



# A handbook for advocacy in the African human rights system

*Advancing reproductive  
and sexual health*

Second Edition  
2006

*Ipas*

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## EXECUTIVE SUMMARY

*This manual was originally prepared by the International Programme on Reproductive and Sexual Health Law of the Faculty of Law, University of Toronto and distributed by Ipas-Africa. It is intended to facilitate use of the African regional human rights system and the African Commission on Human and Peoples' Rights (African Commission) to **promote and protect reproductive and sexual health**. With this as its main purpose, this manual:*

- ***describes the context of reproductive and sexual health** in Africa and the African regional human rights system,*
- ***demonstrates how** the African Charter on Human and Peoples' Rights (African Charter) relates to reproductive and sexual health rights,*
- ***compiles basic texts** such as the African Charter, regional declarations, selected resolutions of the African Commission, and selected national and African Commission case law relevant to reproductive and sexual health rights or to the African Commission's procedure. International human rights documents relevant to the interpretation of the African Charter rights are also included,*
- ***explains the purpose and function** of the African Commission, and*
- ***provides technical information** on the submission of communications to the African Commission.*

### **TO ORDER COPIES OF THIS MANUAL OR TO PROVIDE COMMENTS CONTACT:**

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## **PART I: Chapters 1-6**

Introducing the concept of reproductive and sexual health, the first six chapters provide an overview of the African and international reproductive and sexual health context and the relevant human rights systems. The significance of the *African Charter of Human and Peoples' Rights* (*African Charter*) and the operation of the African Commission on Human People's Rights (African Commission) are reviewed. The final chapter details legal cases that relate to the use of international human rights law and the rights in the *African Charter*, as well as to the procedure of the African Commission.

## **PART II: Chapter 7**

Basic human rights documents founding the African human rights system are reproduced in the second part. Presented in full text for easy reference, these documents include:

- ◆ *The African Charter on Human and Peoples' Rights*
- ◆ *The African Charter on the Rights and Welfare of the Child*
- ◆ *Charter of the Organization of African Unity*
- ◆ *The Constitutive Act of the African Union*
- ◆ *The Protocol to the African Charter on the Rights of Women in Africa*
- ◆ *The Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights*
- ◆ *The Rules of Procedure of the African Commission on Human and Peoples' Rights*

\*\*To facilitate the reader's task of identifying resources relevant to her or his purposes, each document in Parts II and III of this handbook includes a brief introduction outlining how the materials relate to reproductive and sexual health and emphasizing key provisions.

## **PART III: Chapters 8-10**

In Part III, documents relevant to various reproductive and sexual health issues, and effective advocacy before the African Commission are reproduced. Regional declarations, resolutions and decisions on the rights of women, resolutions issued by the African Commission, and documents from other international bodies are included and briefly described.

\*\*To facilitate the reader's task of identifying resources relevant to her or his purposes, each document in Parts II and III of this handbook includes a brief introduction outlining how the materials relate to reproductive and sexual health and emphasizing key provisions.

## **PART IV: Chapter 11**

In this chapter, a selected annotated bibliography of Print and Website resources on the following topics is included:

- Reproductive and Sexual Health Rights: Africa
- Reproductive and Sexual Health Rights: International
- Women's Rights in Africa
- Human Rights in Africa
- International Human Rights and International law

# PREFACE AND ACKNOWLEDGEMENTS

This manual was originally prepared by the International Programme on Reproductive and Sexual Health Law of the Faculty of Law, University of Toronto, and updated in 2006. It is distributed by Ipas-Africa. It is intended to familiarize advocates with the regional human rights system and its treaty body, the African Commission on Human and Peoples' Rights (African Commission), created to promote and protect reproductive and sexual health.

This manual provides you with:

- An overview of the context of reproductive and sexual health in Africa
- An introduction to the African regional human rights system
- Some “how to” information on using the African Commission
- Brief case summaries from domestic courts and from the African Commission relevant to advocacy and reproductive rights.
- The basic human rights documents of the African human rights system and other international interpretive documents
- Print and Website sources relevant to African human rights, women's rights in Africa and reproductive and sexual health rights.

We hope that future editions may provide even further information to bring such resources together in one accessible volume. Please direct any comments you may have on this handbook to Ipas. We would be interested to hear how these resources have been useful in your work.

## Publishing Organizations

The *International Programme on Reproductive and Sexual Health Law* is a programme of the Faculty of Law, University of Toronto. The Programme aims to develop the capacity of lawyers, primarily from southern countries, to address reproductive and sexual health needs and develop effective policies and procedures for the application of human rights in the area of reproductive and sexual health. The primary focus of the Programme is education of Graduate Fellows, including support for their research and development of their skills in legal research, creative analysis and strategic advocacy before governmental, legislative and judicial bodies. Other programme activities include legal advisory and advocacy work, research and publication, and development of a website containing legal articles, documents and links to related web sites.

*Ipas* works globally to improve women's lives through a focus on reproductive health. The organization's work is based on the principle that every woman has a right to the highest attainable standard of health, safe reproductive choices and high-quality health care. Their work concentrates on preventing unsafe abortion, improving treatment of its complications and reducing its consequences. *Ipas* strives to empower women by increasing access to services that enhance their reproductive and sexual health.

*Ipas* technologies, training, research and technical assistance support the development of women-centred reproductive health policies, improve the quality and sustainability of services, ensure long-term availability of reproductive health technologies and promote women's active involvement in improving health care.

The first and second editions of this handbook benefited enormously from the helpful comments of many people who assisted in its development and/or reviewed earlier drafts. The authors extend thanks to:

- ◆ The African Commission on Human and Peoples' Rights for responding to several requests for documentation and information. In particular, Mr. Jan Jalloh from the Information and Documentation Centre was immensely helpful.
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- ◆ The following individuals in Kenya who gave time to provide feedback on the 1<sup>st</sup> edition: Njeri Karuru, Women and Law in East Africa; Mugambi Kiai, Kenya Human Rights Commission; Jane Kiragu, Winnie Guchu, and Anne Muragu Nyabera of FIDA Kenya; Pauline Nyamweya, Public Law International; and Katini Nzau-Ombaka, Kenya Women's Medical Association.
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- ◆ We are very grateful to the United Nations Population Fund (UNFPA), The Ford Foundation and the William and Flora Hewlett Foundation for their financial support in developing the 1<sup>st</sup> edition.
- ◆ The Women's Human Rights Resources website ([www.law-lib.utoronto.ca/diana/mainpage.htm](http://www.law-lib.utoronto.ca/diana/mainpage.htm)) for permission to adapt several annotations from its database for our bibliography
- ◆ We are grateful to Professor Rebecca Cook at the Faculty of Law, University of Toronto for her suggestions and input as well as permitting us to make use of invaluable materials of annotated cases, a publication which is being prepared by the International Reproductive and Sexual Health Law Program of the Faculty of Law, University of Toronto.
- ◆ Thank you to Lonna Hays of Ipas and Tara Lavicy for their work on the second edition.

This manual is one in a series of compilations developed to encourage reproductive and sexual health rights advocacy. The International Programme on Reproductive and Sexual Health Law has worked on developing five advocacy manuals in collaboration with different partners. The first manual explains the *Optional Protocol to the Convention on the Elimination of all forms of Discrimination against Women*. The second manual contains annotated cases from African Commonwealth courts related to gender and reproductive rights. Three of the manuals are primarily compilations of Concluding Observations, General Comments or General Recommendations and other pronouncements by the international and regional human rights treaty bodies relating to reproductive and sexual health rights. The sixth publication is an analysis of the manual's material on the international human rights treaty bodies. This is the last manual of the series in the following list and explains how to advocate for reproductive health rights in the African human rights system. The manuals are designed to assist people preparing governmental reports and alternative (NGO) reports relating to reproductive and sexual health, designers of advocacy manuals or training programmes, and researchers. Each compilation will contain a selected bibliography and key websites for additional sources of information. Brief details of these other manuals in the series are provided below.



# PART 1

# 1. INTRODUCTION

## **Chapter 1 Summary: Introduction**

Approaching health issues, in addition to health care and health policy initiatives, from a human rights perspective can be an effective strategy to elevate health needs to the level of legal entitlement. Expressing reproductive and sexual health concerns in terms of human rights can be an advantage in working to improve women's lives because human rights as a concept, and as a way of placing individual suffering in a wider context, can increase the enforceability of these rights. The language of human rights is an established international vocabulary that can add strength to your advocacy.

This chapter also addresses why the African Commission on Human and Peoples' Rights (African Commission) can be used as an advocacy channel/target for the improvement of women's reproductive and sexual health in Africa. The challenges to the effective protection of reproductive and sexual health rights in Africa are briefly addressed while the encouraging developments and opportunities in this domain are outlined. The growth of women's organizations in Africa, including those focusing on women's legal rights is highlighted and institutional developments are outlined to demonstrate the opportunities for advocacy before the African Commission, the designation of a Special Rapporteur on the Rights of Women in Africa, the creation of a new human rights document specifically addressing African women's rights, the development of the African Court of Human and Peoples' Rights (African Court), and the transformation of the Organization for African Unity (OAU) into the African Union (AU).

## **How to Use This Book:**

This book is a manual to assist women's rights advocates in using the regional human rights system of Africa. This manual is one in a series of publications that compile international human rights documents to encourage advocacy on reproductive and sexual health. (See the preface for details on other volumes in this series.)

The African regional human rights system commenced with the *African Charter on Human and Peoples' Rights (African Charter)*. It sets out basic human rights principles that 53 African countries agreed to uphold. The *African Charter* also created the African Commission on Human and Peoples' Rights (African Commission) to review government performance in ensuring the rights of the *African Charter*.

This book can help you to:

- ◆ Learn about the human rights in the *African Charter*
- ◆ Learn how the African Commission is organized and how it operates

- ◆ Apply the rights of the *African Charter* to reproductive and sexual health issues
- ◆ Link reproductive and sexual health issues to your current women's rights work
- ◆ Understand how *African Charter* rights have been interpreted and what their interpretation means for your advocacy work
- ◆ Prepare a report to submit to the African Commission
- ◆ Submit a human rights complaint
- ◆ Advocate before the African Commission to bring attention to an abuse of women's rights

African women have numerous reproductive and sexual health concerns, and these concerns can vary from according to region and community. Many women are unable to access adequate health services including pre- and post-natal care. Women's social status hinders their reproductive choice. Additionally, women suffer sexual violence in many forms. AIDS, the lack of safe abortion services, and traditional practices such as FGC (female genital cutting) all put women's health at risk. These are just a few examples of reproductive and sexual health issues that are relevant to the lives of many women.

## **Why Use a Human Rights Approach?**

A human rights approach is one avenue to improving women's reproductive and sexual health, and it can be an effective component of a multifaceted effort. Approaching health issues from a human rights perspective, in addition to health care and health policy initiatives, can be a strategic way to elevate health needs to the level of legal entitlement. For several reasons, expressing reproductive and sexual health concerns in terms of human rights can be an advantage in working to improve women's lives:

***Human rights are useful as a concept, as a way of placing individual suffering in a wider context.***

A human rights approach frames your concerns as a social justice issue. The whole of society should be aware and outraged by human rights abuses. Governments that have committed to the *African Charter* and to national constitutional protection of human rights are obligated to act to prevent and remedy human rights violations. Taking an individual case of domestic violence, for example, and showing its social and human rights dimensions lifts it to a whole new level as a call to action. The language of human rights is an established international vocabulary that can add strength to your advocacy. Using a human rights approach can take topics, which are difficult to discuss, such as abortion, and frame them in terms of basic rights of health care and survival that may be more "acceptable" for discussion.

***Human rights are empowering.***

Human rights are a vision of a just society. They are steps towards our best aspirations and are minimum standards to achieve human dignity. Human rights agreements are solemn commitments made by governments. When your rights have been violated, learning that you have recourse to a human rights panel beyond your national courts and government can give hope when options look limited.

***Human rights encompass a whole range of reproductive and sexual health issues.***

The *African Charter* protects reproductive and sexual health rights. While these rights are not explicitly referred to in this legislation, the broadly worded rights of the *African Charter* can be applied to promote reproductive and sexual health issues. The rights are there – you just have to interpret them to address your concerns.

## **Why Focus on the African Commission on Human and Peoples' Rights?**

National constitutions and national legislation are important sources of human rights documentation and are excellent targets for advocacy efforts. This manual highlights the African Commission as a kind of "next step," an alternative advocacy forum that has growing potential for the protection and promotion of women's rights.

The African Commission is a regional institution that is an appropriate focus for advocacy in many situations. For example, when a human rights case has proceeded through all the national

legal channels and a favourable result has not been achieved, the regional level is available for another hearing of the complaint. When a government is not living up to its commitments under the *African Charter*, bringing this fact to the attention of the African Commission can impose substantial pressure upon the government. Raising human rights concerns before a regional institution can also increase awareness about issues that are regional in scope rather than isolated local or national issues.

The *African Charter* and the newly adopted additional text which specifically articulates women's rights, the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Protocol on the Rights of Women)*, are powerful documents. They are African expressions of continental human rights values and aspirations [See Chapter 7, “Basic Texts” for the full text of these documents].

## **Challenges to the Effective Protection of Reproductive and Sexual Health Rights in Africa**

An effective advocacy strategy involves acknowledging your potential obstacles. Advocacy on reproductive and sexual health rights in the African human rights system raises several challenges, including the following:

- ◆ Many people do not understand human rights and how to use them to prevent abuses from occurring and remedy abuses that have occurred.
- ◆ People are unaware of both the *African Charter* and the African Commission as well as how to use them to protect human rights.
- ◆ The African Commission is under-funded and has problems with efficiency and effectiveness.
- ◆ National legal systems may be inefficient, expensive, and complex for the average person seeking justice.
- ◆ In society, women have a lower status that does not prioritize their rights.
- ◆ The human rights movement has focused on rights to survival and rights to be free from oppression rather than quality of life issues, such as rights to health.
- ◆ Advocates have little experience applying human rights to health issues.
- ◆ Willingness to discuss reproductive and sexual health issues varies between different regions within the continent and between different groups within countries.

## **Opportunities for Steps Forward**

In spite of the many challenges to reproductive and sexual health rights advocacy, many opportunities exist. Growing awareness of human rights encourages people to envision living conditions that respect the human dignity of all. You can likely identify a few similar and encouraging developments in your area:

***Growth of women’s organizations in Africa, including those focusing on women’s legal rights***

These organizations present opportunities for education and outreach. They develop women’s expertise and bring women together. Through these organizations, women share knowledge about human rights and the African human rights system.

***Opportunities for advocacy before the African Commission***

Two Commission procedures offer opportunities for NGO participation: consideration of state reports on the human rights situations in specific countries, and consideration of human rights complaints. When African states sign the *African Charter*, they become what are described as “parties to” the *African Charter* or “State Parties.” State parties are required to submit regular reports to the African Commission about their progress in implementing human rights. These occasions are ideal for focusing the attention of the public, in addition to the African Commission, on various human rights concerns, such as reproductive and sexual health rights. The African Commission also receives complaints about human rights violations. Violations of reproductive and sexual health rights can be brought to the African Commission through this process [See the section on “Preparing Documents to Submit to the African Commission” in Chapter 5, “The African Human Rights System,” for tips on submitting reports and complaint forms].

***The designation of a Special Rapporteur on the Rights of Women in Africa***

The appointment of a Special Rapporteur on the Rights of Women in Africa is another international acknowledgement that women suffer particular human rights abuses and need appropriate protection. The Special Rapporteur is an additional regional avenue for seeking redress for violations of women’s rights. She coordinates the enhancement of regional protection of women’s rights by studying state reports, conducts investigations, gathers data, intervenes in certain specific cases with important women’s rights

**Special Rapporteur on the Rights of Women in Africa**

A Special Rapporteur is an individual appointed to look into a specific issue and report back to the African Commission. The Special Rapporteur is designated by a resolution of the OAU. The current Special Rapporteur, appointed in October 2001, is Mrs. Melo Angela from Mozambique.

The creation of the Special Rapporteur on the Rights of Women is a positive indication of a growing understanding that women suffer specific human rights violations that need to be addressed. The resolution appointing the Special Rapporteur mentions “the need to place particular emphasis on the problems and rights specific to women in Africa.”

The Special Rapporteur has been very involved in the development and adoption of the new *Protocol on the Rights of Women*. She also studies reports submitted by the various states, gathers data on the situation in various countries and intervenes in certain specific cases, particularly with regard to succession rights and female genital cutting. She organizes information and awareness campaigns to encourage gender-sensitive amendments of national laws and to strengthen cooperation between governments, NGOs and the Rapporteur.

**Contact the Special Rapporteur on the Rights of Women in Africa:**

Melo Angela  
c/o Ms Kerline Joseph,  
Assistant to the Special Rapporteur,  
P.O. Box 8848 Lome, Togo, Africa  
Fax (228) 222 30 94

dimensions, and organizes campaigns to encourage gender-sensitive national laws and policies.

***The creation of a new human rights document specifically addresses African women's rights***

The *Protocol on the Rights of Women to The African Charter on Human and Peoples' Rights in Africa* entered into force in November 2005, when the 15<sup>th</sup> Country ratified the document. The African regional system developed the *Protocol on the Rights of Women* to specifically address women's rights. This document stands as regional recognition that women have unique human rights concerns that need to be explicitly addressed in regional legislation. In supplementing the protection of women's rights in the *African Charter*, the *Protocol on the Rights of Women* can improve on and add to the existing mechanism for the protection of women's human rights in Africa. This new document commits governments to enhance their protection and promotion of women's rights and provide a means of enforcing these rights.

***The transformation of the Organization for African Unity into the African Union and***

**Women's Participation in  
Constitutional Drafting and Review**

In **Uganda**, the Ministry of Women in Development and NGOs such as the organized women's issues seminars in each of Uganda's 760 sub-counties to ensure women's participation in the drafting of the new constitution. Women became the most vocal social interest group, presenting their interests effectively and networking with youth groups, people with disabilities, organizations for children's rights and the rural poor.

Section 33 of Uganda's 1995 Constitution guarantees women's rights including equality rights, affirmative action, and protection from "laws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status." In addition to these provisions, the Ugandan Constitution is written in inclusive, gender-neutral language and promotes all fundamental human rights.

Several African countries have reviewed or are reviewing their constitutions to ensure that they protect women's rights. **Seychelles, Ethiopia, Eritrea, Namibia, Morocco, Guinea Bissau and Madagascar** have reviewed their constitutions to make them more gender sensitive.

In **Kenya**, the Kenya Women's Political Caucus (a coalition of Kenyan NGOs, civic leaders and activists) and the Collaborative Centre for Gender and Development lobbied the government to ensure adequate women's representation in Kenya's constitutional review process and organized women's participation. The *Constitution of Kenya Review Commission (Amendment) Act 1998* allocated a minimum of 8 seats for women (out of the 25), recognizing that the inclusion of gender equity provisions was among the purposes of the constitutional review.

In **Tanzania**, the Tanzania Gender Networking Programme (TGNP), along with activists, have advocated for a gender sensitive approach to changes to the country's constitution. Women's rights activists have also lobbied for a more participatory process. The government highlighted 20 aspects of constitutional change, with the 20th aspect left for other "general" issues. TGNP and its coalition strategically use this space to present its primary concern: the inclusion of specific rights for women in the constitution. Numerous debates and discussions have been hosted to develop and collect women's opinions on constitutional rights.

### ***Development of the African Court of Human and Peoples' Rights***

As the continental governing body, the Organization of African Unity (OAU) completed its transformation into the African Union (AU) in July 2002. *The Constitutive Act*, through which the AU replaced the OAU, contains references to the protection of human rights in Africa and invests the AU with the power to intervene in affairs where gross human rights violations occur. This is a development that may be, in the future, important in advocating for women's rights or reproductive rights at the national and regional level. However, although the transformation of the OAU into the AU has taken place at the legal level, the practical changes are likely to take time to accomplish. Until the *Constitutive Act* is implemented and the General Assembly of the African Union has clarified the functions of various regional institutions of the AU, it is unclear how the AU will impact upon the regional human rights system. How existing human rights organs, such as the African Commission and the African Court will be incorporated into the AU system remains to be determined. The future developments within the AU system are important developments to follow-up on and understand when developing advocacy strategies at the regional level [See Chapter 5, “The African Human Rights System,” for further details on this issue].

### ***Regional differences in approach to reproductive and sexual health provide opportunities for varied and creative applications of human rights to reproductive and sexual health concerns***

Regional differences are often seen as hindrances, obstacles to a unified stance on women's rights issues. Women's needs are not uniform across all regions and segments of society. Rather than a weakness, this variation can be a strength, adding insight and diversity to interpretations of human rights principles.

### ***National governments are making some progress on women's rights issues and are cooperating more with women's rights advocates***

Uganda's recent constitution includes affirmative action provisions and protection of women's rights. Many countries have participatory constitutional review processes that provide women with opportunities to advance gender issues. There are increasing opportunities to cooperate with members of government in proposing equality laws and positive legal developments. While these changes may be slow to occur, they are positive developments.

### ***International and national momentum is growing for the development and application of women's rights, health rights and international law***

Recent years have seen women's rights highlighted on the international stage at the *World Conference on Human Rights* in Vienna in 1993, the *Fourth World Conference on Women* in Beijing in 1995. The addition of a complaints mechanism to the *Convention on the Elimination of All Forms of Discrimination Against Women* must be noted among other exciting developments.

Judges in national courts are increasingly relying on international treaties as interpretive tools [See the national court decisions included in Chapter 6, “Interpreting Rights In Domestic



**Courts and Under the African Charter on Human and Peoples' Rights”].** In countries where international human rights treaties are directly implemented into national law, they may be relied upon as binding law for legal argument and judicial decisions.

The opportunities for advancing reproductive and sexual health rights through human rights are very real. The experiences of women around the world have demonstrated that a multifaceted approach is needed to improve women’s status and encourage change. Using the regional human rights system to advance women’s rights is part of a larger, more comprehensive effort. The documents in this compilation – resolutions, case law, and regional treaties – are some of the tools to be employed in the struggle. It is hoped that they are practical resources for many creative advocacy strategies.

### **SEXUAL AND REPRODUCTIVE HEALTH IN TUNISIA**

In 1964, Tunisia adopted an ambitious family planning program, making it the first Arabian and African country to adopt an explicit population policy to achieve a balance between population and economic growth. Government commitment to family planning can be seen in legislative and institutional changes, as well as logistical support for the integration of family planning services in maternal and child health care. In 1973, abortion was legalized. The national family planning programme strengthened by the government family planning programme, extended family planning services to underprivileged areas.

About 97% of women now are knowledgeable about contraception. In 1986, Tunisia was selected as a model country for family planning programmes and for the training of medical staff and decision makers from other Arabian countries. About 50% of women of reproductive age use a contraceptive method, with a preference for IUD's (26%) followed by condoms (12%) and pills (7%).

Legislative reform has enhanced women’s rights in many areas. These reforms give both spouses the right to request divorce, set the minimum age for marriage at 17 and provide that a Tunisian woman may pass her nationality to her children. They also require that judges receive training in the field of women's rights.

Sources: International Planned Parenthood Federation Country Profile. Tunisia.  
[www.ippfnet.ippf.org/pub/IPPF\\_Regions/IPPF\\_CountryProfile.asp?ISOCODE=TN](http://www.ippfnet.ippf.org/pub/IPPF_Regions/IPPF_CountryProfile.asp?ISOCODE=TN)  
Tunisia Online: [www.tunisiaonline.com/women/index.html](http://www.tunisiaonline.com/women/index.html)

## 2. REPRODUCTIVE AND SEXUAL HEALTH IN AFRICA

### Chapter 2 Summary: Reproductive and Sexual Health in Africa

Demonstrating the need for advocacy to improve the reproductive and sexual health of African women, this chapter first explores the basics of advocacy and then examines reproductive and health issues in the region. Quantitative and qualitative data is used to highlight particular issues including HIV/AIDS, pregnancy-related ill health, unsafe abortion, female genital cutting (FGC) and early marriage.

Medical data, such as complications due to unsafe abortion or the medical causes of maternal mortality; health systems data such as the number of healthcare workers serving a certain population or the availability of emergency obstetric services; and social data such as data on the actual age of marriage, data on secondary school enrolment rates of adolescent girls, or data on the prevalence of violence against women and girls, including sexual abuse, can be used to show how the neglect of reproductive and sexual health infringes upon certain rights protected by national constitutions and the *African Charter*.

The chapter examines the interconnection of reproductive rights and general human rights concepts for each health issue. Relevant statistics, which illustrate positive developments and existing challenges to women's rights advocacy, are included. Examples of successful treatment, education and support programs, from grassroots endeavours to the initiatives of international organizations, are noted with the aim of providing techniques for further programme development.

### **Advocacy Basics**

Effective advocacy on any issue begins with **analysis** of the problem. In working to address particular sexual or reproductive health issues, begin by reviewing all available information on those issues in Africa and in your country. Be prepared to summarize information that is likely to be of most interest to your intended audiences and to discuss their implications, including needs they underscore for changes in practice and policy. You may want to create a fact sheet summarizing key points.

Next, create a **strategy** that builds on your analysis of data. Your strategy should define specific goals and clear paths to achieve them. Establish a working group of organizations and individuals with complementary interests and capacities. Together, identify primary audiences; define specific, measurable objectives for each, along with strategies that use multiple channels of communication.

**Mobilization** means activating an effective coalition of interested people and organizations, through events, activities, messages and materials. Advocacy has maximum impact when all

coalition members actively participate. Develop a clear action plan and delegate specific responsibilities to each coalition member. Plan events featuring credible spokespersons from different partner organizations. Link your position to the interests of policymakers and others who can influence positive change. Keep networking to keep your coalition growing.

Maintain the coalition's **action** by repeating your key messages every chance you get (or create). Don't miss an opportunity to keep the public's and policymakers' attention focused on the issue. Be ready to respond to your opponents' statements and actions with factual information. Keep all coalition members informed of activities and results, and maintain frequent contact with the media.

Careful, continuous **evaluation** of the impact of your advocacy efforts is critical. Regularly measure what you have accomplished and what remains to be done. Document unintended as well as intended changes, and identify key factors contributing to those changes. Share your results with all stakeholders in a clear and understandable manner.

Advocacy for improved sexual and reproductive health is an ongoing process. Planning for **continuity** means articulating long-term goals, keeping functional coalitions together, and keeping data and arguments in tune with changing situations and windows of opportunity. If desired policy changes occur, monitor implementation to be sure that anticipated outcomes materialize. If they do not, review and revise your strategy as necessary. Develop plans to sustain and reinforce positive changes.

### **Reaching out to stakeholders**

As previously noted, effectively addressing issues of reproductive and sexual health requires engaging a wide range of stakeholders, many of whom may not recognize how this issue affects them and their constituent groups. It is not enough to talk about the need to involve "the community" – it is necessary to identify specific interest groups who can be approached on their own terms, with messages crafted especially for them.

In strategizing for advocacy to promote sexual and reproductive rights, **think creatively about who needs to be involved, and prepare well** before you approach prospective partners. Identify key organizations and individuals. Try to view the issue from their perspective; learn about their needs, interests and constraints. Research their previous involvement and positions on the issue; know their concerns and be prepared to answer them with well-reasoned, fact-based arguments. Identify opinion leaders in each group but also recognize the power of constituencies to effect change 'from the bottom-up.'

Once you've decided to approach a particular group, consider the best arguments to use in persuading your audience to support your work. Anticipate questions and concerns and be prepared to answer them. Research and have handy key information. **Consider all the tools at your disposal** – such as presentations, documents and videos – and pick the ones that emphasize the messages you think will resonate most strongly with your intended audience. If necessary, update or adapt available materials to reflect new information and data specific to your particular context.

Next, **think about the format** of your presentation. What will work best with the group or individual you plan to approach? Is it a formal presentation (using slides or overheads) accompanied by handouts? Would one-on-one conversation, during which you refer to certain printed materials, be more appropriate? Would it be effective to open your presentation with a video that dramatizes the issue by focusing on the people behind the information?

## Understanding the Reproductive and Sexual Health Context

Various types of quantitative and qualitative data are available to assist you in learning about the scope of the problems that arise from the neglect of reproductive and sexual health needs in your community. The data is helpful to break the silence around issues that are often difficult for communities to discuss. It can be used to gain public and government attention. The data can be used to shift the burden to government to explain why they have not done more to protect the reproductive and sexual health of women in the region.

Quantitative and qualitative data can be used to show how the neglect of reproductive and sexual health infringes upon certain rights protected by national constitutions and the *African Charter on Human and Peoples' Rights (African Charter)*. For example, data on the number of maternal deaths due to lack of availability of obstetric services suggests that women's right to health is being infringed. Such data can also be used to argue that the ministry of health needs to increase the availability of such services in order to comply with its duties to protect women's right to health.

The following kinds of data can provide a picture of reproductive and sexual health in a particular community or country:

- **Medical data**, such as complications due to unsafe abortion or the medical causes of maternal mortality
- **Health systems data**, such as the number of healthcare workers serving a certain population or the availability of emergency obstetric services
- **Social data**, such as data on the actual age of marriage, data on secondary school enrolment rates of adolescent girls, or data on the prevalence of violence against women and girls, including sexual abuse.

Data can also demonstrate the interconnections between various reproductive and sexual health issues. For example, hospital-based studies on complications from unsafe abortions can indicate that there is a lack of availability of contraceptive services or safe abortion services.

Numerous sources produce useful reproductive and sexual health data. As a supplement to studies produced by local organizations and case studies from an area, international organizations provide helpful materials. Look for reports by UN agencies and the World Health

Organization<sup>1,2</sup>, the Center for Reproductive Rights<sup>3</sup> (previously named the Center for Reproductive Law and Policy), as well as the World Bank<sup>4</sup>. You can also refer to the print and website resources listed in Chapter 11, “Other Resources,” at the end of this manual.

The data in this chapter highlights particular issues-HIV/AIDS, pregnancy-related ill health, unsafe abortion, female genital cutting (FGC), and early marriage-and demonstrate the need for advocacy to improve the reproductive and sexual health of African women.

## HIV/AIDS

The human immunodeficiency virus (HIV) is a viral infection that gradually destroys the immune system of the infected person. A person with HIV loses the protection of his or her immune system and cannot fight off infections as someone with a healthy immune system can. Health problems then develop and although they may be minor problems at first, more serious illnesses eventually develop. When a person is diagnosed with one of the serious illnesses or cancers that are “AIDS-defining,” the person is then said to have AIDS.

HIV is found in body fluids such as blood, semen, vaginal fluids and breast milk. It is transmitted through sexual intercourse, infected blood, and from an infected mother to her baby, during pregnancy, during childbirth, or during breastfeeding.

### **Report on the HIV/AIDS Pandemic and its Gender Implications**

Expert Group Meeting, Namibia, November 2000

From the Report’s Introduction: “The Commission on the Status of Women has repeatedly expressed its concern over the growing rates of sexually transmitted infections and human immunodeficiency virus/acquired immunodeficiency syndrome (HIV/AIDS) infection among women in every region of the world, especially in sub-Saharan Africa, where women constitute 55 per cent of all adult HIV infections. Of particular concern is the strong link between violation of human rights of women and girls and the HIV/AIDS pandemic. The former is not only one of the root causes of women and girls’ infection but also one reason why women are particularly severely affected by the pandemic.

Compelled by recent alarming developments with regard to women and HIV/AIDS, the Commission on the Status of Women decided to consider the topic as a priority theme in its work programme for the year 2001. The United Nations Division for the Advancement of Women, in collaboration with the World Health Organization (WHO) and the Joint United Nations Programme on HIV/AIDS (UNAIDS) organized an Expert Group Meeting on “The HIV/AIDS Pandemic and its Gender Implications” to contribute to further understanding of the issue, provide input to the report of the Secretary General to the Commission as well as to the special session of the General Assembly on HIV/AIDS (2001). The meeting took place in Windhoek, Namibia, from 13 to 17 November 2000.

The professional group meeting considered the topics of HIV/AIDS, gender, human rights and security and their inter-linkages. It discussed the basic rights to be addressed in this context and adopted a number of recommendations for immediate action, as well as specific recommendations addressing particular actors and areas of concern.”

The full report of this meeting can be found at [www.un.org/womenwatch/daw/csw/hivaids/index.html](http://www.un.org/womenwatch/daw/csw/hivaids/index.html) or obtained from: UN Division for the Advancement of Women, Department for Economic and Social Affairs (DESA) 2 UN Plaza, DC2-12<sup>th</sup> Floor, New York, NY 10017 USA, e-mail: [daw@un.org](mailto:daw@un.org)

<sup>1</sup> Source: World Health Organization. [www.who.int](http://www.who.int)

<sup>2</sup> Source: World Health Organization. Africa Regional Description. [www.whoafr.org](http://www.whoafr.org)

<sup>3</sup> Source: Center for Reproductive Rights, [www.crlp.org](http://www.crlp.org)

<sup>4</sup> Source: World Bank. <http://www.worldbank.org/data/databytopic/databytopic.html>

The following statistical data relate specifically to Africa.<sup>5</sup>

- Africa is home to 70% of adults and 80% of children living with HIV in the world.
- In Sub-Saharan Africa, teenage girls are 5 times more likely to be infected than boys, since girls are mostly infected not by boys their own age, but by older men.
- 55% of all HIV positive adults in Sub-Saharan Africa are women. (At the end of 2002, 58% of HIV positive adults were women.)
- In Sub-Saharan Africa, 8.8 million young people are infected, and 67% of these people are young women.
- A United Nations Development Fund for Women (UNIFEM) study in Senegal showed that the combination of availability, training in the use of female condoms and training in negotiating skills resulted in 80% of the women being able to protect themselves from unsafe sex.
- In Uganda, which has one of the most comprehensive prevention programmes in Africa, infection rates among educated women dropped by more than half between 1995 and 1997.
- Many women's husbands or intimate partners infect them with HIV. A study in Zambia confirmed that fewer than 25% of the women interviewed believed that a married woman could refuse to have sex with her husband, even if he had been demonstrably unfaithful and was infected. Only 11% thought that a woman could ask her husband to use a condom in the circumstances.
- Because of the belief that sex with a virgin will cure HIV, younger girls are being forced into unsafe sex with HIV-positive men.
- In Africa and Asia, early marriage means that young girls are forced to have sex when their bodies are not fully developed and hence are subject to greater risks of tearing and abrasions, making them vulnerable to HIV infection.

In order to effectively curb the spread of HIV/AIDS, the gender dimensions of HIV/AIDS need to be considered. From a development perspective, halting the trend in HIV infection has been identified as a priority in order to improve the standard of living. Women's groups and HIV/AIDS advocates need to work with governments and international organizations to ensure that there is a gender component to HIV/AIDS programs. The United Nations Population Fund (UNFPA) has identified the need to focus on a continuum of care, which consists of prevention, treatment and support. However, in order for these goals to be realized, there is a need for

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<sup>5</sup> Sources: UNAIDS, *AIDS Epidemic Update: December 2000 and December 2002* at [www.unaids.org](http://www.unaids.org), UNIFEM, *Facts and Statistics: Gender and HIV/AIDS* at [www.unifem.org/www/human\\_rights/facts.html](http://www.unifem.org/www/human_rights/facts.html) and African Centre for Gender and Development, United Nations Economic Commission for Africa, *Twenty Years of AIDS*, 21 May 2003.

“...advocacy to create policy change, to spur research on vaccines, cures and new methods of prevention, and to forge institutional action.”<sup>6</sup> With 58% of people living with HIV/AIDS in Africa being women, prevention programs cannot succeed unless women are at the core of planning and implementation.

In order to assess the degree to which women were affected by HIV/AIDS, UNIFEM organized the Cape Town Consultations in partnership with women and youth AIDS organizations. The dialogue was aimed to “...give voice to women’s individual and collective experience with HIV/AIDS, and ensure that these concerns are raised at the governmental level, so that they could be included in prevention, treatment and support programs.”<sup>7</sup> With the involvement of groups from Lesotho, Namibia, Swaziland, South Africa and Zimbabwe, the consultation highlighted the role of women’s inequality in the transmission rate of HIV and received commitment from UNIFEM.

In order to facilitate the inclusion of women’s experiences as an important factor in government programs dealing with the virus, UNIFEM has committed to the following:

- Provide support and resources to help integrate women’s realities into national AIDS programs.
- Advocate to ensure that existing laws and policies related to HIV/AIDS prevention, care and treatment reflect the government’s national and international commitments to equality.
- Raise awareness through the collection of women’s experiences, training materials, and examples of successful grassroots initiatives. These resources will be made available on a new web portal on gender and HIV/AIDS, recently developed by UNIFEM: [www.genderandaids.org](http://www.genderandaids.org).

#### **Equal Rights and HIV Transmission**

"The unequal status of women in African nations contributes to pushing HIV/AIDS infection rates to unprecedented levels. Women’s lacks of rights coupled with their significant economic and family responsibilities are key factors in the rapid transmission of HIV/AIDS in the region... Without putting women at the centre of the fight against AIDS, the battle to control the disease will fail... Women have the experience, skills and expertise needed to shape AIDS prevention and treatment programs in ways that will address women’s physical and cultural susceptibility to the disease. Attention to their ideas and insights are long overdue."

Ms Noeleen Heyzer, Executive Director of UNIFEM, at the Cape Town Consultations

Source: UNIFEM, *The lack of equal rights for African women is a central cause of the rapid transmission of HIV/AIDS on the continent*, 13 May 2003 Press Release, at [www.unifem.org](http://www.unifem.org)

In addition to UNIFEM, the World Health Organization (WHO) has also realized the importance of gender in health issues. In March 2002, WHO adopted the World Health Organization Gender Policy, in which WHO explicitly acknowledges that sex and gender have an important

<sup>6</sup> Source: UNFPA, *Preventing HIV/AIDS Fact Sheet: Promoting Reproductive Health, Saving Women’s Lives*, New York, March 2002.

<sup>7</sup> Source: UNIFEM Press Release, *Southern African Women Living With HIV/AIDS Voice Concerns to UNIFEM*, 19 May 2003.

impact on health and instructs its programs to examine the role of sex and gender and develop ways to mitigate any negative gender-related effects.<sup>8</sup>

In sub-Saharan Africa the HIV/AIDS epidemic remains a serious threat to women's reproductive and sexual health rights. The continent is home to 29.4 million people living with HIV/AIDS, with 3.5 million people being newly infected during 2002 and 2.4 million deaths as a result of the epidemic.<sup>9</sup> The prevalence rate, however, varies in different countries.

<b><u>HIV Prevalence rates in selected African countries</u></b> <sup>10</sup>			
<i>Country</i>	<i>Prevalence rate</i>	<i>Country</i>	<i>Prevalence rate</i>
Botswana	38.8%	Senegal	Under 1%
Lesotho	31%	Mali	1.7%
Swaziland	33.4%	Cameroon	11.8%
Zimbabwe	33.7%	Central African Republic	12.9%
		Côte d'Ivoire	9.7%
		Nigeria	5.8%

Experience in certain countries has shown that the spread of HIV/AIDS can be affected by using various methods. For example:<sup>11</sup>

- In South Africa, the HIV prevalence rate for pregnant women under 20 years of age fell to 15.4% in 2001, from 21% in 1998. This reduction is credited to awareness campaigns and prevention programmes.
- In Ethiopia, the HIV prevalence rate for young inner-city women in Addis Ababa has decreased.
- In Uganda, a steady decline in the HIV prevalence rate among 15-19 year old pregnant women has continued. Strong prevention campaigns have brought HIV infection rates down from 14% in the early 1990s to 8%. The rate among pregnant women has declined by 40% since 1996.

Community based grassroots efforts focusing on education have had the greatest success in tackling the epidemic. The gendered nature of the epidemic and the higher vulnerability of women and girls require that programmes focus on educating women and girls about HIV transmission and ways of preventing transmission. For example, in Kenya, one girl in four between 15 and 19 lives with AIDS, compared with one in 25 boys in that age group; in rural

<sup>8</sup> Source: WHO, Department of Gender and Women's Health (GWH), at [www.who.int/gender/en](http://www.who.int/gender/en)

<sup>9</sup> Source: UNAIDS/WHO, *AIDS epidemic update: December 2002*, at p. 16.

<sup>10</sup> Source: UNAIDS/WHO, *AIDS epidemic update: December 2002*, at pp. 16-17.

<sup>11</sup> Source: UNAIDS, *AIDS Epidemic Update: December 2002*; UNFPA, *Preventing HIV/AIDS Fact Sheet: Promoting Reproductive Health, Saving Women's Lives*, March 2002



Uganda, the ratio is six infected girls to every infected boy; and in Zambia, 16 times as many girls as boys are infected.<sup>12</sup>

The increased vulnerability of women, and young women in particular, to this disease should be an important consideration in HIV/AIDS policy decisions. Advocacy is needed in this area to ensure that programmes and policies respond to the gendered nature of the epidemic and incorporate women's reproductive rights when designing programmes to fight the spread of the disease. The protection of women's reproductive rights is one important way in which to curb the spread of the disease.

Advocacy in this area should focus on ensuring that women and girls are central in HIV/AIDS policy planning. At the community level, however, campaigns against HIV transmission should aim to educate both men and women.

The successful programmes that have reduced the rate of transmission provide hope for those embarking on campaigns against HIV/AIDS transmission. Elements of these successful programmes can be adapted for application in other areas.

It is promising that nineteen African countries have set up national HIV/AIDS councils or commissions at senior levels of government, and local responses are growing in number and vigour.<sup>13</sup> There has also been a special focus on HIV/AIDS within the African Commission, and this has led to the adoption of the *Resolution on HIV/AIDS Pandemic: Threat Against Human Rights and Humanity* in 2001 [See **Chapter 9** for the full text of this resolution].

### **Pregnancy-Related Ill-Health**

Pregnancy-related illness and death affects many women around the world. The following statistics provide some information on maternal health care, maternal mortality, and contraceptive use:

- 43% of births in Africa have skilled attendants.<sup>14</sup>
- The rate of contraceptive prevalence among married women in Africa is 20%.<sup>15</sup>

**Safe Motherhood**

Women's lifetime risk of dying due to maternal causes (pregnancy, delivery and related complications) is:

- in Africa, one in 19;
- in Asia, one in 132;
- in Latin America, one in 188;
- in more-developed countries, only one in 2,976

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Source: Hill, K., C. AbouZahr, and T. Wardlaw. 2001. "Estimates of Maternal mortality for 1995." *Bulletin of the World Health Organization* 79(3): 182-193. In UNFPA, *State of the World Population, 2002: People, Poverty and Possibilities*, at page 35.

<sup>12</sup> Source: UNFPA, *Preventing HIV/AIDS Fact Sheet: Promoting Reproductive Health, Saving Women's Lives*, New York, March 2002.

<sup>13</sup> Source: UNAIDS/WHO, *AIDS epidemic update: December 2002*, at p. 18.

<sup>14</sup> Source: UNFPA, *Maternal Deaths Disproportionately High in Developing Countries* at <http://web.unfpa.org/news/news.cfm?ID=385&Language=1>

- 18.1% of all births in sub-Saharan Africa are to women under the age of 20, 9.6% in northern Africa.<sup>16</sup>
- A woman's risk of dying from pregnancy and childbirth in Africa are 1 in 16.<sup>17</sup>
- An estimated 15 per cent of all pregnancies result in complications. Most cannot be predicted, but they can be treated.<sup>18</sup>

Maternal deaths and illnesses have a significant impact on society. A woman's death or incapacity not only disrupts her family, but also affects economic life and the social fabric of her community.

Due to the impact of pregnancy and the associated health risks, there is a need to focus on protecting women's health. Sex and reproduction are connected to more than one fifth of the burden of disease among women of reproductive age and in sub-Saharan Africa, the figure is 40 per cent.<sup>19</sup> Better provision of health services, particularly reproductive health care, would reduce maternal deaths and improve the lives of women and their families and communities. The obstacles to better reproductive health services often arise out of inequality and poverty. Reproductive health needs, and the needs of poor women in particular, do not command the attention of policy makers or even of women themselves because the poor give priority to their many immediate and pressing needs. In such situations, pregnancy and childbirth are taken for granted and, even though the causes are easily preventable, the related risks are not given adequate attention.<sup>20</sup>

Making motherhood safer should be a priority for governments in health care reform. Making pregnancy safer involves a broader approach to women's health. Since the outcome of pregnancy depends on the health and age of the mother, her nutritional status, her

#### **Young Women and HIV/AIDS**

African women are particularly vulnerable to HIV infection. In particular, young women (defined as 15 - 24 years of age) are at increased risk. The number of young women living with AIDS, as compared to young men, illustrates the risk faced by this group of women. The following are comparisons of young women and men living with AIDS:

- In Botswana, 45% of women, 19% of men
- In Zimbabwe, 40% of women, 15% of men
- In Namibia, 29% of women, 8% of men
- In Cameroon, 15% of women, 6% of men
- In Rwanda, 13% of women, 6% of men

Source: African Centre for Gender & Development [ACGD], United Nations Economic Commission for Africa [UNECA], *Twenty Years of AIDS*, 21 May 2003.

<sup>15</sup> Source: UNFPA, *Demographic, Social and Economic Indicators* at [http://www.unfpa.org/swp/2005/presskit/docs/demographic\\_indicators.pdf](http://www.unfpa.org/swp/2005/presskit/docs/demographic_indicators.pdf)

<sup>16</sup> Source: UN Population Division *World Population Monitoring, 2000: Population, Gender and Development*

<sup>17</sup> "Revised 1990 Estimates of Maternal Mortality: A New Approach by WHO and UNICEF" World Health Organization, Geneva, 1996.

<sup>18</sup> Source: UN, *New report maps Fistula in Africa: Finds hidden condition widespread*, June 2003

<sup>19</sup> Source: UNFPA, *State of the World Population, 2002: People, Poverty and Possibilities* at p. 33.

<sup>20</sup> UNFPA, *State of the World Population, 2002: People, Poverty and Possibilities* at p. 34.

prior pregnancy history and the spacing between her previous births, as well as her available resources, her education and her access to information and services, protecting the health of mothers and their children will require good antenatal care, skilled attendants, and safe places to give birth and have access to emergency obstetric care.<sup>21</sup>

## Obstetric Fistula

In addition to reducing maternal mortality, there is also a need to address other pregnancy related health risks. Obstetric fistula is a health risk specific to motherhood. It is an injury to a woman's birth canal, which occurs during birth and has devastating results on the woman's life. Fistulas affect at least an estimated 2 million females, with nearly all of them being young and very poor women in the developing world.<sup>22</sup> It is however important to note that the figure of 2 million is only based on patients who actually seek treatment in medical facilities, and as such is a low estimate, as new reports indicate. While fistula is a global problem, it is particularly common in Africa.<sup>23</sup> In Nigeria alone, there could be as many as 1 million women living with fistula.<sup>24</sup>

Every minute, a woman dies from pregnancy-related complications. For every woman who dies, 15 to 30 live but suffer chronic disabilities, the worst of which is obstetric fistula.<sup>25</sup> Unfortunately, most women living with fistula today suffer in silence, unaware that a simple cure is available. Many fistula sufferers are abandoned by their husbands, forced out of their homes, ostracized by family and friends and even disdained by health workers, who consider them 'unclean'. Without skills to earn a living, some have no choice but to beg or turn to sex work to survive. Women living with fistula in sub-Saharan Africa are usually under 20 (some as young as 13), illiterate and poor, according to the findings. These

**Vesico-vaginal fistula (VVF)** and its sister ailment, vesico-rectal fistula, occur as a result of prolonged, unrelieved and/or obstructed labour; the baby's head tears through an orifice of the mother, creating an opening between the bladder and the vagina, and sometimes, between the vagina and the rectum. The VVF sufferer loses control over her bodily functions and as a result, urine and sometimes faecal matter flow out of the vagina of the affected woman. Because their pelvises are not fully developed, young girls who become pregnant often have obstructed labour, thereby dramatically increasing their chances of developing VVF.

Although Nigeria has yet to develop a national strategy on VVF, the Nigerian government, both at the national and state levels, has put legislation and measures in place aimed at protecting the welfare of women and promoting safe motherhood. Many of those actions, though not specific to VVF, can impact positively to ameliorate the suffering of VVF patients. Local NGOS, notably the National Council of Women's Societies (NCWS) and Women in Nigeria (WIN), have taken a more aggressive stance to bring the VVF problem into the national agenda.

Source: Hajia Kindin Yoloh, "Epilogue to Childhood Encounter" Populi: the UNFPA Magazine vol. 28 no. 1 April 2001 page 12.

<sup>21</sup> UNFPA, *State of the World Population, 2002: People, Poverty and Possibilities* at pp. 35-36.

<sup>22</sup> UNFPA, *Addressing Obstetric Fistulas: Promoting Reproductive Health, Saving Women's Lives*, June 2002.

<sup>23</sup> Source: UNFPA and EngenderHealth *Obstetric Fistula Needs Assessment: Findings from Nine African Countries*, (New York: UNFPA and EngenderHealth, 2003) at p. 4

<sup>24</sup> Source: UN, *New report maps fistula in Africa: finds hidden condition widespread*, June 2003

<sup>25</sup> Ibid.

women deserve our immediate attention. Recently, UNFPA has launched a global campaign to prevent and treat fistula and this has been successful in attracting international attention to the issue.<sup>26</sup>

Preventing future cases of fistula and treating those with the condition should be included in the provision of health care services. The challenge in addressing this reproductive health arises out of its relation to culture and poverty. Eradication of fistula will require universal access to education and reproductive health care.<sup>27</sup>

There are various strategies to address the occurrence of fistulas that should be advocated. These include preventative methods (postponing marriage and pregnancy for young girls and increasing access to education and family planning services for women and men, and providing access to quality medical care for all pregnant women to avoid complications); curative methods (repairing physical damage through surgical intervention); and rehabilitative methods (repairing emotional damage through counselling, social rehabilitation and vocational training).<sup>28</sup>

**Fistula: A Sign of a Failed Maternal Health System**

A 2003 UN report on the fistula in 9 African nations showed that women with fistula are living indicators of failed maternal health since fistula is both preventable and treatable (fistula surgical repair has up to 90 per cent success rates and costs between \$100-\$400) and is virtually unknown in places where early pregnancy is discouraged, young women are educated, family planning is accessible and skilled medical care is provided at childbirth.

The report assessed the capacity of 35 hospitals in nine countries to treat patients and outlines their needs for equipment, skilled medical staff and surgical supplies. In many countries, doctors are unable to meet the demand for care. The report highlights the need to train more local doctors in fistula surgery and points to a heavy reliance on visiting or volunteer surgeons.

UNFPA and EngenderHealth *Obstetric Fistula Needs Assessment: Findings from Nine African Countries*, (New York: UNFPA and EngenderHealth, 2003)

UN, *New report maps fistula in Africa: finds hidden condition widespread*, June 2003

There are examples of successful fistula prevention and treatment that can be adapted in other countries. Some examples include:<sup>29</sup>

- The Hamlin Fistula Hospital in Addis Ababa, Ethiopia, where 20,000 women with obstetric fistulas have been treated since 1970s but lack of financing has prevented the expansion of facilities and training

<sup>26</sup> Source: UN, *New report maps fistula in Africa: finds hidden condition widespread*, June 2003

<sup>27</sup> Source: UNFPA, *Addressing Obstetric Fistulas: Promoting Reproductive Health, Saving Women's Lives*, June 2002.

<sup>28</sup> Source: UNFPA and EngenderHealth *Obstetric Fistula Needs Assessment: Findings from Nine African Countries*, (New York: UNFPA and EngenderHealth, 2003) at p.5

<sup>29</sup> Source: UNFPA, *Addressing Obstetric Fistulas: Promoting Reproductive Health, Saving Women's Lives*, June 2002.

- The Family Life Centre in Nigeria struggles with the deterioration of basic health services in its efforts to reach the estimated 1 million Nigerian women with unrepaired fistulas. The National Foundation on Vesio-Vaginal Fistulas works to raise awareness of the problem, promote an end to child marriages, provide midwife services, and secure support for the Centre.

## Unsafe Abortion

Abortion is a frequent experience for women in every culture and region of the world. For many reasons – including social, cultural or economic factors – women may be unable to protect themselves from unplanned pregnancy and may decide to terminate pregnancies. Induced abortion is legally restricted in some countries, but even where it is legal, services may be insufficient, or women may be unable to access services.

The right to choose whether and when to have a child is at the core of reproductive rights. Where access to safe and effective contraception is limited, safe and high-quality abortion services are essential to protect women’s autonomy and health. Restrictions on abortion have devastating effects on women’s health and rights. In Africa, the risk of dying following unsafe abortion is the highest worldwide. 13% of maternal deaths are due to unsafe abortion. Currently, 26% of the world’s women live in the 74 countries that either prohibit abortion or permit it only to save a woman’s life. In Africa, these counties include Egypt, Senegal and Nigeria. A further 13% of women live in the 53 nations where abortion is available only where there is threat of serious or permanent, though not necessarily life-threatening, injury to a woman’s health. In nations with more liberal abortion laws, access to the procedure may only be available if it is justified on economic or social grounds. Even in countries that make no restriction on the reason for abortion, women must still observe whatever procedural requirements are prescribed by law, such as third-party authorization from a husband or parent, mandatory waiting periods and counselling, gestational age of the foetus, and the type of medical facility in which the procedure is performed. Finally, the cost of abortion is prohibitive for many women. These factors collude to render abortion inaccessible even in countries where it is legally permissible.<sup>30</sup>

Most African women have no safe and legal way to terminate an unwanted pregnancy and are likely to resort to desperate and dangerous measures. Unsafe abortion is a significant risk to a woman’s health because it is often performed by unskilled persons using hazardous techniques in unsanitary conditions. Complications that could result from unsafe abortion may be life-threatening and can result in both short- and long-term health conditions such as uterine perforation, chronic pelvic pain, and secondary infertility. Prompt and adequate emergency treatment is often necessary to ensure the survival of a woman who has undergone an unsafe abortion. In addition to the possible medical and health complications, many women suffer stigma and isolation imposed by their families and communities.

Every day, 55,000 unsafe abortions take place, 95% of them in developing countries.

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<sup>30</sup> Sources: Center for Reproductive Rights. *Reproductive Rights 2000: Moving Forward* (New York: Center for Reproductive Rights, 2003); [http://www.safemotherhood.org/facts\\_and\\_figures/unsafe\\_abortion\\_fact.htm](http://www.safemotherhood.org/facts_and_figures/unsafe_abortion_fact.htm)

They cause the deaths of 200 women daily and untold numbers of disabilities.<sup>31</sup>

- Between 1 and 5 of every 10 women who undergo unsafe abortions need medical care for complications such as sepsis, haemorrhage and trauma.<sup>32</sup>
- Women living in wealthy and poor regions have similar abortion rates: 39 per 1000 in wealthy regions and 34 per 1000 in poor regions.<sup>33</sup>
- Approximately 5 million unsafe abortions take place in Africa each year. An estimated 34,000 of them die from the experience.<sup>34</sup>

### Reproductive Rights in Nigeria

Unwanted pregnancy and unsafe abortion are significant public health problems in Nigeria. The use of modern contraceptives is low, and the maternal mortality ratio is one of the highest in the world. Approximately 10 percent of the world's maternal deaths occur in Nigeria. Despite national efforts to reduce maternal mortality, including the Safe Motherhood Initiative, an estimated 50,000 maternal deaths occur annually; approximately 40 percent are due to complications related to unsafe abortion. Adolescents are particularly at risk of experiencing unsafe abortion and its complications. Currently, abortion is legally permitted only to save the life of the woman.

Ipas has worked in Nigeria since 1987 and has focused on improving post-abortion care and related reproductive health care for Nigerian women through training and decentralization of services. By working with civil society and governmental bodies, Ipas continues to work on expanding service delivery and implementing policy and advocacy initiatives.

Source: Ipas, *Nigeria*, Country Report, at [www.ipas.org](http://www.ipas.org)

- In many African countries, up to 70% of women treated for abortion complications are younger than 20.<sup>35</sup>
- The average unsafe abortion mortality ratio in Africa is 110 deaths per 100,000 live births – more than twice that of any other region in the world. Thirteen percent of all maternal deaths in Africa are due to unsafe abortion.<sup>36</sup>
- Use of modern family planning methods is the most effective way to reduce unintended pregnancies and abortions.<sup>37</sup>

<sup>31</sup> Source: World Health Organization, “Unsafe Abortion – a worldwide problem” 28:1 *Safe Motherhood: A Newsletter of Worldwide Activity* (2000) at p.1.

<sup>32</sup> Ibid.

<sup>33</sup> Source: Alan Guttmacher Institute, *Sharing responsibility: Women, society and abortion worldwide* (New York and Washington, DC: Alan Guttmacher Institute, 1999).

<sup>34</sup> Source: World Health Organization, “Unsafe Abortion – a major public health problem” 28:1 *Safe Motherhood: A Newsletter of Worldwide Activity* (2000) at p.4.

<sup>35</sup> Source: *The Health of Young People: A Challenge and a Promise*. World Health Organization, Geneva, 1993.

<sup>36</sup> Sources: World Health Organization, *Unsafe Abortion*, 1998; Alan Guttmacher Institute, *Sharing Responsibility, Women and Society and Abortion Worldwide* (New York and Washington, DC: Alan Guttmacher Institute, 1999).

- Of the estimated 46 million abortions that take place each year, 26 million are in countries with liberal abortion laws, and 20 million take place where abortion is restricted or prohibited by law.<sup>38</sup>

A list of countries' abortion laws can be found at <http://annualreview.law.harvard.edu/population/abortion/abortionlaws.htm>.

## Prostitution

Prostitutes or sex trade workers are particularly vulnerable to human rights abuses. The marginalization of sex trade workers allows for slavery-like practices to foster unchecked in the sex trade industry. These practices include violence with impunity, loss of freedom and the denial of a fair share of earnings. By excluding prostitutes from mainstream society, women are denied protection from abuse available to others as citizens or workers. Thus, sex trade workers are exposed to violence and exploitation at the hands of managers, customers, law enforcement officials and the general public. They routinely lack protection against violence, especially sexual violence, and are uniquely vulnerable to sexual ill-health, due to lack of the information and materials necessary to protect themselves against unwanted pregnancy and STDs, including HIV.<sup>39</sup>

Economic conditions, such as poverty and unemployment, contribute both to prostitution and the trafficking in women and girls, which is a form of violence against women. Measures to ensure women's economic independence are essential to eliminate prostitution as a choice of financial necessity. Criminalizing prostitution only further marginalizes sex trade workers and is not in the best interests of women. Although the *Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others* was enacted in 1949, it has yet to implement in a way that gives real meaning to the rights of women working in the sex trade.<sup>40</sup>

## Female Genital Cutting

Female genital cutting (FGC) is also referred to as female circumcision or female genital mutilation. It is a genital cutting performed on females for a variety of medical, cosmetic, psychological or social reasons. FGC can be performed as early as infancy and as late as age 30.

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<sup>37</sup> Source: USAID, *Family planning matters: POP Briefs* (Washington, DC: Center for Population, Health and Nutrition, USAID, 2000).

<sup>38</sup> Source: Alan Guttmacher Institute, *Sharing Responsibility, Women and Society and Abortion Worldwide* (New York and Washington, DC: Alan Guttmacher Institute, 1999).

<sup>39</sup> Sources: Centre for Reproductive Law and Policy, *Bringing Rights to Bear: An Analysis of the Work of UN Treaty Monitoring Bodies on Reproductive and Sexual Rights* (New York, CRLP, 2002); Jo Bindman. "An International Perspective on Slavery in the Sex Industry" in *Global Sex Workers: Rights, Resistance, and Redefinition* (New York: Routledge, 1998).

<sup>40</sup> Sources: Centre For Reproductive Rights And Policy, *Bringing Rights to Bear: An Analysis of the Work of UN Treaty Monitoring Bodies on Reproductive and Sexual Rights* (New York, CRLP, 2002); Jo Bindman. "An International Perspective on Slavery in the Sex Industry" in *Global Sex Workers: Rights, Resistance, and Redefinition* (New York: Routledge, 1998).



However, most commonly, girls experience FGC between 4 and 12 years of age.<sup>41</sup> Different types of procedures involve varying degrees of cutting of the female genitals. Various physical and psychological consequences may arise depending upon the severity of the cutting. The immediate ill-effects of FGC also range in severity but may include infection, haemorrhage, spread of HIV and in some cases, death. Later consequences include painful sexual intercourse and serious complications during childbirth.

In 1998, the World Health Organization estimated that almost 137 million women of all ages had undergone FGC, and every year a further 2 million girls are thought to be at risk.<sup>42</sup> Estimated prevalence rates of FGC in Africa range from about 5% to 98%. The procedure is common in about 28 African countries. It is estimated that 15% of all circumcised women have undergone infibulation, the most severe form of FGC. [Infibulations or photonic circumcision consists of performing a clitoridectomy (removal of all or part of the labia minora and/or the labia majora). This is then stitched up allowing a small hole to remain open for urine and menstrual blood to flow through.] In Djibouti, Somalia, and Sudan, approximately 80% to 90% of all circumcisions are of this type.

Estimated figures are provided below for 15 African countries where national surveys have been conducted and the estimates are considered fairly reliable.<sup>43</sup>

Burkina Faso	72%
Central African Republic	43%
Cote d'Ivoire	43%
Egypt	97%
Eritrea	95%
Guinea	99%
Kenya	38%
Mali	94%
Niger	5%
Nigeria	25%
Somalia	96-100%
Sudan	89%
Tanzania	18%
Togo	12%
Yemen	23%

**Legal Advocacy to Combat FGC**

The Federation of Women Lawyers, Kenya is advocating for a law banning female circumcision. In December 2000, a court ruled against the tradition, issuing a permanent injunction to prevent a father from forcing his 15-and-17-year-old daughters to undergo customary circumcision. This was the first time a Kenyan court ruled against the forced circumcision of girls. Now women's rights advocates want the practice criminalized so such decisions will not depend on judicial discretion but will respect international law.

Source: Chege Mibitiru, "Kenyan: End Genital Mutilation," *The Associated Press*, 14 December 2000.

<sup>41</sup> Source: Center for Reproductive Rights at [www.reproductiverights.org/pub\\_fac\\_fgmicpd.html](http://www.reproductiverights.org/pub_fac_fgmicpd.html) *Female Circumcision/Female Genital Mutilation (FC/FGM): Legal Prohibitions Worldwide* June 2003, Item: F027

<sup>42</sup> Source: World Health Organization, *Female Genital Mutilation: An Overview*, 1998 available at <http://www.who.int/dsa/cat98/fgmbook.htm>

<sup>43</sup> Source: World Health Organization at [www.who.int/frh-whd/FGM/FGM%20prev%20update.html](http://www.who.int/frh-whd/FGM/FGM%20prev%20update.html).



Eradicating harmful cultural practices is a tremendous challenge that should not be undertaken without careful consideration of the objectives and methods. Although FGC violates various human rights standards, it is accepted in many cultures across Africa. Therefore, successfully advocating for its eradication will involve not only legislative reform, but also community awareness and education. There are several areas of government action that could protect women and girls from harmful cultural practices. Legal measures could prohibit the practice and provide penalty for those who participate in the practice. Regulatory measures could be used to target specific sectors such as health professionals who may be in a position to discourage or encourage FGC. Policies on FGC could create awareness to end the practice as part of a broad initiative to empower women.<sup>44</sup> Advocating for the eradication of FGC could be conducted in different settings with different objectives. Efforts to prohibit the practice could be aimed at governments as a reproductive rights issue. However, advocacy is also needed at the community level. Reaching the practitioners is a crucial step in ending the practice, and that will require the implementation of community awareness and education programmes.

Unfortunately for decades, FGC has been considered a taboo subject, which explains the reluctance of governments either to define it, to undertake actions to end it, or to legislate in this area. However, governments have begun to respond to pressure from NGOs, women's organizations, and the international community, all of which have called for its eradication at

### **Changing Harmful Traditions in Senegal**

The number of women who have undergone FGC is estimated to be between 20 and 50 percent. Tostan, a Senegalese NGO, was founded to implement community-based, basic education programs in rural areas. The goal was to improve the physical and mental wellbeing of women and children in rural areas. Through this initiative, village women involved in the training program took on the issue of FGC.

Tostan introduced FGC within a broader health issue and framed as a human right and health issue instead of a sexuality issue. Through continued discussions in the community and the perseverance of the women, the number of communities banning FGC grew. As of July 2002, 708 communities, representing hundreds of thousands of people, have made the pledge to ban FGC.

The Tostan model is spread through the country and has been used in Burkina Faso as well. Keys to the success of the project:

- Addressing anti-FGC activities as part of a community-based, educational project
- Creating a forum for communities to discuss FGC
- Approaching the issue from a health and human rights perspective
- Getting the entire community to sign on
- Involving community and religious leaders
- Using publicity to spread the movement beyond the initial communities

Source: Reproductive Health Outlook, Harmful Health Practices: Program Examples, [www.rho.org/html/hthps\\_progexamples.htm](http://www.rho.org/html/hthps_progexamples.htm)

<sup>44</sup> Rahman, Anika and Toubia, Nahid, *Female Genital Mutilation: A Guide to Laws and Policies Worldwide* (London and New York: Zed Books, 2000) at p. 57.

recent international conferences.<sup>45</sup> Twelve African nations have enacted laws criminalizing FGC.<sup>46</sup>

Benin (2003)  
 Burkina Faso (1996)  
 Central African Republic (1966)  
 Chad (2003)  
 Côte d'Ivoire (1998)  
 Djibouti (1994)  
 Egypt (Ministerial Decree, 1996)  
 Ghana (1994)  
 Guinea (1965)  
 Kenya (2001)  
 Senegal (1999)  
 Tanzania (1998)  
 Togo (1998)

The penalties range from a minimum of six months to a maximum of life in prison. Several countries also impose monetary fines. As of January 2003, there had been reports of prosecutions or arrests in Burkina Faso, Egypt, Ghana, Senegal, and Sierra Leone.<sup>47</sup>

There is also support for initiatives to end FGC at the international level. For example, in Gambia, Guinea and Benin, UNIFEM promotes the rights of young girls to their physical integrity and reproductive rights, advocating for the elimination of FGC. UNIFEM has adopted a strategy of community outreach and mobilization, promoting the rites of passage alternative to FGC and involving religious leaders, policy makers and the media.<sup>48</sup> However, due to the nature of the practice, advocacy to end FGC needs to be culture-sensitive and programs need to be designed with careful consideration of the local culture and full involvement and leadership of local communities.

### Prohibitions on FGC

#### Côte d'Ivoire

In May 1998, Côte d'Ivoire's National Assembly adopted a draft law prohibiting FC/FGM, early marriage, and sexual harassment. The punishment for those who practice excision is one to five years in prison and a fine of 360,000 (U.S.\$573.08) to 2,000,000 CFA francs (U.S.\$3,183.75). The law also punishes those who attempt to perform the procedure. If death results, the punishment is 20 years in prison; if the girl survives, the penalty is one to five years in prison. If the guilty party is a member of the medical profession, he may have his license to practice medicine suspended for up to five years. The Ivorian government has also introduced a draft law targeting the "excisionists" who perform FC/FGM.

#### Senegal

Senegal passed a law on January 13, 1999 regarding intentional assault and battery, other intentional assaults on bodily integrity, and sex crimes. It invokes a penalty of six months to five years of imprisonment and is given to anyone who harms the female genital organ by total or partial ablation, desensitization or infibulation. The maximum penalty applies when a member of the medical or paramedical profession performs or promotes the sexual mutilation. If the procedure has resulted in death, it is punishable by a life sentence of hard labor.

Source: Center for Reproductive Rights, *Women of the World Africa*, February 2003, at page 188  
[www.reproductiverights.org/pdf/regionaltrends.pdf](http://www.reproductiverights.org/pdf/regionaltrends.pdf)

<sup>45</sup> Source: Center for Reproductive Rights 'Women of the world' at p. 188. see at [www.reproductiverights.org/pdf/regionaltrends.pdf](http://www.reproductiverights.org/pdf/regionaltrends.pdf) Feb 2003

<sup>46</sup> Source: Center for Reproductive Rights *Female Circumcision/Female Genital Mutilation (FC/FGM): Legal Prohibitions Worldwide*, June 2003, Item: F027 at [www.reproductiverights.org/pub\\_fac\\_fgmicpd.html](http://www.reproductiverights.org/pub_fac_fgmicpd.html)

<sup>47</sup> Source: Center for Reproductive Rights at [www.reproductiverights.org/pub\\_fac\\_fgmicpd.html](http://www.reproductiverights.org/pub_fac_fgmicpd.html)  
*Female Circumcision/Female Genital Mutilation (FC/FGM): Legal Prohibitions Worldwide*  
 June 2003, Item: F027

<sup>48</sup> For more information on the work of UNIFEM in Africa, see the UNIFEM website at:  
[www.unifem.org/www.at\\_work\\_worldwide/africa.html](http://www.unifem.org/www.at_work_worldwide/africa.html)

## Sexual Violence

Violence against women is one of the most tangible consequences of the economic, social, political, and cultural inequalities that exist between men and women. It is also perpetrated by legal and political systems that have historically discriminated against women. The international community has recognized that violence against women constitutes a violation of their human rights and fundamental freedoms. Sexual violence in its various forms is also a violation of women's reproductive rights since it impacts their sexual and reproductive health and autonomy.<sup>49</sup>

Sexual violence violates women's reproductive rights, particularly their rights to bodily integrity and to control their sexuality and reproductive capacity. It also severely compromises a woman's right to health, including her physical, psychological, reproductive, and sexual health. Sexual violence occurs in both the private and the public spheres of women's lives. It is a violation of women's human rights whether an agent of the state or a private citizen is the perpetrator. It can occur against girls or women of any age; within the family or domestic unit or any other interpersonal relationship; within the community or in the workplace; in an educational institution; in a health facility; during armed conflict or other civil strife; or at any other time or place.<sup>50</sup> Sexual violence in its various forms is one of the most brutal methods men use to maintain women in subordinate gender-based roles — to discriminate against them on the basis of sex.<sup>51</sup>

### Sexual Assault in South Africa

In 1998, the South African Police Services account showed that 49,289 rapes were reported. According to police statistics, rape was one of the few serious crimes that increased steadily, by an average of 7% between 1994 and 1997. A comparison of the 1996 crime rates of 89 Interpol member states showed that South Africa had the highest ratio of reported rape cases per 100,000. Despite the magnitude of the problem, fewer than 8% of reported rapes result in a criminal sentence. In a provocative and dramatic response to the incidence of violence against women, the insurance industry—with very little consultation with actors in the field—recently issued a “rape survivor insurance policy.” For a policy of R25 (U.S.\$3) a month, a rape victim will receive up to R10,000 (U.S.\$1,241) to cover the cost of counseling, anti-HIV drugs, and legal fees, as well as R500 (U.S.\$62) towards “a facial, massage or aromatherapy.” HIV positive women are not eligible for the policy.

Source: Center For Reproductive Rights, *Women of the World*, [www.reproductiverights.org/pdf/wowaapr-southafrica.pdf](http://www.reproductiverights.org/pdf/wowaapr-southafrica.pdf), January 2003.

Unfortunately, few African nations have gathered comprehensive statistics about the scope of this problem, rates of reporting, prosecution or conviction. Nigeria, for example, gathers no official data on violence against women. The lack of statistics is further aggravated by failure to disaggregate violent offences by gender.<sup>52</sup> However, a national study in Kenya surveyed 10,000

<sup>49</sup> Source: Center for Reproductive Rights *Reproductive Rights 2000: Moving Forward*, at p. 45, [www.reproductiverights.org/pdf/rr2k-2.pdf](http://www.reproductiverights.org/pdf/rr2k-2.pdf)

<sup>50</sup> Ibid

<sup>51</sup> Ibid, at p. 46

<sup>52</sup> Source: Center For Reproductive Rights *Women of the World*. [www.reproductiverights.org/pdf/wow-trends.pdf](http://www.reproductiverights.org/pdf/wow-trends.pdf) January 2003 P. 170

secondary school girls aged 12 to 24 and found that about 40% of those who were sexually active said they had been "tricked or forced" into having sex.<sup>53</sup>

Every country in the world formally outlaws rape and at least some other sexual crimes, but in many cases enforcement is often sporadic, especially when allegations of rape relate to the "private" sphere of relations between men and women. Sometimes, the law itself fails to protect women against sexual violence and thus serves to perpetuate a culture of violence against women. Many countries, fail to recognize forced sexual relations within marriage as rape, thus exempting husbands from criminal liability. Other laws, such as those in Ethiopia, condone sexual violence against women but permit a rapist to avoid criminal liability and punishment by marrying the victim.<sup>54</sup> Some countries have "cautionary rules" of evidence, which require that additional care be taken when accepting the uncorroborated testimony of women who have been raped. In effect, cautionary rules result in an additional burden of proof for the prosecution beyond that ordinarily required to prove other assault crimes. In other countries, evidence of a woman's past sexual history is admissible to rebut charges of sexual assault. This is true in Zimbabwe, where evidence of the complainant's prior sexual history may be admitted as relevant to the issue of consent.<sup>55</sup>

#### NGOs at Work in Senegal

One of the most important achievements of feminist organizations in Senegal over the last 10 years is having lifted the taboo on discussing violence against women, particularly sexual violence. When the *Yeewu-Yewwi* association was created in the late 1980s, condemnation of violence against women was just beginning. Women and Society organized the first meeting devoted specifically to violence against women in 1991. The meeting was greeted with general indifference. Since then, UNIFEM has supported women's organizations in waging public awareness campaigns and initiatives to sensitize officials. It has organized more specific seminars aimed at doctors, magistrates, and law enforcement officials on providing medical, legal, and psychological assistance to the victims of violence. In order to sensitize the government and the public on the issues of rape and pedophilia, the *Siggil Jigeen* Network held a march on July 31, 2001, Pan-African Women's Day, to demand greater criminal accountability. This is important, since perpetrators may propose traditional compensation by offering to marry the victim, marginalized by her lost honor. We need only recall the case of a 65 year-old polygamist, with four wives and 22 children, who raped an eight-year-old girl. When scandal broke out, he offered to marry the girl and give her a house. It took significant pressure by local women's groups for the child's family to refuse the "compensation."

Source: Centre for Reproductive Rights, *Women's Reproductive Rights in Senegal: A Shadow Report*, Page 17 [www.reproductiverights.org/pdf/sr\\_sen\\_0801\\_eng.pdf](http://www.reproductiverights.org/pdf/sr_sen_0801_eng.pdf)

<sup>53</sup> Source: World Health Organization *Delay Childbearing (World Health Day April 1998)* [http://www.who.int/archives/whday/en/pages1998/whd98\\_04.html](http://www.who.int/archives/whday/en/pages1998/whd98_04.html)

<sup>54</sup> Source: Center for Reproductive Rights *Reproductive Rights 2000: Moving Forward* at p. 47, [www.reproductiverights.org/pdf/rr2k-2.pdf](http://www.reproductiverights.org/pdf/rr2k-2.pdf)

<sup>55</sup> Ibid

NGOs have an important role in advocating for the sensitization of officials (such as law enforcement and judicial personnel and health care providers) so that they deal effectively with situations of sexual violence. In addition NGOs can advocate for the enacting and enforcement of legislation with appropriately severe penalties against the perpetrators of acts of violence against women, including rape, sexual assault, sexual exploitation, and sexual harassment. It is of vital importance that governments review and amend legislation that discriminate against women by condoning violence against them, such as exclusions found in penal codes for marital rape and “honour killings” and laws that excuse defendants from rape charges if they marry their victims. They should also ensure that practices and procedures do not in themselves violate women’s rights, but rather encourage women to report violations of their rights and provide them with full access to the mechanisms of justice and to just and effective remedies. To this end, governments should review the procedural and evidentiary rules of the courts and amend them to help protect victims of sexual violence. In addition, NGOs should consider the need to lobby the government to enact witness protection measures, including shelters for victims of domestic violence and comprehensive psychological and medical support for victims.<sup>56</sup> Governments should collaborate with NGOs that deal with violence against women in the design, implementation, and evaluation of such programs, particularly those aimed at primary- and secondary-school students. NGOs may need to also conduct advocacy campaigns promoting the passage of laws that protect women against violence in all realms of their lives, and should monitor the enforcement of existing laws and policies.<sup>57</sup>

## Early Marriage

Early marriage is common in many countries, with the available data suggesting that it is most common in Sub-Saharan Africa and in South Asia. Moreover, recent studies show that Sub-Saharan Africa has the highest proportion of teenage marriages in the world.<sup>58</sup> Early marriage often leads to early motherhood, which contributes to the prevalence of pregnancy-related illnesses and death. The health consequences of early marriage can include poor health, including reproductive health; high maternal mortality rates; greater risk of domestic violence; lower education and work skills; divorce or abandonment; reinforced gender stereotypes; psychological disadvantage; widowhood; and a cycle of poverty and abuse.<sup>59</sup>

Pregnancy and childbearing during adolescence defined by the World Health Organization as the period of life between 10 and 19 years of age carry considerable risks. Girls aged 15-19 are twice as likely to die from childbirth as women in their twenties; those under age 15 are five times as likely.<sup>1</sup> In view of the risks associated with early childbearing, adolescent fertility rates are alarmingly high in many countries; in fact, about 11% of all births each year a total of 15 million births annually are to adolescents.<sup>2</sup> As a direct consequence of the frequency of early

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<sup>56</sup> Source: Center for Reproductive Rights *Reproductive Rights 2000: Moving Forward*, at p. 49  
[www.reproductiverights.org/pdf/rr2k-2.pdf](http://www.reproductiverights.org/pdf/rr2k-2.pdf)

<sup>57</sup> Ibid.

<sup>58</sup> Source: Center for Reproductive Rights, “Women of the world: Regional trends in reproductive rights”,  
<http://www.reproductiverights.org/pdf/wowaapr-trends.pdf>, Tuesday, 14 January 2003.

<sup>59</sup> Source: Women’s Human Rights Resources. Special Features: Hot Topics: Age of Marriage. [www.law-lib.utoronto.ca/diana/mainpage.htm](http://www.law-lib.utoronto.ca/diana/mainpage.htm).



pregnancies, pregnancy-related complications are the main cause of death for 15-19 year old girls worldwide.<sup>60</sup>

In order to address these risks young brides face, it is important to address the culture within which early marriage is acceptable. It is necessary to examine the conditions in each situation and devise strategies to deal with each community individually. Education is the key to changing the practice of early marriage. Educating parents and communities about the risks associated with early marriage and early motherhood is paramount. However, a starting point should be advocating for an international standard for the minimum age of marriage. Changing the laws on the age of marriage can protect young women's reproductive choice and is a step closer to promoting reproductive rights.

#### **The Malawi Safe Motherhood Project**

The Malawi Safe Motherhood Project was started in January 1998 and is supported by the government of Malawi with funding from the United Kingdom's Department for International Development. The six-year project, which is taking place in the country's southern region, focuses on a range of factors that affect women's and infants' health during pregnancy and childbirth. Cultural preferences, regular supplies, improved transport, and information for women and families are some of the issues being addressed. For example, the Malawi project started by rehabilitating maternity units. This has not only improved the standard of care provided but has also improved the quality of that care by making it more appropriate to women's needs. Radios and "obstetric ambulances" are also being provided to the Malawi districts to improve transport and communications for emergencies. Other aspects of the project include training for health workers, needs assessments to determine supplies required in the districts, and community awareness campaigns.

Source: World Health Organization, "Facing the Challenge of Maternal Deaths in Malawi" 28:1 *Safe Motherhood: A Newsletter of Worldwide Activity* (2000) at p. 9.

## **Marriage Age<sup>61</sup>**

### Percentage of 15-19 year-olds married in Sub-Saharan Africa

<b>Country</b>	<b>Boys</b>	<b>Girls</b>
Democratic Republic of Congo	5%	74%
Niger	4%	70%
Congo	12%	56%
Uganda	11%	50%
Mali	5%	50%

<sup>60</sup> Source: World Health Organization *Delay Childbearing* (World Health Day April 1998). [http://www.who.int/archives/whday/en/pages1998/whd98\\_04.html](http://www.who.int/archives/whday/en/pages1998/whd98_04.html).

<sup>61</sup> Source: UNICEF, "Early Marriage: Child Spouses" 7 *Innocenti Digest* 2001 at p. 4.

Marriage during adolescence is not customary among young men anywhere in the world, mainly because a man's marriage ability is often dependent upon his being able to support a family. Women are therefore likely to marry men who are much older than themselves. The resulting inequality in economic and social status may lead to unequal decision-making power within marriage, with significant repercussions for women's health and development.<sup>62</sup> Moreover, lower legal ages of marriage for women stereotypes young women into childbearing and service roles.

UNICEF (the United Nations Children's Fund) and the UNFPA have suggested that the minimum age of marriage should be 18 years of age for both females and males. The countries listed below have a legal minimum age of marriage. However, as the figures below indicate, in many countries the law sanctions the disparity in marital age between genders. The minimum age of first marriage is often lower for females than it is for males, violating women's right not to be discriminated against on the basis of sex and in the formation of marriage.<sup>63</sup>

### **Legal Minimum Age of Marriage in African Countries<sup>64</sup>**

Algeria: 18 (Female), 21 (Male)	Malawi: 18
Botswana: 21	Mali: 16 (Female), 18 (Male)
Burkina Faso: 17	Mauritius: 18
Burundi: 18 (Female), 21 (Male)	Morocco: 15
Cameroon: 16	Namibia: 16
Cape Verde: 16	Niger: 14 (Female)
Central African Republic: 18	Nigeria: 18
Côte D'Ivoire: 18 (Female), 21 (Male)	Rwanda: 15
Democratic Republic of Congo: 14	Sao Tome & Principe: 18
Eritrea: 16 (Female), 18 (Male)	Senegal: 16 (Female), 20 (Male)
Ethiopia: 15 (Female)	South Africa: 15 (Female), 18 (Male)
Gabon: 15 (Female), 18 (Male)	Tanzania: 15 (Female), 18 (Male)
Ghana: 18	Togo: 16 (Female), 18 (Male)
Guinea: 18	Uganda: 18
Lesotho: 16 (Female), 18 (Male)	Zambia: 16
Madagascar: 14 (Female), 17 (Male)	

*Note: Where ages do not specify male or female, the age of marriage is the same for both sexes*

It is important to note that even countries that have adopted legislation that is protective of women's rights often do not adequately enforce these laws. Under the laws and customs governing marriage in some countries, the consent of the bride and groom are not required to create a marriage. Instead, the families, without consultation of the parties to be married, may contract together to create the unions. This is often the case in countries that permit customary or religious law to govern matters relating to marriage and the family. In Nigeria, for example, the law recognizes three types of marriage: customary, Islamic, and civil. Under customary law,

<sup>62</sup> Source: Center for Reproductive Rights 'Reproductive Rights 2000: Moving Forward' February 2003 at p. 52, <http://www.reproductiverights.org/pdf/rr2k-2.pdf>

<sup>63</sup> Ibid.

<sup>64</sup> Source: UN Economic Commission for Africa at [www.un.org/Depts/eca/divis/fssd/t1269.htm](http://www.un.org/Depts/eca/divis/fssd/t1269.htm).

marriages are arranged by families and the prospective husband is often required to pay a bride price to the bride's family. Similarly, under the prevailing interpretation of Islamic law, a woman's father retains the right to arrange her marriage, regardless of her age and without her consent.

### **Child Marriage in Mali**

With the minimum age of marriage at 15 for girls, the average age at first marriage for Malian women aged 25 to 49 is 16.5 and 25% of women are married by the age of 15. By the age of 15, about 11% of young women have been pregnant. By the age of 17, 38% of women have already had one child or are pregnant, and by 19, more than two-thirds of women (69%) have begun their reproductive lives, with 61% having already given birth to at least one child. Young women in rural areas are even more likely to bear children during adolescence, with 49% of rural adolescents becoming mothers, compared with only 28% of adolescents in urban areas. Early pregnancies entail a number of risks. Young girls who bear children before their pelvises are fully developed often suffer complications, including protracted labour. Where these complications do not result in death, they may cause chronic injury such as fistulas, or perforations in the birth canal that permits leakage from the bladder or rectum into the vagina.

Source: Center for Reproductive Rights and Association des Juristes Maliennes, *Claiming Our Rights: Surviving Pregnancy and Child Birth in Mali*, 2003, at p. 52.

## **Conclusion**

Thus it is clear that reproductive and health in Africa is a multi-faceted issue that needs to be addressed from all possible approaches. With the human rights approach, reproductive and sexual rights are addressed from a rights and social justice perspective. The protection and promotion of reproductive rights will have wide-ranging benefits for all Africans and contributes to overall positive development within the region. There are various strategies that advocates can use to advocate for reproductive rights at international, regional and national levels. The following chapter outlines the relevance of the international human rights system to reproductive and sexual health rights.



## 3. THE INTERNATIONAL HUMAN RIGHTS SYSTEM

### **Chapter 3 Summary: The International Human Rights System**

Providing an overview of the international human rights system and its regional counterparts, this chapter assists advocates by providing background information on existing international and regional documents, their history and as well as how they can be used to promote human rights. Definitions of international human rights vocabulary and explanations of key international bodies are included to better equip advocates wishing to familiarize themselves with the international human rights system.

Theoretical information on sources and obligations of international human rights instruments, including international treaties, customary international law and national law, is included and the differences between these sources of law are outlined. In particular, the chapter explains why governments who have ratified international human rights treaties take on obligations to respect rights by refraining from any action that would interfere with the citizens' enjoyment of their rights, including actions taken in an efforts to realize their rights; actions to prevent violations of human rights by others; and actions taken to achieve the full realization of rights. The "principle of non-retrogression" is also addressed.

This chapter outlines the development of the international human rights system, beginning with the adoption of the *Universal Declaration of Human Rights* by the General Assembly of the United Nations on December 10, 1948. In addition, the two binding covenants drafted to define the rights articulated in the *Universal Declaration*, the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Social, Economic and Cultural Rights* (ICESCR), are examined. Other international human rights instruments created under the auspices of the UN are also noted in this chapter. Human rights treaty bodies or committees which monitor the performance of states that are parties to a particular treaty are examined. The mandates and procedures of these bodies, both committees and commissions, are explored with special emphasis on how advocacy groups can participate in the process, through issuing shadow reports or encouraging individual complaints where available.

This chapter looks at some of the positive developments made by the international human rights system on reproductive and health issues. By noting various General Comments, Concluding Remarks and Commission Resolutions developed by treaty bodies on issues relating to women's reproductive and sexual health, this chapter aims to provide guidance in developing advocacy strategies and navigating the international human rights system. This chapter concludes with a section on regional human rights instruments and how advocates can develop strategies for both the regional and international arenas.

## What are Human Rights?

Human rights are the basic standards required for people to live with dignity. They are rights all people have simply because they are human beings. Human rights are articulated in numerous international agreements, as well as in national Bills of Rights. The recognition of human rights is also a recognition of duties – the duty of each person to respect the rights of others and the duty of governments to respect, protect and fulfil the rights of its citizens.

## The United Nations and the Development of International Human Rights Standards

On December 10, 1948, the member states of the General Assembly of the United Nations adopted the *Universal Declaration of Human Rights*. This declaration was a statement of general human rights principles by the governments of the world. The idea was to adopt the declaration and then develop a more detailed covenant or convention to specify how human rights standards would be implemented by member states and to require governments to submit periodic reports outlining their actions and the human rights situation in their respective countries.

### What are International Human Rights Instruments?

The term “international human rights instruments” refers to international human rights agreements through which governments have committed themselves to uphold human rights. These types of agreements “bind” governments – impose legal duties on them – to live up to their commitments. These binding agreements are interchangeably called treaties, conventions or covenants.

Two binding covenants were drafted to define the rights articulated in the Universal Declaration: the *International Covenant on Civil and Political Rights* (ICCPR) and the *International*

**Declaration:** Document stating agreed upon standards or principles but which is not legally binding.

**Ratification:** Formal process by which the legislative body of a state confirms a government’s action in signing a treaty.

**Covenant /Convention/Treaty:** Legally binding agreement between states.

**Reservation:** The expectation that state parties make regarding a treaty (for instance, provisions within a treaty that a member does not accept)

*Covenant on Social, Economic and Cultural Rights* (ICSECR). Both of these covenants were adopted by the General Assembly on December 16, 1966 and entered into force 10 years later, after they had been ratified by a sufficient number of states. Other conventions were also drafted and ratified by member states. These include the *Convention on the Prevention and Punishment of the Crime of Genocide* (entered into force in 1951), the *International Convention on the Elimination of All Forms of Racial Discrimination* (entered into force 1969), the *Convention on the Elimination of All Forms of Discrimination against Women* (entered into force 1981), the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or*

*Punishment* (entered into force 1987), the *Convention on the Rights of the Child* (entered into force 1990), and the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* (entered into force 1 July 2003)<sup>65</sup>.

## Sources of Human Rights and Obligations to Implement Human Rights

Human rights are found in international treaties, customary international law, and national law. International treaties are signed agreements that require governments to take certain actions to – in the case of human rights treaties – respect, protect, and fulfil human rights. International customary law includes statements or actions that were not necessarily intended to require governments to take action, but over time gained the status of law. For example, the Universal Declaration of Human Rights was originally intended to be only a statement of principles, but because states have treated it as a document that creates government obligations, many people consider the Declaration to have achieved the status of customary international law, meaning that signatories to the Declaration must ensure that their citizens enjoy the rights set out in it. Human rights are found in national laws as well, in particular in national constitutions and national Bills of Rights. Specific legislation – equality laws and employment laws, for example – may also be a source of legally binding human rights standards within a country that enacts such laws.

When a government ratifies an international human rights treaty, that government assumes three types of obligations. These obligations are known as the obligations to respect, to protect, and to fulfil.

- The obligation to **respect rights** requires states to refrain from any action that would interfere with citizens' enjoyment of their rights, including actions people take in efforts to realise their rights.
- The obligation to **protect rights** requires states to take action to prevent violations of human rights by others. This obligation involves encouraging individuals and organizations to respect the rights of others, as well as imposing sanctions for violations that are committed by private individuals or organizations.
- The obligation to **fulfil rights** requires states to take action to achieve the full realization of rights. These actions can include enacting laws, implementing budgetary and economic measures, or enhancing the functioning of judicial bodies and administrative agencies.

There is a role for civil society organizations to advocate for reproductive rights by monitoring and pressuring governments to meet these obligations.

The “principle of non-retrogression” is also an important principle relating to the implementation of human rights. This is the idea that governments cannot go backward in the protection of human rights. The Committee on Economic, Social and Cultural Rights which monitors government compliance with obligations under the *Covenant on Economic, Social and Cultural Rights*, has referred to the idea of non-retrogression in its General Comment No. 3, which is an

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<sup>65</sup> Source: United Nations Website. UN Treaty Body Database. [www.unhcr.ch/tbs/doc.nsf](http://www.unhcr.ch/tbs/doc.nsf)

elaboration on the nature of state party obligations (General Comment No. 3, Fifth Session, 1990, UN doc. E/1991/23). The Committee stated that any deliberate retrogressive measures would require the most careful consideration by the Committee and that a government trying to justify retrogressive measures must be mindful of all the rights in the Covenant and of its obligation to fully use the maximum available resources to achieve social, economic and cultural rights. Governments are not to take legislative or other measures that have the effect of reducing the enjoyment of human rights.

### **United Nations Human Rights Treaty Bodies**

Each of the United Nations human rights conventions creates a special committee, also referred to as a treaty body, which monitors the performance of states that are parties to a particular treaty. Treaty bodies generally have two main procedures. The state reporting procedure requires state parties to regularly report about their progress in implementing treaty rights. The complaints procedure permits individuals to bring complaints of human rights violations to the treaty monitoring body. These procedures will be described briefly below. Some of the treaty bodies established to monitor compliance with United Nations human rights instruments are:

- The **Human Rights Committee** that monitors compliance with the *International Covenant on Civil and Political Rights* (ICCPR).
- The **Committee on Economic, Social and Cultural Rights** monitors compliance with the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).
- The **Committee on the Elimination of Racial Discrimination** monitors compliance with the *Convention on the Elimination of All Forms of Racial Discrimination* (CERD).
- The **Committee on the Elimination of Discrimination Against Women** monitors compliance with the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW).
- The **Committee on the Rights of the Child** monitors the *Convention on the Rights of the Child* (CRC).
- The **Committee Against Torture** monitors the *Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment* (CAT).

Treaty bodies are established under their respective convention, which means that there is an article in the convention that creates the committee and specifies its composition and functions. The committees are composed of experts from various nations around the world who are elected by the state parties to the convention. (The exception is the Committee on Economic, Social and Cultural Rights, whose membership is elected by ECOSOC, the Economic and Social Council of the United Nations).

Treaty bodies meet a few times a year to consider the **state reports** that governments must submit periodically once they become a party to a treaty. Reports may be considered a few months to a year after they are submitted, depending on the committee's schedule. Nongovernmental organizations (NGOs) may be involved in the state reporting process by providing additional information on the human rights situation, often in the form of a "**shadow report**" to a government's official report. This assists the treaty body in its task of assessing government progress in implementing treaty rights. In the formal review process, a government

delegation may make a presentation before the treaty body and respond to further questions. In some cases, NGOs appear before the treaty body to present their concerns.

In providing additional information to the committees, advocate groups should be aware of the committee's mandate and procedures, or format for NGO participation. For example, with regard to reproductive rights and the Human Rights Committee (HRC), advocates should ensure that their report addresses the ICCPR in order to make the information useful in the Committee's consideration of state party reports. The HRC is particularly interested in the following:<sup>66</sup>

- Laws permitting or prohibiting abortion;
- Traditional practices affecting the right to reproductive and sexual health;
- Equal and non-discriminatory access to health care and family planning;
- Discriminatory laws establishing different minimum ages for marriage of boys and girls, or allowing child marriages;
- Laws (or absence of laws) against trafficking.

After considering state party reports, the treaty body would normally issue **Concluding Observations** that summarize the committee's evaluation, make recommendations, and highlight areas of concern. The Concluding Observations are not considered binding in international law, but are considered "authoritative," that is, carrying considerable moral obligation and weight. States are expected to follow up on such recommendations and to address these issues in subsequent reports. (The texts of Concluding Observations from various treaty bodies are available in *The Application of Human Rights to Reproductive and Sexual Health: A Compilation of the Work of the International Human Rights Treaty Bodies*, available at <http://www.acpd.ca/compilation/>.)

### Individual Complaints and Optional Protocols to Human Rights Instruments

Within the United Nations human rights treaty system, there are supplementary mechanisms that could be useful in advocating for reproductive health rights. The mechanisms that have adopted include:

- *Optional Protocol to the Convention on the Elimination of all forms of Discrimination Against Women*
- *Optional Protocol to the International Covenant on Civil and Political Rights*

<sup>66</sup> Source: Centre for Reproductive Rights, Briefing Paper: *Step-by-Step Guide, Using the UN Treaty Monitoring Bodies to Promote Reproductive Rights*, November 2002, at p. 31.

#### Tips for Drafting Supplementary Reports for UN Treaty Monitoring Bodies

1. *Know the Committee's position on reproductive and sexual health.* Identify the provisions, general comments, concluding observations that are relevant to reproductive and sexual health rights.
2. *Critique and supplement the official government report.* The government's reports will be submitted in advance of the Committee's consideration. The reports will be available on the OHCHR's Treaty Body Database. Refer to the government's report, addressing gaps and inconsistencies in the report. Provide accurate and useful information on reproductive and sexual health rights, such as updated statistics and documentation.

Source: Centre for Reproductive Rights, Briefing Paper: *Step-by-Step Guide, Using the UN Treaty Monitoring Bodies to Promote Reproductive Rights*, November 2002, at pages 5-6.

- *Second Optional Protocol to the International Covenant on Civil and Political Rights on the Abolition of the Death Penalty*
- *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*
- *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict*

These protocols provide additional protection of human rights. In the case of *Optional Protocol to the ICCPR* and *Optional Protocol to CEDAW*, these protocols are also mechanisms through which committees are authorized to hear individual complaints.

Some treaty bodies also receive **individual complaints** about human rights violations. The *Optional Protocol to the ICCPR*, a binding additional agreement to the main treaty, created a procedure whereby the Human Rights Committee receives complaints. Citizens of states that ratify the *Optional Protocol* may submit petitions against their government claiming violations of their ICCPR rights. The Committee on the Elimination of Racial Discrimination accepts complaints regarding state parties that have made a declaration recognizing the Committee’s authority to receive complaints. There is potential for using this individual complaint mechanism in situations where gender and racial discrimination overlap. In recent concluding observations, the Committee on the Elimination of Racial Discrimination identified coercive sterilization, sexual violence, and forced pregnancy resulting from rape as examples of combined gender and racial discrimination.<sup>67</sup>

### Individual Complaints

The individual complaint process can provide relief to individual victims. It can also help draw attention to a particular issue at the international and national levels by mobilizing the media to highlight the severity or extent of a violation. Positive committee decisions can be used as persuasive evidence in domestic litigation, and to advocate for legal reform.

Source: Center for Reproductive Rights, *Bringing Rights to Bear: An Advocate’s Guide to the Work of the UN Treaty Monitoring Bodies on Reproductive and Sexual Rights*, 1997, at page 8. [www.reproductiverights.org](http://www.reproductiverights.org)

The Committee against Torture is also empowered to receive individual complaints regarding state parties that make declarations under Article 22 of the Convention. This Committee considers violence against women, especially rape and other forms of sexual violence, as gender-based acts of torture. There is a potential for using this individual complaint mechanism to protect reproductive health rights. There is the possibility that the committee could recognize violations of the Convention against Torture in cases where the State party is actively preventing women from accessing reproductive health care or failing to address obstacles to access, particularly in light of extremely high rates of maternal mortality and morbidity.<sup>68</sup>

An *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)* was adopted by the United Nations General Assembly in October

<sup>67</sup> Source: Center for Reproductive Rights, *Bringing Rights to Bear: An Advocate’s Guide to the Work of the UN Treaty Monitoring Bodies on Reproductive and Sexual Rights*, November 2002, at p. 9, [www.reproductiverights.org](http://www.reproductiverights.org)

<sup>68</sup> *Ibid.*, at p. 21.

1999 and entered into force in December 22, 2000. Thus, after failing to achieve a successful remedy through their domestic court, citizens in states that have ratified the *CEDAW Optional Protocol* can file claims relating to violations of women’s rights at the United Nations level. The treaty bodies hear from the complainant and the government before issuing a decision in each matter.

Advocates of reproductive rights can utilize the individual complaint mechanisms to realize various objectives. Advocating in this manner would require attention to the rules of procedure of the Committees and is a time-consuming initiative. The committees are often backlogged; therefore, there is a gap between the submission of individual complaints and consideration by the Committee. Further, there are admissibility criteria that must be met in order for the committee to consider a complaint.

Another area for advocacy is pressuring governments to sign on to and ratify international human rights instruments. Unless the State party has signed and ratified the relevant treaty, the individual complaint would not be open to those in states that are not parties to the treaty. By pressuring governments to sign and ratify treaties, the protection of women’s rights will be strengthened. For example, as of 23 June 2003, only 15 African states have signed the *CEDAW Optional Protocol* and of those, only 3 have ratified it.<sup>69</sup> Advocates could lobby for governments to sign or ratify instruments such as the *CEDAW Optional Protocol*.

### General Comments or Recommendations

Treaty bodies also provide guidance in interpreting the rights of the treaty they monitor. They produce what are known as **General Comments or Recommendations**, which usually focus on a particular article of the treaty, and articulate in more detail the standards governments must live up to in implementing that right. General Comments are very important documents in ensuring rights are given meaning and in determining how government performance is to be measured. Since the treaty body issuing the General Comments is the body established to enforce the treaty, its interpretive guidance is highly authoritative.

The **Committee on Economic, Social and Cultural Rights** issued a **General Comment on the right to health**, which is a very useful document for health rights advocates. The Comment begins by stating, *“Health is a fundamental human right, indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity.”*

This General Comment is reproduced in full in Chapter 10 of this handbook, titled “International Interpretive Documents.”

Advocates can rely on General Comments or Recommendations of the committees to influence governments to implement similarly worded legislative or policy provisions.<sup>70</sup> Treaty bodies

<sup>69</sup> Source: Division for the Advancement of Women, at [www.un.org/womenwatch/daw/cedaw/sigop.htm](http://www.un.org/womenwatch/daw/cedaw/sigop.htm). The information on ratification is updated regularly.

<sup>70</sup> Center for Reproductive Rights and the University of Toronto International Programme on Reproductive and Sexual Health Law, *Bringing Rights to Bear: An Analysis of the Work of the UN Treaty Monitoring Bodies on Reproductive and Sexual Rights*, 2002, at p. 22.



have produced various General Comments or Recommendations that have application to reproductive rights.

The following is a list of the General Comments and Recommendations with application to reproductive rights:

- Women’s Committee (CEDAW): General Recommendation 12 and 19 (on violence against women); General Recommendation 14 (on female circumcision); General Recommendation 15 (on discrimination against women and AIDS prevention); General Recommendation 21 (on equality in marriage and family relations); General Recommendation 24 (on women and health)
- Human Rights Committee: General Comment 17 (on the rights of the child); General Comment 18 (on non-discrimination based on sex); General Comment 19 (on right to found a family); General Comment 28 (on equality of rights between men and women)
- Children’s Committee (CRC): General Comment 1 (on the aims of education); General Comment 3 (on HIV/AIDS and the rights of the child); General Comment 4 (on adolescent health)
- Economic Committee (CESCR): General Recommendation 14 (on the right to health)
- CERD: General Recommendation 25 (on gender dimensions of racial discrimination)

**[The full texts of these General Comments are available in Chapter 10 of this handbook.]**

Another UN body that is important in the international human rights system is the **UN High Commission for Human Rights**. This UN High Commission for Human Rights coordinates human rights activities throughout the UN system, promotes human rights, and raises concerns about specific issues on behalf of the Secretary-General. The High Commissioner is responsible for promoting and protecting human rights for all and maintains a continuing dialogue with Member States. The High Commissioner’s functions include crisis management, efforts to prevent and warn of human rights violations, assistance to

**CEDAW AND WOMEN’S RIGHT TO HEALTH**

*The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) includes access to health care as a basic right. Article 12 requires states to eliminate discrimination in access to health care, including reproductive health care, relating to family planning, pregnancy and post-natal care.*

The CEDAW treaty body, the Committee on the Elimination of Discrimination against Women, issued a general recommendation on Article 12 in 1999 to elaborate on government obligations related to health rights. The general recommendation states that governments should implement a comprehensive national strategy to promote women’s health, allocate sufficient resources to women’s health and guarantee women’s access to high-quality and affordable health care, including sexual and reproductive health services. The general recommendation also refers to specific reproductive and sexual health issues such as reproductive health services, education and information; prevention of sexually transmitted diseases; prevention of unwanted pregnancy; reduction of maternal mortality and decriminalisation of abortion.

This General Recommendation is reproduced in full in Chapter 10 of this handbook, titled “Other Interpretive Documents.”



states in periods of transition, promotion of rights and coordination and rationalization of the human rights programme. Information on the UN High Commission for Human Rights and the UN Centre for Human Rights can be found at [www.unhchr.ch/hchr\\_un.htm](http://www.unhchr.ch/hchr_un.htm).

The Commission on Human Rights (CHR) also produces documents that are of relevance to advocates of reproductive rights. The CHR Resolutions that are of relevance to reproductive rights advocacy include:

- CHR Resolution 1997/33 International Guidelines on HIV/AIDS and Human Rights.
- Commission on Human Rights Resolution 2001/50: Integrating the human rights of women throughout the United Nations system.
- Commission on Human Rights Resolution 2002/51: Traffic in women and girls.
- Commission on Human Rights Resolution 2003/28: The right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
- Commission on Human Rights Resolution 2003/29: Access to medication in the context of pandemics such as HIV/AIDS, tuberculosis and malaria.
- Commission on Human Rights Resolution 2003/47: The protection of human rights in the context of human immunodeficiency virus (HIV) and acquired immunodeficiency syndrome (AIDS).

### **Strategies for Implementing Reproductive Rights**

At the international level, strategies focus on the United Nations (UN) system and integrating reproductive rights within the work of UN agencies and bodies.

1. Work through the United Nations human rights system, including the treaty-monitoring bodies, non-treaty based bodies such as the Commission on Human Rights, and thematic mechanisms such as Special Rapporteurs.

- a) Provide independent factual information regarding government action at the national level
  - b) Lobby for human rights recommendations and general comments to be issued by the treaty-monitoring bodies
  - c) Support individual complaints brought before both types of bodies
2. Create greater awareness of reproductive rights within the United Nations system

Source: Center for Reproductive Rights, *Promoting Reproductive Rights: A Global Mandate*, 1997, [www.reproductiverights.org](http://www.reproductiverights.org)

**[The full texts of these Resolutions are available in Chapter 10 of this handbook.]**

In Resolution 2003/28,<sup>71</sup> the CHR “Calls upon States to protect and promote sexual and reproductive health as integral elements of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”. To ensure the realization of the right, the Commission calls upon States to take all appropriate measures and to guarantee that the right will be exercised without discrimination of any kind. Advocates can rely on the obligations perceived by the CHR to support their advocacy efforts. The support of reproductive rights as

<sup>71</sup> Source: Commission on Human Rights *Resolution 2003/28*, Adopted 22 April 2003. The full text of the resolution can be found in Chapter 10 of this handbook.

an integral part of the right to health in general lends further support to the human rights approach.

### **Other United Nations Human Rights Mechanisms**

In addition to the treaty bodies created under particular human rights covenants and conventions as mentioned, the United Nations has established several other mechanisms to oversee and take action on various human rights issues.

*The Economic and Social Council* makes recommendations to the General Assembly on human rights matters and reviews reports and resolutions of the Commission on Human Rights, and transmits them with amendments to the General Assembly. To assist it in its work, the Council established the Commission on Human Rights, the Commission on the Status of Women and the Commission on Crime Prevention and Criminal Justice. It also works closely with agencies of the United Nations system, which have a special interest in human rights matters.

*The Commission on Human Rights* is the main policy-making body dealing with human rights issues. It prepares studies, makes recommendations and drafts international human rights conventions and declarations. It also investigates allegations of human rights violations and handles communications relating to them. The Commission has established a number of subsidiary bodies, including the Sub-Commission on Prevention of Discrimination and Protection of Minorities.

*The Sub-Commission on Prevention of Discrimination and Protection of Minorities* undertakes studies and makes recommendations to the Commission on Human Rights concerning the prevention of discrimination against racial, religious and linguistic minorities. Composed of 26 experts, the Sub-Commission meets each year for four weeks. It has set up working groups and established Special Rapporteurs to assist it with certain tasks.

*The Commission on the Status of Women* prepares recommendations and reports to the Economic and Social Council on the promotion of women's rights in political, economic, social and educational fields. It makes recommendations to the Council on problems requiring attention in the field of women's rights.

*Specialized Agencies and Funds* such as the *World Health Organization (WHO)*, the *UN Children's Fund (UNICEF)* and the *United Nations Population Fund (UNFPA)* also have activities and responsibilities related to human rights.

See "The United Nations and Human Rights" at [www.un.org/rights/dpi1774e.htm](http://www.un.org/rights/dpi1774e.htm)

## Regional Human Rights Systems

Regional intergovernmental organizations have created human rights treaties and monitoring mechanisms for their particular regions. These regional human rights systems function parallel to the United Nations international human rights system. The current regional human rights systems are:

- **The European system** - The Council of Europe has adopted several human rights instruments including the *European Convention on Human Rights*. This convention has elaborate implementation procedures and creates a Commission and Court of Human Rights for monitoring purposes.
- **The Inter-American system** - The Organization of American States, composed of the governments of Latin America, the Caribbean, and North America, adopted the *American Convention on Human Rights*. The monitoring bodies are the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.
- **The African system** - As described in more detail in Chapter 5, the African regional human

### WHAT ARE “SPECIAL RAPORTEURS”?

Special Rapporteurs are people appointed by the Commission to report on specific human rights issues. They often carry out investigations on their designated topic and hear from people directly affected.

In 2002, the Commission on Human Rights decided to appoint a Special Rapporteur to focus on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (‘the right to health’). In his 2004 report to the commission, Special Rapporteur Paul Hunt focused on sexual and reproductive health, recommending “that increased attention be devoted to a proper understanding of reproductive health, reproductive rights, sexual health and sexual rights.” This report is available at <http://www.unhchr.ch/pdf/chr60/49AV.pdf>

See Chapter 1 of this handbook for information on the Special Rapporteur on the Rights of Women appointed by the African Commission.

rights system was created by the Organization of African Unity’s adoption of the *African Charter on Human and Peoples’ Rights (African Charter)* in 1981. With the recent replacement of the Organization of African Unity (OAU) by the African Union (AU), the African system is in a state of transition and is still in the process of redefining the roles and functions of the new AU bodies. The *African Charter* created the African Commission on Human and Peoples’ Rights (African Commission), which is the monitoring body for the African state parties. The African system is the youngest of the three regional systems.

These regional human rights systems have similar procedures to those described above: **reporting procedures**, where state parties must regularly summarize the human rights situation in their countries and **complaint procedures**, where individuals may submit claims of human rights violations. Each of these procedures offers opportunities for advocacy whether directly before the treaty body or through meetings with experts and government representatives, review of the human rights practice in a particular country, or development of public media campaigns to raise awareness about a complaint or state report.

Regional human rights bodies may also be empowered to appoint Special Rapporteurs to gather information on a particular human rights issue, conduct investigations and undertake human rights research and educational programmes.

## Using the Regional or International Human Rights Systems

The protection and promotion of reproductive rights can take place at both regional and international levels. In order to impact on decisions that affect reproductive rights, it is necessary to focus advocacy efforts at both the international and regional levels. In planning to advocate for reproductive rights, it is first important to understand the role of the advocate and the general strategies and tools. The advocate can have three key roles: educator, representative, and persuader.<sup>72</sup>

National constitutional or legislative human rights provisions and their enforcement mechanisms are the first avenue to government compliance with human rights obligations. This usually involves using the national legal system or an administrative mechanism to challenge a law or seek redress for human rights violations. Not only are national systems often more straightforward than the regional and international systems, and thus a more attractive first option, the regional and international levels generally require that you have made some effort to address your concerns in the available national systems, and that those efforts have proved unsatisfactory in process or result.

All the international procedures referred to above, specifically individual complaint procedures and state reporting mechanisms, rely on the good faith of state parties to comply with their obligations. Effective advocacy in large part depends on the sensitivity of the government to internal and international criticism of their conduct. Treaty bodies can issue decisions and comments on state performance but have little power to enforce their decision and opinions. This fact should not discourage anyone from advocating for women's rights at the regional or international levels – substantial pressure can be generated to encourage compliance – but advocates should be aware of limitations of these systems and of the remedies that can be achieved.

There are various opportunities for advocates to affect change in the international human rights system. The various ways for NGOs to participate in the work of the Committees include:<sup>73</sup>

- Submit supplementary information to assist the committees in their consideration of States party reports
- Attend the consideration of States party reports as observers
- Meet formally with Committee Members between sessions

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<sup>72</sup> Source: Center for Reproductive Rights, *From Rights to Reality: How to Advocate for Women's Reproductive Freedom Worldwide*, February 2003, at p. 4. [www.reproductiverights.org](http://www.reproductiverights.org).

<sup>73</sup> Source: Center for Reproductive Rights, *Step-by-Step Guide: Using the UN Treaty Monitoring Bodies to Promote Reproductive Rights*, November 2002, [www.reproductiverights.org](http://www.reproductiverights.org).

- Make presentations to the Committee or pre-sessional working group of the Committee where possible

At both the international and regional levels, there are various strategies and tools available to advocates. Advocates need to begin by understanding their multi-faceted role as educator, representative, and persuader. With that understanding, advocates can then move forward to setting goals and planning strategies.<sup>74</sup>

The first step in advocacy is to identify the appropriate forum. The strategy to be developed will depend on the body being lobbied. With respect to the reproductive rights of African women, the forum can be national, regional and international. There are strategies appropriate to each forum. Having identified the forum, advocates need to consider the following in planning their projects<sup>75</sup>:

- Identify why the issue, legislation or policy is important to the policy makers, allies and partners, general public and media;
- Develop a few main message points that are simple and easy to remember;
- Stay on message and repeat the main message when speaking with members of the media or legislature;
- Stay on the offensive by promoting the message point instead of reacting to opposition arguments.

Developing the message with careful consideration of the audience and diligent advocacy will increase advocacy success and produce change.

The following chapters provide more detailed information on the *African Charter* and the African Commission, which should assist in understanding how to use the African regional human rights system and how to prepare an advocacy strategy that best suits one's goals. The information provided will give some guidance on developing strategies and considering the following<sup>76</sup>:

- Whether a country has ratified the relevant treaty;
- What type of procedure to use (complaint, reporting procedure, or mixed);
- To whom the procedure is available;
- How the system works and what role activists can play;
- What activists must do to access the procedure;
- Possible remedies to human rights violations available at the African Commission level;
- Advantages and disadvantages of participating in the state reporting or individual complaints mechanisms

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<sup>74</sup>Source: Source: Center for Reproductive Rights, *From Rights to Reality: How to Advocate for Women's Reproductive Freedom Worldwide*, February 2003, at p. 4. [www.reproductiverights.org](http://www.reproductiverights.org)

<sup>75</sup> Ibid. at p. 11.

<sup>76</sup> The list is adapted from Women, Law and Development International and Human Rights Watch, Women's Rights Project, *Women's Human Rights Step by Step* (Washington DC: Women, Law & Development, International and Human Rights Watch, 1997) at pp. 18-19.

## **4. REPRODUCTIVE AND SEXUAL HEALTH AND THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS**

### **Chapter 4 Summary: Reproductive and Sexual Health and the *African Charter on Human and People's Rights***

Reproductive and sexual health may be protected by reference to recognized human rights. This chapter addresses how the *African Charter* may be used for this purpose. At the international level, reproductive and sexual health rights have been defined within a human rights framework through government commitments to the *Cairo Programme*, the *Beijing Platform*, and other international human rights agreements. The strength added by using a human rights approach arises from describing reproductive health issues as social justice concerns that relate to women's status in society. From this perspective, denials of rights relating to reproductive and sexual health are violations of human rights. Individual cases are reformulated into women's issues. States are legally obligated to remedy past violations and prevent further violations from occurring.

The *African Charter* provides regional recognition of human rights, including women's reproductive rights. It establishes the African Commission to monitor compliance with the *African Charter*. The AU has built upon the *African Charter* by adopting an additional text, a protocol that focuses specifically on women's rights entitled the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Protocol on Rights of Women)* which entered into force in 2005.

This chapter examines how various articles of the *African Charter* and the *Protocol on Rights of Women* may be used by advocates to promote the recognition of rights to reproductive choice and access to health services. These analyses offer examples of how advocates can link reproductive rights to those rights enshrined in the *African Charter* and overcome challenges to the implementation of reproductive rights.

### **Placing Reproductive and Sexual Health in an International Human Rights Framework**

#### **What is Reproductive and Sexual Health?**

Defining human rights and devising strategies to protect them involves discussions and negotiations. These discussions can take place at the local level as people work together to take action on problems. Nationally, human rights are defined in constitutions and in various laws, such as those addressing equality rights, domestic violence, or affirmative action.

On the international level, people from around the world meet frequently to find ways to better protect human rights. In 1994 in Cairo, Egypt, the United Nations held the *International Conference on Population and Development* (ICPD) to bring people together to discuss their common concerns on the theme of population and development. At that conference, government representatives from over 180 countries developed an international plan of action, known as the *Cairo Programme*, to guide progress on these issues.

One of the topics addressed at the ICPD was reproductive and sexual health. The *Cairo Programme* includes a definition of reproductive health that was agreed upon by those attending the conference. The *Cairo Programme* defines reproductive health as, **“a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes.”**<sup>77</sup>

The *Cairo Programme* also states that reproductive health includes the right to “a satisfying and safe sex life with the capability to reproduce and the freedom to decide if, when and how often to do so.” This right to reproduce safely and freely includes the idea that men and women must be informed and have access to **“safe, effective, affordable and acceptable methods of family planning of their choice ... as well as the right of access to appropriate health care services that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant.”**<sup>78</sup>

At another international human rights conference specifically addressing the human rights of women, the definition of reproductive health was expanded. The *Declaration and Platform for Action*, known as the *Beijing Platform*, was adopted by 187 United Nations member states at the 1995 *Fourth World Conference on Women* in Beijing. The *Beijing Platform* states **“[t]he human rights of women include the right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence. Equal relationships between women and men in matters of sexual relations and reproduction, including full respect for the integrity of the person, require mutual respect, consent and shared responsibility for sexual behaviour and its consequences.”**<sup>79</sup>

What do these international definitions of reproductive and sexual health rights mean for women? They mean that governments are obligated – through their commitments to the *Cairo Programme*, the *Beijing Platform*, and international human rights agreements – to promote reproductive health and related social services and to remove barriers that prevent women from achieving full reproductive and sexual health.

Women around the world have been active in building on the progress of the Cairo and Beijing conferences. Marking the fifth anniversary of each of these events, *Cairo +5* and *Beijing +5* conferences were held. Government representatives and women’s rights advocates met to assess

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<sup>77</sup> Source: United Nations, *Report of the International Conference on Population and Development*, Document A/Conf.171/13 (1994) at para. 72.

<sup>78</sup> Ibid.

<sup>79</sup> Source: United Nations, *Report of the Fourth World Conference on Women*, Document A/Conf.177/20 (1995) at para. 96.

the impact of the *Cairo Programme* and *Beijing Platform*. The discussions and documents from these anniversary conferences underscore the importance of reproductive and sexual health rights.

### **How do Human Rights Relate to Reproductive and Sexual Health?**

Now that governments have committed themselves to a broad concept of reproductive and sexual health through the *Cairo Programme* and the *Beijing Platform*, how do we ensure that this idea becomes a reality? One strategy is to use a human rights approach and tie the concept of reproductive and sexual health to the recognized human rights standards of international human rights instruments, such as the *African Charter on Human and Peoples' Rights (African Charter)*. While all the aspects of reproductive rights may not be overtly expressed in international human rights treaties, the wording in many treaties is broad enough to touch specifically on reproductive and sexual health issues and can be used to address women's physical, mental and social well-being.

Human rights relevant to the promotion and protection of women's reproductive and sexual health include:

- ◆ The right to be free from all forms of discrimination
- ◆ Rights relating to individual freedom, self-determination and autonomy, including rights regarding survival, liberty and security, rights regarding family and private life, and rights to information and education
- ◆ Rights to health care and to the benefits of scientific progress
- ◆ Rights regarding women's empowerment, including the rights of freedom of thought and assembly and the right to political participation

These rights are established human rights that have been confirmed numerous times by the international community and in national constitutions. Reproductive and sexual health may be protected by reference to these recognized human rights. As discussed below, the human rights referred to when advocating for a specific reproductive and sexual health concern will depend on the alleged violation and its underlying causes. The strength of using a human rights approach comes through describing reproductive health issues as social justice concerns that relate to women's status in society. From this perspective, denials of rights relating to reproductive and sexual health are violations of human rights. Individual cases become broader women's issues. States have legally obligated themselves to remedy past violations and prevent further violations from occurring.

A human rights approach is strengthened when human rights commitments are shown to originate in one's own cultures, traditions, and laws. A violation of international human rights must also be shown to be an affront to local concepts of what is fair and just. For this reason, the *African Charter* as a regional document which encompasses human rights principles, may be a particularly effective starting point for human rights advocacy related to reproductive and sexual health in Africa.



## **The African Charter and Human Rights Relevant to Reproductive and Sexual Health**

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

The *African Charter* is one important African regional expression of human rights principles. These rights are also reflected in national constitutions and other national laws. The *African Charter* was adopted on 27 June 1981 by the Assembly of Heads of State and the Government of the Organization of African Unity (OAU). The *African Charter* became effective on 21 October 1986, after the required number of member states had ratified the treaty, meaning they formally accepted to be bound by its terms [**See Chapter 7 of this manual, titled “Basic Texts,” for the full text of the African Charter and refer to Article 63 for provisions on signature, ratification, and the African Charter coming into force**]. Currently, 53 states are parties to the OAU and all have ratified the *African Charter*. Morocco is the only African country that is not a member of the OAU and thus not a party to the *African Charter*.

The *Constitutive Act of the African Union* entered into force in May 2001, replacing the OAU with the African Union in July 2002. The *Constitutive Act* has not yet been fully implemented, however, and it is unclear how the regional human rights system will change under the AU [**See Chapter 5 for more detail on the new AU system**].

The *African Charter* sets out a range of human rights such as the right to be free from discrimination, the right to have respect for personal security and liberty, as well as freedom of conscience, religion, association, expression and movement (Articles 1-17). In addition to these rights related to individuals, there is also a wide range of peoples' rights, or group rights in the *African Charter*. These include the right to self-determination and the right to a satisfactory environment (Articles 19-24). The *African Charter* differs from regional treaties in other parts of the world because it highlights the connections between individual and peoples' rights. Also, the *African Charter* is an important document for stating that individuals, in addition to governments, have duties to respect human rights (Articles 27 to 29 establish that individuals are also responsible for ensuring that rights are respected).

Historically, human rights treaties have been applied to governments, but the *African Charter* and a few other international human rights instruments are being used to ensure governments demand that individuals respect the human rights of others.

The *African Charter* also creates a monitoring body, the African Commission on Human and Peoples' Rights (African Commission) [**see Part II, Chapter I of the African Charter, beginning at Article 30, which is reproduced in Chapter 7 of this handbook**]. The African Commission receives reports from governments on the human rights situation in their respective countries. It also hears human rights complaints submitted by states, individuals, and organizations. The African Commission's work and procedures are discussed in more detail in the following chapter.

The African regional system has attempted to build upon the *African Charter* by adopting an additional text, a protocol that focuses specifically on women's rights. This additional text is referred to as the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Protocol on Rights of Women)*. [See Chapter 7 for the complete text of the *Protocol on Rights of Women*.] The *Protocol on Rights of Women* addresses the many gender-specific human rights violations that women experience and reconfirms that women are entitled to enjoy all the rights of the *African Charter*. Specific rights relating to reproductive and sexual health are also included in the *Protocol on Rights of Women*.

The Special Rapporteur on the Rights of Women in Africa, in conjunction with numerous women's organizations, has successfully worked on ensuring that the *Protocol on Rights of Women* project progressed efficiently. The Special Rapporteur held meetings with NGOs dealing with women's rights to promote the *Protocol on Rights of Women* and prepare for the meetings of Intergovernmental Experts and Ministers.<sup>80</sup> At the Meeting of Ministers, held on 28 March 2003, in Addis Ababa, Ethiopia, it was formally adopted for forwarding to the Heads of State and Government of the AU for adoption during the Maputo Summit 2003. The *Protocol on Rights of Women* was adopted at this meeting in July 2003. On 25 November 2005, the Protocol came into force, when a 15<sup>th</sup> State ratified it.

### Challenges to Using a Human Rights Approach

Using a human rights framework and the African human rights system to promote

<sup>80</sup> Source: Special Rapporteur on the Rights of Women in Africa, *Special Rapporteur on the Rights of Women in Africa to the Human and Peoples' Rights*, From 15 to 29 May 2003, Nja

### The Organization of African Unity (OAU) and the African Union (AU)

Thirty-two independent African States joined the OAU when it was established on May 25, 1963. There are now 53 member states.

At the 5th Extraordinary Summit of the OAU in March 2001, representatives of each member state supported the *Constitutive Act of the African Union*, the document that has renamed and restructured this continental organization, establishing new institutions for greater cooperation. The required number of ratifications was achieved on April 26, 2001, and the 12-month transition period for the OAU to transform itself into the African Union (AU) began on May 26, 2001. This transition includes the establishment of a Pan-African Parliament, a Court of Justice, and an African Central Bank with a common currency, an African Monetary Fund and an African Investment Bank. The details of how the AU will function are still being worked out.

The *Constitutive Act of the African Union* states numerous objectives building on the original objectives of the OAU. The 14 objectives include:

- Acceleration of the political and socio-economic integration of the continent
- Promotion of democratic principles, institutions and good governance
- Promotion and protection of human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments
- Establishment of the necessary conditions which enable the continent to play its rightful role in the global economy and in international negotiations
- Promotion of cooperation in all fields of human activity to raise the living standards of African peoples
- Cooperation with relevant international partners in the eradication of preventable diseases and the promotion of good health on the continent

Learn more about the new AU and its activities by visiting its website: [www.africa-union.org](http://www.africa-union.org). The *Constitutive Act of the African Union* can be found in Chapter 7 of this Handbook.

reproductive and sexual health is a new and promising advocacy strategy. However, the challenges facing advocates in many African countries should not be underestimated. At the extreme, women's rights advocacy has in some contexts led to intimidation, harassment, violent assault, and imprisonment. In situations that are not as openly hostile to women's rights activism, significant hurdles must still be overcome. While state governments have ratified the *African Charter*, they may be opposed to attempts to hold them accountable to Charter obligations. Coordinating groups of women over long distances using unreliable communication systems is frustrating, and at times, consensus about priorities cannot be reached among different women's groups. In many communities, reproductive and sexual health issues are not easy to discuss. This lack of openness also presents a formidable challenge. Combining reproductive and sexual health issues with an analysis of women's place in society and respect for human rights may amount to a shift in social expectations that will meet strong resistance.

These challenges and risks must be measured against the potential gains. Plan your strategies carefully:

- ◆ Look for timely opportunities to raise your concerns when the government and community may be more receptive.
- ◆ Build on small successes.
- ◆ Cultivate allies and work together: a sizeable, united group is more difficult to intimidate.
- ◆ Know your audience and communicate in terms they will understand.
- ◆ Respond to resistance and fear with a clear expression of the importance of your issue.
- ◆ Refer to local and traditional values that support your end goal.

### **Applying the African Charter and the Protocol on the Rights of Women to Reproductive and Sexual Health Issues**

Various methods of advocating for women's reproductive and sexual health can be strengthened by referring to several specific rights in the *African Charter* and in the *Protocol on the Rights of Women*. Which rights are most effectively used will depend on the circumstances and the advocacy strategy used. A number of human rights may be used together to support particular

#### **Strategies for Implementing Reproductive Rights**

At the regional level, strategies focus on the regional human rights bodies and regional institutions active in the area of health and population.

1. Work through the regional human rights bodies to make better use of these bodies for the advancement of reproductive rights
2. Create greater awareness of reproductive rights within regional institutions such as the Economic Commission for Africa, WHO regional sub-office. These institutions and organizations should be encouraged to integrate the international community's recommendations with respect to reproductive rights into their policies and procedures. They should also be urged to promote and assist in monitoring the implementation of these recommendations, in particular by developing a plan of action for implementation, and coordinating activities with other United Nations agencies and regional organizations, United National human rights treaty monitoring bodies and NGOs.

Source: Center for Reproductive Rights, Promoting Reproductive Rights: A Global Mandate, 1997, [www.reproductiverights.org](http://www.reproductiverights.org)

interests. The rights addressed in the examples below are not a complete list of the rights that could be applied. The examples provide only a few ideas of how rights may be applied to promote reproductive and sexual health issues, but local experiences may suggest numerous other options and interpretations.

How to apply *African Charter* rights in applications before the African Commission or courts will also depend on the regional context. For example, South Africa has a growing constitutional consciousness and has enacted legislation addressing various gender issues; women's rights activists in Uganda were organized and effective in securing constitutional provisions that promote women's rights. The approach taken in these countries to address reproductive and sexual health rights would be very different than in countries where legal equality rights have yet to be enacted, where women's groups are not organized for legal rights advocacy, or where discussion of reproductive and sexual health is considered unacceptable.

The examples below explore how specific rights can be applied to two issues: reproductive choice and access to health services.

#### *a) Reproductive Choice*

Many women are unable to make free and informed decisions about their reproductive and sexual health. A woman's social, economic, and psychological dependence on her sexual partner may create a dynamic in which the man decides whether and when to engage in sexual relations and how many children the family will have. A lack of power in relation to her sexual partner, lack of information about family planning options, inadequate access to reproductive and sexual health services, and social and economic vulnerability are a few of the many factors that may limit a woman's ability to control her reproductive and sexual health.

Young women are frequently coerced into sexual relationships that they would not freely choose. Young women and girls are also vulnerable to sexual abuse by older men who may take advantage of girls' inexperience, trust, economic need, or other circumstances. For example, a study on induced abortion in Dar es Salaam, Tanzania found that significant numbers (one quarter to one third) of the study subjects reported male partners aged 45 years or over. These findings document the "sugar-daddy" phenomenon where schoolgirls around 14 years of age engage in sex with old working-class men who give them some money for school lunches and small gifts.<sup>81</sup>

Unplanned pregnancies, sexually transmitted diseases, and the physical and psychological effects of sexual violence and sexual abuse all have long-term consequences that touch on many other aspects of a woman's life. Addressing the many obstacles to women's reproductive choice and educating men about women's rights will improve the quality of women's lives and empower women in various ways.

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<sup>81</sup> G.S. Mpangile, M.T. Leshabari and D.J. Kihwele, "Induced Abortion in Dar es Salaam, Tanzania: The Plight of Adolescents" in Axel I. Mundigo and Cynthia Indriso, eds., *Abortion in the Developing World* (New Delhi: Vistaar Publications and the World Health Organization, 1999.) 387-403 at 393.

❖ ***African Charter Provisions Relevant to Reproductive Choice***

Reproductive choice is a basic human rights issue. A woman's ability to control her sexuality is an aspect of her dignity and individual freedom or autonomy. Several specific rights of the *African Charter* can be applied to the issue of reproductive choice.

Article 6: Right to Liberty and Security of the Person

When a woman has limited ability to exercise free choice about issues as personal as her sexuality, sexual health, and reproductive options, her liberty and personal security are at stake. Factors that infringe her right to liberty and security of the person range from inadequate provision of health information and health care (including access to contraception and STD/HIV prevention methods, as well as safe abortion services) to coercion in instances of rape, forced sterilization or forced abortion.

Article 8: Freedom of Conscience

Freedom of conscience relates to the issue of free choice. A woman should have the space to freely decide reproductive health matters according to her conscience. Health care providers also enjoy freedom of conscience that enables them to decline to provide care that they consider contrary to their beliefs. Where they decline to provide care on grounds of conscience, they have to inform women of services they decline to perform, and refer them to providers who offer such services. However, in emergency situations health care providers cannot decline to provide services on grounds of their conscience where no other providers are available.

Article 9: Right to Receive Information

Full and adequate information is essential to making free and informed choices on reproductive health issues. The *African Charter* includes a right to receive information that can be clearly applied to reproductive health, such as family planning options and emergency contraception following rape.

Article 16: Right to Enjoy the Best Attainable State of Physical and Mental Health

Attaining a high standard of physical and mental health includes having the means to attain the best state of reproductive health. This article calls on the government to take steps to ensure the good health of its citizens. Reproductive choice relates closely to a women's level of health. Her free and informed reproductive choice should be facilitated to promote her best attainable state of health.

Article 60 of the *African Charter* states that the Commission "shall draw inspiration from international law on human and peoples' rights." General Comment 14 of the Committee on Economic, Social and Cultural Rights explains the content of the right to health in the *International Covenant on Economic, Social and Cultural Rights*. The Committee stressed that the right to health has four interrelated and essential elements: availability, accessibility, acceptability and quality [see **paragraph 12 in the text of General Comment 14, reproduced**

**in Chapter 10 of this manual].** Where reproductive and sexual health services in a particular community are not available, accessible or acceptable, advocates can argue that governments are not in compliance with Article 16.

#### Article 18: Elimination of Every Discrimination Against Women

This article can be used to challenge discrimination women face based on their sex, race or ethnicity, age, disability or other status. The right of women to be free from discrimination can be applied to address neglect of their needs regarding reproductive choice and services. This article can be used to call for greater government action on reproductive rights issues, since ensuring the enjoyment of reproductive and sexual health rights enables their ability to participate equally in many aspects of society.

Neglecting to provide health services that only women need, such as emergency contraception, is a form of discrimination against women prohibited by this article of the *African Charter*. On a more specific level, non-discrimination can be applied to a particular reproductive choice issue. For example, in Botswana, a particular college had a policy that required pregnant students to inform the administration of their pregnancy. They were then liable to suspension or expulsion [See Chapter 6 for reference to the legal decision in this case: "*Student Representative Council, Molepolole College of Education v. Attorney General of Botswana*"]. This is a denial of a woman's right to education on an equal basis with men since the college discriminated on the basis of pregnancy.

#### Article 29(1): Individual Duty to Preserve the Harmonious Development of the Family

This article could be applied to require steps necessary to prevent, punish and remedy domestic violence and to oblige governments to take steps necessary to ensure women and men are equal partners in family formation and development.

#### ❖ ***Protocol on the Rights of Women Provisions Relevant to Reproductive Choice***

The *Protocol on the Rights of Women* can also be used to place reproductive choice within a human rights framework. It has provisions that strengthen the protection and promotion of women's rights.

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

This article prohibits "all forms of exploitation, cruel, inhuman or degrading punishment and treatment". It includes a state obligation "to 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". Since violence against women is defined to include "all acts perpetrated against women which cause or could cause them physical, sexual, psychological, or economic harm", protecting women from sexual violence clearly advances women's reproductive choice and reproductive and sexual health. Protecting women and girls from all forms of sexual violence respects their rights to engage in sexual conduct when and if they wish.

### Article 6: Marriage

This article of the *Protocol on the Rights of Women* provides for the free and full consent of both parties to marriage and sets the minimum age of marriage for women at 18 years. The traditional tie between marriage and reproduction is well established; ensuring that women are able to freely consent to marriage is one aspect of ensuring that women have conditions that facilitate choice and consent in sexual relations.

### Article 12: Right to Education and Training

In addition to protecting a woman's right to education in general, this article makes specific provisions for the protection of women from sexual abuse and harassment. It requires states to take measures to "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". Protecting women and young girls in the educational system promotes women's choice in sexual relations. Specifically, it protects young women who are coerced into sexual relations with their teachers.

### Article 14: Health and Reproductive Rights

Article 14 of the *Protocol on the Rights of Women* expressly includes reproductive and sexual rights, such as the right to decide whether to have children, how to space pregnancies, which method of contraception to use, to protect against sexually transmitted diseases, to family planning education, and to have access to medical abortion services.

#### *b) Adequacy of and Access to Health Services*

Reproductive and sexual health can be compromised due to a lack of adequate health care services. Are women receiving family planning information, contraception, maternal care (including pre-natal care that encompasses measures to prevent or minimize harm to the foetus), legal abortion services, post-abortion care, or care for prevention and treatment of sexually transmitted diseases, including HIV? Is health care affordable? The cost of health services can prohibit women from receiving care. These are questions that must be addressed to provide a standard of reproductive and sexual health that respects each woman's dignity and human rights.

#### **❖ African Charter Provisions Relevant to Access to Health Services**

*African Charter* rights that can be applied to demand greater access to health services include the following:

### Article 4: Respect for Life and the Integrity of the Person

Respect for life and the integrity of the person can be interpreted to involve an obligation to protect and foster the life and integrity of the person. Respect for life relates to a quality of life that is improved with adequate health care.

Article 9: Right to Receive Information

Reproductive and sexual health information is an important component of health care. Using this right, advocacy efforts could emphasize how health services facilitate dissemination of information that is essential to a woman's well-being.

Article 16: Right to Enjoy the Best Attainable State of Physical and Mental Health

As noted above, a high standard of physical and mental health includes a high standard of reproductive and sexual health. The right to health contains the elements of availability, accessibility, acceptability and quality. The government obligation to ensure the best attainable state of health includes the provision of affordable and accessible health care services and a range of qualified health care providers who can address the particular health concerns of women, including reproductive and sexual health issues.

Article 18: Elimination of Every Discrimination Against Women

The elimination of discrimination against women requires that women's distinctive reproductive health needs be addressed. Equality requires that like cases are treated alike and that different cases are treated according to those differences. As a result, the *African Charter's* non-discrimination provision can be used to require that reproductive services be provided to women in ways that adequately reflect women's distinctive needs in reproduction, such as obstetric care. Health issues that are primarily or exclusively related to women should be given adequate priority to ensure women achieve their best attainable state of health as guaranteed in Article 16. Neglecting to provide health services that only women need is a form of discrimination prohibited by this Article.

❖ ***Protocol on the Rights of Women Provisions Relevant to Access to Health Services***

The *Protocol on the Rights of Women* also has sections relevant to access to health services:

Article 2: Elimination of Discrimination Against Women.

A requirement that governments incorporate a gender perspective into their policies, laws and development plans gives leverage for women's rights advocates to call for gender perspective in health care policies. The particular barriers that women face and their specific health needs should be addressed in policy development and legal drafting to ensure that health care for women will be accessible and effective. Further, this article also requires that states "take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist". This can be used by advocates to campaign for reforming the inequality in the provision of health services specific to women and reproduction.



### Article 5: Elimination of Harmful Practices

This article requires governments to prohibit harmful practices, including the “para-medicalization of female genital mutilation and all other practices”. This can be used to advocate for the end of female genital cutting (FGC) and prevents disguise of the practice as a medical procedure. Further, there is also the “provision of necessary support to victims of harmful practices through basic services such as health services”. This ensures that women are not only protected against FGC, but also receive necessary health services in dealing with the consequences of FGC.

### Article 14: Health and Reproductive Rights

The *Protocol on the Rights of Women's* right to access to health services is directly on point for application to this issue. States are to “provide adequate, affordable and accessible health services, including information, education and communication programmes to women especially those in rural areas.” It is also explicit in recognizing the inclusion of reproductive and sexual health in general health care. The elements of reproductive rights include the rights of women to decide whether and when to have children, to choose an appropriate method of contraception that may protect against sexually transmitted diseases, the right to safe abortion, the right to appropriate obstetric care and pre- and post-natal health care.

## **Conclusion**

The support of reproductive rights in international and regional human rights instruments, and the application of a human rights approach, can assist advocates in protecting and promoting reproductive rights. Given the strengths of this approach, there are several ways in which advocates can influence laws and policies. Some examples of methods include:<sup>82</sup>

- Convincing the government to help draft legislation;
- Commenting on draft legislation proposed by other groups or members of the legislature;
- Working on reforming current laws;
- Commenting on the effectiveness of current laws;
- Contributing to negotiations at the final stage of the passage or defeat of a bill;

The above examples are best suitable for affecting policies and laws at the national level.

The African regional human rights system offers valuable ways in which reproductive rights may be advanced, most importantly through the application of the *African Charter* and the *Protocol on the Rights of Women*. However, using these documents, and applying a human rights approach, does pose challenges. For example, while the *Protocol on the Rights of Women* is a positive new development for the protection of reproductive rights it still falls short of its potential in some areas. For example, its provision on marriage (Article 6) includes a contradiction within the equality provisions whereby the rights of women to transmit their

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<sup>82</sup> Source: Centre for Reproductive Rights, *From Rights to Reality: How to Advocate for Women's Reproductive Freedom Worldwide*, February 2003.

citizenship to their children is limited where "contrary to national provisions or national security interests". As well, the language on polygamy and monogamy in the *Protocol on the Rights of Women* is lacking in strength. Instead of simply outlawing polygamy, the legislation encourages monogamy as the preferred form of marriage. While the *Protocol on the Rights of Women* is an important document within the African region, and will hopefully soon be in force, there are areas in which it could go further to promote and protect reproductive and sexual health rights. Thus the legislative framework, while serving as a valuable way to advance rights, can itself pose challenges for advocates.

The following chapter provides an overview of the African Human Rights System and its relevant bodies and institutions. It is meant to assist readers in planning advocacy before the African Commission.

## 5. The African Human Rights System

### Chapter 5 Summary: The African Human Rights System

In July 2002, the OAU was replaced by the AU through the adoption of the *Constitutive Act of the African Union (Constitutive Act)*. This chapter provides an overview of the African human rights system and addresses a number of important issues raised by the transition from the OAU to the AU. A comprehensive outline of the institutional and organizational actors within the African human rights arena is provided in this review of the African human rights system. The structure, objectives, and activities of regional human rights institutions are examined. The OAU, and its organs, the African Commission, the forthcoming African Court (the Court resulting from the merger of the African Court of Human and Peoples' Rights and the African Court of Justice) as well as the new AU, are described. From a practical standpoint, the OAU (and all its organs) is still in operation, having only applied some name changes to certain organs, departments and titles. The AU is yet to determine the fate of the former OAU organs and to create the new organs set out by the Act. Current issues of salience within these institutions include the legal and logistical challenges of the transition and are addressed in this chapter.

The *African Charter* established the African Commission to monitor the proper implementation of its provisions. The mandate of the African Commission is to advance human rights in Africa through measures aimed at their protection and promotion. The activities and progress of the African Commission are explored and critically then assessed. The African Commission's activities include organizing educational events and evaluating human rights situations of member states through field tours. Moreover, the African Commission receives reports from member states and evaluates their human rights situation. More frequently it decides upon complaints, called communications, submitted by individuals or non-governmental organizations. Through its overview of the African human rights system, this chapter provides practical guidelines for preparing both communications that seek redress for violations of human rights, and shadow reports on the compliance of member states with their *African Charter* obligations.

In particular this chapter covers such vital matters as the rights and freedoms protected by the *African Charter*, the number of violations permitted per communication, the conditions for submitting a communication, the use of emergency communications, what must be included in order to be valid, legal representation, and the standard format for the submission of communications. Furthermore, some general advice about the preparation of shadow reports is also provided. Shadow reports are compiled by non-governmental organizations (NGOs) and provide information on their country's human rights situation to supplement the State reports given to the African Commission. Since state reports tend to either not report or instead minimize problems and maximize accomplishments, NGO reports can be essential in raising awareness of the reality human rights in their countries.

## Introduction

In 1963 the leaders of 32 independent African States established the Organization of African Unity (OAU) in Addis Ababa, through the adoption of the *Charter of the Organization of African Unity*.<sup>83</sup> The primary focus of the OAU was to enhance co-operation among African nations in the struggle against colonialism and apartheid. The OAU, since its inception, has also focused its energies on promoting economic, socio-cultural, and political ties among the African states. Moreover, the organization also established a system for the protection and promotion of human rights.

The African human rights system emerged in June 1981 through the adoption of the *African Charter on Human and Peoples' Rights (African Charter)*, which entered into force on 21 October 1986.<sup>84</sup> The *African Charter* established the African Commission on Human Rights (African Commission) that monitors the proper implementation of its provisions. The mandate of the African Commission is to advance human rights in Africa through measures aimed at its protection and promotion. The African Commission receives reports from member states and evaluates their human rights situation. It decides upon complaints submitted by individuals or non-governmental organizations. The African Commission's activities, aimed at promoting human rights in the region, include organizing educational events and evaluating human rights situations of member states through field tours. Among similar regional bodies, such as those of the European and Inter-American systems, the African Commission has been the least efficient, suffering from structural and financial challenges. The African Commission's effectiveness has most importantly been affected by a lack of political will to enhance human rights, on the part of the national leaders.

To complement the works of the African Commission, the *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and Peoples' Rights (Protocol on African Court)* was adopted unanimously by the Assembly of Heads of State and Government of the Organization of African Unity on 9 June 1998.<sup>85</sup> **[See Chapter 7, "Basic Texts", for the full text of these documents]**. In 2004, the African Union Assembly decided that the African Court on Human and Peoples' Rights and the African Court of Justice (established by Constitutive act) would be merged into one court. This new African Court will have the power to interpret the provisions of the African human rights instruments.

In July 2002, the OAU was replaced by the African Union (AU) through the adoption of the *Constitutive Act of the African Union (the Constitutive Act)*<sup>86</sup>, a document similar to the OAU *African Charter*. The *Constitutive Act* includes several references to the protection of human rights in Africa, promotion of democratic governance, and the rule of law. Most importantly, it

<sup>83</sup> *Charter of the Organization of African Unity*, 479 U.N.T.S. 39, entered into force Sept. 13, 1963.

<sup>84</sup> *African [Banjul] Charter on Human and Peoples' Rights*, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986

<sup>85</sup> *Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights*. OAU/LEG/MIN/AFCHPR/PROT.1 rev.2 (1997).

<sup>86</sup> *Constitutive Act of the African Union*, OAU Doc. CAB/LEG/23.15 (July 11, 2000) (entered into force May 26, 2001). The Act was adopted on October 11, 2000. It came into force on May 26, 2001. However, due to several constraints that delayed the process, the AU was not formally launched until the 1st Assembly of Heads of State and Government of the Union, in Durban, South Africa which took place from July 9-10, 2002.

invests the AU with the power to intervene in internal affairs where gross human rights violations occur, which is a fundamental and crucial development to the region.

This transition from OAU to AU has raised a number of important practical and legal issues. From a practical standpoint, the OAU (and all its organs) is still in operation, having only applied some name changes to certain organs, departments and titles. The AU has yet to determine the fate of the former OAU organs and to create the new organs set out by the *Constitutive Act*. On the one hand, before these steps are taken, the AU does not exist in the strict sense of the terms of the *Constitutive Act*. On the other hand, from a legal standpoint, the AU has replaced the OAU and the former organization no longer exists. This discrepancy is an obstacle to finding the right documents from the right regional bodies and determining whom to contact for information. Until the AU takes further measures and fully applies the *Constitutive Act* in practice, the future of the African Commission and the forthcoming African Court remains uncertain.

Analyzing the existing African human rights system in the light of the new *Constitutive Act* under the AU might result in confusion given the absence of a clear and specific stance of the *Constitutive Act*. The following discussion on the regional system, therefore, focuses on the structure and functions of both the African Commission and the African Court while referring to the structure and practice of the OAU. The discussion shall also, however, include the relevant or parallel AU organs and documents in parenthesis wherever relevant.

## **REGIONAL HUMAN RIGHTS SYSTEMS**

### **The African Commission on Human and Peoples' Rights<sup>87</sup>**

The African Commission, located in Banjul, The Gambia, has been functioning since 1987. In brief, the African Commission has several duties:

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<sup>87</sup> The information used in this description of procedures and powers of the Commission was obtained from several sources: Evelyn A. Ankumah, *The African Commission on Human and Peoples' Rights: Practice and Procedures* (1996); Evelyn A. Ankumah & Edward K. Kwakwa, eds., *The Legal Profession and the Protection of Human Rights in Africa* (1999); Hurst Hannum (ed.), *Guide to International Human Rights Practice* (3<sup>rd</sup> edition, 1999); Rachel Murray, *The African Commission on Human and Peoples' Rights and International Law* (2000); Chidi Anselm Odinkalu, "Analysis on Paralysis or Paralysis by Analysis?" Implementing Economic, Social and Cultural Rights Under the African Charter on Human and Peoples' Rights" 23:2 *Human Rights Quarterly* (2001) 327; and U. U. Oji Umzurike, *The African Charter on Human and Peoples' Rights, Volume 2* (1997). A detailed and helpful explanation of the communication procedure can be found in a publication by the African Commission on Human and Peoples' Rights, *Information Sheet No. 3: Communication Procedure* (undated) available from the Commission. Nsongurua J. Udombaba, "Can the Leopard Change Its Spots? The African Union Treaty and Human Rights", 17 (2002) *American University International Law Review*, 1177; Yemi Akinseye-George, "New Trends in African Human Rights Law: Prospects of and African Court of Human Rights, 10 (2002) *University of Miami International and Comparative Law Review*, 159; Konstantinos D. Magliveras & Gino J. Naldi, "The African Union – A New Dawn for Africa?", 51(2002) *International and Comparative Law Quarterly*, 415; Corinne A.A. Packer & Donald Rukare, "The New African Union and Its *Constitutive Act*," 96 (2002) *American Journal of International Law*, 365.

- Examining reports which governments submit to account for the human rights situation in their countries;
- Examining human rights complaints, called “communications”, that are submitted by individuals and non-governmental organizations;
- Adopting “resolutions” at its regular meetings;
- Making recommendations to governments on human rights issues;
- Appointing special reporters to investigate specific human rights concerns and promote action; and
- Convening seminars and conferences.

While the African Commission holds much promise, it has received significant criticism of its effectiveness in promoting and protecting human rights. In several ways, the organization has been a disappointment to many and remains unknown to many others. The effectiveness of the African Commission has been hampered by structural and financial problems. For instance, the development of certain procedural practices, such as the procedure for Complaints hearings, has restricted the African Commission’s effectiveness. Complaints are considered only in closed sessions, where public attendance is prohibited. This raises questions about the transparency and credibility of the work of the African Commission. In addition, as with other institutions that apply international laws, the African Commission has no means of ensuring that its decisions and recommendations are implemented. It can state its opinion on human rights cases and on government obligations, but it lacks an effective means of enforcement.

### WHAT IS A “COMMUNICATION”?

“Communication” is the word used for a human rights complaint formally sent to an international human rights body such as the African Commission. The communication is a document that summarizes what happened, explains that the event described is a violation of human rights, and asks for a remedy.

### AFRICAN COMMISSION “RESOLUTIONS”

The African Commission meets twice a year to review state reports and hear human rights complaints. At these meetings Commission members also discuss current human rights concerns and consider procedural issues. Often statements are drafted that express the African Commission’s opinion on these issues. These statements are called resolutions. See Chapter 9 for resolutions relevant to NGO advocacy at the African Commission and the integration of the *African Charter* and the African Commission’s work at the national and sub-regional level.

## African Human Rights System: Chronological Order

### **1961: Creation of the Organization of African Unity**

*(Charter of the Organization of African Unity, 479 U.N.T.S. 39, entered into force Sept. 13, 1963).*

### **1981: Adoption of African Charter on Human and Peoples’ Rights**

*(African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986).*

### **1986: Entry into force, African Charter on Human and Peoples’ Rights**

### **1998: Adoption of the Protocol on African Court**

*(Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights, OAU/LEG/MIN/AFCHPR/PROT.1 rev.2 (1997).*

### **2002: Creation of the African Union**

*(Constitutive Act of the African Union, OAU Doc. CAB/LEG/23.15 (July 11, 2000), entered into force May 26, 2001).*

The African Commission has been suffering from chronic financial constraints to a greater extent than the other OAU organs. Although it has been in existence for sixteen years, it does not have permanent headquarters.<sup>88</sup> It is mainly dependent on foreign inter-governmental and non-governmental organizations for funds. Financial constraints have often discouraged the African Commission from developing and implementing various activities promoting human rights in the region.

In spite of its shortcomings, the African Commission is still a worthwhile focus for human rights advocacy. Its complaint mechanism is available as a further means to address human rights violations when justice has not been obtained within national courts. Moreover, the influence of its decisions will grow with the frequency of its usage. As a regional human rights institution, its decisions and recommendations can provide guidance for all states that are parties to the *African Charter*. Although no mechanism to enforce its decisions exists, the experience of human rights advocates at the international level has demonstrated that publicly declaring human rights violations in an international forum may successfully pressure governments to take action. Thus, the scope of its potential influence remains strong.

“... the *African Charter* on Human and Peoples’ Rights represents a significant new and challenging normative framework for the implementation of economic, social and cultural rights, placing the implementing institutions of the *African Charter* and human rights advocates working in or on Africa in a position to pioneer imaginative approaches to the realization of these rights.”

Source: Chidi Anselm Odinkalu, “Analysis or Paralysis or Paralysis by Analysis? Implementing Economic, Social and Cultural Rights Under the *African Charter* on Human and Peoples’ Rights” 23:2 *Human Rights Quarterly* (2001) 327 at 335.

The creation of the African Court may serve to further define the role of the African Commission and provide a more effective institutional structure for promoting and protecting human rights.

### **The Functions of the African Commission**

The functions of the African Commission are set out in Article 45 of the *African Charter*. Paragraph one of Article 45 states that the African Commission aims:

1. To promote Human and Peoples’ Rights and in particular:
  - a) To collect documents, undertake studies and researches on African problems in the field of human and peoples’ rights, organize seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples’ rights, and should the case arise, give its views or make recommendations to Governments.
  - b) To formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples’ rights and fundamental freedoms upon which African Governments may base their legislation.
  - c) Co-operate with other African and international institutions concerned with the promotion and protection of human and peoples’ rights.

<sup>88</sup> See Nsongurua J. Udombaba, “Can the Leopard Change Its Spots? The African Union Treaty and Human Rights”, 17 (2002) *American University International Law Review*, at p.1251

Paragraphs two, three and four of Article 45 also set out some functions that are particularly important to the enforcement of *African Charter* rights:

2. Ensure the protection of human and peoples' rights under conditions laid down by the present *African Charter*.
3. Interpret all the provisions of the present *African Charter* at the request of a state Party, an institution of the OAU or an African Organization recognized by the OAU.
4. Perform any other tasks, which may be entrusted to it by the Assembly of the Heads of State and Government.

The African Commission is composed of eleven members who serve in their personal capacity, meaning that they are not representing the views of any government or organization. They are elected by the Assembly of Heads of State of OAU (Assembly of the Union of AU) and are selected so that not more than one person comes from any particular state (Articles 33 and 34 of the *African Charter*). Members are normally selected to provide representation from all of the main regions of the continent – Northern, Eastern, Central, Southern and Western Africa. The Commissioners must make a solemn declaration of impartiality and faithfulness upon their election. Commissioners elect a Chairman and Vice Chairman from amongst themselves. A full-time Secretary for the African Commission is based in Banjul, The Gambia.

**IMPARTIALITY**

Impartiality is essential to the fair hearing of human rights complaints. Impartiality involves treating each side equally and forming an opinion that is not based on any preconceived ideas or outside influence or pressure.

**a) Rules of Procedure**

The African Commission has a set of *Rules of Procedure of the African Commission on Human and Peoples' Rights (Rules of Procedure)* [see **Chapter 7 for the full text of the *Rules of Procedure***] that govern its organization and functioning. The *Rules of Procedure* were adopted in 1988 and amended in 1995. They include details such as the frequency of the African Commission's sessions, its composition, and the functions of the Chairman, Vice Chairman, Secretary General, and committees and working groups. There are rules governing whether sessions will be public or private, designating the working languages, the conduct of debates and votes, and the participation of non-members of the African Commission. Details about the consideration of state reports and of human rights complaints, called communications, are also provided for in the *Rules of Procedure*.

**b) African Commission Sessions**

Twice each year, the African Commission meets to discuss its work. At the meetings, the African Commission reviews human rights communications, examines state reports on the status of human rights in their countries, and responds to other human rights issues, such as new conflict situations. The African Commission makes recommendations and resolutions to express its opinions on various issues and to clarify procedural points that will facilitate its future work. These recommendations and resolutions are presented to the Assembly of Heads of State



(Assembly of the Union) in annual activity reports. It is the Assembly of OAU that must implement any recommendations and resolutions of the African Commission.

The African Commission sessions are usually attended by members of governments, NGO representatives, observers and the media.<sup>89</sup> The first few days of each session are public sittings, while the remainder of the session is usually private. During private sittings, the Commissioners and members of the Commission Secretariat review administrative and financial matters and consider communications (see below) (Rule 32 permits public and private sessions, with the presumption that sessions be public.)

### **c) Consideration of State Reports**

Under the *African Charter*, each country is required to submit a report every two years. The report indicates what steps have been taken to put *African Charter* rights into practice on the national level. Through the state reporting procedure, the African Commission monitors compliance with *African Charter* obligations. Article 62 states:

Each State Party shall undertake to submit every two years, from the date the present *African Charter* comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the present *African Charter*.

State reporting is one of the obligations that a government commits to when it signs and ratifies the *African Charter*.

After a report has been submitted to the African Commission, it reviews the report and sends questions to the government. The state is then invited to send representatives to present the report at the next Commission session. At that time, one Commissioner, who has been selected by the African Commission to examine the report in detail, asks prepared questions. Other Commissioners may also ask questions of the state representative to gather further information on that country's human rights situation.

In practice, there are delays in relaying questions to states and representatives may not appear at the next Commission session.<sup>90</sup> This has resulted in a prolonged review process. Concerned about these delays, the African Commission has decided that state reports will be considered on schedule regardless of whether or not states representatives are present.<sup>91</sup>

At the international level, as with state reporting before the Human Rights Committee (monitoring the *International Covenant on Civil and Political Rights*), for example, the Committee releases observations or recommendations after reviewing the report and hearing the government's oral presentation. At a recent session of the African Commission in Tripoli, Libya from 23 April to 7 May 2001, the African Commission issued concluding observations on state

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<sup>89</sup> See Rachel Murray, *The African Commission on Human and Peoples' Rights and International Law* (2000) at p. 13.

<sup>90</sup> *Ibid*, at p. 17.

<sup>91</sup> Decision of the Commission at its 23<sup>rd</sup> Session, noted in Murray, *ibid*.

reports for the first time. Issuing such observations as a regular practice would provide guidance to governments on how to improve their domestic protection and promotion of human rights. Recommendations would also act as points of reference for the evaluation of future reports and provide some insight into the African Commission's interpretation of the *African Charter* provisions.

Unfortunately, although the *African Charter* has been in effect since 1987, very few State Reports have been submitted. As of May 2002, only 30 states had submitted their initial reports, 12 second reports had been sent, and only one state has sent a third report.<sup>92</sup> This demonstrates that the African Commission has been unable to ensure compliance with this requirement. As a result, the reporting procedure has had little effect on the protection and promotion of human rights at the domestic level. The challenges facing the African Commission are two-fold; it must make the consideration of reports more effective as noted above, but also ensure the cooperation of states in submitting reports to be considered.

#### **d) Communication Procedures**

The African Commission is also responsible for receiving human rights complaints, called communications. The African Commission first assesses a complaint to see if it has sufficient information and whether it is an appropriate matter falling within the African Commission's mandate [see **Articles 46-59 of the *African Charter*, reproduced in Chapter 7 of this manual**]. These preliminary considerations are a determination of admissibility [comment-awkward sentence]. If a communication is admissible, the African Commission then considers the substance of the complaint in more depth and works towards a resolution. Articles 46 through 53 of the *African Charter* and Rules 87-118 of the African Commission's Rules address the procedures to be followed in the consideration of complaints. There are 2 types of communications: "*State Communications*" and Non-State or "*Other Communications*".

#### **CHALLENGE: Many states do not submit reports to the African Commission.**

Is the African Commission useful if states are not complying with one of its major monitoring mechanisms?

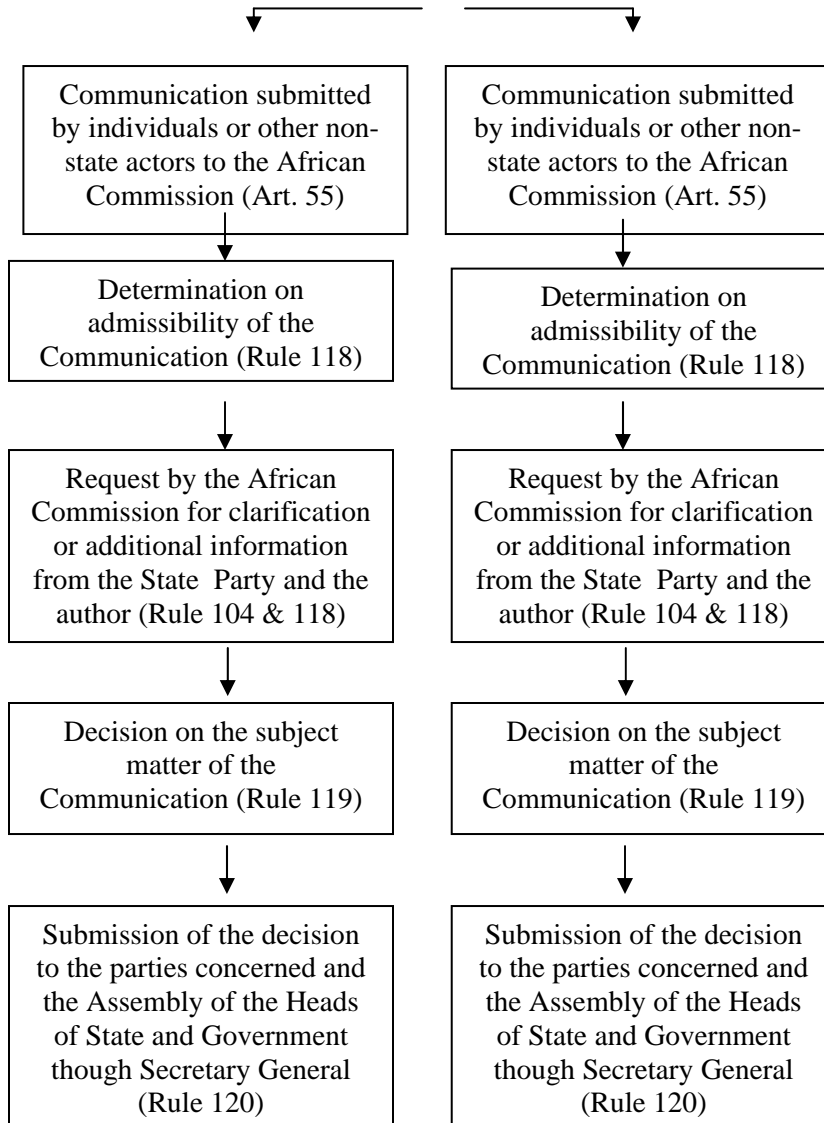
#### **STRATEGY: Encourage your government to submit its report and provide assistance. Submit an NGO report on the status of human rights in your country.**

The African Commission's examination of a government's human rights report can be an excellent opportunity to bring national and international attention to the human rights concerns in your country. The failure of many governments to submit state reports to the African Commission does not mean that the African Commission's procedure is without opportunity. If your country is not submitting its regular reports you can make your voice heard to pressure them to do so. Let them know that you are aware of their commitments under the *African Charter*, commitments that include reporting obligations. Perhaps you can even assist them in preparing their report. Hold a training session for NGOs and government staff explaining how to prepare a country report. You can write your own report for the African Commission whether or not the government is coming through with its report. Highlight human rights issues that are particularly important to your work and give examples from your experience. Make efforts to publicize your report and to appear before the African Commission to speak about your concerns.

For information on preparing a human rights report, see "Preparing Documents to Submit to the African Commission" later in this chapter.

<sup>92</sup> See Rachel Murray, *The African Commission on Human and Peoples' Rights and International Law* (2000) at p. 16.

**Communication procedure under Articles 47-58 of the *African Charter* and Rules 97-120 of the *Rules of Procedure***



The *State Communications* procedure is used very infrequently. State communications are initiated by states that are parties to the *African Charter*. Under Article 47, a state party that believes that another state party has committed a breach of the *African Charter* may call the attention of that state to the matter. Copies of the communication should also be sent to the Secretary-General of the OAU (Chairman of AU) and the Chairman of the African Commission. The state that has been complained against must respond with a written explanation and submit certain documents. If there is no satisfactory resolution within three months, either state may refer the matter to the African Commission (see Article 48).

A State may also submit a communication directly to the African Commission under Article 49. (To date, only one state communication has been filed with the African Commission.) According to its procedure, when a matter is referred to the African Commission by a state party to the *African Charter*, the African Commission requests information and both states involved may submit information in writing or in person through a representative (Article 51). The African Commission would then assist the parties in reaching an amicable solution. If no amicable solution can be reached, the African Commission prepares a report of its findings and submits it to both parties as well as to the Assembly of Heads of State and Government, the governing body of the OAU (Assembly of the Union) (Article 52). Under Article 53 the African Commission may ask the Assembly of Heads of State and Government to make recommendations regarding the matter. There are no provisions for monitoring the implementation of any recommendations given; any follow up rests with the Assembly. State communications, non-state communications, and friendly settlements that have been reached with the aid of the African Commission are all confidential until the OAU Assembly decides otherwise (Article 59).

***Non-State or “Other” Communications*** are complaints received from individuals or non-governmental organizations (see Articles 55-59). The vast majority of communications received by the African Commission to date have been non-state communications. More formal requirements for these complaints are listed in the *African Charter*. For example, individual communications cannot be based solely on news reports and must be submitted within a reasonable time. (For detailed information on submitting a communication, see “Preparing Documents to Submit to the African Commission” later in this chapter.) When received, the communication is given a number, a copy of the allegations are sent to the state involved, and that state is requested to respond within three months. The African Commission considers communications at its twice-yearly sessions. When it makes a decision on the merits of the complaint, a brief decision is produced. These decisions are now published in the African Commission’s *Annual Activity Report* and are available to the public. If the African Commission finds that one or more communications reveal the existence of a series of massive violations of human and peoples’ rights, the African Commission may draw such cases to the attention of the Assembly of Heads of States and Governments (Assembly of the Union). Under Article 58 of the *African Charter*, the Assembly of Heads of States in special cases may direct the African Commission to “undertake an in-depth study of these cases and make a factual report, accompanied by its findings and recommendations.”

The number of complaints received by the African Commission so far has been very limited. As well, the decisions regarding the complaints that are received are generally very short and thus provide little information on the African Commission's reasoning. However, it has been noted that the quality of the African Commission's reasoning has improved over the years, although there is still much room for further improvement.<sup>93</sup>

The major drawback of the African Commission's decisions on state and other communications is that, like the decisions and observations of other international human rights treaty bodies, they do not bind states to take steps. As a result, they "attract little, if any, attention from governments and the human rights community."<sup>94</sup> Public outreach and media relations will be an essential aspect of an advocacy strategy focused on the African Commission. The influence of the institution, like other international human rights monitoring institutions, comes from bringing attention to the fact that governments are falling short of their commitments. International discussion of government failures can shame a government into action. In ratifying the *African Charter*, each government made a commitment, both to its citizens and to other regional governments, to respect the *African Charter* and uphold the rights contained in it. Publicity will also encourage wider discussion of reproductive and sexual health issues among the public.

### *How Many Violations per Communication*

From the wordings of Article 58(1), of the *African Charter*, it would seem that the African Commission can only consider a communication when the latter reveals a series of serious and massive violation of human and peoples' rights and only after the Assembly of Heads of State and Government (Assembly of the Union) has requested it to do so. However, the practice of the African Commission has been to consider every communication even if it refers to only a single violation of the *African Charter*. The rationale behind this practice is that a single violation still violates the dignity of the victim and is an affront to international human rights norms.

**CHALLENGE:** The African Commission seems irrelevant to my daily life and work. It is far away and I do not hear about it. Is it worth the effort to advocate for women's rights at that level?

**STRATEGY:** While the practical challenges are real, obtaining positive pronouncements on women's rights from a regional human rights institution could be very useful to local and national advocacy initiatives.

One of the current challenges facing the African Commission is that it is not well known throughout the continent. Publicizing the work that you do with the African Commission and educating people about its mandate can go a long way to strengthening its influence. While it is essential to work at the local and national levels, advocating at a regional institution may bring new pressure to bear on your government and encourage it to act. Your regional advocacy efforts can have the effect of making the African Commission more relevant.

<sup>93</sup> Chidi Anselm Odinkalu & Camilla Christensen, "The African Commission on Human and Peoples' Rights: The Development of its Non-State Communication Procedures," 20 *Human Rights Quarterly* 235, 277 (1998).

<sup>94</sup> Makau Matua, "The African Human Rights Court: A Two-Legged Stool?," 21(2) *Human Rights Quarterly* 342 (1999) at 348.

### *Emergency Communications*

Every communication should indicate if the victim's life, personal integrity or health is in imminent danger. In such emergency situations, the African Commission has the powers under Rule 111 of its Rules of Procedure to adopt provisional measures, thereby urging the State concerned not to take any action that will cause irreparable damage to the victim until the African Commission has heard the case. The African Commission can also adopt other urgent measures as it sees fit.

### **e) Other African Commission Functions**

In addition to the two main protective functions of reviewing state reports and considering complaints, the African Commission has:

- Undertaken missions to various states to investigate the protection of human rights;
- Appointed three Special Rapporteurs on the topics of women's rights, prisons and conditions of detention, and extra judicial, summary or arbitrary executions; and
- Provided some interpretive guidance by adopting recommendations that elaborate on certain *African Charter* rights, drafting the additional protocol on the rights of women, and by issuing guidelines for state reports.

### **The African Union and the Current Human Rights System**

As mentioned in the introduction, the AU is committed to enhancing human rights in Africa. The *Constitutive Act* that established the AU provides general references to protection and promotion of human rights. However, until the *Constitutive Act* is fully implemented, a number of issues need to be resolved.

Articles 3(e) and (h) of the *Constitutive Act* respectively call member states to “encourage international co-operation, taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights” and to “promote and protect human and peoples’ rights in accordance with the *African Charter* and other relevant human rights instruments.” In addition, the *Constitutive Act*, under Articles 3(l) and (m), provides the promotion of gender equality and the “respect for democratic principles, human rights, the rule of law and good governance.”

#### THE COURT OF JUSTICE

The *Constitutive Act* establishes a Court of Justice but does not set out its relationship with, nor the fate of, the existing human rights organs – the African Commission and the forthcoming African Court.

The *Constitutive Act*, under Article 5(1), establishes nine organs of the AU, but defines the functions of only four: the Assembly of the Union (Article 9), the Executive Council (Article 13), Specialized Technical Committee (Article 15), and the Permanent Representative Committee (Article 21). The General Assembly of the African Union is to determine the functions of the

remaining organs: the Pan-African Parliament, the Court of Justice, the Commission, the Economic, Social and Cultural Council, and the Financial Institutions. Apart from the general reference to human rights, the *Constitutive Act* is silent as to the functions of the Court of Justice, the fate of the existing human rights organs –the African Commission and the forthcoming Africa Court- and the relationship between them.

A similar uncertainty exists for the future of the African Commission. The provisions of the *Constitutive Act* do not expressly recognize the African Commission, though the objectives of the AU and some provisions of the Act indicate that it does support the activities of the African Commission. The *Constitutive Act* provides the Assembly of the Union with three options to deal with the future of the African Commission. First, to devolve the African Commission to the AU as assets of the OAU pursuant to Articles 33(1) and (3) of the *Constitutive Act* that allow for the succession of the OAU organs by the AU. Second, to incorporate the African Commission within the AU in accordance with Article 3(h) of the *Constitutive Act* that provides the promotion and protection of human and peoples’ rights. Finally, to use its power under Articles 5(2) and 9(d) of the *Constitutive Act* and replace the African Commission with a new organ. The same may apply to the fate of the forthcoming African Court, following its creation.

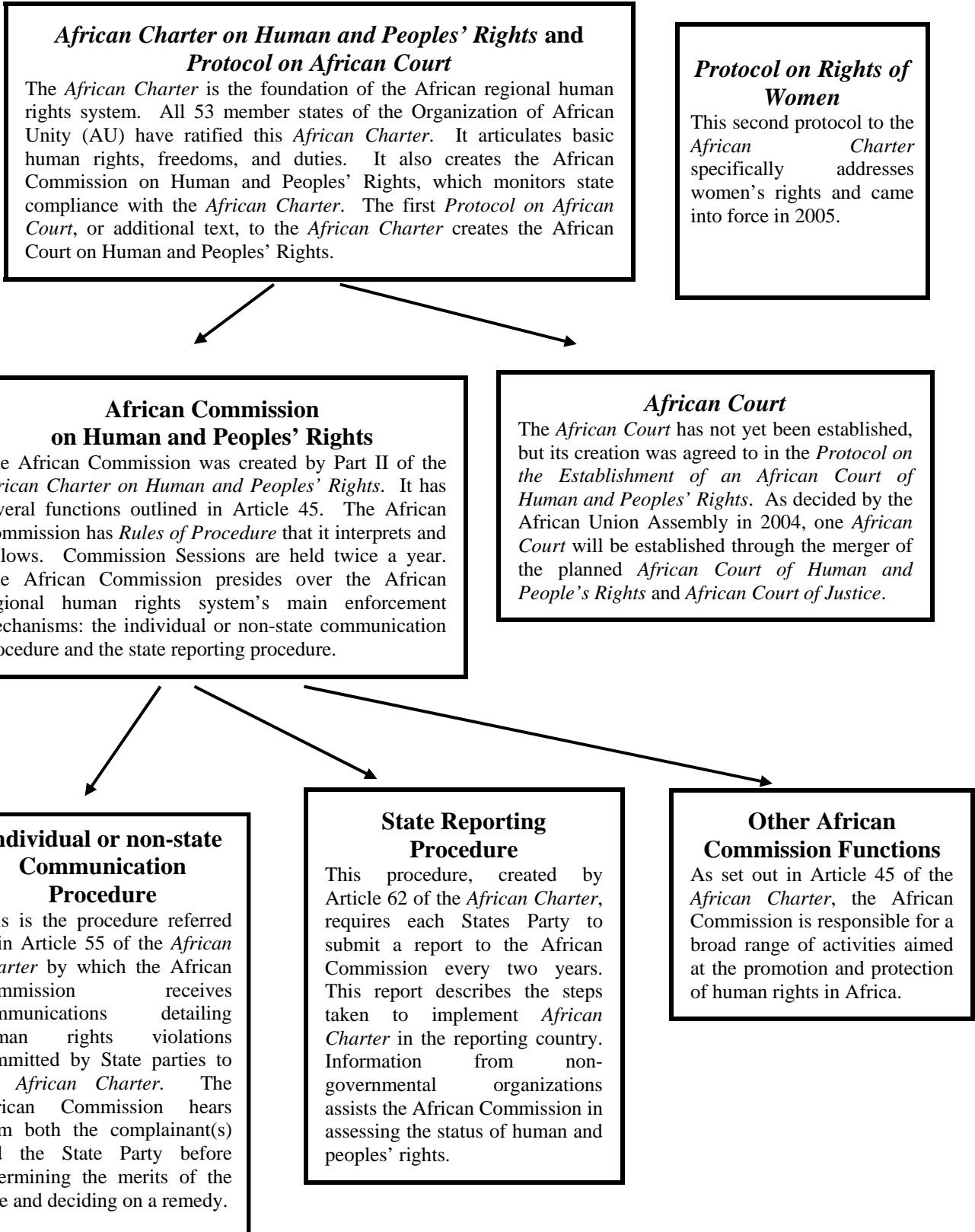
The *Constitutive Act*, on the other hand, has a clear positive impact on the African human rights system. For instance, the Act diminishes the notion of absolute state sovereignty that led the OAU to turn its back on atrocities committed in the continent. While the *Constitutive Act* upholds that traditional commitment of African states to the sovereignty of each member, it also establishes the right of the AU to intervene internally in certain circumstances. Article 4(h) allows the AU to specifically intervene in the case of war crimes, genocide and crimes against humanity. The scope of these crimes and the extent that the AU will intervene will depend on the interpretation of the provision in the future but the very idea of intervention is a positive development in the continent.

**POSITIVE DEVELOPMENT**

A fundamental change that the AU brings to the African human rights system is that the *Constitutive Act* allows member states to intervene into national matters in cases of gross human rights violations.

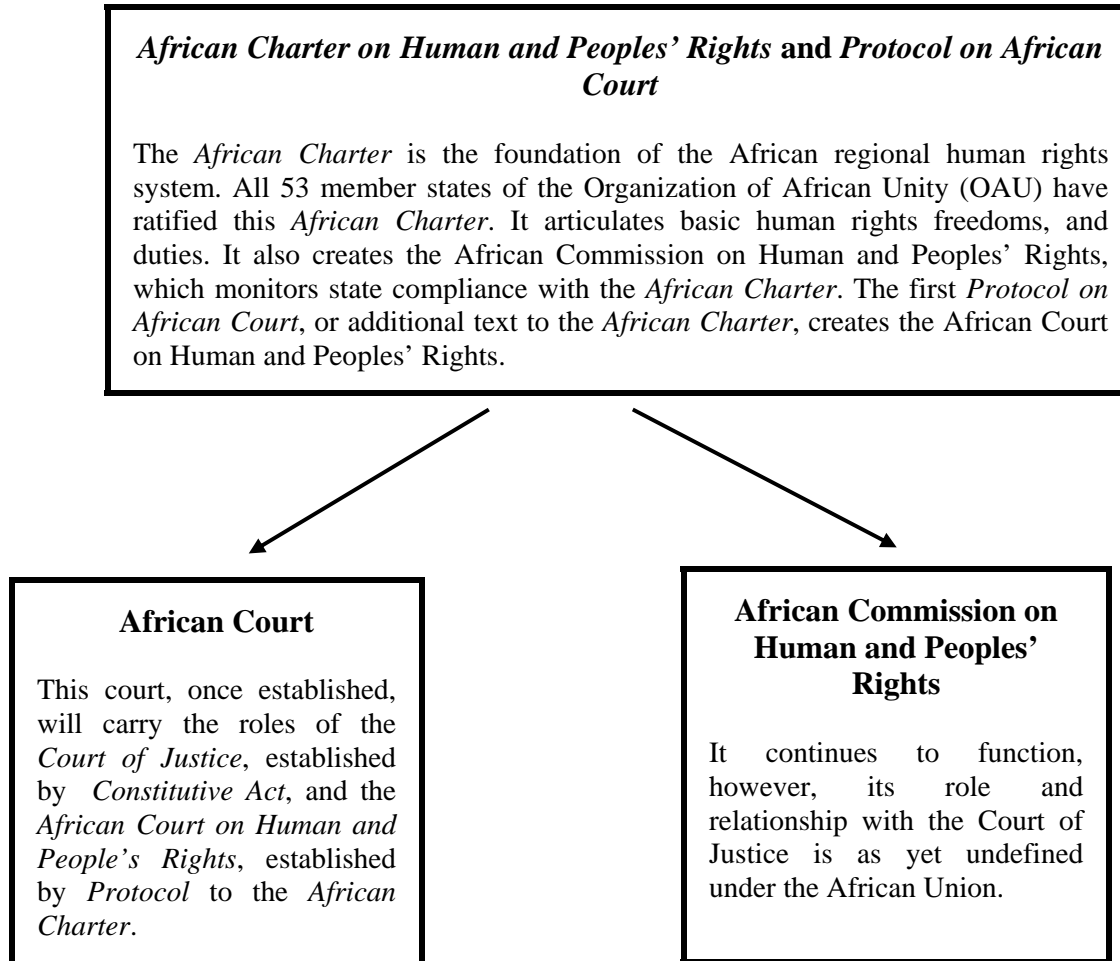
Thus, the creation of the AU is a promising development in the region, as it appears to have been established to address and resolve a number of problems that existed in the former OAU system. If the AU takes fundamental measures to adjust the structural and financial constraints prevalent within the OAU structure, the regional human rights system no doubt will improve. However, much will depend on the political will of national leaders and the international community to enhance human rights in Africa. Like any other regional and international human rights institution, the good will of states is essential to the AU’s success in the future.

***The African Regional Human Rights System under the OAU***





## ***The African Regional Human Rights System under the African Union***



### ***Preparing Documents to Submit to the African Commission***

The next section of this chapter is intended to offer some assistance in preparing:

- a communication to seek redress for a violation of human rights
- a “shadow” report on your country’s compliance with its *African Charter* obligations

A publication prepared by the African Commission provides guidance on what should be included in a communication. This publication is reproduced in full. Following that text, some general advice is provided about the preparation of “shadow” reports.

#### **Submitting a Communication to the African Commission**

The text below is taken from an Information Sheet published by the African Commission. The publication is intended to inform people or groups of people, and state parties to the *African*

*Charter*, about how they can denounce alleged violations of human and peoples' rights within the African human rights protection system. The information covers such matters as:

- The rights and freedoms protected in the *African Charter*
- Conditions for submitting communications
- Emergency communications
- Who can submit a communication
- How many violations per communication
- Legal representation
- A standard format for the submission of communications

The contact details for the African Commission (mailing and e-mail addresses and telephone, fax and Telex numbers) are provided at the end of this reproduced text. **The Information Sheet below is reproduced in full, unaltered, as requested by the African Commission.**

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## **THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS**

### **GUIDELINES ON THE SUBMISSION OF COMMUNICATIONS**

Organization of African Unity

#### **INTRODUCTION**

Most people who suffer human rights abuses sometimes do not know that their rights have been violated, and even if they know, they do not know where or who to turn to for help even within their own countries. It is very important for NGOs and governments to educate people about their human rights and inform them of the local and international remedies available to them when their rights are violated. International intervention is always chosen as a last resort when the local justice delivery system has failed to reinstate the victim in his or her rights.

One of the main functions of the Commission is to attend to communications submitted by individuals, NGOs and States Parties to the African Charter, alleging violations of human rights by these States.

Any person, group of persons or State party alleging a violation should first of all ascertain whether the State committing the violation has ratified the Charter, and in the case of a State, it must have ratified the Charter before submitting a complaint against another State party to the Charter.

By submitting a communication to the African Commission on Human and Peoples' Rights, victims of human rights abuses who for one reason or another could not obtain justice in their countries after exhausting all the available legal remedies, may obtain help.

Under Article 46 of the Charter, the Commission has the power to use any appropriate method of investigation into allegations of human rights abuses. Where the Commission finds that violations have occurred, it makes recommendations to the State(s) concerned; to ensure that the

occurrences are investigated, that the victim(s) is compensated (if necessary) and that measures are taken to prevent the recurrence of the violations.

The Commission's recommendations are submitted to the Assembly of Heads of State and Government of the OAU for adoption. The decision of the Assembly is final.

## **THE RIGHTS AND FREEDOMS PROTECTED IN THE CHARTER**

Understanding the rights and freedoms guaranteed in the Charter is particularly important for the submission of a communication because for any communication to be considered by the Commission, it must in one way or another demonstrate that the State has violated one or some of the rights in the Charter. The complainant need not mention the specific article of the Charter alleged to have been violated, but the facts of the communication should be such that the Commission can deduce the alleged violations.

Two main categories of rights are covered in the Charter:

### **(1) Individual Rights**

These are the rights and freedoms one enjoys as an individual and not because one belongs to a particular community or social grouping or any other association.

These individual rights are divided into civil and political rights on the one hand, and economic, social and cultural rights on the other.

#### **(a) Civil and Political Rights**

- The right not to be discriminated against (**Article 2**)
- Equality before the law (**Article 3**)
- The right to life (**Article 4**)
- The right to inherent dignity and freedom from exploitation, slavery and slave trade; freedom from torture, cruel, inhuman or degrading punishment and treatment (**Article 5**)
- The right to personal liberty and security of the person (**Article 6**)
- The right to a fair trial (**Article 7**)
- Freedom of conscience, worship and religion (**Article 8**)
- The right to receive information and freedom of expression (**Article 9**)
- Freedom of association (**Article 10**)
- Freedom of assembly (**Article 11**)
- Freedom of movement, including the right to leave and enter one's country and the right to seek and obtain asylum when persecuted (**Article 12**)
- The right to participate in the government of one's country and the right of equal access to public service (**Article 13**)

#### **(b) Economic, Social and Cultural Rights**

- The right to own property (**Article 14**)
- The right to work under equitable and satisfactory conditions and receive equal pay for equal work (**Article 15**)
- The right to physical and mental health (**Article 16**)
- The right to education and the freedom to take part in cultural activities in one's community (**Article 17**)
- The family right to protection and assistance from the state, the right to special measures of protection for the aged and disable and the freedom from discrimination of women and children (**Article 18**)

## (2) **Peoples' Rights**

Although the terms 'peoples' rights' have not been defined in the Charter, these rights generally refer to the rights of a community (be it ethnic or national) to determine how they should be governed, as well as how their economies and cultures should develop; they include other rights such as the right to national and international peace and security and the right to a clean and satisfactory environment. This category of rights is also called group or solidarity rights.

### **WHO CAN SUBMIT A COMMUNICATION TO THE COMMISSION?**

Anybody, either on his or her own behalf or on behalf of someone else, can submit a communication to the Commission denouncing a violation of human rights. Ordinary citizens, a group of individuals, NGOs and States Parties to the Charter can all present claims. The complainant or author of the communication need not be related to the victim of the abuse in any way, but the victim must be mentioned.

Complaining on behalf of someone else, for example, a prisoner who can't submit a communication, is a very helpful recourse.

### **LEGAL REPRESENTATION**

Since the preparation, submission and processing of a communication is a relatively straightforward procedure, a complainant or author can act on his or her own without the need for professional assistance. However, it is always useful to seek the help of a lawyer. A lawyer would understand the technical aspects better and would therefore be able to advise, recommend, help to interpret the rights alleged to have been violated, draw up additional arguments, and set out the case in an efficient manner that will demonstrate to the Commission that one or more rights have been violated.

The complainant or his/her legal representative (if any) need not travel to the Commission's session to present or defend a case. The case can be started and concluded only through correspondence with the Secretariat of the Commission. However, should the complainant

opt to be present at any session of the Commission, the Commission will grant him or her audience.

It should be noted that the Commission does not offer legal assistance to complainants. Persons in need of such assistance may approach one of the various legal assistance groups that exist in most countries or the National Bar Associations.

### **CONDITIONS FOR SUBMITTING A COMMUNICATION**

Article 56 of the African Charter outlines seven conditions that must be met before the Commission can consider a communication. These are as follows:

- The communication must include the author's name, even if the author wants to remain anonymous;
- The communication must be compatible with the Charter of the OAU and with the present Charter;
- The communication must not be written in insulting language directed against the state or the OAU;
- The communication must not be based exclusively on news from the media;
- The complainant must have exhausted all available domestic legal remedies;
- The communication must be submitted within a reasonable time from the date of exhaustion of domestic remedies;
- The communication must not deal with a matter that has already been settled by some other international human rights body.

### **HOW MANY VIOLATIONS PER COMMUNICATION**

From the wordings of article 58(1) of the Charter, it would seem that the Commission can only consider a communication when the latter reveals a series of serious and massive violation of human and peoples' rights and only after the Assembly of Heads of State and Government has requested it to do so. However, the practice of the Commission has been to consider every communication even if it refers to only a single violation of the Charter. The rationale behind this practice is that a single violation still violates the dignity of the victim and is an affront to international human rights norms.

### **WHAT A COMMUNICATION SHOULD INCLUDE IN ORDER TO BE VALID**

All communications must be in writing, and addressed to the Secretary or Chairman of the African Commission on Human and Peoples' Rights. There is no form or special format that must be followed, but a communication should contain all the relevant information. If an individual or group of individuals submits the communication, it should include the name(s) of the complainant or complainants, their nationalities, occupation or profession, addresses and signatures. If the communication emanates from an NGO, it should include the address of the institution and the names and signatures of its legal representatives.

If the communication is from a State Party, the names and signature of the State representative, as well as the national seal, are required.

Each communication should describe the violation of human and/or peoples' rights that took place, indicate the date, time (if possible), and place where it occurred. It should also identify the State concerned. The communication should also include the victim's names (even if the latter wants to remain anonymous, in which case, this should be stated), and if possible, the names of any authority familiar with the facts of the case.

It should also provide information indicating that all domestic legal remedies have been exhausted. If all remedies were not exhausted, the communications should indicate the reasons it was not possible to do so.

The complainant should also indicate whether the communication has been or is being considered before any other international human rights body, for instance, the UN Human Rights Committee.

As a general rule, the communication should state only the facts and not be written in vulgar or insulting language. The complaints should be drafted in a clear, simple and straightforward manner, free from unnecessary rhetoric. Any complainant failing to meet these requirements will be notified and where necessary, asked to furnish the Commission with further information.

## **EMERGENCY COMMUNICATIONS**

Every communication should indicate if the victim's life, personal integrity or health is in imminent danger. In such emergency situations, the Commission has the powers under Rule 111 of its Rules of Procedure adopted provisional measures, thereby urging the State concerned not to take any action that will cause irreparable damage to the victim until the case has been heard by the Commission. The Commission can also adopt other urgent measures as it sees fit.

## **STANDARD FORMAT FOR THE SUBMISSION OF COMMUNICATIONS**

As mentioned earlier, there is no hard and fast rule or format for the submission of communications to the Commission, but the following simplified guidelines will make it much easier for would-be complainants to submit their communications.

The guidelines are in two categories: (inter-State communications) and other (individual communications)

### **(A) Guidelines on how to submit communications under articles 48 and 49 (Communications from States)**

1. **Complaining States(s)** (should state amongst other things, its name, official language, and year in which it ratified the Charter).

2. **State party accused of the violation** (state the year the State ratified the African Charter, its official language)
3. **Facts constituting the violation** (Please explain in as much a factual detail as possible what happened, specifying place, time and dates of the violation, if possible.)
4. **Exhaustion of local remedies** (Indicate measures that have been taken to resolve the matter amicable, why this measure failed, or why it wasn't used at all. Also indicate measure taken to exhaust local remedies. Please attach all relevant documents.)
5. **Domestic legal remedies** not yet pursued (Please give reasons why this has not been done.)
6. **Other international avenues** (State whether the case has also been referred to any other international settlement body either at the UN or within the OAU system.)
7. **Complaints submitted to the Secretary General of the OAU and to the accused State.** (These complaint letters should be accompanied by any response from these two sources.)

**(B) Guidelines on how to submit a communication pursuant to article 55 of the Charter (other communications)**

1. **Complainant(s)** (Please indicate whether you are acting on your behalf or on behalf of someone else. Also indicate in your communication whether you are an NGO and whether you wish to remain anonymous.)  
Name.....  
Age .....  
Nationality .....  
Occupation and/or Profession .....  
Address .....  
Telephone/Fax no .....
2. **Government accused of the Violation** (Please make sure it is a State Party to the African Charter.)
3. **Facts constituting alleged violation** (Explain in as much a factual detail as possible what happened, specifying place, time and dates of the violation.)
4. **Urgency of the case** (Is it a case that could result in loss of life/lives or serious bodily harm if not addressed immediately? State the nature of the case and why you think it deserves immediate action from the Commission.)
5. **Provisions of the Charter alleged to have been violated** (If you are unsure of specific Articles, please do not mention any.)

6. **Names and titles of government authorities** who committed the violation. (If it is a government institution please give the name of the institution as well as that of the head.)
7. **Witnesses to the violation** (Include addresses and, if possible, telephone numbers of witnesses.)
8. **Documentary proofs of the violation** (Attach, for example, letters, legal documents, photos, autopsies, tape recordings, etc., to show proof of the violation.)
9. **Domestic legal remedies pursued** (Also indicate, for example, the courts you've been to; attach copies of court judgments, writs of habeas corpus, etc.)
10. **Domestic legal remedies not yet pursued** (Give reasons why they have not been pursued.)
11. **Other International Avenues** (Please state whether the case has already been decided or is being heard by some other international human rights body; specify this body and indicate the stage at which the case has reached.)

For further information, please contact  
African Commission on Human & Peoples' Rights  
90 Kairaba Avenue  
P.O. Box 673  
Banjul  
The Gambia.

Tel. [220] 392962; 372070  
Fax: [220] 390764.

E-mail: [idoc@achpr.org](mailto:idoc@achpr.org)

### ***Preparing a “Shadow Report” for the African Commission State Reporting Procedure***

Non-governmental organizations (NGOs) are considered an essential element of the African Commission process and have been involved since the Commission's inception. The work of NGOs can assist the African Commission to monitor the implementation of the *African Charter* in relation to reproductive and sexual health rights by highlighting *African Charter* provisions that protect women's rights in general and reproductive and sexual health rights in particular. Since state reports tend to minimize problems and maximize accomplishments, NGO reports can be essential in raising awareness of the reality of women's enjoyment of human rights in their countries. NGO reports will also be helpful given the poor reporting record of many states. Find out when your country is required to submit its next report to the African Commission and gather information to add to what the government provides. Try to obtain the government report in



advance and determine its shortcomings. Collaborate with other NGOs if possible. This will strengthen your voice and increase the impact of your concerns.

**Some suggestions for preparing a shadow report:**

1. Keep your report brief. The members of the African Commission have a lot to read and little time. They will be happy to encounter a short document that is to the point. This will require you to prioritize your issues and decide what is most important to include.
2. Gather documentation to support your concerns. Documentation such as statistics, legal cases, testimony of individuals, news clippings, academic research, and excerpts from national and local laws and regulations will support your argument that there is a need for, and a possibility of, change.
3. Organize the information according to articles of the *African Charter*, not by issue. This will facilitate the African Commission's task of reviewing compliance with *African Charter* provisions. If an issue relates to more than one article, elaborate on the issues under the article that is most related and note other articles that may cover the issue.
4. Where possible, refer to the comments of other international treaty bodies in their reviews of your government's compliance with human rights obligations. (Concluding Observations of the major UN treaty bodies can be found at [www.unhchr.ch/tbs/doc.nsf](http://www.unhchr.ch/tbs/doc.nsf).)
5. Provide an executive summary, regardless of the length of the report. An executive summary should be no more than three pages (a very long report may require up to five pages of summary). The summary will highlight the main points of the report, refer to the evidence/data included to support those points, and state recommendations for government action.
6. Include an introduction that provides details on how the report was produced, how documentation was gathered, etc.
7. Provide a list of questions the African Commission can ask the government delegation. The state reporting procedure involves a dialogue where members of the African Commission ask specific questions. NGOs are not permitted to make comments during the examination of a state report, so it is essential that any questions you would like posed to the government be provided to the African Commission before the review session.
8. Organize your recommendations into a separate, easy-to-read section of the report.
9. Don't forget a table of contents and a brightly coloured, eye-catching title page with a title, list of authors and date.

## 6. INTERPRETING RIGHTS IN DOMESTIC COURTS & UNDER THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

### **Chapter 6 Summary: Interpreting Rights in Domestic Courts and under the African Charter on Human and Peoples' Rights**

This chapter demonstrates how legislative provisions related to reproductive and sexual health, and women's rights in general, are interpreted at both national and regional levels. Brief summaries of cases decided by domestic African courts and the African Commission are highlighted in this chapter. The cases illustrate how domestic courts interpret human rights provisions in accordance with their respective constitutions, and in light of the *African Charter*. Although women's rights issues have been litigated infrequently in African courts, important decisions relevant to women's rights have been taken in Africa, and judges have referred to international law in some circumstances. These decisions can act as useful precedents as they are examples of how women's legal rights can be upheld by the courts. This chapter also provides summaries of selected examples of how the African Commission has interpreted provisions of the *African Charter*.

Part I of this chapter presents brief summaries of selected national cases which have addressed reproductive and sexual health rights and gender equality. In particular, cases which have dealt with extramarital sex, sexual orientation, abortion, HIV/AIDS and discrimination, freedom of movement, pregnancy discrimination, property rights, and health rights are summarized. These cases do not necessarily discuss provisions of the *African Charter*; however, they are included to provide readers with a sampling of how various jurisdictions have interpreted issues of sexual orientation, health rights and property rights. The courts' interpretation of constitutional provisions directly affects almost all legislation and regulations, which in turn influences the day-to-day life of people. These cases are particularly important as they often involve the balancing of customary and cultural values against modern human rights concepts.

Part II of this chapter consists of cases that have addressed issues of women's rights or health rights and involved the interpretation of international law and the *African Charter*. Domestic courts, in interpreting the scope of constitutional provisions, often resort to analysis of regional and international human rights instruments and their interpretations. The cases summarized in this section demonstrate the interconnection between national and international human rights, how international law can be a powerful mechanism for the interpretation of national law and practice in African countries, and how women's rights have been recognized in various jurisdictions. In this section, the selected cases illustrate how international or regional human rights norms may be imported into national jurisprudence to override or complement customary and statutory law.

Part III of this chapter examines the work of the African Commission in considering human rights communications. Summaries of particular cases heard by the African Commission provide more detailed information on how it interprets and applies the *African Charter*. The precedents are very important for advocacy work as they illustrate the interpretation of the *African Charter* by the African Commission. The decisions of the African Commission also shed light on the communication procedure and “admissibility requirements” that must be met in order for the Commission to consider a communication. In particular, the cases noted in this section examine the Commission’s treatment of the requirements of providing adequate information and exhausting local remedies. This section also summarizes the few cases where the Commission has had an opportunity to discuss the non-discrimination and equality provisions and the health provisions under the *African Charter*.

What do judges in African countries have to say about women’s rights when such cases come before them in the courts? Do they refer to the *African Charter on Human and Peoples’ Rights* (*African Charter*) or relevant international law? Issues relating to women’s rights have been litigated infrequently in African courts. However, a number of decisions relevant to women’s rights have been issued, and, in a few cases, judges have applied international law. These decisions may serve as positive precedents – useful examples of how women’s human rights can be upheld by the courts. Decisions from other regional human rights systems – the Inter-American and European systems – are also beneficial resources. Please refer to the preface of this handbook for information on the companion volumes that compile reproductive and sexual health rights documents from the Inter-American and European regional systems.

**Part I** of this chapter presents brief summaries of selected national cases that relate to women's rights, reproductive and sexual health rights and gender equality. These cases do not necessarily discuss provisions of the *African Charter*; however, they are included to provide readers with examples of how various jurisdictions have used principles within the *African Charter* in deciding human rights issues. **Part II** of this chapter consists of cases involving the interpretation of international law and the *African Charter*, and those which address issues of women’s rights or health rights. **Part III** of this chapter examines the work of the African Commission on Human and Peoples' Rights (the African Commission) in considering human rights communications. Summaries of particular African Commission cases provide more detailed information on how the African Commission interprets and applies the *African Charter*. The decisions of the African Commission also shed light on the communication procedure and “admissibility requirements” that must be met in order for the African Commission to consider a communication. The final cases summarized in Part III provide the African Commission’s interpretation of the right to health. The right to health is found in Article 16 of the *African Charter*.

## **PART I: NATIONAL INTERPRETATION OF DOMESTIC LAW**<sup>95</sup>

The following section offers case summaries on selected national cases that relate to courts' interpretation of domestic legislation on issues relating to women's rights, reproductive and sexual health rights and equality.

### **Adultery**

#### **(Nigeria)**

In *Amina Lawal v. The State*, USC FT/CRA/1/02, a young single pregnant woman, Amina, was raped and became pregnant. She was then charged and convicted of adultery and sentenced to death by stoning by a lower state court in Katsina state, Nigeria, in March 2002. The fact that she gave birth to a child was considered to be conclusive evidence of the charge. The sentence was upheld by a higher Sharia court, at which point Amina appealed to the regional appellate court. The grounds for the appeal related to Sharia law, fact and procedure. The man who allegedly impregnated her and denied the charge, Yahaya, was acquitted due to a lack of witnesses. The appellate court has postponed a decision on the appeal for a third time, due to reasons unrelated to the case.

↪ *This case illustrates possible repercussions of adopting religious law into criminal law. It is also an example of draconian legislation that is still in place to regulate and punish women for their moral behaviour. This case has provoked the involvement of Amnesty International, human rights organizations as well as international outrage at the charge against the defendant.*

### **Sexual Orientation/Same Sex Relationships**

#### **(Zimbabwe)**

In *Banana v State*, 2000 4 LRC 621; 2000 8 BHRC 345, the Supreme Court of Zimbabwe held that the common law offence of sodomy did not contravene the right of non-discrimination set out in the Constitution of Zimbabwe. The Court affirmed that the law differentiated between gay men and heterosexual men based on their sexual orientation, but that this did not amount to gender discrimination as provided in the Constitution.

↪ *The reasoning of the Court in the case reveals the significant impact of social norms on value judgment made by judges. Citing the prevailing conservative social values, the Court expressly refused to interpret the non-discrimination provision of the Constitution.*

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<sup>95</sup> The following summary of cases are taken from: Kibrom I. Teklehaimanot, Annotated Decisions of African Commonwealth Courts Relating to Reproductive and Sexual Health and Women's Status, *International Programme, Reproductive and Sexual Health Law, Faculty of Law, University of Toronto, Toronto, 2003.*

**(South Africa)**

The South African Cape Provincial Division Court broadly interpreted the term 'spouse' to include same sex relationship in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*, Case No. 3988/98; 1999 (3) SA 173. This case involved the Aliens Control Act of South African, in which the term 'spouse' was defined as a partner involved in a heterosexual

relationship. Same sex partners of South African citizens were not recognized as 'spouses' for immigration and residence purposes. The Cape Provincial Court of South Africa found that the narrow meaning of 'spouse' under the Act was discriminatory based on sexual orientation and that the provision of the Act was unconstitutional.

↳ *The Court recognized sexual orientation as a significant part of life and identity worthy of constitutional protection. The Court's decision in this case shows that the concept of 'equality before the law' includes sexual orientation as a ground. The Court seemed to follow the current trend in many countries to move towards constitutional recognition of same sex relationships. The case illustrates the role which courts can play in reversing the conservative values of African societies towards homosexuality.*

**Excerpt from the judgment of Davis J. of the South African Court of Cape Provincial Division in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*:**

"The Constitution seeks to promote a society in which diversity of identity is respected and protected. In other words, the Constitution seeks to transform the nature of the boundaries, which previously determined the character of the South African community. The Act fails to meet this imperative. Section 25(5) prefers certain forms of life partnership over others. In doing so, it grants legal recognition to certain styles of life and confirms the legal rejection of others. In the context of the constitutional commitment to a plurality of identity and that everyone should be treated with equal concern and respect, it must follow that s. 25(5) cannot be justified on the grounds of fairness."

**(Namibia)**

In *Chairperson of the Immigration Selection Board v Frank & Anor*, Case No. SA 8/99 (unreported), the Namibian Supreme Court held that an administrative body erred when it failed to provide reasons for denying a residence permit to a same sex partner of a citizen. The Court, however, held that neither the Namibian Constitution nor the *African Charter* expressly recognized same sex partners as having equal rights as heterosexuals.

↳ *Sexual orientation is yet to be recognized as a basis for discrimination in most of Africa, save for few exceptions such as in South Africa. This case shows the prevailing interpretation by many African courts that the term 'spouse' referred to a heterosexual relationship only.*

### Abortion

#### (South Africa)

In *Christian Lawyers Association of South Africa & Ors v Minister of Health & Ors*, Case No. 1629/97; 1998(1)BCLR 1434 (T); [1999] 3 LRC 203, an Association challenged the *Choice on Termination of Pregnancy Act* of 1996 before a High Court, arguing that the *Act* violated the right to life of an unborn child. The High Court held that the *Constitution* did not expressly recognize the unborn child to enjoy the right to life. It further held that recognizing the right to life of an unborn child would violate women's rights enshrined in the *Constitution*.

↳ *Central to this case is that the Court weighed the effects of recognizing the right to life of the foetus against other rights namely, women's rights) provided for by the Constitution. The case showed that courts needed to consider all provisions of a given Constitution when interpreting a specific provision.*

**Excerpt from the judgment of McCreath J. of the South African Court of Transvaal Provincial Division in *Christian Lawyers Association of South Africa & Ors v Minister of Health & Ors*:**

“There is no express provision affording the foetus (or embryo) legal personality or protection. It is improbable, in my view, that the drafters of the Constitution would no have made express provision therefore had they intended to enshrine the rights of the unborn child in the bill of rights, in order to cure any uncertainty in the common law and in the light of case law denying the foetus legal personality. One of the requirements of the protection afforded by the *nasciturus* rule is that the foetus be born alive. There is no provision in the Constitution to protect the foetus pending the fulfilment of that condition.”

### HIV/AIDS Status and Discrimination

#### (South Africa)

In *Hoffmann v South African Airways*, 2001 (10) BHRC 571, the central issue was the constitutionality of employment discrimination on the basis of HIV status. The employer refused to hire an HIV positive applicant on the grounds of public safety. The Constitutional Court of South Africa found the discrimination to violate the right to equal protection and fair treatment, provided in s.9 of the South African Constitution.

↳ *In some situations, discrimination based on HIV status has been justified by courts on "public health grounds". The Court in this case, in finding a violation of the Constitution, held that the public health consideration should be based on scientific findings and must strike the appropriate balance between society's safety and the impact on the individual's life.*

#### (Botswana)

The central issue in *Makuto v State*, [2000] 5 LRC 183 was whether or not positive HIV status of an individual accused of rape should be considered as an aggravating circumstance. The Court of Appeal of Botswana held that it was not discriminatory to consider the HIV status of an accused in determining sentence, as it is justified in deterring the spread of HIV/AIDS. In this case, however, the evidence did not show that the accused was HIV positive when he committed the crime.

↔ *The Court recognized the importance of deterring people who are HIV positive from committing sexual violence. Given the very nature of sexual violence, the transmission of HIV through rape almost inevitably puts the life of the victim at risk. The Court recognized the deterrent element of the Penal Code as a means of limiting the spread of HIV/AIDS through sexual violence. In some exceptional situations, however, placing an emphasis on the punishment of those who commit such crimes while HIV positive may be unjust, as it puts additional burden on the shoulders of people with HIV, who are already victims of discrimination and stigmatization.*

**(South Africa)**

In *Minister of Health, Members of Executive Council for Health, Free State and Others v Treatment Action Campaign*, Dr. Haroon Saloojee and Others, the Constitutional Court of South Africa held that the South African government had an obligation to take all measures, within the scope of the maximum available resources, to reduce the spread of HIV. The Court required the government to make Nevirapine, a drug that prevents mother-to-child transmission of HIV/AIDS, available in the appropriate public health institutions. Following the pharmaceutical manufacturers' decision to withdraw their case on 18 April 2001, the Court did not proceed with the case.

↔ *In determining the obligation of states to meet the basic needs of citizens, courts usually consider the available resources at the disposal of the governments. This case showed that the access to treatment aspect of the right to health is relative to the level of economic resources of a given country.*

**Freedom of Movement/Discrimination in Immigration Rules**

**(Zimbabwe)**

In *Rattigan and Others v Chief Immigration Officer and Others*, 1995(1) BCLR 1-5 at 2D and 4J; 1995 (2) SA 182 (ZSC), the relevant section of the immigration law was challenged because it may have restricted the mobility of citizen women married to alien husbands, but not that of alien women married to citizen husbands. Immigration law in Zimbabwe required alien husbands of citizen women to fulfil certain criteria relating to renewal of residency permits and deportation. In this sense, the law treated women who had married alien husbands inequitably. The Supreme Court of Zimbabwe held that the law violated the right to freedom of movement of the women under the Constitution of Zimbabwe and hence was unconstitutional.

↔ *Given that the majority of African women are socially and economically dependent on their husbands, restrictions on residency of alien husbands directly affects women. Thus, the residence restrictions imposed on their husbands apply equally to the women. This case clearly shows the interconnection between the well being of women and their right of freedom of movement based upon the residence status of the alien husbands. The women's citizenship rights are significantly affected if they are forced to leave their home country to stay with their alien husbands because of immigration law restrictions.*

**(Zambia)**

In the case of *Nawakwi v. Attorney-General of Zambia*, [1993] 3 LRC 231, the Zambian High Court examined the government's practice of requiring an unmarried woman to swear affidavits and get the father's permission in order to have her children included on her passport. It was

argued that the procedure for applying for these documents amounted to gender discrimination. The Court held that this practice amounted to discrimination on the basis of sex even though the Zambian Constitution did not explicitly include sex or gender among prohibited grounds of discrimination. Every mother must be accorded the same powers as the father, and furthermore, having a passport is a constitutional right.

↳ *Where gender or sex discrimination are not expressly recognized as prohibited grounds of discrimination in a nation's constitution, showing that such discrimination is similar to recognized forms of discrimination opens the door for the courts to address all issues of women's inequality. Unequal treatment by government offices can have a significant impact on women's status in society. A pronouncement from the courts that gender discrimination is unconstitutional is a significant step towards legal equality and greater protection of women's rights including reproductive and sexual health rights.*

### **Pregnancy Discrimination**

#### **(Botswana)**

In *Student Representative Council, Molepolole College of Education v. Attorney General of Botswana* (unreported, Civil Appeal No. 13 of 1994, Misca No. 396 of 1993, judgement delivered on Jan. 31, 1995, and noted in E.K. Quansah, "Is the Right to Get Pregnant a Fundamental Human Right in Botswana?" *Journal of African Law* 97-102 (1995)), the Botswana Court of Appeal found that a college regulation that discriminated against female students was unconstitutional. The regulation required students to inform the college director if they became pregnant. They were then liable to suspension or expulsion.

↳ *This decision relates directly to reproductive health rights. A woman's choice to have a child should not have the effect of limiting her access to education. Policies and regulations that create such serious consequences for pregnant women are discriminatory and inhibit women's ability to make free choices about their reproductive lives.*

#### **(Zimbabwe)**

In *Lloyd Chaduka and Morgenster College v Enita Mandizvidza*, Judgment No. S.C. 114/2001, Civil Appeal No. 298/2000, the Supreme Court of Zimbabwe held that the rules of a private college that expelled students who got pregnant while studying were contrary to Section 23 of the Zimbabwean Constitution which prohibited gender discrimination. The Court also recognized the College as a 'public authority' within the meaning of the *Constitution*.

↳ *This case is significant because it gives broad meaning to the term "public authority," such that a private college is not insulated from constitutional review. Despite the College's apparent private status, the Court considered the impact of the College's activities on the constitutionally protected rights of women. Since the College is open to the public, its rules directly affected human and constitutional rights of the students. The relevant aspect of this case is that the Court held that the rules of the College were discriminatory based on gender because the prohibition of pregnancy applied only to women students, not to the males involved in the pregnancy.*



### Property/Inheritance Rights

#### **(Zimbabwe)**

*Magaya v Magaya*, [1999] 3 LRC 35, involved the determination of constitutionality of customary law that prefers male children to female children in granting inheritance rights. The Supreme Court of Zimbabwe held that customary law relating to inheritance carried complex social and economic values that the communities recognized to be part of their life. The Court should not direct the mandate and purposes of the customary law through their judgments. The Court further held that couples have an option to marry through civil marriage in order to avoid the consequences of the customary law in areas of divorce, inheritance, and so on.

→ The case demonstrated the reluctance of Courts to make changes to the social values of communities, even where these values may be discriminatory under modern human rights concepts. The Court preferred to maintain the existing social values attached to the customary law at issue rather than dealing with the discriminatory impacts of the law against female children. In some cases, property and inheritance rights are determined through customary law practice of a specific community. Thus, this area of law is particularly sensitive to challenges using modern human rights concepts.

#### **(South Africa)**

In *Prior v Battle and Others*, Case No. 0405/98, 1999(2) SA 850, the South African High Court addressed the *South Africa Transkei Marriage Act*, which granted marital power to the husband and excluded specific land from common property. The *Act* had the effect of denying a wife's claim on that specific land. The High Court found sections of the *Act* unconstitutional, as they violated various rights of the wife such as the right to life, the right to dignity and the right to housing.

→ *The case illustrates the role of courts in diminishing gender inequality by striking down discriminatory laws. Unlike other similar courts, the South African Court reversed a central element of customary law in Africa, which recognized a husband as head of a family who may hold sole authority over a wife's rights to property.*

#### **(South Africa)**

The case *Ryland v Edros*, Case No. 16993/92; 1997(2) SA 690, involved the issue of whether the Court should enforce a couple's agreement based on Islamic law, which did not recognize the right of a plaintiff wife to her contribution to enriching common property. The Cape Provincial Division Court held that according to the Constitution, courts had a duty to enforce the agreement between couples under the Islamic law. The Court concluded that the provisions of Islamic law were valid and enforceable and that the wife did not have a

#### **Excerpt from the judgment of Davis J. of the South African Court of Cape Provincial Division in *Ryland v Edros*:**

“...it is inimical to all the values of the new South Africa for one group to impose its values on another and that the Courts should only brand a contract as offensive to public policy if it is offensive to those values which are shared by the community at large, by all right-thinking people in the community and not only by one section of it. It is clear, in my view, that in the *Ismail* case the views (or presumed views) of only one group in our plural society were taken into account.”

right to claim her contribution to common property.

↪ *This case demonstrated the dilemma that faces courts when they are required to balance competing constitutional rights. The Court, in this case, had to weigh the rights of a particular minority group to govern its affairs in specific areas, such as family issues, with the corresponding rights of individuals that may be affected. The case also called for couples to consider the consequences of each type of marriage arrangement in the area of divorce, custody, and inheritance, and marriage contracts.*

### **Health Rights**

#### **(South Africa)**

The Constitutional Court of South Africa's first interpretation of the South African Constitution's right to health was in the case of *Soobramoney v. Minister of Health (Kwazulu-Natal)*, 1998 (1) SA 765 (CC).<sup>96</sup> The appellant suffered from kidney failure and other health conditions, but had been denied dialysis treatment because of a shortage of treatment resources. The hospital had a policy that only patients suffering from treatable kidney disease were given automatic access to renal dialysis at the hospital. Those patients who, like the appellant, suffered from chronic irreversible kidney failure were not automatically admitted to the dialysis programme. In determining whether this denial of treatment was a violation of the appellant's constitutional right to health care services (s.27) and his right to life (s.11), the Court held that given the current lack of resources, an unqualified obligation to meet housing, health care, food, water and social security needs would not be capable of being fulfilled. Sections 27(1) and (2) of the Constitution entitle everyone to have access to health care services provided by the state "within its available resources." The Court found that the hospital's policy dealt with the lack of resources in a reasonable way. If treatment had to be provided to the appellant, it would also have to be provided to all other persons similarly placed, causing the system to collapse.

↪ *While realistic about finite state resources, this decision is disappointing in its hesitancy to explore the meaning of the South African Constitution's guarantees of economic and social rights. The decision highlights the effect of qualifying language in human rights provisions and also emphasizes that effective economic and social rights advocacy will have to demonstrate how real meaning can be given to these rights while at the same time acknowledging limitations on state action.*

## **PART II: NATIONAL INTERPRETATION OF THE AFRICAN CHARTER AND INTERNATIONAL LAW**

The following case summaries are examples of cases where domestic courts have recognized the domestic impact of the *African Charter* or have specifically addressed international women's or health rights in their decisions.<sup>97</sup>

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<sup>96</sup> Available at [www.concourt.gov.za](http://www.concourt.gov.za)

<sup>97</sup> For a discussion on other domestic cases that have recognized the impact of the *African Charter* (but that do not relate to women's rights or health rights) see Frans Viljoen, *Application of the African Charter on Human and Peoples' Rights by Domestic Courts in Africa* 43 *Journal of African Law* 1-17 (1999).

### Use of International Law

#### **(Namibia)**

The High Court of Namibia decision in *Kauesa v. Minister of Home Affairs and Others*, [1995] 1 South Africa Law Reports 51, is a good example of the use of international human rights law at the national court level. The High Court used a comparative law approach and cited international agreements in considering freedom of speech and expression, racial discrimination and defamation with regard to comments made in a television address by a police officer. The Court stressed the impact of international human rights principles in Namibian constitutional jurisprudence, noting the context of international involvement in drafting the Namibian Constitution and that Article 8 of the Constitution (equality/non-discrimination) was based on Article 1 of the *Universal Declaration of Human Rights*. The Court approached international human rights law in two different ways in their reasoning: a) the *African Charter* has been formally recognized by the Namibian government and its provisions are therefore binding on Namibia and form part of Namibian law, and b) although the provisions of the *Universal Declaration* and other international human rights agreements have not become part of Namibian law, they can still be used as aids in interpreting the *Namibian Constitution*. In particular, they refer extensively to the *Universal Declaration* and the *Convention on the Elimination of All Forms of Racial Discrimination*.

↳ *This decision emphasizes that international law can be a powerful tool at the national level.*

*Given the growth of international human rights law and the development of modern national constitutions, courts may be more willing to find international human rights law necessary to properly interpret and enforce national laws. In advocacy, referring to the African Charter and other international human rights instruments can provide you with a wealth of precedents and interpretive authority.*

#### **Excerpt from the High Court of Namibia's decision in *Kauesa v. Minister of Home Affairs and Others*:**

“... The Namibian Government has, as far as can be established, formally recognized the *African Charter* in accordance with art 143 read with art 63(2)(d) of the Namibian Constitution.

“The provisions of the *Charter* have therefore become binding on Namibia and form part of the law of Namibia in accordance with art 143, read with art 144 of the Namibian Constitution.

“It is questionable, however, whether the aforesaid 1982 agreement and the *Universal Declaration of Human Rights* have become part of the law of Namibia. But, even if they are not, their provisions should carry weight when interpreting provisions of the *Namibian Constitution*, such as those which are relevant to the issues in this case and which are discussed or interpreted in the course of this judgment.”

#### **(South Africa)**

In *The State v. Williams*, 1995 (2) SACR 251 (CC), the Constitutional Court of South Africa held that punishing juvenile offenders by whipping was unconstitutional and amounted to cruel, inhuman or degrading punishment. In discussing the meaning of “cruel, inhuman or degrading,”

the Court referred to the jurisprudence of the UN Human Rights Committee and its interpretation of the right to be free from “cruel, inhuman or degrading” punishment within the *International Covenant on Civil and Political Rights*. The Court found that “according to the UNHRC, the assessment of what constitutes inhuman or degrading treatment depends on all the circumstances of the case, such as the duration and manner of the treatment, its physical or mental effects as well as the sex, age and state of health of the victim.” The Court also referred to decisions of the European Commission of Human Rights and the European Court of Human Rights, as well as other national courts. In referring to all these sources of interpretation, the Court held that “the common thread running through the assessment of each phrase is the identification and acknowledgement of society's concept of decency and human dignity.”

↪ *The decision in State v. Williams could be used to distinguish the Constitutional Court's limitation of health rights in Soobramoney, where long-term, chronic care was at issue. The interpretation of “cruel, inhuman or degrading treatment”, which drew in international law decisions and general comments, could be used to require governments to provide short-term, emergency health care such as treatment for VVF (vesico-vaginal fistula) or emergency contraception in cases of rape. These are examples where refusing to provide treatment can be characterized as cruel, inhuman or degrading treatment.*

## **GENDER DISCRIMINATION**

**(Botswana)**

In *Attorney-General of Botswana v. Unity Dow*, [1992] LRC (Const.) 63, the *African Charter* was one of several international treaties referred to by the judge. The Court had to determine whether or not the Botswana Constitution protected citizens from discrimination on the basis of sex. The Constitution included a section prohibiting various kinds of discrimination but did not expressly include reference to sex discrimination. The judge made the following comment about the influence of the *African Charter* in determining the government's responsibilities: “Botswana is a signatory to this *Charter*. Indeed, it would appear that Botswana is one of the credible prime movers behind the promotion and supervision of the *Charter*.” The judge noted that the *African Charter* was not considered binding law since it had not been implemented through domestic legislation. However, the judge stated that domestic legislation should be interpreted in a way that does not “conflict with Botswana's obligations under the *Charter*.”

### **Excerpt from the *Unity Dow* judgement of Judge President Ammissah of the Botswana Court of Appeal:**

“... Botswana is a signatory to this Charter [*African Charter on Human and Peoples' Rights*]. Indeed, it would appear that Botswana is one of the credible prime movers behind the promotion and supervision of the Charter. ... Even if it is accepted that those treaties and conventions do not confer enforceable rights on individuals within the State until Parliament has legislated its provision into the law of the land, in so far as such relevant international treaties and conventions may be referred to as an aid to construction of enactments, including the Constitution, I find myself at a loss to understand the complaint made against their use in that manner in the interpretation of what no doubt are some difficult provisions of the Constitution. ...”

The full text of this decision is available on the Internet at [www.law-lib.utoronto/diana/](http://www.law-lib.utoronto/diana/) under the heading of “Domestic Implementation.”

↪ *This case confirms that where there is no clear conflict between Botswana law and the African Charter, the law must be interpreted to respect human rights within the African Charter. This provides some room to inject African Charter principles into the interpretation of national legislation. In situations where women's rights under certain laws are not explicit, reference to the African Charter will assist the argument that equality and human rights principles require the inclusion of women's rights.*

### **(Nigeria)**

Women's rights to inheritance were considered by the Court of Appeal (Enugu) in *Mojekwu v. Ejikeme*, (2000) 5 NWLR 403. The case involved the *Nrachi Nwanyi* custom of inheritance, which enables a man to keep one of his daughters unmarried – perpetually under his roof to raise the father's children (especially male children who would succeed him). The daughter takes the position of a man in the father's house and she and any of her children are entitled to inherit. In this case, the appellants were claiming rights as heirs through the deceased's daughter, whom they claim was assimilated into the family by *Nrachi*. The Court of Appeal found that the *Nrachi* custom is designed to oppress and cheat women, compromises the basic tenets of family life, and is inequitable and judicially unenforceable. The performance of *Nrachi* is not necessary for a female child to inherit her deceased father's estate. The Court referred to Article 5 of the *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*, which calls on State Parties to modify social and cultural patterns of conduct in order to eliminate prejudices, customs and practices based on the inferiority or superiority of either sex.

↪ *CEDAW and the African Charter call on governments to eliminate "all forms of" and "every" discrimination against women. The non-discrimination provisions are far-reaching and can be used to require governments to act, or to refrain from certain action, as in the previous case. For example, not providing health services that only women need is discriminatory. CEDAW and the African Charter require governments to provide women with adequate and accessible health care.*

### **(Tanzania)**

In *Ephrahim v. Pastory*, [1990] LRC (Const) 757, the Tanzanian High Court dealt with a customary rule of the Haya group that did not permit females to sell clan land. The Court found that the rule violated Article 18(3) of the *African Charter*. This article prohibits discrimination based on sex. The judge deciding the case wrote, "Tanzania has also ratified the *African Charter* on Human and Peoples' Rights which in Article 18(3) prohibits discrimination based on account of sex ... The principles enunciated in the above named documents are a standard below which any civilized nation will be ashamed to fall. It is clear ... that the customary law under discussion flies in the face of our Bill of Rights as well as the international conventions to which we are signatories."

↪ *The reasoning of the Tanzanian High Court demonstrates the power of a human rights analysis. Reference to the African Charter as a regional expression of human rights standards placed the facts of this case in a wider context. Human rights create a standard that countries must meet to show their respect for social justice. Non-discrimination provisions can address the many inequalities women face. As noted above, this provision can be particularly useful in*

*advocating for health care that meets women's needs. Failing to provide health services that only women need is a form of discrimination.*

**(Zambia)**

In *Longwe v. Intercontinental Hotel*, [1993] 4 Law Reports of the Commonwealth 221, the High Court of Zambia confirmed that the constitutional provisions against discrimination applied equally to private and public entities. The Court held that a hotel that did not allow single women to enter its premises was discriminating unlawfully on the grounds of gender. The court noted international conventions, such as the *Convention on the Elimination of All Forms of Discrimination Against Women*, which Zambia has ratified.

↪ *Human rights have traditionally been applied to governments. Through international human rights treaties and national constitutions, governments pledge themselves to respect the human rights of their citizens. Increasingly, human rights principles are being extended to private organizations and individuals. This case demonstrates that once a human rights issue, such as gender discrimination, has been understood as a matter of social justice, the denial of this justice – by any entity, government or private – is seen as wrong and legally punishable.*

**Status of African Charter in Municipal Laws**

**(Nigeria)**

In *Ubani v. Director of State Security Services and Anor*, 7 July 1999, Nigerian Court of Appeal, the appellant claimed that his detention and arrest by plain-clothes operatives of the State Security Service violated his constitutional rights and his rights under the *African Charter*, the *International Covenant on Civil and Political Rights* and the *Universal Declaration of Human Rights*. The respondent asserted, among other arguments, that the lower court did not have jurisdiction since the detention order was signed by the Inspector-General of Police and had been issued in respect of the applicant pursuant to the *State Security (Detention of Persons) Decree No 2* of 1984. In deciding the case, the appeal judges stated that the courts retain jurisdiction in the present case because the fundamental rights protected in the *African Charter* are superior to all municipal laws in Nigeria, and cannot be ousted by decrees of the military government. Decree 2 was found to violate several civil rights contained in the *African Charter*.

↪ *Parties to the African Charter must ensure that all national and municipal laws respect African Charter obligations.*

**What is Meant By “Grounds of Discrimination”?**

International human rights treaties and many national constitutions forbid discrimination that is based on a number of different factors. The *African Charter* prohibits discrimination based on “race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status (Article 2).” This list of factors is referred to as prohibited grounds of discrimination. The factors listed are unacceptable foundations for discrimination.

### **PART III: AFRICAN COMMISSION'S INTERPRETATION OF THE AFRICAN CHARTER**

The African Commission examines communications at its meetings, called Ordinary Sessions, which are held twice each year [See Chapter 5, “The African Human Rights System,” for more information on the African Commission's procedures]. This section first summarizes cases that provide guidance on the African Commission's admissibility requirements, requirements that must be met for the African Commission to consider the merits of a claim of human rights violations. Two cases addressing specific and relevant *African Charter* rights – one on the Article 2 non-discrimination provision and Article 3 equality rights and another on the Article 16 right to health – are also provided and discussed in the context of reproductive and sexual health rights advocacy.

#### **Admissibility Requirements**

The following section provides examples of how the African Commission has addressed admissibility requirements. Admissibility requirements are set out in the African Commission's guidelines on the submission of communications. These guidelines have been included in Chapter 5 of this handbook.

In considering communications, the African Commission first applies a test to decide if it will “seize” the communication, meaning it will accept the communication and look into it further. During the “test of seizure,” the African Commission determines if the communication alleges a violation of the *African Charter* and if the state named in the communication is a party to the *Charter*.

If the communication passes these standards, the African Commission then determines its admissibility. The complainant and the state involved submit their opinions on admissibility before the African Commission makes its decision. If the communication is found to be inadmissible, then the case is closed. If the communication is admissible, then the African Commission proceeds to consider it based on its merits. The determination of admissibility and the consideration of the case on its merits are separate stages. The African Commission considers its decisions legally binding upon the State Parties concerned and works with them to ensure decisions are implemented.

#### **Provision of Adequate Information**

A communication submitted to the African Commission must include adequate information to support the allegation of a violation of the *African Charter*. Some of the necessary details include specific dates, the names of the authors of the communication, and other factual information necessary to describe the *African Charter* violation.

#### **(Algeria)**

In *Centre for the Independence of Judges and Lawyers v. Algeria et al* (Communications 104/94, 109-126/94, 16<sup>th</sup> Session of the African Commission on Human and Peoples' Rights, October 1994), the communication was in the form of a report that described the harassment and

persecution of judges and lawyers in 53 different countries, including 18 African countries. The events described included murder, torture, intimidation and threats.

In determining the admissibility of the communication, the African Commission referred to Article 56 of the *African Charter* and Rule 114(3) of the *Rules of Procedure of the African Commission on Human and Peoples' Rights (Rules of Procedure)*. Article 56 states that “communications ... shall be considered if they...indicate their authors even if the latter requests anonymity.” Rule 114(3) requires that either the author be an alleged victim of a violation or that the communication be submitted in the name of an alleged victim.

↳ *The African Commission declared the communication inadmissible since it did not “give specific places, dates, and times of alleged incidents that would permit the Commission to investigate or even convey to the governments concerns what incident is complained of.” The African Commission also noted that “in this case the author is not an alleged victim, nor is the communication submitted in the name of a specific victim, nor does the complainant allege a series of serious or massive violations that would excuse such vagueness.”*

### **“Exhaustion of Local Remedies”**

One of the key requirements for the admissibility of a communication is the exhaustion of local remedies. This means that a human rights case must go through all the levels of the national court system before it can be taken to the African Commission. The African Commission will not consider a communication unless the applicant has ensured that all local options for seeking a remedy have been attempted. Both non-state communications and state communications are subject to the requirement that local remedies be exhausted (Article 50 of the *African Charter*).

Exhaustion of domestic recourse is a common requirement in all international and regional human rights systems. Before using these systems, the applicant must first address the matter to the appropriate parties for redress within his or her own state. What constitutes a remedy and when it is deemed to be exhausted is determined by the case law of the international or regional treaty body. There is usually the expectation that the applicant has tried to seek a remedy in the domestic courts.

The African Commission has interpreted the meaning of “exhaustion of local remedies” on numerous occasions. The following decisions highlight some of the major considerations.

#### **(Togo)**

In *Jean Yaovi Degli (on behalf of Corporal N. Bikagni), Union Inter africaine des Droits de l'Homme, Commission Internationale de Juristes v. Togo* (Communications 83/92, 88/92, 91/93, 17<sup>th</sup> Session of the African Commission on Human and Peoples' Rights, March 1995), the three communications involved in this decision concerned the torture, maltreatment, attempted murder, assassination, extortion and killing of 18 villagers; murder and mutilation of 15 people; and the shooting of 20 peaceful demonstrators. The African Commission found that the communication provided evidence of serious and mass violations and decided that the circumstances created an exception to the exhaustion of domestic remedies requirement. In its decision, the African Commission stated, “In respect of those situations that appear to evidence a



series of serious or massive violations of human and peoples' rights, the Commission has held on previous occasions that given the great numbers of individuals who allegedly suffered from human rights violations, it cannot hold that the requirement of local remedies should be applied literally in cases where it is impractical or undesirable for the complainant to seize the domestic courts in the case of each individual. Due to the seriousness of the human rights situation as well as the great number of people involved, such remedies as might theoretically exist in the domestic courts are as a practical matter unavailable or 'unduly prolonged.'

↳ *Relying on this reasoning, there may be many other situations "where it is impractical or undesirable for the complainant to seize the domestic courts." Advocates should be aware that there is some flexibility in the strict requirements set out in the African Charter and the Rules of Procedure.*

**(Niger)**

The case of *Union des Scolaires Nigériens – Union Générale des Étudiants Nigériens au Bénin v. Niger* (Communication 43/90, 15<sup>th</sup> Session of the African Commission on Human and Peoples' Rights, April 1994), makes it clear that sufficient information on exhaustion of local remedies must be given to the African Commission in order for it to find a communication admissible. The African Commission sent a request to the complainant to inform the African Commission when local remedies have been exhausted, and there had been no response from the complainant. Since Article 56(5) of the *African Charter* requires the exhaustion of local remedies, the African Commission was unable to proceed with the consideration of the communication without knowing whether such remedies had been exhausted.

↳ *When submitting a communication to the African Commission, complainants should be careful to include all information necessary for the African Commission to deal with the matter. See Chapter 5 of this manual for details on submitting a communication to the African Commission.*

**(Nigeria)**

*Civil Liberties Organization v. Nigeria* (Communication 45/90, 15<sup>th</sup> Session of the African Commission on Human and Peoples' Rights, April 1994) dealt with alleged human rights violations committed against refugees in Nigeria. Court action was taken claiming compensation from the government, and the case was still before the national courts at the time the communication was submitted to the African Commission. The African Commission decided that if a case is still pending before the national courts, then local remedies have not yet been exhausted.

**(Nigeria)**

In an earlier case, *Academic Staff of Nigerian Universities v. Nigeria* (Communication 107/93, 14<sup>th</sup> Session of the African Commission on Human and Peoples' Rights, December 1993), the African Commission held that remedies will not be considered to be exhausted where national courts are seized of the case and no further information is provided.

**(Kenya)**

In *Kenya Human Rights Commission v. Kenya* (Communication 135/94, 18<sup>th</sup> Session of the African Commission on Human and Peoples' Rights, October 1995), the African Commission found that cases that are pending before national courts cannot be considered and that a delay of two months is insufficient to say that local remedies have been unduly prolonged. The African Commission stated that “although it is claimed that the President gave indications that any challenge would not be effective, the complainants must still await the outcome of national procedures.” Once local remedies have been exhausted, the complainant can resubmit the communication to the African Commission.

↳ *These decisions make it clear that you must work your way through the national court system before submitting a communication to the African Commission. The African Commission is an alternative forum for seeking redress if justice is not obtained in the national courts.*

**“Exhaustion of Local Remedies” Requirement where Cases have been 'Unduly Prolonged'**

There is a provision that the “exhaustion of local remedies” requirement can be waived if the process is obviously unduly prolonged (Article 56(5)). The African Commission has not defined a set period of time that qualifies as “unduly prolonged.” This allows the African Commission some flexibility to deal with each situation individually, as demonstrated in the cases below.

**(Gambia)**

*Paul S. Hays v. The Gambia* (Communication 90/03, 16<sup>th</sup> Session of the African Commission on Human and Peoples' Rights, October 1994) established that in situations where one has to obtain the court's permission (known as obtaining “leave”) to appeal a court decision, and if that permission is denied, the African Commission will find that all local remedies are exhausted. However, in this case, the complainant did not apply for leave to appeal within the required time period. The African Commission found that “in other regional human rights systems, notably the European, cases are inadmissible if the national authorities reject the case as being out of time or for failure to meet other formal requirements.” The African Commission then stated that if there is a possibility to appeal “out of time,” meaning that one can apply even though the original time period to apply for leave has passed, then the complainant must apply for leave to exhaust local remedies.

↳ *An advocate should be aware of all the local rules of procedure to ensure that all national options have been pursued before applying to the African Commission.*

**(Nigeria)**

In its decision in *Constitutional Rights Project v. Nigeria* (Communication 60/91, 16<sup>th</sup> Session of the African Commission on Human and Peoples' Rights, 3 November 1994), the African Commission stated that extraordinary, discretionary remedies do not need to be exhausted before the African Commission can consider the case. The case was brought on behalf of several people sentenced to death under the *Robbery and Firearms (Special provision) Decree No. 5* of 1984. The decree does not provide for any judicial appeal of sentences. Sentences are subject to confirmation or disallowance by the Governor of a state. The African Commission described the Governor's power as “a discretionary, extraordinary remedy of a non-judicial nature.” The

African Commission found that the object of the Governor's power of confirmation or disallowance "is to obtain a favour and not to vindicate a right. It would be improper to insist that the complainants seek remedies from sources that do not operate impartially and have no obligation to decide according to legal principles. This remedy is neither adequate nor effective."

↳ *The case was declared admissible since the remedy was "not of a nature that requires exhaustion according to Article 56, paragraph 5 of the African Charter."*

**(Malawi)**

The case of *Krishna Achuthan on behalf of Aleke Banda, Amnesty International on behalf of Orton and Vera Chirwa v. Malawi* (Communication 64/92, 68/92, 78/92, 16<sup>th</sup> Session of the African Commission on Human and Peoples' Rights, October/November 1994) involved issues of imprisonment without legal charge, in addition to unfair trials. Aleke Banda had been imprisoned for 12 years without charge or trial and was being held "at the pleasure of the head of state." Orton and Vera Chirwa were abducted from Zambia, tried without legal representation and sentenced to death for treason. Their sentences were commuted to life imprisonment, and they suffered mistreatment while in prison. The communication also described the arrests of office workers on the suspicion that they had been using office equipment to disseminate propaganda of the pro-democracy movement and detailed extremely poor prison conditions, including overcrowding and torture. It also outlined violations allegedly suffered by Roman Catholic bishops, trade union leaders, striking workers and students.

In the case of Aleke Banda being held without charge or trial, the African Commission found that "[w]here the remedy is at the complete discretion of the executive, the existence of local remedies is futile and to exhaust them would be ineffective." In the case of the alleged mistreatment of Orton and Vera Chirwa and other violations, the African Commission stated that even for those violations "in respect of which no domestic legal action has been brought by the victims or complainants, the African Commission presumes that the state of Malawi had notice" of the situation. This interpretation of the requirement of exhaustion of local remedies indicates that part of the reason for the existence of the requirement is to make the state aware of alleged human rights violations. Continuing on the use of local remedies as notification to the state, the African Commission also found that "given the great numbers of individuals allegedly suffering from human rights violations, and the very fact that the alleged events, if true, would constitute a 'series of serious or massive violations', the state of Malawi could not have been ignorant of the situation prevailing in its territory."

Commenting on the large number of victims and the impracticality of exhausting local remedies, the African Commission noted that they could not "hold the requirement of exhaustion of local remedies to apply literally in cases where it is impractical or undesirable for the complainant to seize the domestic courts in the case of each individual complainant. This is the case where there are thousands of individual victims. Due to the seriousness of the human rights situation as well as the great numbers of people involved, such remedies as might theoretically exist in the domestic courts are as a practical matter unavailable or, in the words of the *African Charter* 'unduly prolonged.'"

↳ *In cases involving discretionary remedies or a large number of victims, advocates should be aware of the flexibility the African Commission has shown in interpreting "exhaustion of local remedies".*

**(Nigeria)**

The complainants in *Civil Liberties Organization v. Nigeria* (Communication 67/91, 14<sup>th</sup> Session of the African Commission on Human and Peoples' Rights, December 1993), alleged that large numbers of people were arrested pursuant to the *State Security and Detention of Persons Decree*. The *Decree* did not permit the court to hear claims regarding violations of fundamental rights under the constitution. The African Commission found that the provisions of the *Decree* "effectively remove[d] all possible local remedies from national law." The African Commission decided that the requirement to exhaust all local remedies need not apply in this case.

**(Nigeria)**

The issue of clauses which prohibit recourse to the courts in national legislation was dealt with again in *Civil Liberties Organization in respect of the Nigerian Bar Association v. Nigeria* (Communication 101/93, 17<sup>th</sup> Session of the African Commission on Human and Peoples' Rights, March 1995) and in *Civil Liberties Organization v. Nigeria* (Communication 129/94, 17<sup>th</sup> Session of the African Commission on Human and Peoples' Rights, March 1995). In these cases the African Commission held that in light of legislation that effectively removes all possible local remedies, it is reasonable to assume that local remedies will be prolonged or yield no results.

**(Zambia)**

In *Rencontre Africaine pour la Defense des Droits de l'Homme v. Zambia* (Communication 71/92, 20<sup>th</sup> Session of the African Commission on Human and Peoples' Rights, October 1996), the African Commission held that the government had failed to demonstrate the availability of local remedies. Since the Zambian government had asserted that the complainant had not exhausted local remedies, the African Commission required the government to prove the non-exhaustion of local remedies as claimed.

The African Commission elaborated on the exhaustion of local remedies requirement in general, providing some insight into the reasoning behind it. The African Commission stated, "[t]he rule requiring the exhaustion of local remedies as a condition of the presentation of an international claim is founded upon, amongst other principles, the contention that the respondent state must first have an opportunity to redress by its own means within the framework of its own domestic legal system, the wrong alleged to have been done to the individual."

The African Commission continued by stating that "[t]his does not mean, however, that complainants are required to exhaust any local remedy which is found to be, as a practical matter, unavailable or ineffective." The African Commission held that when a state government argues that local remedies have not been exhausted, "the government then has the burden of demonstrating the existence of such remedies."

↪ *These cases demonstrate that while complainants are required to exhaust local remedies, this requirement does not include unavailable, ineffective or discretionary remedies. As well, where a state government argues that local remedies have not been exhausted, “the government then has the burden of demonstrating the existence of such remedies.”*

**(Sudan)**

The complainants in *The Law Office of Ghazi Suleiman v. Sudan* (Communication 220/98, 31<sup>st</sup> Session of the African Commission on Human and Peoples' Rights, May 2002), alleged that the Ministry of Education of the Sudan ordered the closure of universities across the country for the purpose of facilitating military mobilization. They argued that the measures taken by the Ministry of Education violated Article 6 (the right to liberty), Article 7(c) (the right to defence), and Article 17(1) (the right to education) of the *African Charter*. The complainants urged the African Commission to take interim measures requiring the government of the Sudan to reopen the universities. The African Commission raised the issue of inadmissibility based on the domestic remedies. The government of the Sudan alleged that the complainants had not exhausted local remedies before bringing their case to the African Commission. The complainants in turn argued that the Constitutional Court and other local institutions suffer from lack of independence and integrity, which render access to local remedies ineffective. The African Commission found the Communication inadmissible because the complainants failed to search for local remedies for a reasonable period of time. One month is too short to exhaust the available local remedies and the complainants did not indicate that they instituted a proceeding in the domestic courts.

↪ *The case shows the significance of an interval between the alleged violation of human rights and the submission of the communication to the African Commission in determining the issue of exhaustion of local remedies.*

**Non-Discrimination and Equality Rights**

The African Commission has had few occasions to discuss Articles 2 and 3 of the *African Charter*, which provide protection against discrimination on the basis of “race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status” (Article 2) and equality before the law and equal protection of the law (Article 3). The following African Commission decisions refer to these articles, the use of other international instruments in interpreting and applying the *African Charter*, and the authority of treaties that have been ratified (but not implemented) in national legal system.

**(Zambia)**

In *Legal Resources Foundation v. Zambia* (Communication 211/98, 29<sup>th</sup> Session of the African Commission on Human and Peoples' Rights, April-May 2001), a challenge was brought against the provision of the *Constitution of Zambia Amendment Act* of 1996, which requires that anyone who wishes to contest the office of President of Zambia has to prove that both parents were Zambian citizens by birth or descent. The Legal Resources Foundation argued that this was discriminatory and that the effect of the amendment was to disenfranchise some 35 percent of the electorate of Zambia from standing as candidates for President in any future elections.

In the course of its decision, the African Commission noted that Articles 60 and 61 of the *African Charter* require the African Commission to draw inspiration from international law on human and peoples' rights as reflected in the instruments of the OAU and the UN as well as other international standard setting principles, and to take into consideration other international conventions and African practices consistent with international norms. The African Commission also emphasized, "international treaties which are not part of domestic law and which may not be directly enforceable in the national courts, nonetheless impose obligations on State Parties."

In addressing the importance of equality rights, the African Commission stated, "[t]he right to equality is very important. It means that citizens should expect to be treated fairly and justly within the legal system and be assured of equal treatment before the law and equal enjoyment of the rights available to all other citizens. The right to equality is important for a second reason. Equality or lack of it affects the capacity of one to enjoy many other rights."

↪ *This decision can be used to stress the centrality of international human rights norms in the interpretation of African Charter rights and to emphasize that women's equality is necessary for the effective enjoyment of numerous other human rights.*

### **Health Rights**

The African Commission has not yet had occasion to address reproductive and sexual health rights directly. The following case involves the right to health, which is found in Article 16 of the *African Charter*. The interpretation of Article 16 provides some guidance as to how health issues, including reproductive and sexual health, may be understood by the African Commission.

#### **(Nigeria)**

In a 2001 case before the African Commission (Communication 155/96, 30<sup>th</sup> Session of the African Commission on Human and People's Rights, October 2001), it was alleged that the Nigerian government failed to prevent the negative impacts of oil exploitation on the environment and the local communities. It was argued that the oil companies exploited the oil reserves and had not considered the toxic effects of the projects on the health of the communities and the environment.

The African Commission held that Article 16 (the right to health) of the *African Charter* call upon African governments to refrain from carrying out, sponsoring or tolerating activities that are detrimental to the environment and individual's health. Article 16 also requires governments to undertake studies by independent monitoring bodies to assess the impact of industrial development projects on the environment and on the local communities. In addition, individuals from the communities must have an opportunity to participate in the decision making process.

↪ *The case shows the interconnection between the environment and health and that the economic benefits of industrial developments should not supersede hazardous effects to the health and well being of local communities. It also demonstrated that the right to health under African Charter entails positive and negative aspects, the duty of governments to take appropriate measures to promote health, and to refrain from activities detrimental to health.*

**(Zaire)**

Massive human rights violations were at issue in **World Organization Against Torture, Lawyers' Committee for Human Rights, Les Témoins de Jéhovah, Union Interafricaine des Droits de L'Homme v. Zaire** (Communication 25/89, 47/90, 56/91, 100/93, 19<sup>th</sup> Session of the African Commission on Human and Peoples' Rights, March 1996). This case involved numerous alleged human rights violations including arbitrary arrests, detentions, torture in detention, extra-judicial executions, persecution of Jehovah's Witnesses, restrictions on freedom of association and freedom of the press, shortage of medicines and the failure of the government to provide basic services such as safe drinking water and electricity. The African Commission found that the right to health includes the duty of government to provide services such as safe drinking water, electricity and medicine. The African Commission referred to Article 16 of the *African Charter*, which states, "every individual shall have the right to enjoy the best attainable state of physical and mental health." The African Commission decided that the government's failure "to provide basic services necessary for a minimum standard of health, such as safe drinking water and electricity, and the shortage of medicine" constituted a violation of Article 16.

↳ *This case demonstrates that the African Commission understands the Article 16 right to health to include rights to "basic services necessary for a minimum standard of health." The government is responsible, through its commitments to the African Charter, to provide these basic services. The challenge for reproductive and sexual health rights advocacy is demonstrating that reproductive and sexual health services fall into this category of "basic services necessary for a minimum standard of health." The application of this idea may be most obvious in situations where women's lives are repeatedly put at risk, for example, in regions where there is a high rate of maternal mortality because of a lack of appropriate health care services. The concept of "basic services" may also apply where women are at risk of contracting HIV/AIDS and other sexually transmitted diseases because quality public education and public health services are unavailable.*