

GENERAL COMMENT OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS: A SOURCE OF NORMS AND STANDARD SETTING ON SEXUAL AND REPRODUCTIVE HEALTH AND RIGHTS

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Abstract

In 2012, during its 52nd ordinary session in Côte d'Ivoire, the African Commission on Human and Peoples' Rights for the first time adopted a General Comment, and did so to clarify the content of articles 14(1)(d) and (e) of the Protocol to the African Charter on the Rights of Women in Africa. The General Comment details steps and measures states must take to protect women from HIV. These include addressing cultural practices that perpetuate the low status of women; ensuring access to comprehensive, reliable, non-discriminatory information on women's health; and ensuring universal access to sexual and reproductive health services. This chapter argues that although the General Comment is not binding on African governments, it serves as a useful tool to set norms and standards on HIV and human rights in Africa. It also examines measures that states and civil society groups, including national human rights institutions, can take to ensure the effective implementation of the General Comment at the national level. Drawing experience from the international human rights system, the chapter examines the role of soft law in creating useful standards in the promotion and protection of human rights in general and sexual and reproductive health and rights in particular.

1 Introduction

More than three decades into the HIV epidemic, Africa continues to bear the greatest burden of AIDS. In particular, sub-Saharan Africa remains the epicentre of the epidemic. According to the Joint United Nations Programme on HIV/AIDS (UNAIDS), an estimated 26 million people were living with HIV in sub-Saharan Africa at the end of 2016, representing approximately 70 per cent of the global total.¹ In the same vein, it was reported that of the 1 million HIV-related deaths globally, the

1 UNAIDS *Global AIDS update report* (2017) 12.

region accounted for about one quarter.² While this was a significant reduction in the number of deaths from previous years globally, Africa remains the region with highest number of HIV-related deaths. More importantly, the number of people on anti-retroviral therapy worldwide increased from 24 per cent in 2010 to approximately 60 per cent (about 20 million people) with about 60 per cent in sub-Saharan Africa at the end of December 2016.³ Despite the significant progress made in curbing the spread of the epidemic in the region – with a decline in new HIV infections and a significant increase in access to anti-retroviral treatment – HIV remains one of the leading causes of death in sub-Saharan Africa.⁴ Moreover, the region continues to face serious social, legal and policy challenges, including stigma, discrimination, gender inequality and other negative norms and practices that render people vulnerable to HIV and hinder access to HIV services.

One of the greatest challenges militating against curbing the spread of the epidemic in sub-Saharan Africa relates to the issue of stigma and discrimination as well as human rights violations. In this regard, the foremost human rights body in Africa, the African Commission on Human and Peoples' Rights (African Commission) has an important role to play in addressing human rights violations in the context of HIV/AIDS. The African Commission, through its broad mandate of promoting and protecting human rights, can assist in setting important human rights norms and standards African governments should adopt in addressing the various human rights challenges raised by the HIV epidemic.

The adoption in 2003 by the African Union (AU) of the Protocol to the African Charter on the Rights of Women in Africa (African Women's Protocol) signified a milestone in the advancement of women's rights in the region.⁵ Prior to this, the foremost African human rights instrument – the African Charter on Human and Peoples' Rights (African Charter)⁶ – had been criticised for inadequately protecting women's fundamental rights. With the entry into force of the African Women's Protocol in 2005, great opportunities exist for African governments to address the gender dimension of the HIV pandemic. The Protocol, hailed for its radical stance, contains a number of important provisions crucial to advancing women's fundamental rights, in general, and sexual and reproductive

2 As above.

3 As above.

4 CD Mathers et al 'Global and regional causes of death' (2009) 92 *British Medical Bulletin* 27.

5 Adopted by the 2nd ordinary session of the African Union General Assembly in 2003 in Maputo, Mozambique, CAB/LEG/66.6 (2003) entered into force 25 November 2005.

6 African Charter on Human and Peoples' Rights, OAU Doc CAB/LEG/67/3/Rev 5, adopted by the Organisation of African Unity, 27 June 1981, entered into force 21 October 1986.

health and rights, in particular.⁷ It breaks new ground on sexual and reproductive health and rights in a number of ways, not least of which are the recognition of women's vulnerability to HIV as a human rights issue; the explicit recognition of women's sexual and reproductive health rights; and access to abortion, albeit on limited grounds.⁸ Indeed, the African Women's Protocol is the first human rights instrument to explicitly recognise women's vulnerability to HIV as a human rights issue. Article 14(1)(d) 'protects a woman's right to self-protection and to be protected from HIV', while article 14(1)(e) protects a woman's right to know her status and that of her partner.⁹ However, these provisions are not clear as to what measures and steps African governments must adopt to fulfil their obligations in this regard. Hence, during its 52nd ordinary session in October 2012, the African Commission for the first time in its 25 year history adopted a General Comment to specifically clarify the nature of states' obligations under articles 14(1)(d) and (e) of the African Women's Protocol.¹⁰

This chapter examines the content and importance of the African Commission's General Comment on articles 14(1)(d) and (e) of the African Women's Protocol as a tool for advancing women's rights in the context of HIV. It argues that although the General Comment is not binding on African governments, it serves as a useful tool to set norms and standards on HIV and human rights in Africa. The chapter also examines the extent to which the General Comment has been put to use, as well as measures that states, civil society groups and national human rights institutions can take to ensure its effective implementation at the national level. Drawing on experiences from the international human right system, the chapter discusses the role of soft law in creating useful standards in the promotion and protection of human rights, in general, and sexual and reproductive health and rights, in particular.

2 Background to the General Comment

The idea of a General Comment was first brought to the attention of the NGO Forum during the 51st ordinary session of the African Commission

7 F Banda 'Blazing a trail: The African Protocol on Women's Rights comes into force' (2006) 50 *Journal of African Law* 72; see also E Durojaye 'Advancing gender equity in access to HIV treatment through the Protocol to the Rights of Women' (2006) 6 *African Human Rights Law Journal* 187.

8 C Ngwena & E Durojaye 'Strengthening the protection of sexual and reproductive health and rights in the African region through human rights: An introduction' in C Ngwena & E Durojaye (eds) *Strengthening the protection of sexual and reproductive health and rights in the African region through human rights* (2014) 1.

9 African Women's Protocol (n 5 above).

10 General Comment on arts 14(1)(d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted during the 52nd ordinary session, Yamoussoukro, Côte d'Ivoire, 9-22 October 2012, <http://www.achpr.org/news/2012/11/d65/> (accessed 28 August 2017).

that took place in Banjul, The Gambia from 18 April to 2 May 2012. The NGO Forum, which usually precedes the ordinary sessions of the African Commission, is one of the largest gatherings of non-governmental organisations (NGOs) and civil society groups in Africa. Thereafter, an initial draft of the General Comment was produced by the Centre for Human Rights, University of Pretoria.¹¹ This was followed by two separate meetings – one in Pretoria, South Africa and the other in Dakar, Senegal – to discuss and build on the initial draft.

The meeting in Pretoria was attended by academics, experts on sexual and reproductive health and rights and civil society organisations focusing on women's rights and HIV, mainly from Eastern and Southern Africa.¹² At the end of this meeting, the draft was updated and then widely circulated across the region for comments. The second meeting in Dakar also comprised academics, experts on sexual and reproductive health and rights and civil society groups working on women rights and HIV, mainly from West and Central Africa.¹³ Representatives of two special mechanisms of the African Commission – the Special Rapporteur on the Rights of Women in Africa and the Committee on the Protection of the Rights of People Living with HIV (PLHIV) and Those at Risk, Vulnerable to and Affected by HIV – also participated in this meeting, which yet again updated the draft text of the General Comment. This final draft was considered and adopted with minor amendments by the African Commission in Yamoussoukro, Côte d'Ivoire, in October 2012.

3 Why a General Comment?

During the process leading to the adoption of the General Comment, one of the important issues that came up for consideration was the relevance or viability of adopting a General Comment, and not another resolution, by the African Commission. Some of the participants at the expert meeting gave several reasons in favour of a General Comment rather than a resolution. First, it was believed that the African Commission had issued so many resolutions, including some specifically on HIV/AIDS,¹⁴ with no clear indication as to their importance or significance, particularly in the

11 The Centre for Human Rights in conjunction with two special mechanisms of the African Commission (Special Rapporteur on the Rights of Women in Africa and the HIV Committee) co-ordinated the drafting process that led to the adoption of the General Comment.

12 This meeting took place in March 2012 and was hosted by the Centre for Human Rights, University of Pretoria.

13 This meeting took place in July 2012 in Dakar, Senegal.

14 See, eg, Resolution on the HIV/AIDS Pandemic – Threat against Human Rights and Humanity adopted at the 29th ordinary session of the African Commission held in Tripoli, Libya, ACHPR Res.53/(XXIX)01; also ACHPR/Res 141 (XXXXIII) 08: Resolution on Access to Health and Needed Medicines in Africa.

absence of proof that states adhere to them.¹⁵ Altogether, the African Commission has issued about 300 resolutions, including thematic, administrative and country-specific resolutions.¹⁶

Second, resolutions are declarations that do not necessarily carry significant legal weight when compared to a General Comment. While both resolutions and General Comments technically are not legally binding, experience has shown that the latter provide interpretative guidance to specific provisions of a treaty. Moreover, judging from the experience of UN treaty-monitoring bodies, General Comments or recommendations have been well received by states, academics, civil society groups and other stakeholders.¹⁷ Third, the wording or content of resolutions are often brief and do not afford the African Commission the opportunity to clearly outline states' obligations regarding important human rights issues.¹⁸ While the guidelines by the African Commission are more elaborate than resolutions, they have been criticised for being vague and sometimes unduly verbose.¹⁹ It was further contended that adopting a General Comment would be consistent with the approach of UN human rights treaty bodies of clarifying the provisions of human rights treaties.²⁰ Moreover, a General Comment would afford the African Commission the opportunity to explicitly outline steps and measures states should take in order to fulfil their obligations in articles 14(1)(d) and (e) of the African Women's Protocol.

Perhaps one of the strongest arguments in favour of a General Comment was the fact that it could be used as an interpretative guide for the provisions of the African Women's Protocol.²¹ This issue is addressed further below.

Another issue that came up relates to the scope of the General Comment, bearing in mind that article 14 of the African Women's Protocol contains ground-breaking provisions on sexual and reproductive health and rights in general. From the outset, the drafters of the General

15 For a detailed analysis of the impact of the Resolutions of the African Commission, see J Biegon 'An analysis of the impact of the resolutions of the African Commission on Human and Peoples' Rights' unpublished LLD thesis, University of Pretoria, 2016; see also J Biegon 'Towards the adoption of guidelines for state reporting under the African Union Protocol on Women's Rights: A review of the Pretoria Gender Expert Meeting, 6-7 August 2009' (2009) 9 *African Human Rights Law Journal* 618.

16 Available on the website of the African Commission.

17 Eg, General Comment 14 of the ESCR Committee on art 12 of the ICESCR has frequently been referred to as the benchmark for determining whether a state is meeting its obligation to realise the right to health.

18 Perhaps due to administrative reasons, most of the resolutions of the African Commission are couched in a few paragraphs.

19 See F Viljoen *International human rights law in Africa* (2012) 372.

20 Virtually all the UN treaty-monitoring bodies issue General Comments to clarify specific rights or provisions of human rights treaties.

21 For a detailed discussion, see M Geldenhuys et al 'The African Women's Protocol and HIV: Delineating the African Commission's General Comment on articles 14(1)(d) and (e)' (2014) 14 *African Human Rights Law Journal* 681.

Comment, made up of academics, activists, members of the African Commission and civil society groups, were clear about its aim. It was aimed at clarifying states' obligations relating to the provisions on HIV/AIDS. While it was recognised that the provisions on HIV intersect with other provisions in article 14, it was believed that limiting the General Comment to HIV/AIDS alone would achieve better results, as opposed to trying to develop an omnibus General Comment for article 14. This was a strategic move. Given that this was the first time the African Commission would be adopting a General Comment, it was important that its contents steered clear of controversy so as to enjoy the support of the African Commission and other stakeholders, including state representatives. Participants at the drafting stage noted that to enjoy the support of the members of the African Commission in adopting the General Comment, its language must be as clear and simple as possible. Indeed, after the adoption of the first General Comment, another General Comment was adopted to deal with other provisions of article 14.²² While this chapter does not intend to focus on General Comment 2 by the African Commission, the discussion in the chapter relating to the way in which the first General Comment can become a useful tool for setting norms and standards on sexual and reproductive health and rights equally applies to General Comment 2.

4 Content of the General Comment

The General Comment is divided into four broad parts: the introduction or Preamble; the normative content; states' obligations; and specific obligations.

4.1 Preamble

In the Preamble, the African Commission identifies the various forms of discriminatory practices against women based on age, sex, gender, socio-economic circumstances and cultural practices, and how these practices prevent them from realising their 'right to self-protection and to be protected'.²³ The African Commission reaffirms that African women have the 'right to the highest attainable standard of health, including sexual and reproductive health and rights'.²⁴ It further explains that while the focus of the General Comment is to clarify the provision of articles 14(1)(d) and (e), this 'should not be read and understood in isolation from other provisions of the Protocol dealing with other aspects of women's human rights'.²⁵

22 General Comment 2 on arts 14(1)(a), (b), (c) and (f) and arts 14(2)(a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2014).

23 General Comment on arts 14(1)(d) and (e) (n 10) above.

24 General Comment (n 10 above) para 4.

25 As above.

Implicit in this is the fact that the provisions of the African Women's Protocol should not be 'compartmentalised', but should rather be interpreted as an integral whole. In essence, the rights guaranteed in article 14 are intrinsically linked to other rights in the instrument.

This clarification by the African Commission is very important in that it facilitates a better understanding of the African Women's Protocol and affirms the indivisibility, interdependence and interrelatedness of all human rights. Moreover, this observation of the African Commission tallies with other UN treaty-monitoring bodies, such as the Committee on Economic, Social and Cultural Rights (ESCR Committee)²⁶ and the Committee on the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW Committee),²⁷ both of which have noted that the enjoyment of the right to health of individuals, in general, and women, in particular, is dependent on other rights such as the rights to life, dignity, privacy and non-discrimination.

Indeed, the African Commission has applied the indivisibility approach in some of its decisions, such as *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria*²⁸ and *International Pen and others (On behalf of Ken Saro-Wiwa) v Nigeria*,²⁹ where it held that a violation of the right to health would impugn the rights to life and other rights. This approach thus requires African governments to adopt a holistic and purposive interpretation of articles 14(1)(d) and (e).

4.2 Normative content

The African Commission explains that while the African Women's Protocol makes the distinction between the right to self-protection and the right to be protected from HIV in article 14(1)(d), this provision is interpreted to refer to 'states' overall obligation to create an enabling, supportive, legal and social environment that empowers women to be in a position to fully and freely realise their right to self-protection and to be protected'.³⁰ Furthermore, an enabling environment must respect women's sexual autonomy and discourage coercive testing or treatment in general. This clarification tallies with the International Guidelines on HIV and Human Rights³¹ and the views of other commentators who have

26 The Right to the Highest Attainable Standard of Health; UN ESCR Committee General Comment 14, UN Doc E/C/12/2000/4.

27 General Recommendation 24 of CEDAW on Women and Health, UN GAOR, 1999, Doc A/54/38 Rev 1.

28 (2001) AHRLR 60 (ACHPR 2001).

29 (2000) AHLR 212 (ACHPR 1998).

30 General Comment (n 10 above) para 12.

31 Office of the United Nations High Commissioner for Human Rights International Guidelines on HIV and Human Rights 2006 consolidated version adopted during the third international consultation on HIV and human rights, 25-26 July 2002, Geneva, Switzerland.

argued that a friendly legal environment will go a long way towards addressing discriminatory practices against women, especially in relation to HIV.³² Ultimately, this will minimise the human rights violations often experienced by women.

Ensuring an enabling environment where women's fundamental rights and freedoms are respected and protected requires states to repeal antiquated and obnoxious laws and practices that are potentially discriminatory against women. At the same time, it also requires that states adopt laws and policies that not only protect women from discrimination, but also advance their fundamental rights. In addition, states must refrain from enacting laws that may further fuel or perpetuate discrimination in society. Thus, laws criminalising HIV transmission, including perinatal transmission of HIV, may be counter-productive and fuel discriminatory practices.³³

According to the African Commission, the 'right to be informed on one's health status includes the right of women to access adequate, reliable, non-discriminatory and comprehensive information about their health'.³⁴ Conversely, the African Commission reasons that 'the right to self-protection and to be protected' includes women's rights to access information, education and sexual and reproductive health services.

The right to self-protection and the right to be protected are also intrinsically linked to other women's rights, including the right to equality and non-discrimination, life, dignity, health, self-determination, privacy and the right to be free from all forms of violence.³⁵ The African Commission discourages the disclosure of an individual's HIV status, unless done in accordance with international standards. Specifically, the African Commission adopts the exceptions for disclosure as provided by the International Guidelines on HIV and Human Rights.³⁶

For many years, the disclosure of an individual's HIV status has remained a thorny issue in many parts of Africa, not least because of the stigma and discrimination still associated with the epidemic. At the wake of the HIV epidemic, caution was thrown overboard and an individual's HIV status was disclosed without regard to ethical considerations. This led to violent reactions and gross violations of human rights.³⁷

32 C Albertyn 'Using rights and the law to reduce women's vulnerability to HIV' (2000) 5 *Canadian HIV/AIDS Policy Law Review* 72.

33 See the Report of the UN Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health on Criminalisation of Same-Sex Relationships, Sex Work and HIV Transmission, 27 April 2010, A/HRC/14/20.

34 General Comment (n 10) para 14.

35 General Comment para 13.

36 International Guidelines on HIV and Human Rights (n 31 above).

37 See eg Centre for the Right to Health (CRH) *HIV/AIDS and human rights: Experiences of people living with HIV in Nigeria* (2001).

Studies have shown that women are more likely to suffer violence and human rights abuses when their partners become aware of their HIV status.³⁸ This has often led to a state of denial among the public, making it difficult for partners to share their HIV status with each other. Healthcare providers sometimes tend to compromise the confidentiality of patients, particularly female patients, through the disclosure of their HIV status to their partners or relatives.³⁹ This not only is unethical but also a violation of the right to privacy and confidentiality of patients.

In this context the General Comment recommends that the disclosure of the HIV status of a person should only take place after attempts have been made to counsel the infected person unsuccessfully, or where the infected person has refused to disclose, a real risk exists of infecting others, and the infected person is not likely to be at risk of violence. This is in line with internationally-accepted standards. It is hoped that policy makers across Africa will ensure that health care providers in both public and private health care institutions adhere to this very important recommendation of the African Commission.

4.3 Nature of states' obligations

Consistent with obligations under international human rights law, the General Comment reiterates that African states are obligated under articles 14(1)(d) and (e) to respect, protect, promote and fulfil women's rights in the context of HIV.

The General Comment explains that the obligation to respect 'requires states to refrain from interfering directly or indirectly with the rights to self-protection, to be protected, and the right to be informed on one's health status and the health status of one's partner'.⁴⁰ Furthermore, it notes that the obligation to protect 'requires states to take measures that prevent third parties from interfering with these rights'.⁴¹

According to the African Commission, the obligation to promote 'requires states to create legal, social and economic conditions that enable women to exercise their rights in relation to sexual and reproductive health'.⁴² The African Commission explains that the obligation to fulfil 'requires states to adopt all necessary measures, including allocation of adequate resources for the full realisation of the right to self-protection and

38 '2001 Global: Stigma, HIV/AIDS and prevention of mother-to-child transmission: A pilot study in Zambia, India, Ukraine and Burkina Faso' (2001).

39 See, eg, C Obermeyer et al 'Facilitating HIV disclosure across diverse settings: A review' (2011) 10 *American Journal of Public Health* 1011; see also A Roux-Kemp 'HIV/AIDS: to disclose or not to disclose: That is the question' (2013) *Potchefstroom Electronic Law Journal* 201.

40 General Comment (n 10 above) para 21.

41 General Comment para 22.

42 General Comment para 23.

to be protected, and the right to be informed of one's health status as well as that of one's partner'.⁴³ An important point to note here is that protecting women from HIV infection requires the political will of African governments. In particular, it requires African governments to allocate more resources towards realising universal access to sexual and reproductive health services.

The General Comment further explains that states have specific obligations under articles 14(1)(d) and (e). These include providing access to information and education, which 'should address all taboos and misconceptions relating to sexual and reproductive health issues, deconstruct men and women's roles in society, and challenge conventional notions of masculinity and femininity'.⁴⁴

The need to address gender stereotypes and taboos in many African countries cannot be overemphasised. This is due to the challenges women, in general, and young women, in particular, often encounter regarding access to sexual and reproductive health information and services in the region.⁴⁵ It has been noted that due to religious beliefs and cultural sentiments around sexual issues, young women are being deprived of crucial information that could enable them lead a healthy life.⁴⁶ In essence, unless women and girls have access to sexual and reproductive health information, they will be unable to enjoy the rights guaranteed under articles 14(1)(d) and (e).

4.4 Specific obligations

In a language similar to that of General Comment 14 of the ESCR Committee, the African Commission notes that states are to 'ensure availability, accessibility, acceptability and quality sexual and reproductive health care services for women'.⁴⁷ States are further enjoined to create an enabling legal and policy framework, which includes 'a supportive, legal and social environment that allows women to control their sexual and reproductive choices in order to prevent HIV transmission'.⁴⁸ Adopting a holistic approach to safeguarding women's rights in the context of HIV, the African Commission requires states to also 'provide access to sexual and reproductive health procedures, technologies and services' that are 'women-centred, appropriate and evidence based; remove barriers to sexual and reproductive health rights; commit resources to provide a

43 General Comment para 24.

44 General Comment para 26.

45 G Kangaude & T Banda 'Sexual health and rights of adolescents: A dialogue with sub-Saharan Africa' in Ngwenya & Durojaye (n 8 above) 251.

46 K Stefiszyn 'Adolescent girls, HIV, and state obligations under the African Women's Rights Protocol' in Ngwenya & Durojaye (n 8 above) 155.

47 General Comment (n 10 above) para 28.

48 General Comment para 33.

comprehensive range of services for the prevention and treatment of every person's sexual and reproductive health and provide redress for sexual and reproductive health violations'.⁴⁹

One of the major threats to women's protection from HIV is their inability to enjoy their sexual and reproductive rights. Women, particularly young women, often lack access to basic information about their sexual and reproductive well-being. Barriers to sexual and reproductive health information and services for young women include the judgmental attitudes of health care providers, and religious or customary practices and laws that often require parental consent before treatment is provided.⁵⁰

During the International Conference on Population and Development in Cairo⁵¹ and the Fourth World Conference on Women in Beijing,⁵² the international community affirmed that women should enjoy their sexual and reproductive health and rights without hindrances, discrimination or violence. It was further agreed that states should prioritise sexual and reproductive health and the rights of women in laws and policies at the national level.⁵³

More recently, the international community has shown more commitment to realising women's rights and addressing gender inequality. This is reflected in the adoption by the UN in September 2015 of the Sustainable Development Goals (SDGs).⁵⁴ Goal 5 aims at achieving gender equality and empowering women and girls. One of the targets is to eliminate harmful practices that undermine the rights and well-being of women and girls.

Despite these developments, African women and girls are still subjected to inhuman and degrading cultural practices, such as widow inheritance, which further predispose them to HIV infection. In some countries in the region, laws still exist that perpetuate inequality by treating women almost as minors or second-class citizens.⁵⁵ Respecting the sexual and reproductive health and rights of women is crucial to reducing susceptibility to HIV. Moreover, access to vital information on sexual and reproductive health for young women will empower them to make

49 General Comment para 38.

50 See E Durojaye 'Access to contraception for adolescents in Africa: A human rights challenge' (2011) Vol 44 *Comparative and International Law Journal of Southern Africa* 1.

51 Report of the International Conference on Population and Development, 5-13 September 2014, UN Doc A/CONF.171/13.

52 Report of the Fourth World Conference on Women, Beijing, 15 September 1995, A/CONF.177/20.

53 As above.

54 UN General Assembly, adopted in September 2015 with 17 major goals to eradicate poverty by 2030.

55 MP Eboh 'The woman question: African and Western perspectives' in E Eze (ed) *African philosophy: An anthology* (1997) 333-337.

informed decisions regarding their sexual well-being. By calling on African governments to invest in sexual and reproductive health services and establish youth-friendly services in their jurisdictions, the African Commission would seem to be echoing the Abuja Declaration.⁵⁶ According to this document, African governments agreed to commit at least 15 per cent of their annual budgetary allocations to the health sector in order to combat the HIV epidemic and address other diseases, such as malaria and tuberculosis, that are affecting the continent. Therefore, it is hoped that this clarification will serve as a wake-up call to African governments and propel them to recommit themselves to the promises made in Cairo and Beijing.

Decisions in some African countries reveal that courts are beginning to take a proactive stance in striking down laws and practices that continue to discriminate against women. Examples of such decisions include the *Bhe* case in South Africa,⁵⁷ where the Constitutional Court rejected and declared as unconstitutional the primogeniture customary practice, which tends to favour male over female children in inheritance matters. According to the Court, this practice is discriminatory and violates the equality clause in the South African Constitution. Similarly, the Nigerian Supreme Court in *Ukeje v Ukeje*⁵⁸ held that a cultural practice among the Igbo in the eastern part of the country that denies inheritance rights to female children is discriminatory and in contravention of the provision of section 42 of the Nigerian Constitution. Also, the Court of Appeal in Botswana has struck down a similar customary practice that denies the right of inheritance to a female child.⁵⁹ The Court held that, given Botswana's commitment to human rights standards, as evidenced by the ratification of international and regional human rights instruments, this discriminatory cultural practice could not be justified. The Court declared that the customary practice was inconsistent with the spirit and letter of the Constitution of Botswana. These cases reaffirm the willingness of courts in Africa to address discriminatory practices against women in the region.

5 What is the legal significance of a General Comment?

As noted earlier, a General Comment is not legally binding on states. However, it may serve as an interpretative guide for a better understanding of the specific provisions of a human rights treaty. To this extent, General Comments may be regarded as 'soft law'. Under international law, 'soft

56 Abuja Declaration on HIV/AIDS, Tuberculosis, Malaria and Other Related Infectious Diseases, Abuja, Nigeria, 24-27 April 2001, OAU/SPS/ABUJA/3.

57 *Bhe & Others v Magistrate Khayelitsha* 2005 (1) BCLR 1 (Constitutional Court).

58 (2014) LPELR-22724 (SC).

59 *Ramantele v Mmusi & Others* (CACGB-104-12) [2013] BWCA 1 (Botswana Court of Appeal).

law' is described as quasi-legal instruments which do not have any legally binding force, or whose binding force is somewhat 'weaker' than the binding force of traditional law, often contrasted with soft law by being referred to as 'hard law'.⁶⁰ Examples include resolutions or declarations of international bodies such as the UN General Assembly, consensus statements and principles.

According to the Vienna Convention on the Law of Treaties,⁶¹ it may be necessary to consider extraneous documents in interpreting a provision of a treaty. Specifically, articles 31 and 32 lay down the procedures to follow in interpreting treaties. Article 31(1) provides that '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose'. Furthermore, article 32 provides:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

Implicit in this provision is the fact that a General Comment may become a source of interpretation of a treaty such as the African Charter or its Women's Protocol. In other words, the African Commission and national courts can use the General Comment to assess a state's commitment to realising women's rights in the context of sexual and reproductive health rights.

Under the UN system, General Comments issued by treaty-monitoring bodies have served as important sources of clarification or interpretation of the provisions of treaties. Examples abound in relation to the work of the ESCR Committee. For instance, General Comment 3 of the Committee on the nature of states' obligations remains an authoritative guidance on what is expected of states in relation to fulfilling their obligations under the Covenant.⁶² Also, General Comment 14 on the right to the highest attainable standard of health is the most authoritative clarification on the meaning and scope of the right to health ever provided. Furthermore, General Comments 12 and 15 on the rights to food and

60 For a detailed discussion, see FC Castaneda 'A call for rethinking the sources of international law: Soft law and the other side of the coin' (2013) *Anuario Mexicano de Derecho Internacional* 355; T Guzman & TL Meyer 'International soft law' (2010) *Journal of Legal Analysis* 173.

61 Vienna Convention on the Law of Treaties 1969 1155 UNTS 331, 8 ILM 679, entered into force 27 January 1980.

62 ESCR Committee General Comment 3: The nature of states parties' obligations (art 2, para 1, of the Covenant) 5th Session 1990 E/1991/23.

water, respectively, serve as normative articulation of states' obligations regarding these rights.⁶³ This is more so since the content and nature of these rights are sketchy under international law.

It should be noted that some of these General Comments have created norms and standards on specific rights they relate to, such that courts often refer to them as interpretative guides in their decisions. For instance, in the *Grootboom*⁶⁴ and *Treatment Action Campaign*⁶⁵ cases, the South African Constitutional Court referred to General Comments 3 and 14 of the ESCR Committee to clarify the government's obligations in arriving at its decisions. Even though the Constitutional Court rejected the minimum core approach expounded by the ESCR Committee in its General Comments, the Court was nonetheless influenced by the clarification provide by the ESCR Committee regarding the nature of obligations imposed on states to realise socio-economic rights. A Kenyan High Court in *POA & Others v Attorney-General*,⁶⁶ which relates to the constitutionality of the Anti-Counterfeiting Act, again referred to the General Comment of the ESCR Committee. Specifically, the Court relied on General Comment 14 of the Committee in finding that the Counterfeiting Act constituted an impediment to access to life-saving medications for people living with HIV in the country.

In addition, the General Comments of the ESCR Committee have influenced some of the jurisprudence of the African Commission. For instance, in the *Purohit* case,⁶⁷ the African Commission's decision was based on the reasoning of the ESCR Committee as provided in some of its General Comments. More importantly, the Principles and Guidelines on the Implementation of Socio-economic Rights under the African Charter,⁶⁸ particularly the section on the right to health, draw extensively from the General Comments of the ESCR Committee. This clearly attests to the importance of the General Comments of the Committee as sources of norms and standards on socio-economic rights.

The General Comment of the African Commission can play a similar influential role on the continent, if it is well disseminated among civil society groups and government institutions. In determining the obligation of a state in relation to articles 14(1)(d) and (e) of the African Women's Protocol, courts can use the General Comment as the 'marking scheme' for this purpose. For instance, the landmark decision by Malawi's High

63 ESCR Committee General Comment 12 on the right to adequate food, 20th session 1999 E/C.12/1999/5; ESCR Committee General Comment 15: The right to water (arts 11 and 12 of the Covenant) 29th session 2002.

64 *Government of the Republic of South Africa v Grootboom* 2000 3 BCLR 227 (CC).

65 *Minister of Health v Treatment Action Campaign & Others* 2002 10 BCLR 1033 (CC).

66 [2012] eKLR.

67 *Purohit & Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003).

68 Adopted by the African Commission on Human and Peoples' Rights during its 48th ordinary session in 2010.

Court declaring forcible HIV testing of sex workers as unlawful and a violation of their rights to privacy, equality, dignity and freedom from cruel, inhuman and degrading treatment, could have benefited from the content of the General Comment.⁶⁹ There was no evidence that the General Comment had been canvassed before the Court in that case as there was no reference to it in the judgment. Given the strong wording of the General Comment on the need for consent to be obtained before HIV testing and the need to create an enabling legal environment for all individuals, the Court could have invoked it to find the Malawian government in breach of its obligation under the African Women's Protocol to protect female sex workers from HIV infection. It was a missed opportunity for the Court to use the General Comment as an important standard-setting document at the national level. This testifies to the lack of knowledge about the General Comment and the fact that more effort is required for creating awareness among civil society groups and other stakeholders at the national level. Crucially, African governments will need to show more commitment to ensuring the proper implementation of the General Comment at the national level.

However, it needs to be stated that the General Comment fails to strongly canvass the rights of vulnerable and marginalised groups, such as gay, lesbian and transgender people. Given that it was the first attempt to adopt a General Comment and the need to win the support of states as well as some conservative members of the African Commission at the time, there was some compromise in the language of the General Comment. At the time of the adoption of the General Comment in 2012, the African Commission was perceived as very reluctant to address human rights violations based on sexual orientation or identity.⁷⁰ More recently, the Commission has shown more willingness in denouncing human rights violations based on gender identity or sexual orientation.⁷¹

6 Putting the General Comment into effective use

While the General Comment is not a binding instrument, it serves as an authoritative interpretation of articles 14(1)(d) and (e) of the African Women's Protocol. This provides great opportunities for civil society groups across Africa to engage with their governments on the importance

69 See *S v Mwanza Police & Others* unreported High Court decision of Malawi decided on 25 May 2015.

70 See, eg, A Ibrahim 'LGBT rights in Africa and the discursive role of international human rights law' (2015) 15 *African Human Rights Law Journal* 263.

71 See, eg, Resolution 275 on Protection against Violence and Other Human Rights Violations Against Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity, adopted during the 55th ordinary session held in Luanda, Angola, from 28 April to 12 May 2014; see also African Commission on Human and Peoples' Rights Report on *HIV, the law and human rights in the African human rights system: Key challenges and opportunities for rights-based responses* (2017) <http://www.achpr.org/news/2017/12/d317/> (accessed 9 February 2018).

of the General Comment. It is important that the General Comment is put into effective use by courts and policy makers at the national level. Therefore, civil society groups and the African Commission will need to create awareness about the existence of the General Comment. In this regard, the General Comment may be used as a tool for advocacy and for interacting with policy makers at the national and regional levels.

Furthermore, it will be necessary to organise a series of workshops or seminars where the importance and relevance of the General Comment are discussed. The General Comment can also be simplified and translated into local languages that can be widely disseminated to organisations working on women's issues in rural areas as well as policy makers and other stakeholders. This is very important as most women in rural or disadvantaged areas often lack formal education and are unable to assert their rights. They are thus susceptible to human rights abuses and HIV infection. Sadly, most of these women do not know how to seek redress for such violations.

Human rights organisations can urge courts or quasi-judicial bodies such as national human rights institutions (NHRIs) to develop norms and standards on women's rights in the context of HIV, drawing inspiration from the General Comment. The African Commission should continuously engage with states and civil society organisations on the implementation of the General Comment. More importantly, the African Commission should require state parties to include in their state reports⁷² steps they have taken to effectively popularise and implement the provisions of the General Comment in their respective jurisdictions.

Currently, however, there is little evidence to show that the General Comment has been put into use by states at the national level. While some civil society groups have continued to disseminate and popularise the General Comment, many African states are yet to embrace the General Comment. Since the African Commission adopted the General Comment, no framework has been established to monitor how states have applied it in their jurisdictions. This would seem to be a major gap which may undermine the significance of the General Comment. To further compound the situation, only few African countries (including Burkina Faso, Malawi, Mauritania, Namibia, Nigeria, Rwanda, Senegal and South Africa) have so far submitted their state reports on steps and measures taken regarding the implementation of the African Women's Protocol.⁷³ This is disappointing and shows that African countries merely pay lip service to advancing women's rights in the region. This state of

72 State parties to the African Charter and African Women's Protocol are required to submit periodic reports every two years to the African Commission outlining the steps and measures they have taken to implement the provisions of these instruments.

73 See, eg, Inter-session Activity Report of the Special Rapporteur on the Rights of Women in Africa presented during the 60th ordinary session of the African Commission from 8-22 May 2017, Niamey, Niger.

affairs has not afforded the African Commission the opportunity to interact with states on their commitments to the African Women's Protocol and to engage with them on how the General Comment has been put into use in their countries. Further, a report on the impact of the African Women's Protocol in selected African countries has revealed mixed reactions as to the extent the instrument is put into effective use.⁷⁴ Surely, much more is expected from the governments on a continent where threats to women's sexual and reproductive health and rights are most severe. The African Commission should require member states to establish national frameworks to oversee the implementation of the General Comment at the national level.

As noted earlier, some civil society groups have already engaged in advocacy work to educate the public and disseminate the General Comment among vulnerable and disadvantaged groups.⁷⁵ However, many organisations focusing on women's rights are still not using the General Comment as expected. Crucially, there is no evidence to show that the General Comment is being cited before courts at the national level across the region. This may suggest that civil society groups engaging in public interest litigation on sexual and reproductive health issues would need to do more by citing the General Comments before courts whenever the opportunity arises.

Some reasons that may account for the low utilisation of the General Comment have to do with the fact that it has not been well received among some civil society groups. First, there have been questions about the legitimacy of these General Comments as some civil society groups this author engaged with have argued that the processes leading to their adoption were far from being representative and participatory. Although some of the drafts of the General Comments were placed on the websites of the African Commission for a few days, many organisations would have wished for more time to enable them engage more with the draft documents before their final adoption.

Second, some civil society groups are of the view that the current process for adopting a General Comment leaves much to be desired. This is because some of the meetings leading to the adoption of the General Comment were sponsored by donor organisations. The initial drafting of a General Comment is sometimes done by consultants or experts hired by donor organisations. While it should be noted that there is nothing wrong

74 See A Ayeni (ed) *The impact of African Charter and the Maputo Protocol in selected African states* (2016).

75 Eg, the Centre for Human Rights at the University of Pretoria has made efforts to simplify the General Comment and has engaged with relevant state delegates and institutions about its importance; also the Dullah Omar Institute, University of the Western Cape has provided training to relevant government institutions about the importance of the General Comment.

with donor organisations supporting the process for the adoption of a General Comment, however, this should be done without any agenda.

7 Conclusion

The General Comment on articles 14(1)(d) and (e) of the African Women's Protocol no doubt is an important milestone in the history of the African Commission. It serves as an authoritative clarification of the obligations of African governments to protect women from HIV infection. In addition, it creates an opportunity for African governments to double their commitment to promoting and protecting women's rights, in general, and sexual and reproductive health and rights, in particular. However, the important clarifications provided by the African Commission in the General Comment will amount to a mere paper promise if adequate efforts are not made for its implementation at the national level. Thus, African governments and civil society organisations will need to forge good partnerships to ensure the full implementation of the General Comment at grass roots level. Moreover, the African Commission will need to re-evaluate the process for the adoption of its General Comments to ensure more transparency and participation by relevant stakeholders. It will also be crucial that civil society groups that litigate at the national level make reference to the General Comment before the courts. Equally, national courts need to take cognisance of the General Comment and apply it in their decisions.