

The African Women Protocol as Supplemental to the African Charter and Other Human Rights Instruments: A Brief Analysis

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Abstract

The African women's Rights Protocol was adopted in July 2003 and came into force in November 2005 as a response to widespread human rights violations sustained by women in Africa. The purpose of this article was to succinctly canvass the issue of whether the Protocol is able to remedy the inadequacies of the African Charter and other human rights instruments in terms of guaranteeing rights of African women. The article found out that the Protocol is a landmark treaty in a number of respects either by conferring new rights or broadening the scope of rights of women in existing treaties. Specific areas to which the Protocol has added value to the existing human rights instruments include: violence against women, harmful practices, women's reproductive rights and HIV/AIDS. In some cases, however, the Protocol is found out to contain protections below the existing treaties as can be exemplified by its failure to expressly recognize the right of women to vote or to participate at the international level and the right of women to equal share of common property at the time of dissolution of marriage. In terms of establishing a treaty monitoring body to improve states' compliance with their treaty obligations, the Protocol has not come up with a distinct body as opposed to CEDAW and the African Charter on the Rights and Welfare of the Child. The article contended that cultural and religious practices as well as lack of universal ratification could hamper the smooth implementation of the Protocol. To overcome these setbacks, the article, inter alia, recommended that the Protocol should be ratified by the remaining

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states with minimum possible or no reservation(s) and cultural and religious resistance should be lessened through continuous awareness creation and dialogue.

Key Words: Women's Rights. Protocol, African Charter, CEDAW

1. Introduction

Many women in Africa suffer from widespread human rights violations in the private and public spheres. These violations perpetuate their inequality and put them at risk for poverty and disease, including HIV/AIDS. Brutal violations, such as domestic violence, marital rape, unequal property and inheritance rights, trafficking, labour rights abuses, sexual violence in armed conflict, and discrimination in education and health care systems continue despite the adoption and ratification of the African Charter on Human and Peoples' Rights (the Charter)¹ and other human rights instruments² by the majority of African states.³

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¹ African Charter on Human and Peoples' Rights, 1981.

² Other international instruments that protect and promote the rights of women include, but not limited to: Convention on the Elimination of All Forms of Discrimination against Women, 1979; International Covenant on Civil and Political Rights, 1966; International Covenant on Economic, Social and Cultural Rights, 1966; Convention on the Rights of the Child, 1989; and Beijing Declaration and Platform for Action, 1995. Moreover, the World Conference on Human Rights held in Vienna, Austria in 1993 made advances to human rights theory and practice with respect to women's human rights. The Declaration and Programme of Action of the World Conference on Human Rights at Vienna emphasized: 'The human rights of women and of the girl child are an inalienable, integral and indivisible part of the

As a response to the failure of the Charter and other human rights instruments to guard the rights of women, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Protocol) was adopted in July 2003 and came into force in November 2005.⁴ This article briefly examines whether the Protocol is successful in rectifying the drawbacks of the Charter and other human rights instruments in safeguarding the rights of women. It further outlines the challenges the Protocol faces in addressing these issues. By way of background, it highlights the shortcomings of the Charter and the need for the adoption of the Protocol.

2. Shortcomings of the Charter in Promoting and Protecting Women's Rights

Indeed, the Charter is the most important human rights instrument in promoting and protecting human rights in Africa. The African Commission on Human and Peoples' Rights (the Commission), an organ in charge of monitoring the Charter, has made remarkable progress in interpreting and applying the provisions of the Charter. The Charter and the Commission do not, however, escape criticism.

universal human rights.' It also emphasized that elimination of violence against women is a human-rights obligation upon states.

³ Protocol to the African Charter on Human and Peoples, Rights on the Rights of Women in Africa, 2003, Preamble [hereinafter the Protocol).

⁴ Article 66 of the Charter that provides for the establishment of Protocols and Agreements to supplement its provisions gave impetus for the consideration and subsequent formulation of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

One of the main criticisms forwarded against the Charter is that it gives little express attention to the position of women.⁵ Only three provisions are pertinent in terms of addressing the rights of women. These articles include: article 2 providing a general non-discrimination clause, article 3 stating equality before the law and article 18 (3) requiring states to eliminate ‘every discrimination against women and ensure the protection of the rights of women as stipulated in international declarations and conventions.’

The latter article makes reference to relevant international declarations and conventions to ensure the protection of the rights of women. Such reference is made regardless of the fact that the state concerned is a state party to a particular convention. By doing so, the Charter seems to grant a wider protection to the rights of women as required under international standards. However, this procedure is unsatisfactory and its appropriateness is doubtful⁶ for the following reasons. First, making reference to international declarations, such as the Universal Declarations of Human Rights, is the weakest means of guaranteeing protection of women’s rights. It is a well-founded principle of international law that declarations do not have a binding

⁵ Ouguergouz, F., *The African Charter on Human Peoples’ Rights: A comprehensive Agenda For Human Dignity and Sustainable Democracy in Africa*, Martinus Nijhoff Publishers, 2003, pp. 192-193, [hereinafter Ouguergouz, *The African Charter on Human Peoples’ Rights*].

⁶ *Id.*, p. 192.

force on states.⁷ This creates loopholes for African states to evade their responsibilities in respect of ensuring the rights of women.

Second, when article 18 (3) of the Charter makes reference to binding international instruments, it is the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) that will come to mind. This is because CEDAW is a relatively comprehensive and specialised international treaty addressing the rights of women. Making reference to CEDAW, nevertheless, is not the best way of promoting and protecting the rights of women in Africa. This reference is a mere repetition of the already existing treaty obligations of African states in view of the fact that almost all African states⁸ have ratified CEDAW and are bound by it. The reference to CEDAW also makes the protection of the rights of African women incomplete. As we shall see later, there are rights of women which are not addressed in CEDAW.

Apart from the failure of the Charter in granting comprehensive protection to the rights of women, there have also been concerns in reference to traditional

⁷ Although the Universal Declaration of Human Rights is evolved as customary international law and thus binding on all states, it by no implies that all provisions therein, including women's rights, are parts of custom.

⁸ By the time the Charter came into force in 1986, CEDAW was ratified by a number of African states. Currently, all African states, except Somalia and Sudan, have ratified it. For details, see <<http://www.ohchr.org/en/hrbodies/cedaw/pages/cedawindex.aspx>> (consulted 20 December 2014).

values in the Charter would take preference over women's concerns.⁹ One such concern is well articulated as:

Articles 17(2) and (3) of the African Charter state that every individual 'may freely take part in the cultural life of his community' and that '[t]he promotion and protection of morals and traditional values recognized by the community shall be the duty of the State.' Article 27(1) of the African Charter further provides that 'every individual shall have duties towards his family and society.' Moreover, the only specific reference to women's rights in the charter is contained in a clause concerning 'the family and [upholding] tradition, thereby reproducing the essential tension that plagues the realization of the rights of women' in Africa.¹⁰

'In Africa, some of the most serious violations of women's rights take place in the private sphere of the family and are reinforced by traditional norms and cultural values.'¹¹ Thus, given the fact that African women are bound towards their family and the family is the custodian of traditional values, there may be a tendency to give effect to traditional values in event they conflict with the limited rights of women recognised in the Charter.

⁹ Murray, R., Women's rights and the Organisation of African Unity and African Union: The Protocol on the Rights of Women in Africa, in Ssenyonjo, Manisuli (ed.), *International Law: Modern Feminist Approaches*, Martinus Nijhoff Publishers, 2005, p. 258 [hereinafter Murray, Women's rights and the Organisation of African Unity and African Union: The Protocol on the Rights of Women in Africa].

¹⁰ Centre for Reproductive Rights, *The Protocol on the Rights of Women in Africa: An Instrument for Advancing Reproductive and Sexual Rights*,

At <http://www.reproductiverights.org/pdf/pub_bp_africa.pdf> (consulted 23 June 2007).

¹¹ *Ibid.*

Additional weaknesses of the Charter indentified by writers include its ‘failure to explicitly define discrimination against women’ and ‘lack of guarantees of the right to consent to, and equality in, marriage.’¹²

The criticism forwarded against the Commission relates to its failure to give effect to the rights of women recognised in the Charter.¹³ It has been argued that although the Commission has a broad power ‘under article 45 and 46 of the Charter to promote and protect the rights contained in the Charter and a potentially large variety of mechanisms at its disposal, yet few have been used to advance the rights of women.’¹⁴ This argument is evidenced, for example, by the fact that, for long period of time, the Commission had adopted only few resolutions interpreting the Charter from the perspective of women although it has adopted a number of resolutions on other issues.¹⁵

¹² Klugman, J., Women's health and human rights: Public spending on health and the military one decade after the African Women's Protocol, *African Human Rights Law Journal*, (14), 2014, p. 720. See also Centre for Human Rights, Faculty of Law, University of Pretoria, *The impact of the Protocol on the Rights of Women in Africa on violence against women in six selected Southern African countries: An advocacy tool, 2009*, at <http://www.genderlinks.org.za/attachment.php?aa_id=13283> (consulted 20 March 2015).

¹³ Murray, Women's rights and the Organisation of African Unity and African Union: The Protocol on the Rights of Women in Africa, *supra* note 9, p. 259. See also Banda, Fareda, Protocol to the African Charter on the Rights of Women in Africa, in Malcolm and Rachel Murray (eds.), *The African Charter on Human and Peoples' Rights: The System in Practice 1986–2006*, 2nd Edition, Cambridge University Press, Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo, 2008, p. 444, [hereinafter Banda, *Protocol to the African Charter on the Rights of Women in Africa*].

¹⁴ *Ibid.*

¹⁵ Resolutions cited to show the weakness of the Commission that specifically relate to women are those on special rapporteurs and draft protocol.

Recently, however, the Commission has passed several resolutions relating to the rights of women.¹⁶ In May 2014, for example, the Commission adopted two resolutions; namely, Resolution on the Situation of Women and Children in Armed Conflict¹⁷ and a Resolution on the Suppression of Sexual Violence against Women in the Democratic Republic of Congo. The Commission in the latter resolution condemned ‘the several acts of sexual violence and other forms of gender-based violence committed by the various armed groups against Congolese women and girls’ and, among other things, required DRC to take effective measures to end sexual violence against Congolese women. Almost two months after adoption of this resolution, the Commission endorsed a Resolution Condemning the Perpetrators of Sexual Assault and Violence in the Arab Republic of Egypt.¹⁸

¹⁶ Resolution on the Suppression of Sexual Violence against Women in the Democratic Republic of Congo, adopted at its 55th *Ordinary Session held from 28 April to 12 May 2014 in Luanda, Angola*, at <<http://www.achpr.org/sessions/55th/resolutions/284/>> (consulted 20 December 2014). This resolution is not the first resolution on DRC pertaining to the rights of women. Prior to this Resolution, the Commission passed Resolution ACHPR/Res.103 (XXXX) 06 of 29 November 2006 on the situation of the rights of women in the DRC.

¹⁷ Resolution on the Situation of Women and Children in Armed Conflict, adopted at its 55th *Ordinary Session held in Luanda, Republic of Angola, from 28 April to 12 May 2014*, at <<http://www.achpr.org/sessions/55th/resolutions/283/>> (consulted 20 December 2014).

¹⁸ Resolution Condemning the Perpetrators of Sexual Assault and Violence in the Arab Republic of Egypt, adopted at its 16th *Extraordinary Session held from 20 to 29 July 2014 in Kigali, Rwanda*, at <<http://www.achpr.org/sessions/16th-eo/resolutions/288/>> (consulted 20 December 2014).

Apart from resolutions, the Commission has adopted three important general comments on the rights of women. The general comments¹⁹ are meant to give authoritative interpretations to articles 14(d) and (e) of the Protocol. These provisions provide for the rights of women in the context of HIV/AIDS. While the Protocol has been praised for explicitly mentioning the need to protect the rights of women from the HIV/AIDS pandemic, scholars criticized articles 14(d) (e) as extremely superficial.²⁰ These general comments responded to criticisms by specifying the measures to be taken by states parties to ensure the full implementation of women's rights to sexual and reproductive health in general and pertaining to HIV/AIDS in particular. The general comments also provide a set of international standards and best practices towards an effective implementation of the provisions of Article 14 (1) (d) and (e) of the Protocol.

3. Why the Women's Protocol?: A Brief Background of Its Rationale

The foregoing analysis on the shortcomings of the Charter sheds some light as to why the Protocol is needed. The idea of having a protocol was raised in a seminar organised by the Commission with WILDAF (Women in Law and

¹⁹ General Comments on Article 14 (1) (d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted at its 52nd Ordinary Session held from 9 to 22 October 2012 in Yamoussoukro, Côte d'Ivoire, at [http://www.achpr.org/instruments/general-comments-rights-women/\(consulted](http://www.achpr.org/instruments/general-comments-rights-women/(consulted) 20 December 2014).

²⁰ Viljoen, F., An Introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, *Washington and Lee Journal of Civil Rights and Social Justice* 16, 2009, P. 29, [hereinafter Viljoen, *An Introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*].

Development in Africa) in 1995 in Lome, Togo.²¹ The NGOs participating in the seminar recognized the inadequacy of the Charter and other human rights conventions in terms of guaranteeing the rights of women and started to drive the process for greater recognition.²² Human rights and genders activists were also of the opinion that:

*the existence of a specific treaty on women's rights has the benefit of highlighting the issues that impact upon women disproportionately, and forcing on existing mechanisms and States a more gendered interpretation of rights so that human rights really do begin to be seen as women's rights.*²³

More specifically, there were three reasons behind adopting a protocol although they are not mutually exclusive.²⁴ The first reason was to have an African binding document which provides detailed rights of women. Second, a protocol was seen as a means of consolidating existing international standards for African states and to allow African governments to fulfil the international commitments to which they have subscribed. Lastly, the Protocol was seen as a strong enforcement mechanism for the existing obligations of states with respect to the rights of women in Africa. Whether the Protocol is successful in addressing these issues will be addressed in the following section.

²¹ Murray, *Women's rights and the Organisation of African Unity and African Union: The Protocol on the Rights of Women in Africa*, supra note 9, p. 261.

²² *Ibid.*

²³ Banda, *Protocol to the African Charter on the Rights of Women in Africa*, supra note 13, p. 445.

²⁴ *Id.*, pp. 263-264.

4. Does the Protocol Successfully Address the Drawbacks of the Charter and Other Human Rights Instruments?

As pointed out earlier, the adoption of the Protocol aims at rectifying and supplementing the shortcomings of the existing human rights instruments dealing with the rights of women. This section is devoted to analysing whether the Protocol is successful in this regard. An evaluation of the success of the Protocol is made from three angles; namely, its success in respect of broadening the scope of the existing instruments; improving observance; and using extra-legal means of implementation.

4.1 The Success of the Protocol in Broadening the Scope of the Existing Instruments

The Protocol has been praised by many writers and NGOs for addressing the concerns of African Women.²⁵ It has become a milestone in a number of respects either by conferring new rights to African women which have never existed in any human rights treaty or broadening the scope of rights of women in existing global and regional treaties. From the outset, it should be borne in mind that even prior to the Protocol, different treaty bodies had drawn up general comments and concluding observations regarding protection and promotion of the rights of women, for instance, authorising abortion in specified circumstances.²⁶ These general comments and concluding

²⁵ See Stefiszyn, K., *The African Union: Challenges and Opportunities for Women*, *African Human Rights Law Journal* (5), 2005, p. 376. Center 1, Protocol on the Rights of Women in Africa at http://www.equalitynow.org/english/campaigns/african-protocol/african-protocol_en.html (consulted 23 June 2007).

²⁶ The General Comments and Concluding Observations of the CEDAW Committee, the CRC Committee and Human Rights Committee are relevant in this regard.

observations are not, however, binding on state parties. They have only a mere persuasive value and hence, they do not create a strong obligation unlike the Protocol.

The Protocol adds rights not found in CEDAW, such as specific articles proscribing violence against women. In this regard, article 3 (4) of the Protocol requires state parties to take all 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.’²⁷

The protocol is also unique among global human rights treaties in expressly articulating girls’ and women’s right to be protected from sexual harassment as a key component of their right to equality in education.²⁸ It affirms women’s right to be free from sexual harassment as a basic social and economic right and as a key component of their right to work.²⁹ Apart from the inclusion of new rights, the Protocol incorporates provisions that expand rights contained in CEDAW. This is exemplified by the broader meaning it draws to violence against women so as to include economic harm and a threat to take physical, sexual, psychological, and economic harmful acts.³⁰ Given women’s economic vulnerability and dependence on men, the recognition of economic harm ‘which can include denial of income, refusal of permission to participate in the paid sector, or demanding that earnings be handed to the

²⁷ Article 3 (4) of the Protocol has to be read together with article 1 (j) that defines violence against women and 4 (2) (a) that includes violence against women as a violation of the right to life, integrity and security of the person.

²⁸ The Protocol, *supra* note 3, art. 12(1) (c).

²⁹ *Id.*, art.13 (c).

³⁰ See art. 1(j) of the Protocol.

husband, and, indeed, sexual harassment at work' is indispensable.³¹ Despite the recognition of violence against women in its broadest possible definition, however, the impact of the Protocol has not yet been adequately felt on the ground. The findings of research on adherence to the Protocol by six Southern African Development Community (SADC) countries focusing on the provisions of the Protocol dealing with violence against women revealed that 'the levels of violence against women in Sub-Saharan Africa remain unacceptably high and continue to fuel the spread of HIV.'³²

Moreover, the Protocol is a groundbreaking, legally binding human rights instrument that expressly bans harmful practices, such as female genital mutilation and outlines measures to accompany legislation towards its eradication.³³ The obligation of states to proscribe harmful practices in the Protocol is extremely crucial for African women. This is because harmful practices are practiced in many African countries and their practice is a source of violation of the rights of African women. As discussed below, harmful practices, such as female genital mutilation, early marriage, widow inheritance, marriage by abduction, sexual cleansing and dry sex also increase women's vulnerability to HIV/AIDS.

Recognizing the specific human rights violations that widows experience due to harmful practices, the Protocol innovatively dedicates article 20 for the

³¹ Banda, *Protocol to the African Charter on the Rights of Women in Africa*, supra note 13, p. 455.

³² Centre for Human Rights, supra note 12, p. 91.

³³ *Id.*, art. 5. Read art. 5 in conjunction with 1(g) of the Protocol that defines harmful practices and art. 2(2) of the Protocol that requires state parties to modify the social and cultural patterns of men and women as one means of elimination harmful practices.

right of widows. In particular, article 20(a) is meant to protect widows from being subject to harmful practices such as sexual ‘cleansing’ rituals (common in Zambia, Kenya and Malawi) that require the widow to have sexual intercourse with one of the deceased husband’s relatives. In certain communities of these countries, there is a wrong belief that ‘if the widow refused to exorcise her dead husband’s spirit [through cleansing ritual], she would be blamed every time a villager died.’³⁴

Article 20(c) of the Protocol that recognizes widow’s right to marry the person of her choice and thereby outlawing the harmful practice of widow inheritance is also meant to address the plight of African women. The practice of widow inheritance commonly requires a woman to marry her husband’s brother or another family member after he dies.³⁵ In the past, the practice was justified by taking care of the widow and the children of the deceased.³⁶ In the era of HIV/AIDS, however, ‘this practice exposes women both to greater violence and to a greater chance of being infected with HIV/AIDS.’³⁷

Recognising that much of the controversy about the human rights of African women is the issue of ‘African cultural values,’ the Protocol acknowledged

³⁴ Fuller, L., *African Women’s Unique Vulnerabilities to HIV/AIDS: Communication Perspectives and Promises*, Palgrave Macmillan, New York, 2008, p. 74.

³⁵ Human Rights Watch, *Just Die Quietly: Domestic Violence and Women’s Vulnerability to HIV in Uganda*, 2003, at <<http://www.-hrw.org/reports/2003/uganda0803/index.htm>> (consulted 20 January 2009).

³⁶ *Ibid.*

³⁷ *Ibid.*

the importance of African culture,³⁸ nevertheless required the participation of African women at all levels in the determination and formulation of cultural policies.³⁹ The equal participation of women in the formulation of cultural policies is taken as one manifestation of the non-discrimination clause of the Protocol. The participation of women in the formulation cultural policies gives them the opportunity to influence policy making so that cultural policies will be formulated in conformity with their rights. It could be contended that the right of citizens to participate in the formulation of cultural policies is a particular manifestation of the rights to participate in conduct of public affairs recognized in article 25 of the International Covenant on Civil and Political Rights (ICCPR),⁴⁰ article 21 of the Universal Declaration of Human Rights; and article 13 of the Charter.

The protocol is also the first legally binding human rights instrument to expressly recognise women's reproductive rights as human rights, and to expressly guarantee a woman's right to control her fertility.⁴¹ Further, it

³⁸ Banda, F., *Women, Law and Human Rights: An African Perspective*, Hart Publishing, Portland & Oxford, 2005, P. 67 [hereinafter Banda, *Women, Law and Human Rights: An African Perspective*]. In this context, the term 'culture' should not be interpreted to include harmful practices.

³⁹ The Protocol, supra note 3, art.17 (1).

⁴⁰ The Human Rights Committee, an organ empowered to monitor the implementation of the International Covenant on Civil and Political Rights, has elaborated the content of the right to take part in processes that constitute the conduct of public affairs. According to the Committee, the conduct of public affairs is extensive enough to cover 'the formulation and implementation of policy at international, national, regional and local levels.' See Human Rights Committee, *General Comment No. 25, Right to Participate in Public Affairs (1996)* para 2 and para 5.

⁴¹ The Protocol, supra note 3, art.14. See also *Fana Hagos Berhane, Women, sexual rights and poverty: Framing the Linkage under the African Human Rights System*, in Ngwenya, Charles and Durojaye, Ebenezer (eds.), *Strengthening the Protection of Sexual and Reproductive Health and Rights in the African Region through Human Rights*, Pretoria

provides more detailed provisions than global human rights instruments of women's right to reproductive health and family planning services. The protocol affirms women's right to reproductive choice and autonomy, and clarifies African states' duties in relation to women's sexual and reproductive health. The Protocol is the first international human rights instrument that explicitly authorises a woman's right to abortion 'in case of sexual assault, rape, or incest; and when the continued pregnancy endangers the mental and physical well-being of the mother or the life of the mother or the foetus.'⁴²

The recognition of abortion right in the Protocol is of paramount importance to African women. Africa is a continent in which 4 million unsafe abortions take place each year and 40 percent of unsafe abortions in the world occur.⁴³

Another staggering statistic tells us that '[w]hile the ratio of unsafe-abortion-

University Law Press (PULP), 2014, P. 334; and Stefiszyn, Karen et al, Realising the Right to Health in the Universal Declaration of Human Rights after 60 Years: Addressing the Reproductive Health Rights of Women Living with HIV in Southern Africa, A project by the Centre for Human Rights, University of Pretoria, for the Swiss Initiative to Commemorate the 60th Anniversary of the Universal Declaration of Human Rights - Protecting Dignity: An Agenda for Human Rights, June 2009, P. 23, at

<atfile:///C:/Users/Vostro154032bit/Downloads/13282_gender_realising_right_to_health_hiv_southern_africa.pdf> (consulted 16 April 2015).

⁴² The Protocol, supra note 3, art.14 (2) (c).

⁴³ See the Millennium Development Goals Report 2006, UN, New York, 2006, pp. 6–7. See also Banda, *Protocol to the African Charter on the Rights of Women in Africa*, supra note 13, pp. 458-59; Centre for Reproductive Rights (CRR), *The Protocol on the Rights of Women in Africa: An Instrument for Advancing Reproductive and Sexual Rights*: Briefing Paper, February 2006, p. 1, at <http://www.reproductiverights.org/sites/default/files/documents/pub_bp_africa.pdf>(consulted 16 April 2015); and CEDAW Committee, *General Comment 24 on Health*, UN Doc. a/54/38/Rev.1, paras. 12(d), 14 and 31(c) (e).

related deaths in low-resource countries is estimated to be 330 per 100,000 abortions, that of Sub-Saharan Africa is 680 per 100,000 abortions.’⁴⁴ Even if restrictive abortion laws are not the sole reason for the occurrence of unsafe abortion, ‘such laws constitute a potent obstacle to accessing safe abortion services’ and ‘serve as major incentives or active catalysts for resort to unsafe, illegal abortion.’⁴⁵ Thus, the recognition of abortion in the Protocol could have an immense contribution in terms of paving the way for safe abortion and thereby reducing the suffering of African women.

The Protocol is the only obligatory human rights instrument that specifically addresses women’s rights in relation to HIV/AIDS, and to recognise protection from HIV/AIDS as a key component of women’s sexual and reproductive rights.⁴⁶ In addition to guaranteeing women’s right to protection from sexually transmissible infections, including HIV/AIDS, the protocol guarantees women’s right to adequate, affordable, and accessible health services.⁴⁷ The Protocol, by recognizing the right of women to be protected against HIV/AIDS, impose a duty on state parties to take measures to address all the factors that exacerbate women’s vulnerability to HIV/AIDS in Africa.

⁴⁴ Singh, S., The Incidence of Unsafe Abortion, in Warriner, K. and Shah, H., (eds.), Preventing Unsafe Abortion and its Consequences, Guttmacher Institute, New York, 2006, p. 45. For similar data, see also Klugman, supra note 12, pp.711-717.

⁴⁵ Ngwena, C., Protocol to the African Charter on the Rights of Women: Implications for Access to Abortion at the Regional Level, *International Journal of Gynecology and Obstetrics*, (110), 2010, p. 164.

⁴⁶ Article 14 of the Protocol.

⁴⁷ *Id.*, art.14 (1) (d) & 14 (2) (a).

Apart from physiological factors,⁴⁸ women's vulnerability to HIV in Sub-Saharan Africa stems from a mix of social and human rights factors.⁴⁹ The social and human rights factors that increase women's vulnerability to HIV infection include: harmful traditional practices, sexual violence, such as rape, and other socio-economic factors which limit women's capacity to protect themselves.⁵⁰ Rape and other forms of sexual assault diminish the power of women to control when, with whom, and how they perform sex, which in turn considerably increase their HIV infection.⁵¹ Lack of economic independence of women also fuels their susceptibility to HIV/AIDS. It is an unquestionable fact that women are generally economically dependent than men particularly in Sub-Saharan Africa. Consequently, economically dependent women will be more submissive to their spouses' sexual request even in risky situations;

⁴⁸ Most African women become infected with HIV through unprotected sexual intercourse. Studies made it clear that male-to-female sexual transmission of HIV is much greater than female-to-male transmission. The major factors that account for this greater variation in transmission 'are the large mucosal surface area exposed to the virus in women, and the greater viral concentration in semen compared with vaginal secretions'. See Amnesty International, *Women, HIV/AIDS and human rights*, 2004, at <<http://www.amnesty.org/en/library/asset/ACT77/084/2004/en/dom-ACT770842004en.pdf>> (consulted 2 February 2009).

⁴⁹ *Ibid.*

⁵⁰ *Ibid.* See also Tlou, S., *Gender and HIV/AIDS*, in Max Essex *et al* (eds.) *AIDS in Africa*, Kluwer Academic Publishers, New York, Boston, Dordrecht, London, & Moscow, 2002, p.655.

⁵¹ World Health Organization, *Violence against Women and HIV/AIDS: Setting the Research Agenda*, World Health Organization, Geneva, 2000, p. 6.

for fear that they will be abandoned by their spouses.⁵² Moreover, poverty may compel women to exchange sex for food or other needs.⁵³

In guaranteeing women's right to adequate, affordable, and accessible health services, the Protocol, *inter alia*, enjoins states to ensure that millions of women living with HIV/AIDS in Africa have access to antiretroviral medication. Apart from realizing the right to health of women living with HIV/AIDS, ensuring treatment of those infected with and affected by HIV/AIDS significantly contributes towards the public health goals of controlling HIV/AIDS and mitigating its effects. It has also become clear that HIV treatment lessens the socio-economic impact of HIV/AIDS and increases the length and quality of life of PLWHA.⁵⁴ Proper implementation of an antiretroviral therapy (ART) program has proven to be successful in terms of significantly reducing the viral load and thereby reducing the risk of HIV transmission. The role of ART on HIV prevention was initially recognized in the context of preventing the vertical transmission of HIV from the mother to the child.⁵⁵ Recent evidence, nevertheless, shows the impact of ART beyond vertical transmission. According to a study by the United States National Institutes of Health, 'if an HIV-positive person adheres to an effective

⁵² Andreeff, J., *The Power Imbalance between Men and Women and its Effects on the Rampant Spread of HIV/AIDS among Women*, Human Rights Brief, (1.9), 2001, p. 24. See also, Human Rights Watch, *supra* note 35.

⁵³ Facing the Future Together, *Report of the United Nation Secretary General's Taskforce on Women, Girls and HIV/AIDS in Southern Africa*, 2004, p.9.

⁵⁴ WHO, *National AIDS Programs: A Guide to Monitoring and Evaluating HIV/AIDS Care and Support*, 2007, p.7, at <http://data.unaids.org/publications/irc-pub06/jc1013-caresupport_en.pdf> (consulted 1 January 2011).

⁵⁵ UNAIDS, *Outlook Report*, 2010, p. 48, at <http://data.unaids.org/pub/Outlook/2010/20100713_outlook_report_web_en.pdf> (consulted 20 July 2011).

antiretroviral therapy regimen, the risk of transmitting the virus to their uninfected sexual partner can be reduced by 96%.⁵⁶ Furthermore, ART has proven to increase the uptake of HIV testing and encourage disclosure of HIV status. It also significantly contributes to reducing stigma and discrimination compounding HIV infection.⁵⁷

While African states have significant gain in terms of reducing new HIV/AIDS infections and HIV/AIDS related morbidity and mortality, HIV/AIDS continues to be a major public health problem in Africa even currently. Of the 35 million people living with HIV at the end of 2013 around the world, 24.7 million were living in sub-Saharan Africa.⁵⁸ In terms of new infections, ‘adolescent girls and young women account for one in four new HIV infections in sub-Saharan Africa.’⁵⁹ The figures clearly show that African states must design and implement more targeted strategies to curb HIV/AIDS infection among adolescent girls and young women.

Although the Protocol should be praised for recognizing the rights of women in the context of HIV/AIDS, scholars have criticized its HIV/AIDS provisions as unnecessarily brief and ambiguous particularly in the light of the need to

⁵⁶ UNAIDS, *Groundbreaking Trial Results Confirm HIV Treatment Prevents Transmission of HIV*, May 2011, at

<http://www.unaids.org/en/resources/presscentre/pressreleaseandstatementarchive/2011/may/20110512pstrialresults/#d.en.59530> (consulted 15 June 2011).

⁵⁷ *Ibid.*

⁵⁸ UNAIDS, *Gap Report*, 2014, p.18.

⁵⁹ *Id.*, p.5.

give the necessary guidelines for states to discharge their duties.⁶⁰ It is true that the provisions on HIV/AIDS are scanty given the gravity of the problem on African women. However, the Protocol itself implicitly recognizes this limitation and consequently by referring to “internationally recognized standards and best practices.”⁶¹ These internationally recognized standards and best practices can be used to elucidate the rights and corresponding states’ obligation. Moreover, the Commission has responded to this criticism by issuing General Comments on Article 14 (1) (d) and (e) of the Protocol. These General Comments ‘unpack the obligations arising out of the provisions, and set out the specific methods in which a state could meet its responsibility’ under the Protocol.⁶²

Apart from those rights mentioned above, the Protocol addresses a range of rights of women in different contexts, such as marriage, including polygamy and the choice of matrimonial regime.⁶³ Economic and social welfare rights and group rights,⁶⁴ such as the rights to a healthy and sustainable environment,⁶⁵ the right to peace,⁶⁶ and the right to development⁶⁷ are also

⁶⁰ Stefiszyn, Karen, *Adolescent Girls, HIV and State Obligations under the African Women’s Protocol*, in Ngwena, Charles and Durojaye, Ebenezer (eds.), *Strengthening the Protection of Sexual and Reproductive Health and Rights in the African Region through Human Rights*, Pretoria University Law Press (PULP), 2014, p.161.

⁶¹ The Protocol, supra note 3, art. 14(1) (e).

⁶² Geldenhuys, M., et al, *The African Women’s Protocol and HIV: Delineating the African Commission’s General Comment on articles 14(1)(d) and (e) of the Protocol*, *African Human Rights Law Journal*, (14), 2014, pp. 485-486

⁶³ The Protocol, supra note 3, art. 6.

⁶⁴ *Id.*, art. 3.

⁶⁵ *Id.*, art. 8.

⁶⁶ *Id.*, art.10.

⁶⁷ *Id.*, art.19.

addressed. The Protocol is particularly innovative as is the inclusion of the right to inheritance,⁶⁸ and special protection for the elderly and disabled women.⁶⁹

With regard to polygamy, the Protocol, under article 6(c), implicitly recognizes polygamous marriages. Polygamy is a practice that allows a man to marry more than one wife. It remains a practice in many countries, particularly in Africa.⁷⁰ Polygamy has been justified by ‘sexual abstinence during pregnancy in societies where sexual intercourse’ was a ‘taboo during periods of pregnancy, menses, lactation, mourning, and ritual ceremony periods’;⁷¹ and giving ‘security to childless women’.⁷² It serves as an instrument of sexual abstinence during the said times as the husband would have sex with one of his other wives. It also gives sterile women some sort of security because the husband can marry additional wife instead of divorcing the sterile one.⁷³ Polygamous marriages are, nevertheless, less acceptable these days. This is because when compared to monogamous marriages, they are more risky in terms of HIV/AIDS transmission. Women are generally more subservient in this kind of marriage than in monogamous marriage.⁷⁴ Since the husband may have several wives, he can divorce one of them in

⁶⁸ *Id.*, art.21.

⁶⁹ *Id.*, arts. 23 &24.

⁷⁰ United Nations Children’s Fund, *Early Marriage: a Harmful Traditional Practice: a Statistical Exploration*, 2005, p.18.

⁷¹ Mwale, G. *et al*, *Women and AIDS in Rural Africa: Rural Women's Views of AIDS in Zambia*, Avebury, 1992, pp.39-40.

⁷² *Ibid.*

⁷³ *Id.*, p.39.

⁷⁴ See Human Rights Watch, *supra* note 35, p.32.

case of refusal to blindly obey him. The inferior position of the women in this relationship will decrease her bargaining power over when and how to have sex.⁷⁵ Thus, seeing this from the right to equality and HIV/AIDS prevention points of view, polygamous marriages should not be tolerated. The Protocol is, however, cautious in recognizing polygamous marriages. While, on the one hand, it implicitly recognizes polygamous marriage and thereby embraces culture, it requires states to ensure the rights of women living in this kind of relationship, on the other hand. Thus, it rectifies the shortcomings of CEDAW and the Charter by striking a balance between culture and equality. However, it remains to be seen how states will be able to ensure equality between men and women living in polygamous marriages while at the same time allow the existence of such kind of marriage.

Undeniably, the Protocol has incorporated new rights for African women which had never been addressed either by international or African human rights instruments. In some cases, however, the Protocol falls clearly below international standards and contains provisions that do not reflect realities on the ground.⁷⁶ For example, it fails to expressly refer to the right of women to vote or to participate at the international level despite its inclusion in the General Comment No. 23 of the CEDAW Committee.⁷⁷ With respect to the

⁷⁵ G Mwale, *supra* note 71, pp.39-40. See also Andreeff, *supra* note 52, p.24.

⁷⁶ Murray, *Women's rights and the Organisation of African Unity and African Union: The Protocol on the Rights of Women in Africa*, *supra* note 9, p. 268.

⁷⁷ Art. 9 (1) of the protocol limits the political participation of women at national level, thereby excludes their participation at international level. On the other hand, the CEDAW Committee, in its General Comment No. 23, has given broad scope of participation, including in national and international levels.

right of women to participate at international level, the CEDAW Committee contended that:

*Under article 8 [of the CEDAW], Governments are obliged to ensure the presence of women at all levels and in all areas of international affairs. This requires that they be included in economic and military matters, in both multilateral and bilateral diplomacy, and in official delegations to international and regional conferences.*⁷⁸

Article 7(d) of the Protocol is another example where the Protocol does not guarantee a robust protection of the right of women. This provision requires states to ‘ensure that, 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.’ Given the ambiguity of the term “equitable” share, women may be disfavored during partition of common property in the event of dissolution of marriage. As Banda contended:

The concept of what is fair or equitable is, like beauty, in the eyes of the beholder. Women rarely receive equal shares in property on death or divorce, meaning that it was incumbent on an instrument seeking to protect their rights to state explicitly that they were entitled to equal shares with men. Women’s historical lack of access to resources, including land, has played a major role in their relative lack of bargaining power vis-à-vis men, and has been identified as a reason for the fact that they are disproportionately impacted by poverty. If anything, it has made them subject to the whims of husbands, fathers and brothers. With this in mind, it is a pity that, when addressing

⁷⁸ The CEDAW Committee, *General Comment No. 23*, para 35.

*women's rights to access land, the Protocol was not more explicit in saying that women had equal access to land.*⁷⁹

The Commission, by availing itself of its power of “formulat[ing] and lay[ing] down principles and rules aimed at solving legal problems relating to human and peoples’ rights” provided under article 45(1)(b) of the Charter, can rectify this ambiguity through contextual interpretation and interpretation in the light of the object and purpose of the treaty.⁸⁰ In doing so, the Commission can rely on the Preamble, the definition of discrimination in Article 1(f) and the introductory phrase of Article 7 of the Protocol.

At this point, it is important to note, that in areas where the Protocol does not guarantee more robust protection, the Protocol implicitly allows treaties with stronger protection of the rights of women to override the Protocol. In this regard, Article 31 of the Protocol provides that:

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 6 of the Protocol contains important provisions that are designed to protect the right of women during marriage and the conclusion thereof. However, in one its sub article, it sets a requirement that may backfire against

⁷⁹ Banda, *Protocol to the African Charter on the Rights of Women in Africa*, supra note 13, p. 463.

⁸⁰ For the rules of interpretation of treaties, see article 31 of the Vienna Convention on Law of Treaties of 1969.

women themselves. In particular, Article 6 (d) of the Protocol stipulates that ‘every marriage shall be recorded in writing and registered in accordance with national laws, *in order to be legally recognized.*’(Emphasis mine) The obvious purpose of this provision is to enable women to easily prove the existence of their marriage and thereby claim the consequence of marriage notably partition of common property. Put differently, it aims at safeguarding women from denial of their marital relationship and the results thereof. Despite the good intentions of the drafters, however, the written form and registration requirement of marriage may negatively affect millions of rural women. In rural areas of Africa, marriage is quite often concluded according to local custom without bothering about the written formality and much less about its registration. Moreover, the marriage registration services are often not available in rural areas. Thus, the registration requirement for the legal validity of marriage may disadvantage women themselves for the simple reason that women who concluded their marriage in accordance with customary and religious rules cannot prove their marriage for lack of certificate of marriage. As discussed below, it is for this reason that South African made a reservation on Article 6 (d) of the Protocol. The author of this article is also of the opinion that one of the reasons for Ethiopia’s failure to ratify the Protocol so far is due to the requirement of Article 6(d) of the Protocol. According to the Revised Family Code of Ethiopia, marriage registration is not a requirement for the validity of marriage whether the marriage is concluded according to customary or religious rules or even

before the officer civil status.⁸¹ This stipulation of the Family Code is in part a reflection of the reality that marriage registration facilities are not available in many parts of Ethiopia.

4.2 The Protocol's Success in Improving Observance

As an instrument supplementing the Charter, the Protocol is monitored by the same body as the Charter; namely, the Commission. As can be discerned from Article 26 (1) of the Protocol, state parties are under obligation to submit to the Commission their periodic reports in accordance with article 62 of the Charter. The African Court on Human and Peoples' Rights is also entrusted with the task of interpretation of the Protocol.⁸²

From this, it is possible to argue that the Protocol does not add value to the Charter as regards putting in place institutions in charge of overseeing states' observance of the obligations they assume in the Protocol. The main downside of the Protocol in this respect is its failure to establish a separate treaty monitoring body for the Protocol similar to CEDAW that established the CEDAW Committee and the Charter on the Rights and Welfare of the Child that established the African Committee on the Rights and Welfare of the Child. Banda severely criticized the Protocol for its failure to set up a distinct monitoring body raising the following three reasons.⁸³ First, the CEDAW Committee 'has played an important role in raising the profile of

⁸¹ Revised Family Code, 2000, Art. 28, Proc. No. 213/2000, *Fed. Neg. Gaz.* (Extraordinary issue), year 6, no. 1.

⁸² See article 27 of the Protocol.

⁸³ Banda, *Protocol to the African Charter on the Rights of Women in Africa*, supra note 13, pp. 469-470.

women's rights throughout the organization' and its jurisprudence has augmented the works of the United Nations (UN) treaty monitoring bodies and other agencies of the UN. A separate treaty monitoring body for the Protocol could have played similar role at the African Union (AU) level. Second, despite the fact that the Commission has shown improvements in its treatment of issues of women, it is less likely that it can effectively and efficiently deal with all human rights issues at continental level including the rights of women. Third and related to the second, the continued human rights violations of women in different parts of the continent coupled with wide spread gender-based discrimination means that a separate body should be dedicated to overcome these challenges.

A close examination of the relevant provisions of the Protocol, however, reveals that the Protocol has gone a step ahead in designing effective mechanisms of compliance at the domestic level. In this respect, article 25 (1) of the Protocol requires state parties to provide appropriate remedy to any woman whose rights or freedoms have been infringed. Based on this general obligation, states should put in place specific remedies to victims of human rights violations. Remedies for violation of human rights may take different forms including 'cessation of an ongoing violation' and reparation to victims of human rights violations.⁸⁴ The Human Rights Committee explained that reparation may include 'restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-

⁸⁴ See Human Rights Committee, *General Comment No.31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 2004, paras. 15 and 16.

repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.’⁸⁵ Courts, national human rights institutions and administrative bodies are the main government institutions providing remedies.

4.3 The Success of the Protocol in Including Extra-Legal Means of Implementation

The Protocol is commendable, not only for its recognition of the limitations of legislative prescriptions alone and its provisions, but also for taking a holistic approach to women’s rights.⁸⁶ Such broad-based approach to protection of rights is also reflected in the implementation mechanism of the Charter. The drafters of the Protocol are cognizant of the fact that promoting and protecting the rights of women involves a sea change in societal and individual thinking. To effect such profound social change, government action should take multiple forms and legislative measures should be part of a long-term process of promoting social justice for all, particularly women.⁸⁷

The Protocol requires state parties to take a range of non-legislative means of implementation of the provisions of the Protocol. These include, but are not limited to, policy, administrative, social and, economic measures;⁸⁸ education

⁸⁵ *Ibid.*

⁸⁶ Stefiszyn, *supra* note 25, pp. 376-77.

⁸⁷ Center for Reproductive Rights: Female genital mutilation: A matter of human rights, at <<http://www.reproductiverights.org/pdf/fgmhandbook.pdf>> (consulted 24 June 2007).

⁸⁸ The Protocol, *supra* note 3, arts. 2 (1) (c) & 4 (2) (b).

and outreach programmes;⁸⁹ supporting victims of harmful practices;⁹⁰ and provision of legal aid.⁹¹

5. Challenges to Effective Implementation

Even though the Protocol managed to rectify most of the drawbacks of the existing instruments on rights of women, such as the Charter and CEDAW, its effective implementation may be challenged by a number of factors. The following two sub-sections discuss these challenges.

5.1 Cultural and Religious Challenges

Generally speaking, international human rights treaties, including CEDAW, face a legitimacy crisis and attempts to enforce them face difficulty as states raise culture as a defence for non-compliance for their treaty obligation.⁹² Effective realisation of the rights of women envisaged in CEDAW has been greatly hindered by the sweeping reservations entered by states.⁹³ What is striking is not just the number or scope of the reservations that states entered,

⁸⁹ *Id.*, art.2 (2) & 5 (a).

⁹⁰ *Id.*, art. 5(c).

⁹¹ *Id.*, art. 8 (a).

⁹² Mullally, S., *Gender, Culture and Human Rights: Reclaiming Universalism*, Hart Publishing, Portland, Oregon & Oxford, 2006, p. 74, [hereinafter Mullally, *Gender, Culture and Human Rights: Reclaiming Universalism*].

⁹³ *Ibid.* As explained by Mullally, ‘More than half of the states parties to the Convention have entered reservations and declarations, limiting the scope of the Convention and also limiting the mandate of the CEDAW Committee. Many states have entered sweeping reservations to article 2, the core obligation of the Convention, making it difficult to ascertain what obligations, if any, are being undertaken by those states’.

but the justifications given by states for making the reservations.⁹⁴ States have appealed to religious beliefs and practices to justify such reservations.⁹⁵

With respect to cultural and religious challenges, the Protocol, like CEDAW, may face a stiff cultural resistance. This argument is reinforced by the situation of Africa where different societies give priority to culture and religion than law as their guiding principle. Consequently, African women may still be victims of discriminations and harmful practices despite the hope that the Protocol will resolve such problems.

Of course, the Protocol has incorporated mechanisms, such as awareness-raising, to tackle harmful practices. Until now, however, the traditional practices, such as female genital mutilation have proven to be difficult to eliminate, despite efforts of awareness-raising, legislative reform and human rights activism.⁹⁶ Why is this so? First, communities that practice female genital mutilation and other such practices today believe that their tradition is indeed logical, rational, and necessary. Second, the rural socio-cultural setting where these practices are particularly widespread is steeped in traditional and socio-cultural norms that guide individual behaviour.⁹⁷ Third, the formal law including the family and the criminal law which should be applicable are mostly simply imposed without sufficiently raising the awareness of law

⁹⁴ Mullally, *Gender, Culture and Human Rights: Reclaiming Universalism*, supra note 92, p. 89.

⁹⁵ *Ibid.*

⁹⁶ Packer, C., Understanding the Socio-Cultural and Traditional Context of Female Genital Mutilation and the Impact of Human Rights Discourse, in Nnaemeka, O. and Ezeilo, J. (ed.), *Engendering human rights: Cultural and socio-economic realities in Africa* Palgrave MacMillan, New York, 2005, p. 227.

⁹⁷ *Id.*, p. 228.

enforcement local officials and the people on the ground. Such kinds of impositions are far from success in communities in which cultures are deeply embedded.

5.2 Ratifications

According to Article 29(1) of the Protocol, the Protocol would come into force upon ratification by 15 states. For a treaty to impose a binding obligation on individual states, a state in question should ratify or accede to it after the treaty is enforced. A state will be bound by treaty obligation only where it willingly becomes a party to a treaty either through ratification or accession. On 26 October 2005, the Protocol received its 15th ratification, meaning the Protocol entered into force on 25 November 2005. For the Protocol to bring the desired change to the lives of all African women, it needs to be ratified by all African states. Although the ratification status of states is encouraging with the 36 ratifications, there are still 18 countries that have not yet ratified.⁹⁸ Of these 18 countries that have failed to ratify so far, 3 of them have even failed to sign the Protocol. Ethiopia has signed but not ratified the Protocol. This lack of universal ratification of the Protocol may hinder the application of the Protocol all over Africa. Compared to the ratification of CEDAW by African states, the ratification of the Protocol by the same token is not satisfactory. As mentioned above, CEDAW has been ratified by all African States except Somalia, South Sudan and Sudan.

⁹⁸ For list of countries that have ratified the Protocol, at <<http://www.achpr.org/instruments/women-protocol/ratification/>> (consulted 19 December 2014).

Therefore, for the Protocol to have a wider scope of application, relevant NGOs and human rights activists must lobby African governments to ratify the Protocol. Moreover, states that are not yet parties to the Protocol should also consider ratification by themselves to turn their commitment of realization of rights of women into reality.

Although states may be willing to ratify the Protocol, they may do it with reservations. Obviously, reservations impact on the scope of application of the Protocol. The Protocol is silent as to whether states can enter reservations. The silence of the law may be interpreted in two ways. First, since it does not expressly allow reservation, reservation is prohibited. However, this argument is weak because, if the silence is interpreted as prohibition of the reservation, it prevents the Protocol from having wider acceptance which defeats the very purpose of the Protocol.⁹⁹ The second possible interpretation is that the silence of the Protocol is with the implicit assumption that the issue of reservation shall be governed by international law. This is a much more plausible interpretation; certainly more tenable than the former one.¹⁰⁰ As long as the reservation is compatible with the object and purpose of the Protocol,¹⁰¹ it must be allowed so that states will not be shying off ratifying the Protocol.

⁹⁹ Dugard, J., *International Law: A South African Perspective*, third edition, Lansdowne, Juta, p. 411.

¹⁰⁰ Article 19 of the Vienna Convention on the Law of Treaties of 1969 provides the conditions of entering reservations.

¹⁰¹ *Ibid.*

Although reservations entered upon ratification have been the major setback for CEDAW, the problem is less visible in the Protocol.¹⁰² According to the available information, only three countries; namely, The Gambia, Namibia and the Republic of South African made reservations to the Protocol.¹⁰³ According to Viljoen, while there were many countries that raised concerns during the drafting stages of the Protocol, only these countries made reservations.¹⁰⁴ Both South Africa and Namibia made reservations on Article 6 (d) of the Protocol which requires every marriage to be reduced in written form and registered consistent with domestic law to produce legal consequence. In their reservations, Namibia postponed the requirement of registration until the issuance of legislation to that effect and South African excluded the application of the validity requirement of registration of marriage for customary marriages.¹⁰⁵ While the sweeping reservation made by the Gambia on Articles 5, 6, 7 and 14 was viewed by scholars as incompatible with the very purpose and objectives of the Protocol, it withdrew its reservation in March 2006 as a result of a sensitization campaign by civil society organizations.¹⁰⁶

¹⁰² Viljoen, *An Introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, supra note 20, p. 42.

¹⁰³ Information available at <http://www.chr.up.ac.za/index.php/documents-by-theme/women.html> (consulted 20 December 2014).

¹⁰⁴ Viljoen, *An Introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, supra note 20, p. 42.

¹⁰⁵ Information available at <http://www.chr.up.ac.za/index.php/documents-by-theme/women.html> (consulted 20 December 2014).

¹⁰⁶ Viljoen, *An Introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, supra note 20, p. 43.

6. Conclusion

The core aim of the Protocol is undoubtedly to remedy the limitations of the Charter and other human rights instruments with respect to protecting women from discrimination and harmful practices. In doing so, the Protocol has made a remarkable progress by introducing new rights which do not exist in other treaties although few rights incorporated in other treaties are left out or inadequately guaranteed in the Protocol. Scepticism about the single-hand effective implementation of the Protocol by the Commission has also made progress in terms of designing domestic ways of implementation, such as by requiring states to provide appropriate remedy for any woman whose rights have been violated. Last but not least, it has coupled legislative and non-legislative means of implementation which is expected to improve the effective application of the Protocol.

Despite these innovative aspects of the Protocol, there are some factors that may hinder the Protocol from keeping its Promise. As is the case of CEDAW, the practical application of the Protocol at a grass-root level may be challenged by cultural and religious practices. As the current trend shows, lack of universal ratification and reservation may also hinder the scope of application of the Protocol. In order to effectively implement the Protocol, therefore, governments must ratify the Protocol with minimum possible reservation(s) and ensure the implementation thereof. Much is also expected from NGOs in terms of awareness-raising on the ground and lobbying governments to ratify the Protocol.