly, in terms of philosophy.³² Using Article 14 of the Women's Protocol as a pivot for discussion, she argues the Women's Protocol lacks cohesive principles and, instead, harbors contradictory philosophies that set some rights in conflict with others.³³ Drawing from feminist philosophy, Rebouché sees the Women's Protocol as concomitantly embracing liberal, dominant and cultural feminism. The author, however, ends on an optimistic note and suggests though the shortcomings of the Protocol are serious, they are not irredeemable.³⁴

Edith Miguda's paper, "*The Distant 'Big' Hospital: Linking Development, Poverty and Reproductive Health—A Gender Mainstreaming Approach*," begins by asking three key questions: "What are the critical links between development, poverty and reproductive rights? What specific challenges does poverty pose for women's reproductive health? How does

29. See *id.* (analyzing "three of the most socially pervasive and persistent stereotypes of women that operate to impair or nullify their access to reproductive health care").

30. See Rachel Rebouché, *Health and Reproductive Rights in the Protocol to the African Charter: Competing Influences and Unsettling Questions*, 16 WASH. & LEE J.C.R. & SOC. JUST. (2010) ("The Protocol incorporates the various insights of feminist legal thought that are reflected in regional and international women's rights instruments over the last thirty years.").

31. See *id.* (describing the origins of the Women's Protocol and critically examining its strengths and weaknesses).

32. See *id.* ("The process as a whole shows a failure to consider how the various purposes of the Protocol . . . were to converge into a process aligned with a set of defined principles and rights that supported the document's larger purpose.")

33. See *id.* at (discussing three shortcomings of Article 14 in failing to recognize the interdependence of various women's issues, the underdevelopment of women's rights to comprehensive healthcare, and women's autonomy rights and freedom from stereotype).

34. See *id.* (stating that despite its shortcomings, the Protocol has the potential to "evolve to meet African women's . . . needs" if member states are willing to adhere to certain principles).

the link with development provide an opportunity to enhance women's reproductive rights?"³⁵ The paper proceeds to address these questions, by using a human development framework with Kenya serving as a focal point. Miguda uses two stories that are drawn from personal experiences to capture the constraints that poor women have when attempting to realize access to health care.³⁶ The stories illustrate how two Kenyan women who are separated in time, but have common challenges in that they both live in rural areas, far away from the big hospital, and lack access to transportation in their time of reproductive care need to take them to the big hospital. The point that the author makes is that it is not just a challenge of distance in terms of getting to the big hospital but that even the big hospital lacks adequate resources.³⁷ Miguda's thesis is that to realize universal access to health care—including stemming the tide of maternal mortality in which the developing world is overrepresented—it is essential to have a holistic development agenda that enables all human beings to realize their potential, is gender responsive, and prioritizes the poor.³⁸ She sees gender mainstreaming as an essential building block of a successful development agenda.³⁹

In *Realizing Access to Sexual Health Information and Services for Adolescents through the Protocol to the African Charter on the Rights of Women*, Ebenezer Durojaye discusses the intersection between the African Women's Protocol and the realization of the sexual health of adolescents.⁴⁰ The focus of the paper is on examining the impediments to sexual health,

35. Edith Miguda, *"The Distant 'Big' Hospital": Linking Development, Poverty and Reproductive Health—Gender Mainstreaming Approach*, 16 WASH. & LEE J.C.R. & SOC. JUST. (2010).

36. *See id.* (recounting two personal experiences in Kenya which helped to form the author's beliefs regarding the necessity for change with respect to women's access to health care).

37. *See id.* (explaining that in addition to the problem of distance to the hospital, "many times when they reach the so called 'big hospital,' there are no adequate medical resources, medicine, medical equipment, bed facilities").

38. *See id.* (describing the studies showing that impoverished women, especially those living in developing countries, suffer disproportionately from health and gender-based problems).

39. *See id.* ("[M]ainstreaming reproductive rights to empower women can counterbalance the negative impact of poverty on women's ability to actualize their reproductive rights.").

40. *See Ebenezer Durojaye, Realizing Access to Sexual Health Information and Services for Adolescents through the Protocol to the African Charter on the Rights of Women*, 16 WASH. & LEE J.C.R. & SOC. JUST. (2010) (examining the sexual health needs of female adolescents and using the Women's Protocol as a "unique opportunity" to do so).

and exploring the intersections between the Women's Protocol and the African Charter, and the African Charter on the Rights and Welfare of the Child. On the factors that impede the realization of sexual health, Durojaye identifies two broad categories of factors—socio-cultural factors and health care setting-related factors.⁴¹ He proceeds to identify and discuss the provisions of African human rights instruments that are pertinent to the sexual health of adolescents, including the rights to health, privacy, information, equality, and non-discrimination.⁴² The author highlights the importance of a rights-based approach in promoting accountability on the part of States Parties.⁴³

The focus on the paper by Susan SáCouto and Katherine Cleary is on the intersection between the Women's Protocol on the protection against sexual violence in times of conflict. In their paper, *The Women's Protocol to the African Charter and Sexual Violence in the Context of Armed Conflict or other Mass Atrocity*, SáCouto and Cleary set out to examine the relationship between sexual violence in times of conflict and the Women's Protocol, to give an account of the historical development of accountability jurisprudence at the international level and to examine the ways in which the African human rights system, especially the Women's Protocol, can contribute towards bringing perpetrators to account.⁴⁴ In terms of the historical development of jurisprudence and mechanisms for accountability, the authors submit that the Women's Protocol came at a time that tremendous progress had been achieved.⁴⁵ The authors cite the existence of jurisprudence that now recognizes sexual violence as constituting additional war crimes,⁴⁶ including the Statute of Rome and the establishment of ad hoc

41. See *id.* (explaining how implicit discouragement and intimidation imposed by socio-cultural and health care setting factors hinder the sexual health of adolescent females).

42. See *id.* (examining the relationship between certain human rights instruments and the sexual health of women).

43. See *id.* ("Adopting a rights-based approach to an issue such as realizing access to sexual health information and services for adolescents is important in the sense that it provides an avenue for holding states accountable to their commitments under international law.").

44. See Susana SáCouto & Katherine Cleary, *The Women's Protocol to the African Charter and Sexual Violence in the Context of Armed Conflict or Other Mass Atrocity*, 16 WASH. & LEE J.C.R. & SOC. JUST. (2010).

45. See *id.* ("[G]reat strides have been made in the investigation and prosecution of sexual violence, in particular in the *ad hoc* international criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR).").

46. See *id.* (noting that "these tribunals have recognized that sexual violence may constitute a number of additional crimes, including the war crimes of torture and outrages upon personal dignity").

tribunals in the former Yugoslavia, Rwanda and Sierra Leone that recognized sexual violence-based crimes.⁴⁷ At the same time, SáCouto and Cleary highlight that while there has been progress, there are also remaining challenges. Among the main challenges they cite, is that allegations of sexual violence are not always investigated and prosecuted, leaving perpetrators unaccountable.⁴⁸ The authors welcome Article 11 of the Women's Protocol which contains provisions aimed at protecting women in times of conflict as a positive development that adds to the domestication of international humanitarian law.⁴⁹ At the same time, the authors argue that Article 11 does not go far enough in that at a textual level, it appears to be weaker than what is already provided under the international humanitarian law.⁵⁰

47. *See id.* (citing specific examples in which instances of sexual violence are being prosecuted as war crimes).

48. *See id.* (referencing an example in which "problems plagued the early operations of the Special Court for Sierra Leone, with the result that all evidence relating to crimes of sexual violence committed by the Civilian Defence Force (CDF) was excluded from the trial of that group's leaders.").

49. *See id.* (stating that Article 11 is a "positive development" in that it "further domesticates" obligations of African states).

50. *See id.* (stating that Article 11 "raise[s] some questions about whether the drafters were more focused on the traditional role of women as civilians than their possible role as soldiers or combatants").