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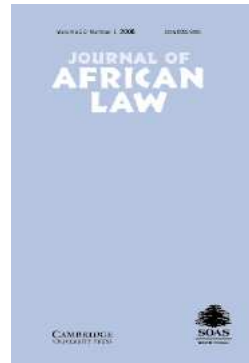
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## BLAZING A TRAIL: THE AFRICAN PROTOCOL ON WOMEN'S RIGHTS COMES INTO FORCE

FAREDA BANDA\*

The entry into force of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003<sup>1</sup> (hereafter African Women's Protocol or Protocol) on 25 November, 2005,<sup>2</sup> marked the culmination of years of lobbying for a document which would promote and protect the human rights of the continent's women by African women's rights advocates. This commentary provides a brief historical overview of the process leading up to the adoption of the Protocol by the African Union in Maputo in July 2003 before moving on to consider its substantive provisions.

### HISTORICAL OVERVIEW

The genesis of the African Women's Protocol can be traced back to a joint NGO/African Commission initiative in 1995.<sup>3</sup> At the instigation of a regional women's NGO, Women in Law and Development in Africa (WILDAF), the African Commission on Human and People's Rights had organized a meeting to discuss the situation of women in Africa. At the meeting it was noted that the widespread ratification by African states of the International Bill of Rights<sup>4</sup> and the Convention on the Elimination of All Forms of Discrimination, 1979 (CEDAW),<sup>5</sup> all of which protected women from gender-based discrimination, had not greatly improved the lives of women on the continent. It was further noted that although African states had ratified the African Charter on Human and Peoples' Rights, 1981,<sup>6</sup> (African Charter), which proscribed discrimination on the basis of sex,<sup>7</sup> enjoined states, amongst other things, to ensure equality before the law<sup>8</sup> and also to "eliminate every discrimination against women",<sup>9</sup> still, women's rights on the continent were not being enforced. The result of this non-enforcement was that women were continuing to experience violations of their rights.

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<sup>1</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003, available at <www.africa-union.org>.

<sup>2</sup> The Protocol required 15 ratifications to bring it into force. African Protocol on Women's Rights art. 29(1). The first states to ratify were: Benin, Cape Verde, Comoros, Djibouti, Gambia, Lesotho, Libya, Mali, Malawi, Namibia, Nigeria, Rwanda, Senegal, South Africa and Togo.

<sup>3</sup> WILDAF, "The African Charter on Human and Peoples' Rights and the additional Protocol on Women's Rights", (1999) *WILDAF News* 18; R. Murray, "A feminist perspective on the reform of the African human rights system", (2000) 1 *African Human Rights Journal* 205.

<sup>4</sup> Universal Declaration of Human Rights, 1948 (UDHR) UN GA Res. 217A (III) 1948 arts. 2 and 7; International Covenant on Civil and Political Rights, 1966 (ICCPR) 999 UNTS 171 arts. 2(1), 3, 26; International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR) 993 UNTS 3 arts. 2(2), 3.

<sup>5</sup> Convention on the Elimination of All Forms of Discrimination against Women, 1979 (CEDAW) 1249 UNTS 13.

<sup>6</sup> African Charter on Human and Peoples' Rights, 1981, OAU Doc. CAB/LEG/67/3 REV. 5. See also Constitutive Act of the African Union, 2000, available at <www.africa-union.org>, arts. 3(h) and 4(1). A. Lloyd and R. Murray, "Institutions with responsibility for human rights protection under the African Union", (2004) 48 *J.A.L.* 165, 176–177.

<sup>7</sup> African Charter art. 2.

<sup>8</sup> *Ibid.*, art. 3.

<sup>9</sup> *Ibid.*, art. 18(3).

The non-governmental organization (NGO) movement noted a lack of political will on the part of states to guarantee the rights of women within their jurisdictions. Interestingly, the African Commission had not in its nine years of existence (1986–1995) dealt with any complaints alleging violations of women's rights.<sup>10</sup> To its credit, the African Commission agreed to the setting up of a working group to look into the matter of African women's legal disenfranchisement. To lead the working group, it appointed the Special Rapporteur on the Rights of African Women whose mandate provides in part:

- “d) The Special Rapporteur will assist African governments in the development and implementation of their policies of promotion and protection of women's right in Africa.
- e) He or she will encourage and work with NGOs in the field of promotion and protection of women's rights.
- f) He or she will serve as a link between the Commission and inter-governmental and non-governmental organisations at regional and international levels in order to harmonise the initiatives on the rights of women.”<sup>11</sup>

The initiative found support within the Organization of African Unity which mandated the African Commission to prepare a Protocol on the Rights of Women in Africa.<sup>12</sup>

The Special Rapporteur duly constituted a small working group which produced the first draft.<sup>13</sup> It had a definition of discrimination; highlighted the importance of eliminating *de jure* and *de facto* discrimination against women; and identified different kinds of violence against women, including trafficking and traditional and cultural practices harmful to women. The draft also contained family law provisions including the provision that marriage should be entered into willingly and guaranteeing women and men equal rights within marriage and at its dissolution. There were provisions protecting widows from degrading and inhuman treatment, and socio-economic rights including the right to food, housing, employment and education, all of which were to be enjoyed without discrimination on the basis of sex. Provision was also made for women to participate in decision making and interestingly it was also noted that women had a right to live in peace with states being enjoined to:

“commit themselves to reduce military expenditure significantly in favour of spending on social development, while guaranteeing the effective participation of women in the distribution of these resources.”<sup>14</sup>

This was the first of many drafts. As the drafting process went along, input came from NGOs throughout the continent, government legal experts and the Women's Unit of the Organization of African Unity.<sup>15</sup> Although using CEDAW as the template, the document that was eventually adopted by the African Union in July 2003 was arguably more radical than its progenitor. This should not be a surprise, the drafters having had the benefit of the Vienna Declaration and

<sup>10</sup> The position remains unchanged. See F. Banda, “The protection of women's rights in Africa”, (2004) 14 *Interights Bulletin* 147.

<sup>11</sup> Draft Terms of Reference for the Special Rapporteur on the Rights of Women in Africa DOC/OS/34c (XXIII) Annex 11, 1996. See also M. Evans and R. Murray, “The Special Rapporteurs in the African system”, in M. Evans and R. Murray (eds.), *The African Charter on Human and Peoples' Rights: The System in Practice, 1986–2000*, Cambridge, 2002, 280, 295.

<sup>12</sup> Resolution AHG/Res. 240 (XXXI) of the OAU Assembly of Heads of State and Government, adopted at the 31st Ordinary Session, Addis Ababa, July 1995.

<sup>13</sup> Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women, DOC/OS/34c (XXIII) Annex.

<sup>14</sup> *Ibid.*, art. 10(3).

<sup>15</sup> Discussed in F. Banda, *Women, Law and Human Rights: An African Perspective*, Oxford, 2005, 66–83.

Programme for Action, 1993,<sup>16</sup> the UN General Assembly Declaration on the Elimination of Violence against Women, 1993,<sup>17</sup> and the Beijing Declaration and Programme for Action, 1995.<sup>18</sup> The drafting process also drew upon sub-regional instruments on women's rights, including the SADC Declaration on Gender and Development, 1997, and its Addendum on Violence of 1998.<sup>19</sup>

#### PROTOCOL PROVISIONS

In line with both CEDAW, 1979, and the African Charter, 1981, the African Women's Protocol, 2003, contains civil, political, socio-economic and cultural rights. Like CEDAW, the preamble notes the failure of states to promote and protect women's rights, notwithstanding the existence of many human rights instruments enjoining them so to do. Its definition of discrimination is closely modelled on that found in article 1 of CEDAW and provides:

“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.”<sup>20</sup>

Some states parties resisted provisions of the draft seeking to ensure *equal* rights for men and women, arguing that men and women could not be considered as being the same (equal). They are different and therefore their roles and responsibilities required differential treatment. These objections call to mind the tensions that arose during the drafting of CEDAW<sup>21</sup> and are manifest in the many reservations made to CEDAW by contracting parties.<sup>22</sup>

The state is enjoined in article 2 to combat discrimination by a variety of means, including amending constitutions to guarantee equality, mainstreaming and also taking “corrective and positive action in those areas where discrimination against women in law and in fact continues to exist”.<sup>23</sup> This last provision builds on CEDAW article 4 on temporary special measures.<sup>24</sup> It shows an appreciation of the need for states to derogate from a strict reading of the non-discrimination provision to accelerate women's advancement.<sup>25</sup> It is telling that the use of temporary special measures which permit the use of (women only) quotas or selection lists, is highlighted in article 9 on women's right to participate in the political and decision-making process.<sup>26</sup> This reflects the concerns of

<sup>16</sup> United Nations World Conference on Human Rights: Vienna Declaration and Programme for Action, reproduced in (1993) 32 *International Legal Materials* 1661.

<sup>17</sup> UN Declaration on the Elimination of Violence against Women, 1993, GA Res. 48/104.

<sup>18</sup> Beijing Declaration and Programme for Action (15 September, 1995), reproduced in (1996) 35 *International Legal Materials* 404.

<sup>19</sup> “SADC Gender and Development Declaration on Gender and Development, 1997”, (1999) 1 *SADC Gender Monitor* 33; “The Prevention and Eradication of Violence against Women and Children. An Addendum to the 1997 SADC Declaration on Gender and Development”, (1999) 1 *SADC Gender Monitor* 37.

<sup>20</sup> African Protocol on Women's Rights, 2003, art. 1(f). See also Human Rights Committee General Comment No. 18 on Non-Discrimination (21 November, 1989) CCPR/C/21/Rev. 1. Add. 1; *Legal Resources Foundation v. Zambia* Communication 211/98, Decision of the Af/CmHPR, 29th Ordinary Session, April/May 2001 [2001] IHRL 1 (May 2001).

<sup>21</sup> L. Rehof, *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination against Women*, Dordrecht, 1993.

<sup>22</sup> J. Connors, “The women's convention in the Muslim world”, in J. Gardner (ed.), *Human Rights as General Norms and a State's Right to Opt Out*, London, 1997, 85. For the reservations, see <<http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm>>.

<sup>23</sup> African Protocol on Women's Rights, 2003, art. 2(1)(d).

<sup>24</sup> See also CEDAW General Recommendation No. 25 on Temporary Special Measures, CEDAW/C/2004/WP.1/Rev. 1.

<sup>25</sup> *Guido Jacobs v. Belgium*, Communication No. 943/2000 CCPR/C/81/D/943/2000.

<sup>26</sup> African Protocol on Women's Rights art. 9(1).

women's rights advocates who argue that the under-representation of women in national parliaments and other decision-making bodies results in an inability to influence policy and also to challenge discriminatory laws and practices.<sup>27</sup> It is for this reason that article H(ii) of the SADC Gender and Development Declaration, 1997, provides for 30 per cent representation of women in the region by 2005, a target met by Mozambique and South Africa.<sup>28</sup>

Equally important in article 2 is the recognition that women experience discrimination not only as a result of law but also social practice. It is for this reason that article 2(2) of the Protocol builds on articles 2(f) and 5(a) of CEDAW to hold:

“States Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public 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.”<sup>29</sup>

Significantly, the Protocol is detailed in its consideration of the role of culture in limiting the enjoyment by women of their rights, thus article 17 is clear in its injunction that women have the right to live in a positive cultural context and to be involved in the determination of cultural policies. Moreover, unlike the African Charter, which merely provides for the promotion of positive African values<sup>30</sup> without specifying the nature or content of said values,<sup>31</sup> the Protocol makes clear in its preamble that African values are to be “based on the principles of equality, peace, freedom, dignity, justice, solidarity and democracy”. For the avoidance of doubt, article 3 on the right to dignity makes clear that: “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”.<sup>32</sup>

In light of the fact that the family constitutes the arena in which women are most likely to experience violations of their rights,<sup>33</sup> it is worth examining the provisions made for their protection.

## FAMILY

Article 6 on marriage builds on many existing human rights instruments, not least the Convention on the Consent to Marriage, Minimum Age of Marriage and Registration of Marriage, 1962,<sup>34</sup> ICCPR<sup>35</sup> and CEDAW. Specifically,

<sup>27</sup> J. Foster, S. Makanya and G. Mutukwa (eds.), *Women in Politics and Decision Making in Southern Africa*, Harare, 1999.

<sup>28</sup> See also CEDAW arts. 7 and 8, General Recommendation No. 23 on Women in Public Life, UN Doc.A/52/38/Rev.1 para. 4(1).

<sup>29</sup> African Protocol on Women's Rights art. 2(2). See also R. Holtmaat, *Towards Different Law and Public Policy: The Significance of Article 5 (a) CEDAW for the Elimination of Structural Gender Discrimination*, The Hague, 2004.

<sup>30</sup> African Charter art. 29(7).

<sup>31</sup> But see C. Beyani, “Toward a more effective guarantee of women's rights in the African human rights system”, in R. Cook (ed.), *Human Rights of Women: National and International Perspectives*, Philadelphia, 1994, 285.

<sup>32</sup> African Protocol on Women's Rights art. 3(1).

<sup>33</sup> C. Chinkin, “Gender inequality and human rights law”, in A. Hurrell and N. Woods (eds.), *Inequality, Globalisation and World Politics*, Oxford, 1999, 95 at 105; Human Rights Committee General Comment No. 28 on Equality of Rights between Men and Women art. 3 (29 March, 2000) CCPR/C/21/Rev.1 Add.10.

<sup>34</sup> Convention on Consent to Marriage, Minimum Age of Marriage and Registration of Marriage General Assembly Resolution 1763A (XVIII) of 7 November, 1962.

<sup>35</sup> ICCPR art. 23; Human Rights Committee General Comment No. 19 on Protection of the Family, the Right to Marriage and Equality of the Spouses (art. 23) (39th session, 1990) HRI/GEN/1/Rev.7.

the African Protocol requires the consent of both parties to the marriage,<sup>36</sup> specifies the age of 18 as a minimum age of marriage<sup>37</sup> and calls for the registration of marriages "in order to be legally recognized".<sup>38</sup> These provisions pose a challenge to African states, many of which have personal law systems that allow marriage before the age of 18, especially for girls. Moreover, given the inequality of bargaining power between men and women and fathers and daughters, it is likely that girl children will continue to be married against their will.<sup>39</sup> Of the states participating in the drafting of the Protocol, it was only Tunisia and Sudan which placed on record their objections to having 18 as the minimum age of marriage. It is likely that they were the only states paying attention or telling the truth.

Another clash between legal provision and practice is reflected in the injunction that unregistered marriages will not be valid. Although registration has the triple benefit of checking to ensure consent, that children under 18 are not being married and, of course, of providing legal certainty about the existence of the marriage, it is worth noting that the vast majority of marriages on the continent are not registered. Indeed, there is little state involvement, marriage being regarded as a private arrangement between the two families. It may well be that an approach that promotes registration but does not penalize those who fail to register may constitute a more realistic approach. It would be unfortunate if an instrument designed to be for the protection of women led to their legal disenfranchisement.<sup>40</sup>

Other family related provisions worth considering are on nationality. Article 6(g) provides that a woman can retain her nationality or acquire that of her husband, thus putting paid to the problems that have arisen in many jurisdictions where the law provided that on marriage a woman would lose her own nationality and acquire that of her husband, or that a woman could not on marriage bestow her nationality on her husband although a man marrying an alien woman, could.<sup>41</sup> More controversial is the provision on nationality of children which reads:

"a woman and a man shall have equal rights, with respect to nationality of their children except where this is contrary to a provision in national legislation or is contrary to national security interests."<sup>42</sup>

This provision, which is based on article 9(2) of CEDAW was, during the drafting process, subject to the same objections as those made during the drafting of CEDAW and which have resulted in reservations being made by, amongst others, Algeria, Egypt, Morocco and Tunisia.<sup>43</sup> The objections related to a

<sup>36</sup> African Protocol on Women's Rights art. 6(a).

<sup>37</sup> *Ibid.*, art. 6(b). See also African Charter on the Rights and Welfare of the Child, 1990, available at <[www.africa-union.org](http://www.africa-union.org)> art. 21(2).

<sup>38</sup> *Ibid.*, art. 6(d).

<sup>39</sup> See the documentary film on Ethiopia by G. Barnes and L. Paton, *The Child Brides* [documentary film], London, 1998. See also Forum on Marriage and the Rights of Women and Girls, *Early Marriage: Whose Right to Choose?* London, 2000.

<sup>40</sup> See, e.g., the South African Recognition of Customary Marriages Act, 1998 (Act 120 of 1998) ss. 4(1), 4(9).

<sup>41</sup> *Aumeeruddy Cziffra v. Mauritius* (2000) A.H.R.L.R. 3 (HRC 1981); *Rattigan and Others v. Chief Immigration Officer and Others* 1994 (2) Z.L.R. 287 (SC); *Salem v. Chief Immigration Officer* 1994 (2) Z.L.R. 287 (SC); A. Gubbay, "The effect of the deportation of alien husbands upon the constitutionally protected mobility rights of citizen wives in Zimbabwe", in United Nations, *Bringing International Human Rights Law Home*, New York, 2002, 116; Human Rights Committee General Comment No. 19, above n. 35, at paras. 5 and 7; Human Rights Committee General Comment No. 28, above n. 33, at para. 26.

<sup>42</sup> African Protocol on Women's Rights art. 6(h).

<sup>43</sup> See <<http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm>>.

mother's *equal* right to pass on her nationality to her children. Children, it was argued, "traditionally" follow the father's line.<sup>44</sup> To break the deadlock, the drafters agreed to make the right subject to national law, which solution constitutes a usurpation of international law principles.<sup>45</sup>

Equally controversial during the drafting of the Protocol was the demand made by non-governmental organizations that polygyny be abolished. This was actively resisted by government experts who met in 2001.<sup>46</sup> Grounds for resistance included the fact that the Shari'a and many customary personal law systems recognized the rights of men to marry more than one wife. It was also argued that a legal abolition of polygyny would result in hardship being suffered by women already in polygynous unions. The final Protocol embodies a compromise providing as it does that:

"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."<sup>47</sup>

The divorce provisions of the Protocol are also worth looking at. Having provided for compulsory registration of marriage, article 7(a) requires that "separation, divorce or annulment of a marriage shall be effected by judicial order". This provision, together with the one giving men and women the same rights to seek separation, divorce or annulment of marriage, was objected to by some of the North African Islamic states as being incompatible with the Shari'a which allows a man to divorce his wife unilaterally and which provides different grounds for divorce for men and women.<sup>48</sup> Here it is instructive to look at the Egyptian reservation to article 16 of CEDAW, which reads in part:

"The provisions of the *Sharia* lay down that the husband shall pay bridal money to the wife and maintain her fully and shall also make a payment to her upon divorce, whereas the wife retains full rights over her property and is not obliged to spend anything on her keep. The *Sharia* therefore restricts the wife's rights to divorce by making it contingent on a judge's ruling, whereas no such restriction is laid down in the case of the husband."<sup>49</sup>

Another problem linked to the use of the liberal model of equality based on "reversing the sexes and comparing"<sup>50</sup> was the objection to men and women having an *equal* right to share the property of the marriage. Again, in line with its reservation to article 16 (1) of CEDAW, Egypt was resistant to men and women having the same property rights and made an objection during the drafting process. The final provision in the Protocol on property is as follows:

"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"<sup>51</sup> (emphasis added).

The question is: are equitable and equal the same? The Committee on the Elimination of All Forms of Discrimination against Women (also CEDAW) would argue not. In its concluding observations to the report submitted by

<sup>44</sup> This position echoes the arguments made on behalf of the government of Botswana in *Unity Dow v. Attorney General of Botswana* [1991] L.R.C. 574.

<sup>45</sup> See Vienna Convention on the Law of Treaties, 1969, 1155, UNTS, 331 art. 27.

<sup>46</sup> Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (as adopted by the Meeting of Government Experts in Addis Ababa on 16 November, 2001) 22 November, 2001, CAB/LEG/66/6/Rev.1.

<sup>47</sup> African Protocol on Women's Rights art. 6(c).

<sup>48</sup> A. An Na'im, *Islamic Family Law*, London, 2003.

<sup>49</sup> Egypt's reservation to article 16 of CEDAW. See above n. 43.

<sup>50</sup> C. Mackinnon, *Towards a Feminist Theory of the State*, Cambridge, 1989, 217.

<sup>51</sup> African Protocol on Women's Rights art. 7(d).



Paraguay, the Committee noted that the terms equal and equity were not synonymous or interchangeable.<sup>52</sup> It further noted that the aim of the Convention was the elimination of discrimination between men and women:

“and ensuring de jure and de facto equality between men and women. The Committee therefore recommends that the State party use the term ‘equality’ henceforth.”<sup>53</sup>

It is worth noting that women often experience discrimination in the allocation of property on divorce with judges minimizing the contribution made by women to the joint family enterprise.<sup>54</sup> It is for this reason that the inclusion in article 13 of the injunction that states have an obligation to “take the necessary measures to recognize the economic value of the work of women in the home”<sup>55</sup> is important.

The other area in which women experience discrimination in the allocation of property is on the death of a spouse. The recognition of this sometimes legally, but more often than not, socially sanctioned disenfranchisement by the Protocol is a welcome development. Article 21 provides that 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 if she has inherited it.”<sup>56</sup>

Equally important is the recognition that brothers and sisters have the right to inherit in equitable (but not equal) shares their parents' properties. Again, it is worth noting that Egypt entered objections to the provisions just discussed, arguing that Shari'a made different provisions for the widow and for male and female children on the death of the husband/father.<sup>57</sup> Significantly, case law from across the continent indicates that this is not a uniquely Islamic perspective.<sup>58</sup>

Linked to widow disinheritance is widow abuse which can include being made to sleep with a stranger to be “cleansed” or indeed being forced to marry one of the deceased's relatives. The Protocol makes clear that the widow is not to be subject to degrading and inhuman treatment.<sup>59</sup> Moreover, a widow shall have the right to remarry if she so wishes (and whom she wishes to marry)<sup>60</sup> and to be appointed the guardian of her children.<sup>61</sup>

<sup>52</sup> CEDAW Concluding Observations to the Combined Third, Fourth and Fifth Periodic Reports of Paraguay, CEDAW/C/PAR/CC/3-5 (15 February, 2005) para. 23.

<sup>53</sup> *Ibid.*

<sup>54</sup> C. Nyamu-Musembi, “‘Sitting on her husband's back with her hands in his pockets’: commentary on judicial decision making in marital property cases in Kenya”, in A. Bainham (ed.), *International Survey of Family Law 2002*, Bristol, 2002, 229.

<sup>55</sup> African Protocol on Women's Rights art. 13(h). See also CEDAW General Recommendation No. 21 on Equality in Marriage and Family Relations, UN Doc a/49/38 paras. 11 and 12; Zimbabwe Matrimonial Causes Act (Cap. 5:13) s. 7(3).

<sup>56</sup> African Protocol on Women's Rights art. 21(1).

<sup>57</sup> Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (as adopted by the Meeting of Ministers, Addis Ababa, Ethiopia, 28 March, 2003) MIN/WOM/RTS/DRAFT.PROT. (II) Rev.5.

<sup>58</sup> *Nzekwu v. Nzekwu* [1989] 2 N.W.L.R. 373; C. Odinkalu, “Customary law and women's inheritance rights in Commonwealth Africa”, (2000) 13 *Interights Bulletin* 39; U. Ewelukwa, “Post-colonialism, gender, customary injustice: widows in African societies”, (2002) 24 *H.R.Q.* 424; *Magaya v. Magaya* 1999 (1) Z.L.R. 100; *Bhe v. Magistrate Khayelitsha and Others* 2005 (1) B.C.L.R. 1 (CC), discussed by E. Grant, “Human rights, cultural diversity and customary law in South Africa”, (2006) 50 (1) *J.A.L.* 2.

<sup>59</sup> African Protocol on Women's Rights art. 20(a). See also art. 3 on the right to dignity and the definition of harmful practices in art. 1(g).

<sup>60</sup> *Ibid.*, art. 20(c).

<sup>61</sup> *Ibid.*, art. 20(b).



It is in its consideration of violence against women that the Protocol comes into its own. With the exception of article 6 on trafficking and exploitation of prostitution of women, CEDAW does not have any provisions pertaining to violence against women.<sup>62</sup> What the African Protocol does is to build on the Addendum to the SADC Declaration on Gender and Development on Violence against Women.<sup>63</sup> It also reflects international developments including the Vienna Declaration and Programme of Action, 1993, the UN General Assembly Declaration on the Elimination of Violence against Women, 1993, and the Beijing Declaration and Platform for Action, 1995. Provisions on violence are found throughout the Protocol but in discussing them, I will work thematically, starting with violence against women in the family, then looking at violence against women in the community including school and the work place, before moving on to consider “public violence”, under which rubric I include violence against women in war and also abuse of refugees. First, it is worth considering the definition of violence:

“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.”<sup>64</sup>

This definition covers all the spheres in which women experience violence: the family, community and at the hands of the state. Its breadth of coverage is reinforced by the requirement in article 3 on dignity that states protect women from “all forms of violence, particularly sexual and verbal violence”.<sup>65</sup> This may well be the first time that verbal violence against women has been recognized in an international human rights instrument. It is also noteworthy that the state is made responsible for violence including forced sex in the private sphere<sup>66</sup> raising the possibility that those African states which have not already done so, may have to legislate to make rape within marriage illegal. The bar for state responsibility is set very high in the Protocol. It requires the state to provide education, punish perpetrators whilst also ensuring that it implements programmes to rehabilitate women victims and also provide them with reparations for their suffering.<sup>67</sup> It echoes the *Velasquez*<sup>68</sup> test for due diligence required of states, which is also set out in CEDAW General Recommendation No. 19:

“Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.”<sup>69</sup>

The Protocol offers new protection to girls and women as they go about trying to get an education or earn a living. Sexual harassment and sexual abuse at

<sup>62</sup> However, the Committee has tried to make up for this by use of General Recommendations. See General Recommendation No. 12 on Violence against Women, UN Doc A/44/38; CEDAW General Recommendation No. 19 on Violence against Women, UN Doc A/47/8.

<sup>63</sup> SADC Addendum on Violence, above n. 19.

<sup>64</sup> African Protocol on Women's Rights art. 1(j). Cf. CEDAW General Recommendation No. 19, above n. 62, para. 6; UN Declaration on the Elimination of Violence against Women, 1993, above n. 17, art. 1.

<sup>65</sup> African Protocol on Women's Rights art. 3(4).

<sup>66</sup> *Ibid.*, art. 4(2)(a).

<sup>67</sup> *Ibid.*, arts. 4(d)–(f).

<sup>68</sup> *Velasquez Rodriguez v. Honduras* (1989) 28 *International Legal Materials* 291.

<sup>69</sup> CEDAW General Recommendation No. 19, above n. 62, para. 9.

school and at work is proscribed.<sup>70</sup> Again, this is an important gain not least for girl children whose studies have often been interrupted due to sexual harassment by teachers and other pupils. Instead of expelling the girl as often happens, the Protocol enjoins states to punish the perpetrators.<sup>71</sup> Another area in which the African girl child finds herself vulnerable is to the possibility of being trafficked to another country, often for the purpose of domestic work, but sometimes also sexual exploitation.<sup>72</sup> Here the African Protocol builds on the existing international framework on trafficking including the ECOWAS Declaration on the Fight against Trafficking in Persons, 2001,<sup>73</sup> calling on states to: “prevent and condemn trafficking in women, prosecute perpetrators of such trafficking and protect those women most at risk”.<sup>74</sup>

Impressively, a spotlight is put on groups that are often ignored including elderly women, women in distress and those with disabilities.<sup>75</sup> The state is also required to protect them from abuse, discrimination and violations of their right to dignity.<sup>76</sup> Moving away from Western debates about whether pornography constitutes a violation of women's rights or is covered under the right to free speech, the African Protocol makes clear that it considers it a violation of women's rights, thus states are required to “take effective legislative and administrative measures to prevent the exploitation and abuse of women in advertising and pornography”.<sup>77</sup>

One of the most controversial topics over the past decade has been that of harmful practices, and specifically female genital cutting, also called female circumcision or female genital mutilation.<sup>78</sup> The African Protocol is unequivocal in its opposition to said practices, which it defines widely to include:

“‘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.”<sup>79</sup>

To deal with the problems associated with harmful practices, the Protocol enjoins states to implement legislation prohibiting harmful practices and specifying punishments for the perpetrators.<sup>80</sup> States parties are also required to use education to modify attitudes.<sup>81</sup> Interestingly, state obligation is not only to assist those who have undergone harmful practices, but also to prevent the occurrence of such practices by protecting those who are at risk of being subjected to the practices.<sup>82</sup> The strength of the African Protocol is in its recognition that violence against women, including the elimination of harmful practices, requires an holistic approach which goes beyond law and punishment to embrace the totality

<sup>70</sup> African Protocol on Women's Rights arts. 12(1) (c) and 13(c) (d). See also CEDAW General Recommendation No. 19, above n. 62, paras. 17, 18.

<sup>71</sup> *Ibid.*, art. 12(1)(c).

<sup>72</sup> Human Rights Watch, *Borderline Slavery: Child Trafficking in Togo*, London, 2003. CEDAW General Recommendation No. 19, above n. 62, para. 14.

<sup>73</sup> ECOWAS Declaration A/DC/12/12/01 on the Fight against Trafficking in Persons, 25th Ordinary Session of Authority of Heads of State and Government, Dakar, 20–21 December, 2001.

<sup>74</sup> African Protocol on Women's Rights art. 4(g).

<sup>75</sup> *Ibid.*, arts. 22–24.

<sup>76</sup> *Ibid.*, arts. 22(b) and 23(b).

<sup>77</sup> *Ibid.*, art. 13(m).

<sup>78</sup> See Banda, above n. 15, 207–218.

<sup>79</sup> African Protocol on Women's Rights art. 1(g). See also African Charter on the Rights and Welfare of the Child art. 21(1); CEDAW General Recommendation No. 19, above n. 62, paras. 11 and 12; CEDAW General Recommendation No. 24 on Health, UN Doc A/54/38/Rev.1, paras. 12(b) and 15(d).

<sup>80</sup> African Protocol on Women's Rights arts. 2(1)(b) and 5(b).

<sup>81</sup> *Ibid.*, art. 2(2).

<sup>82</sup> *Ibid.*, art. 5(d).

of the person whose rights have been violated. With this in mind, the Protocol calls on states to provide the:

“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.”<sup>83</sup>

The assertion in article 10 of the Protocol that women “have the right to a peaceful existence and the right to participate in the promotion and maintenance of peace”<sup>84</sup> is powerful not least because it reminds us of the numerous ongoing civil wars on the continent and that more often than not women and children are the unwitting and unwilling casualties of those conflicts. Article 10 is also significant in its wholesale adoption of Security Council Resolution 1325 on Women, Peace and Security.<sup>85</sup> The article makes clear that women are to participate in conflict prevention and also post conflict reconstruction and rehabilitation both locally and internationally.<sup>86</sup> There is recognition within the Protocol of the special needs of women refugees, an international first.<sup>87</sup> Also blazing a trail are the provisions on reproductive rights.

#### REPRODUCTIVE RIGHTS

Traditionally, human rights instruments, including CEDAW, have tended to focus on child bearing (the right to determine the number and spacing of children) as the central element in reproductive choice. However, the 1994 International Conference on Population and Development held in Cairo<sup>88</sup> changed all that. It provided a broader understanding of reproductive rights as extending beyond family planning.<sup>89</sup> The African Protocol, while noting that women have the right to control their fertility<sup>90</sup> and to decide on the method of contraception,<sup>91</sup> goes further and introduces a right to self protection.

The scourge of HIV and AIDS on the continent has affected women disproportionately. Various reasons have been given for women's higher HIV infection rates including early marriage, forced intercourse and the socio-economic powerlessness of women, which render them unable to negotiate safe sex with partners. The African Protocol is alive to all these issues and seeks to protect women by providing that a woman has the right to protect herself, and indeed to be protected from sexually transmitted infections including HIV/AIDS.<sup>92</sup> Optimistically, some might say, the Protocol also provides that a woman has the right to be informed of her health status and that of her partner, “particularly if affected with sexually transmitted infections, including HIV/AIDS, in accordance with internationally recognised standards and best practice”.<sup>93</sup> Again, one must ask

<sup>83</sup> *Ibid.*, art. 5(c). See also General Assembly Declaration on the Elimination of Violence against Women, above n. 17, art. 4.

<sup>84</sup> African Protocol on Women's Rights art. 10(1).

<sup>85</sup> Security Council Resolution 1325 on Women, Peace and Security, S/RES/1325 (2000). Adopted by the Security Council at the 4213th Meeting on 31 October, 2000. Reference to SC 1325 is also made in the preamble to the African Protocol on Women's Rights.

<sup>86</sup> African Protocol on Women's Rights art. 10(2) (b) (e).

<sup>87</sup> *Ibid.*, art. 10(2) (c) (d). See also art. 4(k).

<sup>88</sup> International Conference on Population and Development, Cairo (18 October, 1994), UN Doc. A/CONF. 171/13 (ICPD).

<sup>89</sup> *Ibid.*, para. 7:3.

<sup>90</sup> African Protocol on Women's Rights art. 14(1) (a).

<sup>91</sup> *Ibid.*, art. 14(1) (c). Resource implications mean that women's choices will perforce be constrained by what is available in the national health systems.

<sup>92</sup> *Ibid.*, art. 14(1) (d).

<sup>93</sup> *Ibid.*, art 14(1) (e).

how many women would dare ask a husband or partner about his HIV status? Fear of rejection or violence for daring to challenge the breadwinner and head of the household means that this provision will have to be read with article 2(2) on changing attitudes and challenging stereotypes.

State obligations under article 14(2) closely mirror General Comment No. 14 on Health of the Committee on Economic Social and Cultural Rights.<sup>94</sup> States are called upon to:

“provide adequate, affordable and accessible health services, including information, education and communication programmes to women especially those in rural areas.”<sup>95</sup>

The controversial article 14(2)(c) of the Protocol is the subject of some strong objections. It enjoins the state to authorize medical abortion for women who have been raped, or in cases of incest or where it is clear that the health of the mother or the life of the foetus are under threat. Although not a blanket requirement that there be abortion on demand, this middle path<sup>96</sup> was objected to by Libya, Rwanda and Senegal. It is likely that religious pressures will also be brought to bear on states not to honour their Protocol commitments.<sup>97</sup> Whatever its prospects of enforcement, it is worth noting that this provision constitutes the first time in international human rights law that a right to abortion has been enshrined in law.

#### ECONOMIC SOCIAL AND CULTURAL RIGHTS

Given the fact that over 70 per cent of women in Africa are rural dwellers, the Protocol rightly pays attention to the economic, social and cultural rights issues that most directly affect them.<sup>98</sup> Of these, the most important for rural women is article 15 on the right to food security which enjoins states to: “provide women with access to clean drinking water, sources of domestic fuel, land, and the means of producing nutritious food”.<sup>99</sup>

It encapsulates all the challenges faced by rural women in their day-to-day lives. It is noteworthy that the issue of land is revisited in article 19(c) which requires states to “promote women’s access to and control over productive resources such as land and guarantee their right to property”. This is recognition that although they are the ones who work the land and produce the food that feeds families, often women are not allowed to own land, either because of direct legally sanctioned discrimination or through the invocation of cultural norms

<sup>94</sup> Committee on Economic Social and Cultural Rights General Comment No.14 (2000) on the Right to the Highest Attainable Standard of Health (Art. 12 of the ICESCR) (11 August, 2000) E/C.12/2000/4 para. 12.

<sup>95</sup> African Protocol on Women’s Rights art. 14(2) (a). See also CEDAW General Recommendation No. 24 on Health, UN Doc A/54/38/Rev.1.

<sup>96</sup> The two “extremes” being abortion on demand or an outright ban on abortion. R. Cook and B. Dickens, “Human rights dynamics of abortion law reform”, (2003) 25 *H.R.Q.* 1.

<sup>97</sup> The Constitutional Court of South Africa threw out a challenge brought by a Christian group which argued that the country’s liberal abortion laws enacted in the Choice on Termination of Pregnancy Act (Act No. 92 of 1996) violated the constitutional guarantee of a right to life. *Christian Lawyers Association of South Africa v. The Minister of Health* (1998) 4 S.A. 1113 (CC).

<sup>98</sup> African Protocol on Women’s Rights arts. 14–21. See also C. Nyamu, “The international human rights regime and rural women in Kenya”, (2000) 6 *East African Journal of Peace and Human Rights* 1; “Montreal Principles on Women’s Economic, Social and Cultural Rights”, (2004) *H.R.Q.* 760; Committee on Economic Social and Cultural Rights General Comment No. 16 (2005) art. 3, The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (13 May, 2005) E/C.12/2005/3.

<sup>99</sup> African Protocol on Women’s Rights art. 15(a).

and “traditions”.<sup>100</sup> Given the resistance to women acquiring land and also their limited involvement in its allocation in rural areas, it may have been better if the Protocol had specified that states had a duty to ensure that women had *equal* access to land ownership with men for, as Elson notes:

“To have an entitlement implies access to an accountable process in which the discretion of the decision maker is limited. If my access to a resource is at the arbitrary discretion of a public official or dependent on . . . the goodwill of a husband. . . then I do not get that resource as of right.”<sup>101</sup>

With this in mind, it may be worth noting the provisions of South Africa’s Communal Land Act which provides that women should comprise at least one third of all land committees<sup>102</sup> and also guarantees that:

“A woman is entitled to the same legally secure tenure rights in or to land and benefits from land as a man, and no law, community or other rules, practice or usage may discriminate against any person on the ground of gender of such person.”<sup>103</sup>

Echoing article 14 of CEDAW, which focuses on the rights of rural women, the Protocol makes clear that women are to be consulted about development policy and indeed that they should be involved in its formulation.<sup>104</sup> Although not grouping rural women’s rights in one article as is done in CEDAW, the African Protocol is clear that rural women are entitled to enjoy all the other rights contained within the Protocol without discrimination. To reinforce this, article 13 on economic and social welfare rights calls on the state to provide a system of social security for women working in the informal sector,<sup>105</sup> while article 14 on reproductive rights calls on states to:

“Provide adequate, affordable and accessible health services including information, education and communication programmes to women especially those in rural areas.”<sup>106</sup>

An important innovation of the African Protocol is in its introduction of the right to adequate housing in article 16. Although a right to housing was read into the African Charter by the African Commission in the Ogoni case,<sup>107</sup> it is important to see that women’s equal right to access housing is guaranteed “whatever their marital status”.<sup>108</sup>

<sup>100</sup> See L. Wanyeki (ed.), *Women and Land in Africa*, London, 2003; Women and Law in Southern Africa Research Trust (WLSA), *A Critical Analysis of Women’s Access to Land in the WLSA Countries*, Harare, 2001; CEDAW art. 14(2) (g) CEDAW General Recommendation No. 16 Unpaid Women Workers in Rural and Urban Family Enterprises, UN Doc. A/46/38.

<sup>101</sup> D. Elson, “Gender, justice, human rights and neo-liberal economic policies”, in M. Molyneux and S. Razavi (eds.), *Gender, Justice, Development and Rights*, Oxford, 2003, 78 at 102–103.

<sup>102</sup> Communal Land Rights Act, 2004 (No. 11 of 2004), ss. 22(3), 22(4).

<sup>103</sup> *Ibid.*, s. 4(3). See also CEDAW art. 14(2) (g).

<sup>104</sup> CEDAW art. 14(2) (a) and 14 (2) f); and African Protocol on Women’s Rights, preamble and arts. 9(1) (c), 18(2) (a), 19(b) and 19(e). See also World Bank, *Engendering Development Through Gender Equality in Rights, Resources and Voice*, Washington, D.C., 2001; and B. Hamm, “A human rights approach to development”, (2001) 23 *H.R.Q.* 1005, 1018.

<sup>105</sup> African Protocol on Women’s Rights art. 13(e).

<sup>106</sup> *Ibid.*, art. 14(2) (a).

<sup>107</sup> See Communication 155/96 *The Social and Economic Rights Center and the Center for Economic and Social Rights v. Nigeria*, 2001–2002, Annex V; and G. Bekker, “The Social and Economic Rights Action Center and the Center for Economic and Social Rights/Nigeria”, (2003) 47 *J.A.L.* 126 at 129–130.

<sup>108</sup> African Protocol on Women’s Rights art. 16. See also L. Farha, “Is there a woman in the house? Re/conceiving the human right to housing”, (2002) 14 *Canadian Journal of Women and Law* 118; and J. Ngwake, “Realizing women’s economic, social and cultural rights: challenges and strategies in Nigeria”, (2002) 14 *Canadian Journal of Women and Law* 142.

## MONITORING

The monitoring of the African Protocol is linked to the African Charter with states obliged to submit periodic reports to the African Commission in line with article 62 of the African Charter.<sup>109</sup> When set up, the African Court will be responsible for the interpretation of the Protocol.<sup>110</sup>

It is clear that the African Protocol is comprehensive in its coverage of the impediments that have hitherto affected women's ability to enjoy their rights and also in its prescriptions for fixing them. Articles 8 (on access to justice) and 25 (on remedies) reinforce states' obligations to ensure that the machinery is in place to enable women to challenge violations of their rights.<sup>111</sup> However, the fact that women the world over continue to experience widespread violations of their rights and to be the least educated, with little access to political, social or personal power within the community and home, suggests that the vision of a discrimination-free life for the African woman is still remote. Moreover, although the Protocol is silent on the issue of the reservations which have blighted CEDAW, it is clear that the objections raised by states parties to key provisions of the Protocol (on marriage, inheritance and reproductive rights) all indicate that ratification by states should be seen to be the first key legal step.<sup>112</sup> It is clear that greater commitment is needed from states to challenging and changing attitudes and behaviour that are the main impediments to the enjoyment by women of their rights. Moreover, in order to benefit from the rights guaranteed in the Protocol, human rights advocates will have to lobby those states that have not as yet ratified the Protocol to do so.<sup>113</sup> They will also need to put pressure on states to incorporate the Protocol into domestic law.

## CONCLUSION

It used to be said that international law ignored women and their interests.<sup>114</sup> The plethora of human rights instruments addressing issues that affect women disproportionately, and the heightened sensitivity of some international (human rights) agencies and committees to the rights of women, means that it is no longer sustainable to argue that women's rights are ignored internationally.<sup>115</sup> At the regional level, the adoption and coming into force of the African Protocol on Women's Rights is also a strong indicator of the normative acceptance of the idea that human rights are women's rights. The African Protocol is a cause for celebration, but not complacency.

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<sup>109</sup> African Protocol on Women's Rights art. 26(1).

<sup>110</sup> *Ibid.*, art. 27.

<sup>111</sup> See also *ibid.*, art. 26 (2).

<sup>112</sup> See CEDAW, "Statement on reservations to the Convention on the Elimination of All Forms of Discrimination against Women adopted by the Committee on the Elimination of Discrimination against Women", reproduced in UN, IRAW, Commonwealth, *Assessing the Status of Women: A Guide to Reporting Under the Convention on the Elimination of all Forms of Discrimination against Women*, London, 2000, 90.

<sup>113</sup> A.N. Kithaka, "Smile, woman of Africa, smile", (234) *Pambazuka News* at <<http://www.pambazuka.org>>.

<sup>114</sup> H. Charlesworth, C. Chinkin and S. Wright, "Feminist approaches to international law", (1991) 85 *American Journal of International Law* 613; and H. Charlesworth, "Human rights as men's rights", in J. Peters and A. Wolper (eds.), *Women's Rights, Human Rights: International Feminist Perspectives*, London, 1995.

<sup>115</sup> X. Fellmeth, "Feminism and international law: theory, methodology and substantive reform", (2000) 22 *H.R.Q.* 658.