

The Protocol on the Rights of Women in Africa:

An Instrument for Advancing Reproductive and Sexual Rights

On November 25, 2005, the Protocol on the Rights of Women in Africa¹ (the protocol) entered into force, after being ratified by 15 African governments.² Two years earlier, in July of 2003, the African Union—the regional body that is charged with promoting unity and solidarity among its 53 member nations—adopted this landmark treaty to supplement the regional human rights charter, the African Charter on Human and Peoples’ Rights (the African Charter). The protocol provides broad protection for women’s human rights, including their sexual and reproductive rights.³

The significance and potential of the protocol go well beyond Africa. The treaty affirms reproductive choice and autonomy as a key human right and contains a number of global firsts. For example, it represents the first time that an international human rights instrument has explicitly articulated a woman’s right to abortion when pregnancy results from sexual assault, rape, or incest; when continuation of the pregnancy endangers the life or health of the pregnant woman; and in cases of grave fetal defects that are incompatible with life. Another first is the protocol’s call for the prohibition of harmful practices such as female circumcision/female genital mutilation (FC/FGM), which have ravaged the lives of countless young women in Africa.

Sub-Saharan Africa has the worst indicators of women’s health—particularly of reproductive health—of any world region. These indicators include the highest number of HIV-positive women and the highest infant, maternal, and HIV-related death rates worldwide. The ability of a woman to make her own decisions regarding her body and her reproductive life are key to improving these indicators. The protocol can help advocates pressure governments to address the underlying social, political, and health-care issues that contribute to the dismal state of women’s health throughout the continent.

This briefing paper offers concrete suggestions for women’s health and rights advocates within and beyond Africa. It provides detailed information that can help African women use the protocol to exercise their reproductive rights, and suggests ways that governments can implement the protocol’s landmark provisions. The paper can also be useful to advocates outside Africa who are seeking to establish similar guarantees.

Reproductive Health in Sub-Saharan Africa: Global Comparisons							
	Estimated total number living with HIV/AIDS (end of 2004)	% of HIV-positive adults who are women (end of 2004)	Estimated total deaths from HIV/AIDS in 2004	Estimated maternal mortality ratio (2000) (maternal deaths per 100,000 live births)	Number of maternal deaths (2000)	Lifetime risk of maternal death (2000) 1 in:	Infant Mortality Rate (2004) (per 1,000)
Sub-Saharan Africa	25,400,000	52%	2,300,000	920	247,000	16	104
South & South East Asia	7,100,000	29%	490,000	330 (Asia)	253,000 (Asia)	94 (Asia)	67 (South Asia)
North Africa and Middle East	540,000	46%	28,000	130 (Northern Africa)	4,600 (Northern Africa)	210 (Northern Africa)	45
Latin America	1,700,000	35%	95,000	190	22,000	160	27
Developed regions	570,000 (Western Europe)	28% (Western Europe)	16,000 (Western Europe)	20	2,500	2,800	5
Global	39,400,000	44%	3,100,000	400	529,000	74	54
* Sources: UNAIDS & WHO, AIDS EPIDEMIC UPDATE 2004 (2004); WHO ET AL., MATERNAL MORTALITY IN 2000 (2004); UNICEF, STATE OF THE WORLD'S CHILDREN 2005 (2004).							

WHY A PROTOCOL ON WOMEN'S RIGHTS?

Although the African Charter is the primary treaty providing a framework for human rights in the region, its provisions on women's rights are largely seen as ineffective and inadequate.

The charter recognizes and affirms women's rights in three provisions. First, article 18(3) requires states parties to "ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman."⁴ Second, article 2 provides that the rights and freedoms enshrined in the charter shall be enjoyed by all, irrespective of race, ethnic group, color, sex, language, national and social origin, economic status, birth or other status.⁵ Third, article 3 of the African Charter states that every individual shall be equal before the law and shall be entitled to equal protection of the law.⁶ And yet the protocol notes that "despite the ratification of the African Charter ... women in Africa still continue to be victims of discrimination and harmful practices."⁷

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The protocol, which resulted from years of activism by women's rights supporters in the region, has attempted to reinvigorate the African Charter's commitment to women's equality by adding rights that were missing from the charter and clarifying governments' obligations with respect to women's rights.⁸ Only one out of the more than sixty articles in the African Charter makes specific reference to women. The following are key shortcomings of the treaty as it pertains to women:

- its failure to explicitly define discrimination against women;⁹
- its lack of guarantees to the rights to consent to marriage and equality in marriage; and
- its emphasis on traditional values and practices that have long impeded the advancement of women's rights 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 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."¹² Article 27(1) of the African Charter further provides that "every individual shall have duties towards his family and society."¹³ 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.¹⁴ Indeed, the African Charter has been interpreted to *protect* customary and religious laws that violate women's rights, such as the rights to equality and nondiscrimination; to life, liberty, and security of the person; and to protection from cruel and degrading treatment.¹⁵ In a recent ruling by the Zimbabwean Supreme Court, for example, the court held that domestic laws discriminating against women carry greater weight than international instruments protecting women from discrimination.¹⁶ And in considering whether a woman could inherit her father's estate, that court relied on traditional conceptions of the family and the male patriarch—as *stressed under the African Charter*—as the sources of women's status, rather than on the rights and standards guaranteed under international legal instruments.¹⁷

Advocates for women's rights recognized these weaknesses and sought to address them by adopting an additional protocol that focused solely on women's rights. In April

The Protocol in Brief

The protocol requires states to "ensure that the right to health of women, including sexual and reproductive health, is respected and promoted."

The protocol also calls upon states to:

- provide adequate, affordable, and accessible health services to women;
- establish and strengthen prenatal, delivery, and postnatal health and nutritional services for women during pregnancy and while breast-feeding;
- prohibit all medical or scientific experiments on women without their informed consent;
- guarantee women's right to consent to marriage;
- set the minimum age of marriage at 18 years;
- ensure equal rights for women in marriage;
- protect women against all forms of violence during armed conflict and consider such acts war crimes;
- enact and enforce laws prohibiting all forms of violence against women, including unwanted or forced sex; and
- reform laws and practices that discriminate against women.

1997, a draft protocol was created and was finally ratified some six years later.¹⁸ The adoption of the protocol signifies a renewed political commitment to the advancement of women's rights as human rights in Africa. Furthermore, attempts to strengthen the African human rights system through the reinvigorated African Union, which replaced the Organization of African Unity, and through the creation of the African Court on Human and People's Rights (the African Court), should embolden advocates to press for more vigorous enforcement of the protocol.¹⁹

KEY WOMEN'S RIGHTS PROVISIONS IN THE PROTOCOL

This section examines key reproductive rights protections in the protocol within the context of existing international protections for women.²⁰ The section supplies direct relevant quotes from the protocol; the full text of the treaty can be found at <http://www.africa-union.org>.

Global and Regional Standards for Reproductive Rights

At the regional level, the African Charter on Human and People's Rights and the African Charter on the Rights and Welfare of the Child contain provisions—including the rights to equality, life, liberty, security of the person, health, and protection from cruel, inhuman, and degrading treatment—that underlie women's sexual and reproductive rights.²¹ The African Charter on Human and Peoples' Rights has been ratified by every country on the continent and legally obligates every African state to respect, promote, and fulfill the rights guaranteed to African women.

In addition to the regional treaties, African women's sexual and reproductive rights are embedded in the six major United Nations international human rights treaties:

- the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);
- the International Convention on the Elimination of All Forms of Racial Discrimination;
- the Convention on the Rights of the Child (CRC);
- the International Covenant on Economic, Social, and Cultural Rights (ICESCR); and
- the International Covenant on Civil and Political Rights (ICCPR).

These treaties are legally binding instruments that require all ratifying countries to take action at the national level to respect, protect, and fulfill women's rights.

The content of women's sexual and reproductive rights under international law is further elaborated in the work of committees (known as treaty monitoring bodies) that monitor government compliance with the rights and obligations espoused by these six key international human rights treaties. On the basis of reports and information submitted to them, treaty monitoring bodies issue country-specific recommendations (known as concluding observations) to help states parties meet treaty obligations. The committees also issue general comments to aid all member states in interpreting the broad provisions of international human rights treaties. These increasingly

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comprehensive interpretations, while not legally binding, serve to elaborate on the content and meaning of particular rights and thereby facilitate improved observance of these rights. Both the committees' general comments and their concluding observations have generally embraced reproductive and sexual health for women.²²

In general, regional treaties and organizations are more likely than global ones to have an impact on local human rights because regional agreements are less likely to be seen as being imposed by outsiders.²³ An effective regional human rights system is based on a region's shared legal, political, socioeconomic, and intellectual traditions.²⁴

I. Provisions Relating to Reproductive Health and Reproductive Autonomy

A. REPRODUCTIVE HEALTH SERVICES

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

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

2. *States Parties shall take all appropriate measures to:*

- a) provide adequate, affordable and accessible health services, including information, education and communication programmes to women especially those in rural areas;*
- b) establish and strengthen existing pre-natal, delivery and post-natal health and nutritional services for women during pregnancy and while they are breast-feeding.*

(Article 14)

The protocol is the first legally binding human rights instrument to expressly articulate women’s reproductive rights as human rights, and to expressly guarantee a woman’s right to control her fertility.²⁵ It also provides a more detailed articulation 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.

Existing global human rights standards recognize women’s right to “the highest attainable standard of health”²⁶ and to equality in “access to health care services, including those related to family planning.”²⁷ Among the current global human rights treaties, women’s right to family planning is expressly recognized only in CEDAW and the CRC.²⁸ CEDAW additionally guarantees women’s right to “appropriate services in connection with pregnancy”;²⁹ and to “decide freely and responsibly on the number and spacing of their children, and to have access to the information, education and means to enable them to exercise these rights.”³⁰ The CRC affirms women’s right to “necessary medical assistance and health care”;³¹ to “appropriate pre-natal and post-natal health care for mothers”;³² and to “family planning education and services.”³³

B. Abortion

States Parties shall take all appropriate measures to:

c) protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.

(Article 14[2][c])

The protocol is the first human rights instrument to expressly articulate a woman’s right to abortion in specified circumstances.

No other human rights treaty explicitly articulates women’s right to abortion. The Human Rights Committee, the treaty monitoring body that supervises government compliance with the ICCPR, has interpreted existing global human rights standards to guarantee a women’s right to safe and legal abortion, under certain circumstances. This pertains to the interpretation of stated rights to equality, nondiscrimination, life, liberty, security of the person, and the highest attainable standard of health.³⁴ The CEDAW Committee, the treaty monitoring body that monitors government compli-

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ance with CEDAW, has framed the issue of maternal mortality due to unsafe abortion as a violation of women's right to life.³⁵ The Committee on the Rights of the Child, the treaty monitoring body that monitors government compliance with the CRC, has also linked illegal, unsafe abortions to high rates of maternal mortality, and has expressed concern over the impact of punitive legislation on maternal mortality rates.³⁶

C. HIV/AIDS

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

- c) the right to choose any method of contraception;*
- d) the right to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS*
- e) the right to be informed on one's health status and on the health status of one's partner, particularly if affected with sexually transmitted infections, including HIV/AIDS, in accordance with internationally recognised standards and best practices.*

(Article 14)

The protocol is the only treaty to specifically address women's rights in relation to HIV/AIDS, and to identify protection from HIV/AIDS as a key component of women's sexual and reproductive rights. 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.³⁷ It also articulates a state's duty to protect girls and women from practices and situations that increase their risk of infection, such as child marriage, wartime sexual violence, and FC/FGM.³⁸

HIV/AIDS is not expressly mentioned in any other global or regional human rights treaty. Existing global human rights standards on the right to equality, to the highest attainable standard of health, and to life have all been interpreted to indirectly guarantee women's rights in relation to HIV/AIDS. For example, the CEDAW Committee has acknowledged that inequality and discrimination against girls and women play a role in making women more vulnerable to HIV infection,³⁹ and the committee has asked governments to adopt a human rights-based approach to HIV/AIDS.⁴⁰ However, no global human rights instrument other than the protocol has expressly articulated the standards governing women's rights and states' duties in relation to the HIV/AIDS pandemic.

D. Sexual Education

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

f) the right to have family planning education.

(Article 14[1][f])

States Parties shall take all appropriate measures to:

a) provide adequate, affordable and accessible health services, including information, education and communication programmes to women especially those in rural areas.

(Article 14[2][a])

The protocol guarantees women's right to family planning education, thus reaffirming the right to family planning explicitly recognized in CEDAW and the CRC. CEDAW recognizes "access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning" as a key component of women's right to equality in education.⁴¹ The CRC requires states parties to "develop preventive health care, guidance for parents and family planning education and services."⁴² Provisions in other human rights instruments protecting "the right to receive and impart information" have also been interpreted as safeguarding women's right to sexual education.⁴³

II. Provisions Relating to Violence Against Women

A. BODILY INTEGRITY

"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."

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(Article 1[j])

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

(Article 3[4])

States Parties shall take appropriate and effective measures to:

a) enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public.

(Article 4[2][a])

The protocol goes beyond existing global and regional treaties by affording specific legal protection against gender-based violence, in both the public and private sphere, including domestic abuse and marital rape. The protocol significantly advances women's rights by relocating everyday abuses in the private sphere of the home to the public realm of rights violations for which states must be held accountable. In addition, the protocol is unique in its express guarantee of women's right to be protected from threats of both physical and verbal violence.

None of the existing global human rights treaties define or openly address violence against women.⁴⁴ This gap in the protection afforded to women was, in part, due to a historic legal distinction between rights violations that occur in the public sphere and those that occur in the private sphere. Until relatively recently, the so-called "private" violence of domestic abuse, marital rape, and harmful traditional practices escaped specific mention and legal scrutiny under international, regional, and national laws.

The CRC, the most recent of the global human rights treaties, requires states to "protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation."⁴⁵ However, this provision of the convention is expressed in gender-neutral terms and does not recognize the particular vulnerability of girls and female adolescents to violence. Nor does it articulate specific state obligations in relation to gender-based violence.

Provisions in other global treaties—i.e., those guaranteeing the rights to equality, nondiscrimination, life, liberty, security of the person, and the highest attainable standard of health—have been interpreted to include women's right to be protected from violence. For example, in its General Recommendation on Violence against Women, the CEDAW Committee states "[t]he definition of discrimination includes gender-based violence [...]. It includes acts that inflict physical, mental or sexual harm

or suffering, threats of such acts, coercion and other deprivations of liberty.”⁴⁶ The Human Rights Committee has also identified domestic violence and sexual violence as violations of women’s right to be free from torture and other cruel, inhuman, or degrading treatment.⁴⁷

B. PRACTICES HARMFUL TO WOMEN

“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.

(Article 1[g])

States Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.

(Article 2[2])

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

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

(Article 5)

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The protocol affirms and reinforces the language of CEDAW, which also requires states parties to take all appropriate steps to eliminate social and cultural patterns and practices that are discriminatory to women.⁴⁸ The protocol's provisions on harmful practices also affirm existing provisions in the CRC and the African Charter on the Rights and Welfare of the Child, which both prohibit practices prejudicial to the well-being of the child. The CRC requires states to take all appropriate measures "with a view to abolishing traditional practices prejudicial to the health of children."⁴⁹ The African Charter on the Rights and Welfare of the Child requires states to "take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child. . . ."⁵⁰ Other global standards guaranteeing the rights to life, liberty, security of the person, and health have also been interpreted to include women's right to be protected from harmful practices.

However, in a significant advancement of women's sexual and reproductive rights, the protocol goes further than existing treaties in requiring states to prohibit, through legislative measures backed by sanctions, all forms of female genital mutilation.⁵¹ No other global human rights instrument expressly calls for the prohibition of FC/FGM by name. The language of the protocol also does not allow for a cultural defense of FC/FGM, whereas the African Charter arguably does.⁵²

The protocol's provisions on harmful practices lay to rest arguments that customary and traditional practices can prevail over the rights of women under the African Charter. Under that document, the lack of specificity on discrimination against women has left them vulnerable to arguments that "cultural values" and community norms should prevail, even when physical harm results. Since women are underrepresented in the judiciary and legal community, these arguments have rarely been rebuffed. The protocol affirms the primacy of women's rights to nondiscrimination and reproductive self-determination under regional law. It requires states to eliminate cultural and traditional practices that discriminate against women and, in this respect, the protocol makes clear what the African Charter omitted—that the legal protection of tradition ends where discrimination against women begins. The protocol further provides that "women shall have the right to live in a positive cultural context and to participate at all levels in the determination of cultural policies."⁵³

C. SEXUAL HARASSMENT

States Parties shall take all appropriate measures to...

c) protect women, especially the girl-child from all forms of abuse, including sexual harassment in schools and other educational institutions and provide for sanctions against the perpetrators of such practices.

(Article 12[1][c])

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

c) ensure transparency in recruitment, promotion and dismissal of women and combat and punish sexual harassment in the workplace.

(Article 13[c])

The protocol is 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. The protocol also 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.

Existing global treaties espouse the right to education and to equality in education, but do not directly address the sexual harassment faced by girls and women in attempting to exercise their right to education. With respect to sexual harassment in the workplace, global human rights treaties do not provide clear protection to women. However, international standards have been interpreted to include women's right to be protected from sexual harassment. For example, the CEDAW Committee has explicitly identified sexual harassment as a form of violence against women and has expressed concerns over high levels of sexual harassment of women, including in schools and work environments.⁵⁴ The Human Rights Committee has also considered sexual harassment in work or education to be a form of discrimination against women.⁵⁵

III. Provisions Relating to Rights within Marriage

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

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

(Article 6[a]-[c])

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

(Article 7)

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

(Articles 21[1] and [2])

The protocol clearly specifies 18 as the minimum age of marriage, affirming girls' and women's right to be protected from child marriage. It also provides for freedom from forced marriage and other discriminatory practices during and upon the dissolution of marriage.

The protocol surpasses current global human rights protections by prohibiting forced marriage practices and articulating a woman's right to decide herself on matters of marriage and family. It is also the only international human rights treaty to identify monogamy as the "preferred form of marriage."⁵⁶ These provisions clearly extend the protocol's reach into the spheres of family, community, and tradition—the areas where women are most likely to experience violations of their sexual and reproductive rights.

The protocol is also unique in its articulation of widows' right to equality under international law. Its express guarantees include those of a widow's automatic right to become the guardian and custodian of her children, unless contrary to their interests and welfare; and of a widow's right to remarry and, in that event, to marry the person of her choice.⁵⁷ Widows face severe deprivations of their fundamental human rights in many regions of the world; existing global standards guaranteeing the right to equality and nondiscrimination may be interpreted to include widows' rights, but have seldom been applied to combat discrimination against widows at the national level. The sexual and reproductive rights violations faced by widows in Africa are acute; these transgressions are specifically addressed under the protocol for the first time in a regional or global human rights instrument.

Apart from the protocol, the only other human rights instrument to specify a minimum age of marriage is the African Charter on the Rights and Welfare of the Child, which provides that child marriage "shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years..."⁵⁸ Further, CEDAW provides that "[t]he betrothal and the marriage of a child shall have no legal effect and all necessary action, including legislation, shall be taken to specify a minimum age for marriage."⁵⁹ However, CEDAW fails to specify 18 as the minimum age of marriage.⁶⁰

Women's right to equality in marriage is guaranteed under CEDAW and the African Charter, though the charter notably fails to explicitly affirm women's right to fully and freely consent to marriage.⁶¹ Other global human rights standards have been interpreted to include a prohibition on forced marriage practices. For example, the Committee on the Rights of the Child has determined that forced marriage is both a harmful traditional practice and a form of gender discrimination.⁶² In a General Comment, the Human Rights Committee has identified women's right to free and informed choice in marriage as an element of women's right to equality.⁶³

PUTTING THE PROTOCOL TO USE: SUGGESTIONS FOR ADVOCATES

The protocol provides a strategic platform for advocates seeking to bring women's sexual and reproductive rights to the attention of citizens, organizations, governments, and policymakers throughout Africa. This section provides both advocates and policymakers with suggested guidelines on how to use the protocol to advance women's sexual and reproductive rights, both nationally and locally.

Advocate for Ratification of the Protocol

The protocol, which has received the necessary 15 ratifications, has entered into force and is a legally binding instrument on ratifying parties. To find out if a particular country has signed and ratified the protocol, visit the African Union's Web site at <http://www.africa-union.org/home/Welcome.htm>.

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Advocates in countries that have not yet signed the protocol should press their governments to sign.

Advocates in countries that have signed but not ratified the protocol can lobby their governments to complete the ratification process.

Uphold Protocol's Objectives

Once a state has ratified the protocol, that state is bound under international law to refrain from any acts that would defy the object or purpose of the protocol.⁶⁴ As a result, any state that ratifies the treaty immediately assumes an obligation to uphold its stated objective “to ensure that the rights of women are promoted, realized and protected in order to enable them to enjoy fully all their human rights.”⁶⁵

Article 26 of the protocol requires all states parties to “ensure the implementation of this Protocol at national level [...]”⁶⁶ States parties are further required to submit periodic reports to the African Commission on Human and Peoples’ Rights (the African Commission), which will monitor the legislative and other measures taken to ensure women’s full realization of the rights guaranteed in the protocol.⁶⁷ In addition, states parties are required to “provide for appropriate remedies to any woman whose rights or freedoms...have been violated.”⁶⁸ The adoption or repeal of legislation, implementation of policies and programs, and enforcement by national-level courts and other mechanisms of existing legal standards can fulfill the obligations outlined in the protocol.

Reform Legislation that Hinders Women's Rights

Advocates can lobby policymakers to reform national laws in accordance with the sexual and reproductive rights guaranteed in the protocol. And in countries where national laws or constitutions require the domestication of international treaties, advocates can push their governments to incorporate the protocol into local laws and policies.

National courts can then exercise jurisdiction over cases involving violations of the treaty.

Advocates working at the national level can lobby the government to amend existing laws that fail to respect the rights guaranteed in the protocol. Advocates can also lobby governments to adopt laws that will protect the rights guaranteed under the protocol. Finally, advocates can use the protocol to urge governments to pass laws that implement the rights laid out in the treaty.

Laws that protect women's rights include:

- criminal laws that penalize gender-based violence, including violence that occurs in the family and the home;
- laws, with education and outreach components, that prohibit FC/FGM;
- family laws that guarantee women's right to equality in marriage, including their right to land and property ownership during and upon the dissolution of marriage; and
- legislation that penalizes sexual harassment in schools and the workplace.

Laws that implement women's rights include:

- legislation that guarantees women the full range of reproductive health services; and
- laws that establish institutional mechanisms for monitoring women's status and adjudicating complaints concerning gender discrimination.

Examples of laws that require accompanying policies or programs include laws that address or recognize the following:

- violence against women;
- sexual discrimination against women;
- women's right to sexual and reproductive health; and
- a woman's right to abortion.

Promote National Policies and Programs that Support the Implementation of Women's Rights

Although national laws guaranteeing women's rights are crucial for empowering women, it is equally important that governments adopt policies and programs that create the conditions necessary for women to exercise and realize their legal rights. For instance, although a state party may pass legislation decriminalizing abortion, without a policy or program that provides for safe and accessible health care during and after the procedure, the right to abortion exists only on paper. Similarly, sexual violence may be penalized under a state's criminal law, but sexual violence cases will not be effectively reported or addressed by the courts without a policy or program to train police officers, lawyers, and judges to take this crime seriously and handle victims with dignity. Governments must therefore translate the protocol's guarantees into national laws and policies, which are backed by programs that implement the rights promised in the protocol.

To achieve this end, advocates using the protocol to help make sexual and reproductive rights a reality for African women should consider taking the following steps:

- push national and local policymakers to enact policies and programs that seek to fulfill women's rights;
- ensure support for nongovernmental organizations (NGOs) that serve women; and
- advise policymakers on the conditions necessary for women to effectively exercise the rights guaranteed under the protocol.

Redress Violations of the Protocol in National Courts

Article 25 of the protocol requires all states parties to "provide for appropriate remedies to any woman whose rights or freedoms...have been violated."⁶⁹ States that have incorporated the protocol into national law can use their courts to uphold their international legal obligations to protect women's human rights. In states that have yet to incorporate the protocol into national law, courts can still play a crucial role by enforcing domestic legislation regarding reproductive rights. Advocates can bring cases before national courts to help address violations of women's sexual and reproductive rights.

Use the Protocol to Raise Public Awareness of Women's Sexual and Reproductive Rights

Treaties help advocates articulate the nature and content of women's human rights. The language of the protocol, therefore, may be used to educate women and men, policymakers, and advocates on the meaning and significance of legal standards, entitlements, and obligations as they apply to women's rights in Africa. Because the protocol largely affirms, and in some cases surpasses, existing global standards, it can help educate and remind policymakers about their existing obligations to women.

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To raise public awareness of women's rights, advocates can consider undertaking the following initiatives:

- disseminate information to the public on the women's rights guaranteed by the protocol and the state's obligations to women that result from those guarantees;
- stage information campaigns in national and local media outlets to reach and educate a broad spectrum of citizens; and
- distribute information on the protocol to organizations, lawyers, judges, law students, policymakers, and other government officials.

Conduct trainings on the African Human Rights System and the Role of the Protocol

In addition to raising public awareness of the rights and obligations espoused in the protocol, it is critical to train those who play a role in protecting, promoting, and advancing women's rights. To this end, advocates can take the following actions:

- conduct civil society training sessions on the rights espoused in the protocol and the mechanisms available to enforce compliance with and implementation of the protocol;
- train women at the grassroots level on how to redress violations of the rights they are guaranteed by the protocol;
- train public officials on the rights guaranteed in the protocol and their obligation to respect, promote, and fulfill them; and
- train members of the legal community—including lawyers, judges, and law students—on the content of women's rights and the mechanisms available to enforce them at regional and national levels.

Advocate for Effective Regional Enforcement Mechanisms

Compliance with and implementation of the protocol will be supervised by the African Commission, the body established to monitor compliance with the African Charter and its protocols, until the establishment of the African Court. Whether the African Commission will be effective is unclear.⁷⁰ At present, the African Commission lacks the legal authority to enforce remedies in cases of rights violations, and it also lacks any mechanism to encourage and track states' compliance with its decisions. Despite individuals' ability to bring complaints before the African Commission, its decisions on

Cases brought before national courts may involve:

- denied access to abortion;
- lack of state protection from FC/FGM;
- challenges to criminal laws that do not recognize marital rape;
- a remedy for child marriage;
- lack of adequate access to emergency obstetric services;
- protection from customary or religious laws that discriminate against women;
- denied rights to subgroups of women (e.g., adolescents, certain ethnic groups, refugees, or unmarried women) to appropriate and freely chosen reproductive and sexual health-care services; and
- violations of women's right to be protected from sexual harassment.

such complaints are nonbinding and generally do not attract attention from member states. The African Court, however, will have the authority to issue legally binding and enforceable decisions.⁷¹

Advocates seeking to ensure that the protocol is adequately implemented can take the following steps:

- collaborate with women's and human rights advocates around the world to lobby for a more effective African Commission;
- pressure governments to ratify the Protocol to the African Charter Establishing an African Court on Human and Peoples' Rights, and to make declarations accepting the jurisdiction of the African Court over cases brought by individuals and NGOs;
- urge governments to properly staff and fund the African Court;
- advocate for the nomination of female judges to the African Court; and
- lobby member states of the African Union to ensure that the African Court's rules of procedure address issues of specific concern to female victims and witnesses (e.g., assuring that there be adequate protection for and sensitivity to victims of sexual violence).

CONCLUSION

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa significantly advances human rights protections in Africa to better reflect and incorporate women's experiences. Its significance lies in its affirmation of *women's reproductive rights as human rights*, its articulation of women's rights within an *African* regional context, and in the legal and moral pressure it exerts over the governments and policymakers responsible for its implementation. The protocol presents a tremendous opportunity for women's rights advocates in Africa, and could herald a new age of sexual and reproductive health for women throughout the continent.

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ENDNOTES

- 1 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2nd Ordinary Sess., Assembly of the Union, adopted July 11, 2003 [hereinafter Protocol on the Rights of Women in Africa].
- 2 As of February 17, 2006, Benin, Cape Verde, Comoros, Djibouti, Gambia, Lesotho, Libya, Malawi, Mali, Mauritania, Mozambique, Namibia, Nigeria, Rwanda, Senegal, South Africa and Togo have ratified the Protocol.
- 3 Under international law, a "treaty" is "an international agreement concluded between States in written form and governed by international law." See Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, art. 2(1)(a), 1155 U.N.T.S. 331, 333. The interpretation and application of treaties under international law is governed by the Vienna Convention on the Law of Treaties. The Vienna Convention provides that "Every treaty in force is binding upon the parties to it and must be performed by them in good faith" *Id.* art. 26. It further provides that, in the case of successive treaties relating to the same subject-matter, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty. *Id.* art. 30(3). The Protocol is intended to supplement the African Charter, and therefore, will generally complement rather than conflict with the African Charter. Protocol on the Rights of Women in Africa, *supra* note 1, pmbl. However, should conflicting obligations arise under the Protocol and the African Charter, States Parties' obligations under the Protocol would prevail, as a matter of international law. Note, however, that any additional obligations arising under the Protocol apply only to states that are parties to the Protocol itself.
- 4 African (Banjul) Charter on Human and Peoples' Rights, June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, art. 18(3) (1982) (entered into force Oct. 21, 1986) [hereinafter African Charter].
- 5 *Id.* art. 2.
- 6 *Id.* art. 3.
- 7 See *Id.* pmbl.
- 8 The Protocol responds to the "need to reinforce Article 18 [of the Charter] with a more elaborate rendering of the respect for women's human rights." J. Oloka-Onyango, *Human Rights and Sustainable Development in Contemporary Africa: A New Dawn, or Retreating Horizons?*, 6 BUFF. HUM. RTS. L. REV. 39, 66 (2000).
- 9 See Fitnat Naa-Adjeley Adjetey, *Religious and Cultural Rights: Reclaiming the African Women's Individuality: The Struggle Between Women's Reproductive Autonomy and African Society and Culture*, 44 AM. U. L. REV. 1351, 1376 (1995) (noting that the Charter "leaves substantial room for ambiguity in the interpretation of what constitutes prohibited discrimination") ("The reference to cultural values requires definition and the questions of which traditional values are recognized by the community and who makes that determination leave a lot of uncertainty in the interpretation of the rights in the Charter.").
- 10 WOMEN IN LAW AND DEVELOPMENT IN AFRICA (WILDAF), WILDAF NEWS, THE AFRICAN CHARTER ON HUMAN AND PEOPLE'S RIGHTS & THE ADDITIONAL PROTOCOL ON WOMEN'S RIGHTS, <http://site.mweb.co.zw/wildaf/news5.html> (last visited May 18, 2005).
- 11 See Adjetey, *supra* note 9, at 1356 (citing Sonia Correa & Rosalind Petchesky, *Reproductive and Sexual Rights: A Feminist Perspective*, in POPULATION POLICIES RECONSIDERED: HEALTH, EMPOWERMENT, AND RIGHT 107, 110 (Gita Sen et al. eds., 1994)) ("For the African Woman, the most severe violations of her human rights are 'rooted deeply within the family system, bolstered by community norms of male privilege and frequently justified by religious doctrines or appeals to custom or tradition.'").
- 12 African Charter, *supra* note 4, art. 17(2)-(3).
- 13 *Id.* art. 27(1).
- 14 Oloka-Onyango, *supra* note 8, at 62.
- 15 It should be noted that different countries have interpreted their obligations under the Charter in different ways. In the Botswana case of *Attorney General v. Unity Dow*, the Court used the principles espoused in the African Charter to override traditional customs of unequal treatment of women in their citizenship rights. See *Attorney General v. Unity Dow*, C.A. Civ. App. No.4/91 (unreported) (1991) (Bots.). However, a key observation is that the language of the African Charter does not guarantee progressive interpretation of women's rights in the region. The Constitutions of many African countries, for instance those of Kenya, Zimbabwe and Zambia, maintain special protection for personal law systems, often to the

- disadvantage of women attempting to exercise their right to equality in the family and society. The application of Sharia laws in Northern Nigeria provides another example of the use of customary or religious laws to usurp the rights of equality and non-discrimination guaranteed to women under international law. *See e.g.*, Press Release, Human Rights Watch, Sharia Stoning Sentence for Nigerian Women (Aug. 20, 2002), <http://hrw.org/press/2002/08/nigeriastoning.htm>.
- 16 *See Venia Magaya v. Nakayi Shonhiwa Magaya*, S.C. 210/98/, Civ. App. No.635/92 (unreported) (1999) (Zimb.).
- 17 *See id.*
- 18 WiLDAF, *supra* note 10. The process of drafting of this document began in 1995, when the African Commission, in collaboration with WiLDAF organized a seminar on the African Charter and the Rights of Women in Africa in Lome, Togo. The seminar did not discuss the specific contents of the Protocol. *Id.* Instead, general recommendations were put forward to the African Commission, which submitted them to the OAU Conference of Heads of State and Government. *Id.* Once recommendations were approved, experts were appointed to draft the Protocol. *See id.*
- 19 The Protocol to the African Charter on Human and Peoples' Rights Establishing an African Court on Human and Peoples' Rights (the Protocol) only recently entered into force. According to Article 34(3) of the Protocol, "the Protocol shall come into force thirty days after fifteen instruments of ratification or accession have been deposited." The ratification by Comoros on December 23, 2003 paved the way for the entry into force of the Protocol on January 25, 2004 and for the establishment of the Court. As of April 2005, the Court is still in the process of being established and is not yet functioning. The African Union has decided to merge the African Court with the African Union Court of Justice in July 2004, which has contributed to the delay in the establishment of the court. Interights, *A Human Rights Court for Africa*, 15 INTERIGHTS BULLETIN 1, 1 (2005). To date, the other ratifying states are: Algeria; Burkina-Faso; Burundi; Côte d'Ivoire; Comoros; Gabon; Gambia; Kenya; Lesotho; Libya; Mali; Mauritius; Mozambique; Niger; Nigeria; Rwanda; Senegal; South Africa; Togo; and Uganda. Once established, the Court will consider cases of human rights violations referred to it by the African Commission on Human and Peoples' Rights (African Commission) established pursuant to the African Charter on Human and Peoples' Rights (African Charter) and states parties to the Protocol and, where a state party accepts such a jurisdiction, by individuals and non-governmental organizations (NGOs).
- 20 This briefing paper considers existing standards in the global human rights treaties *applicable* in the African region. Guarantees existing under treaties only applicable, for instance, in the European or inter-American human rights system are not included in the analysis. Therefore, the terms "global treaties," "global instruments" or "human rights instruments" refer to those treaties binding on *African states parties* and the term "regional treaty" or "regional instrument" refers to *African regional instruments*. The terms "treaty" and "instrument" are interchangeable and both refer to an agreement between states that is legally binding on the states which consent to be bound by the agreement and for which the agreement is in force. States consent to be bound by a treaty by "ratifying" the agreement and become "states parties" when the treaty enters into force. *See Vienna Convention on the Law of Treaties, supra* note 3, pt. I, art. 2.
- 21 African Charter, *supra* note 4, arts. 3–6, 16; African Charter on the Rights and Welfare of the Child, July 11, 1990, O.A.U. Doc. CAB/LEG/24.9/49, arts. 3, 5, 7–10, 14, 16 (1990) (*entered into force* Nov. 29, 1999).
- 22 *See* CENTER FOR REPRODUCTIVE RIGHTS & UNIVERSITY OF TORONTO INTERNATIONAL PROGRAMME ON REPRODUCTIVE AND SEXUAL HEALTH LAW, BRINGING RIGHTS TO BEAR: AN ANALYSIS OF THE WORK OF UN TREATY MONITORING BODIES ON REPRODUCTIVE AND SEXUAL RIGHTS (2002).
- 23 *See* George William Mugwagwa, *Realizing Universal Human Rights Norms through Regional Human Rights Mechanisms: Reinvigorating the African System*, 10 IND. INT'L & COMP. L. REV. 35, 41–42 (1999); Adjetej, *supra* note 9, at 1354 (noting that international

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- human rights norms “must be linked to local laws and regional human rights instruments to make people realize that these norms are not part of an alien culture which is to be imposed on them.”). Fitnat Naa-Adjeley Adjetey states, “The African Charter must be used to the fullest extent in order to eliminate the notion that foreign ideas are being imposed on African women... Only as a last resort should there be a resort to international fora.” *Id.* at 1369.
- 24 Mugwagwa, *supra* note 23, at 41.
- 25 Article 14 of the Optional Protocol is entitled: “Health and Reproductive Rights.”
- 26 Convention on the Rights of the Child (CRC), adopted Nov. 20, 1989, G.A. Res. 44/25, Annex, U.N. GAOR, 44th Sess., Supp. No. 49, at 167, art. 24(1), U.N. Doc. A/44/49 (1989) (entered into force Sept. 2, 1990). See e.g., Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted Dec. 18, 1979, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, art. 12, U.N. Doc. A/34/46 (1979) (entered into force Sept. 3, 1981); International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted Dec. 16, 1966, G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16, at 49, art. 12(1), U.N. Doc. A/6316 (1966), 999 U.N.T.S. 3 (entered into force Jan. 3, 1976).
- 27 CEDAW, *supra* note 26, art. 12(1).
- 28 See *id.*; CRC, *supra* note 26, art. 24(2)(f).
- 29 CEDAW, *supra* note 26, art. 12(2).
- 30 *Id.* art. 16(1)(e).
- 31 CRC, *supra* note 26, art. 24(2)(b).
- 32 *Id.* art. 24(2)(d).
- 33 *Id.* art. 24(2)(f).
- 34 See e.g., Concluding Observations of the Human Rights Committee that discusses how women compelled to seek illegal abortions experience a violation of Article 6 of the International Covenant on Civil and Political Rights, the right to life: e.g., *Concluding Observations of the Human Rights Committee: Senegal*, Human Rights Committee (HRC), 61st Sess., 1640th mtg., para. 12, U.N. Doc. CCPR/C/79/Add.82 (1997); *Concluding Observations of the Human Rights Committee: Sudan*, HRC, 61st Sess., 1642nd mtg., para. 10, U.N. Doc. CCPR/C/79/Add.85 (1997); *Concluding Observations of the Human Rights Committee: Tanzania*, HRC, 63rd Sess., 1697th mtg., para. 15, U.N. Doc. CCPR/C/79/Add.97 (1998); *Concluding Observations of the Human Rights Committee: Zambia*, HRC, 56th Sess., 1498th mtg., para. 9, U.N. Doc. CCPR/C/79/Add.62 (1996). See also HRC, *General Comment No. 28: Equality of rights between men and women (Art. 3)*, 68th Sess., para. 10, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000), in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1 at 179 (2003).
- 35 The CEDAW Committee has commented on the issue of maternal mortality due to unsafe abortion in numerous sets of concluding observations, consistently criticizing restrictive abortion laws and asking states parties to review legislation making abortion illegal. See e.g., *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Burundi*, CEDAW, 24th Sess., 488–489th, 496th mtgs., para. 61, U.N. Doc. A/56/38 (2001); *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Madagascar*, CEDAW, 49th Sess., 236–237th mtgs., para. 244, U.N. Doc. A/49/38 (1994); *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Morocco*, CEDAW, 52th Sess., 312–313th, 320th mtgs., para. 68, U.N. Doc. A/52/38/Rev.1 (1997); *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Namibia*, CEDAW, 52nd Sess., 336–337th, 342nd mtgs., para. 111, U.N. Doc. A/52/38/Rev.1, pt. II (1997); *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Zimbabwe*, CEDAW, 53rd Sess., 366–367th, 372nd mtgs., para. 159, U.N. Doc. A/53/38 (1998); *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Burkina Faso*, CEDAW, 55th Sess., 458–459th mtg., para. 276, U.N. Doc. A/55/38 (2000); *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Cameroon*, CEDAW, 55th Sess., 476–477th, 483rd mtgs., para. 60, U.N. Doc. A/55/38 (2000). See also CEDAW, *General Recommendation 24: Women and health*, 20th Sess., paras. 14, 27, U.N. Doc. A/54/38 (1999), in

- Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 271 (2003) [hereinafter CEDAW Committee, General Recommendation 24].
- 36 See e.g., *Concluding Observations of the Committee on the Rights of the Child: Chad*, CRC, 21st Sess., 55th mtg., para. 30, U.N. Doc. CRC/C/15/Add.107 (1999).
- 37 Protocol on the Rights of Women in Africa, *supra* note 1, art. 14(1)(d), (2)(a).
- 38 See e.g., *id.* arts. 5–6, 11.
- 39 See CEDAW Committee, General Recommendation 24, *supra* note 35, para. 18.
- 40 See e.g., *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Egypt*, CEDAW, 24th Sess., 492–493rd mtgs., paras. 336–337, U.N. Doc. A/56/38 (2001).
- 41 CEDAW, *supra* note 26, art. 10(h).
- 42 CRC, *supra* note 26, art. 24(2)(f).
- 43 Article 9(1) of the African Charter provides: “Every individual shall have the right to receive information.” African Charter, *supra* note 4, art. 9(1). Article 13(1) of the CRC provides: “The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds.” CRC, *supra* note 26, art. 13(1).
- 44 While no international treaty explicitly addresses violence against women, the Convention of Belém do Pará, an Inter-American regional human rights treaty expressly addresses violence against women. Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women “Convention of Belém do Pará,” adopted June 9, 1994, reprinted in 33 LLM 1534 (1994) (entered into force Mar. 5, 1995). It is the most widely ratified regional treaty in Latin America. Press Release, Amnesty International, Tenth anniversary of the Convention of Belém do Pará: Time for action! (June 8, 2004), <http://news.amnesty.org/index/EN/ACT770632004>; CENTER FOR REPRODUCTIVE RIGHTS, REPRODUCTIVE RIGHTS IN THE INTER-AMERICAN SYSTEM FOR THE PROMOTION AND PROTECTION OF HUMAN RIGHTS 6 (2002). As of May 18, 2005, 31 countries have ratified the treaty. INTER-AMERICAN COMMISSION OF WOMEN, STATUS OF SIGNING AND RATIFICATION OF THE CONVENTION OF BELÉM DO PARÁ, <http://www.oas.org/cim/English/Laws.Rat.Belem.htm> (last visited May 18, 2005).
- 45 CRC, *supra* note 26, art. 19(1). Article 34 of CRC further requires states to “protect the child from all forms of sexual exploitation and sexual abuse.” *Id.* art. 34.
- 46 CEDAW, *General Recommendation 19: Violence Against Women*, 11th Sess., para. 6, U.N. Doc. A/47/38 (1999), in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 243 (2003).
- 47 Human Rights Committee, *General Comment No. 28: Equality of rights between men and women (Art. 3)*, 68th Sess., para. 11, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000), in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1 at 168 (2003) [hereinafter Human Rights Committee, General Comment 28].
- 48 CEDAW, *supra* note 26, art. 5 (“States Parties shall take all appropriate measures (a) to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary 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 men and women.”). Article 2(f) of CEDAW requires states to “take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.” *Id.* art. 2(f).
- 49 CRC, *supra* note 26, art. 24(3).
- 50 African Charter on the Rights and Welfare of the Child, *supra* note 21, art. 21.
- 51 Protocol on the Rights of Women in Africa, *supra* note 1, art. 5(b).
- 52 Article 18(3) of the African Charter provides, “[t]he State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.” African Charter, *supra* note 4, art. 18(3). Article 17(2) of the African Charter provides, “Every individual may freely, take part in the cultural life of his community.” *Id.* art. 17(2). Article 17(3) of the African Charter provides, “The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State.”

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- Id.* art. 17(3). Together, these provisions may be interpreted and applied to permit cultural defenses to traditional practices harmful to women.
- 53 Protocol on the Rights of Women in Africa, *supra* note 1, art. 17(1).
- 54 *See e.g., Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Thailand*, CEDAW, 20th Sess., 417–418th mtgs., para. 243, U.N. Doc. A/54/38 (1999); *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Tanzania*, CEDAW, 19th Sess., 394–395th mtgs., para. 228, U.N. Doc. A/53/38/Rev.1 (1998); *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Ethiopia*, CEDAW, 51st Sess., 292–293rd mtgs., para. 151, U.N. Doc. A/51/38 (1996); *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Cuba*, CEDAW, 23rd Sess., 474–475th mtgs., para. 264, U.N. Doc. A/55/38 (2000); *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Finland*, CEDAW, 24th Sess., 494–495th mtgs., para. 301, U.N. Doc. A/56/38 (2001).
- 55 *See e.g., Concluding Observations of the Human Rights Committee: Argentina*, CEDAW, 70th Sess., 1893rd mtg., para. 15, U.N. Doc. CCPR/CO/70/ARG (2000).
- 56 Protocol on the Rights of Women in Africa, *supra* note 1, art. 6(c).
- 57 *Id.* art. 20(b)–(c).
- 58 African Charter on the Rights and Welfare of the Child, *supra* note 21, art. 21(2).
- 59 CEDAW, *supra* note 26, art. 16(2).
- 60 *Though note:* The CEDAW Committee, in its General Recommendation on Equality in Marriage and Family Relations, identified 18 as the appropriate legal age of marriage for both men and women. *See* CEDAW Committee, *General Recommendation 21: Equality in Marriage and Family Relations*, 13th Sess., para. 36, U.N. Doc. A/49/38, at 1 (1994), in *Compilation of General Comments and General Recommendations by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.5 at 250 (2003).
- 61 Article 16(1) of CEDAW outlines women’s rights to equality in marriage and family relations. CEDAW, *supra* note 26, art. 16(1). Article 18(3) of the African Charter requires the state to “ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.” African Charter, *supra* note 4, art. 18(3).
- 62 *See e.g., Concluding Observations of the Committee on the Rights of the Child: Burkina Faso*, CRC, 6th Sess., 135–137th mtgs., para. 14, U.N. Doc. CRC/C/15/Add/19 (1994); *Concluding Observations of the Committee on the Rights of the Child: Djibouti*, 24th Sess., 641st mtg., para. 25, U.N. Doc. CRC/C/15/Add.131 (2000).
- 63 Human Rights Committee, General Comment 28, *supra* note 47, para. 23.
- 64 *See* Vienna Convention on the Law of Treaties, *supra* note 3, art. 18.
- 65 *See* Protocol on the Rights of Women in Africa, *supra* note 1, pmb.
- 66 *Id.* art. 26.
- 67 *Id.* art. 26(1).
- 68 *Id.* art. 25(a).
- 69 *Id.*
- 70 It is uncertain based on the historic inefficacy of the African Commission in relation to ensuring compliance with and implementation of the African Charter. Even “the most positive reviews of the major mechanism of implementation of the Charter, the African Commission on Human and Peoples’ Rights, generally agree that the institution has performed at less than par.” *See* Oloka-Onyango, *supra* note 8, at 69–70. “Most cases of human rights violations filed by individuals and organizations take an average of two years to process. State parties rarely provide prompt answers at all until threatened with a finding of default. Complainants’ costs are prohibitive and, until very recently, little or no publicity could be given to the proceedings and issues. Rules...ensure that public embarrassment and shame cannot act to remedy current situations or prevent new occurrences.” *Id.* at 70 (citing Oji Umzurike, *The African Commission on Human and Peoples’ Rights, Special Harare Conference Issue*, COMMONWEALTH HUMAN RIGHTS INITIATIVE (CHRI) NEWS 28 (1998)). Infrastructure, funding, and lack of political will are additional problems that have plagued the African Commission. *Id.* *See also* J. Oloka-

Onyango, *Reinforcing Marginalized Rights in an Age of Globalization: International Mechanisms, Non-State Actors, and the Struggle for Peoples' Rights in Africa*, 18 AM. U. INT'L L. REV. 852, 859 (2003) ("In reality, the Commission lacks sufficient protective powers and enforcement remedies, and even mechanisms to encourage and track state compliance with its decisions. In the words of Amnesty International, '...the decisions it renders are non-binding, and attract little, if any, attention from governments of Member States.'").

71 Individuals and NGOs will only have direct access to the African Court if a state party to the Protocol also makes a declaration accepting the competence of the African Court to receive individual cases.

