

Background paper: Towards the adoption of reporting guidelines under the African Women's Protocol

## Introduction

The Centre for Human Rights (CHR), which is part of the Faculty of Law at the University of Pretoria, has identified a need to support the African Commission in the development of reporting guidelines under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol or Protocol) in order to promote strengthened state reporting and facilitate subsequent meaningful engagement between state parties and the ACHPR on women's rights. On 6 and 7 August 2009, the CHR facilitates a working meeting in Pretoria with invited experts and members of the African Commission on Human and Peoples' Rights (African Commission). The overall goal of this working meeting is to strengthen the capacity of the African Commission to promote and protect women's rights in Africa through monitoring implementation of the Protocol.

The Protocol is a legally binding multilateral supplement to the African Charter on Human and Peoples' Rights (African Charter), adopted in 2003 by the African Union Assembly of Heads of State and Government. The Protocol entered into force on 25 November 2005. By 30 June 2009, it had been ratified by 27 of the 53 African Union (AU) members, all of which are also state parties to the African Charter.<sup>1</sup>

## State reporting under the African Women's Protocol

According to article 62 of the African Charter, state parties to the Charter are under an obligation to submit reports to the African Commission, on a two yearly basis, setting out the measures they have taken to give effect to the rights under the Charter. As they have accepted the African Women's Protocol as a substantive supplement to the African Charter, it should be assumed that states party to the African Women's Protocol also have to report on the measures taken to realise the Protocol rights when they submit their periodic reports under article 62 of the Charter. This obligation is spelt out explicitly in the Women's Protocol, mirroring the

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<sup>1</sup> See [www.africa-union.org/root/au/Documents/Treaties/Text](http://www.africa-union.org/root/au/Documents/Treaties/Text). The state parties are: Angola, Benin, Burkina Faso, Cape Verde, Comoros, Democratic Republic of the Congo, Djibouti, The Gambia, Ghana, Guinea-Bissau, Lesotho, Liberia, Libya, Malawi, Mali, Mauritania, Mozambique, Namibia, Nigeria, Rwanda, Senegal, Seychelles, South Africa, Tanzania, Togo, Zambia and Zimbabwe.

wording in the Charter.<sup>2</sup> This provision was probably included for the avoidance of any doubt, and to serve as a reminder of states about their obligation to submit periodic reports.

It is suggested that states that are party to both the African and the Protocol submit one report, but in two parts: Part A dealing with the African Charter; and Part B dealing with the provisions of the Protocol.

Despite the obligation to submit state reports under the Charter and Protocol, non-reporting and late submission of state reports are likely to continue. By failing to consistently adopt and publicise concluding observations after examining state reports, the Commission itself has also been responsible for undermining the effectiveness of the state reporting procedure. It should also be noted that the mere extension of the scope of the rights to be reported upon is therefore no guarantee of improved implementation.

### Need for Guidelines

State reporting under the Women's Protocol poses additional challenges to the Commission. There is a lack of clarity about the format and content of reporting under the Protocol. Therefore, there is a need to develop guidelines to guide states regarding the format and content of their reports. The practice of the Commission has been to leave questions about the Women's Protocol to the Special Rapporteur on the Rights of Women, who usually poses a series of questions about women's rights without specific reference to the Women's Protocol. As for state practice, the reports of state parties to the Women's Protocol almost universally omit any specific discussion on the measures given to give effect to the Women's Protocol. Women's rights are mostly dealt with as part of the report under article 18(3) of the Charter.

### Content and format of Guidelines

A set of draft guidelines for reporting will be developed and discussed at the meeting. In the development of these guidelines, the Commission should take into account the existing state reporting obligations under:

- CEDAW,
- the AU Solemn Declaration on Gender Equality in Africa, and
- the South African Development Community (SADC) Protocol on Gender and Development.

Because the CEDAW has been ratified by 51 African states, all AU members are obliged to report under the Solemn Declaration, and 12 SADC Member States have signed the Gender Protocol,<sup>3</sup> the extent of potential overlap in obligations is evident.

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<sup>2</sup> Protocol, art 26(1).

<sup>3</sup> Three SADC member states have not signed the Gender Protocol (adopted in 2008): Botswana, Mauritius and Malawi. The Gender Protocol has not been ratified by any

It should also be kept in mind that there are some overlaps between the Protocol and the African Charter on the Rights and Welfare of the Child (which also requires states to report on implementation to the Committee established under the Charter) as well as with other international human rights treaties.

A reporting system should be devised in a way that addresses the recurrent apprehension of states about being overburdened by reporting obligations. Unnecessary duplication should be avoided.

One option would be for states to attach any recently submitted reports under the CEDAW, the SADC Gender Protocol and Solemn Declaration to their African Women's Protocol reports. The guidelines for reporting under the Women's Protocol should then stipulate the additional aspects, unique to the Women's Protocol, on which states have to report.

Such a solution was opted for in the guidelines for reporting under the African Children's Charter, in an effort to create synergy between states' reporting under the UN Convention on the Rights of the Child and its African pendant. 'Guidelines for initial reports of state parties to the African Charter on the Rights and Welfare of the Child' states that

the provisions for the reporting process state party that has already submitted its report to the UN Committee on the Rights of the Child is required to re-submit such report to the African Committee together with a supplementary report devoted to the provisions of the Children's Charter not duplicated in the CRC.<sup>4</sup> The supplementary report must specify the action taken by the state party in response to any recommendations made to it by the UN Committee on the Rights of the Child.<sup>5</sup> If a state party has not yet submitted an initial report to the UN Committee on the Rights of the Child, the state party shall be invited to prepare a complete report on all the provisions of the Children's Charter.<sup>6</sup>

If this strategy is followed, a time limit should be fixed within which the report should have been submitted (for example, within the last three years). Alternatively, the state could be guided to update the relevant information. It may also be required that the report should have been of a certain quality.

The reporting guidelines should highlight areas to be omitted and focused upon by states that submit a recent report together with its Protocol report. The similarities

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member state. Although no state is thus yet obliged to report under the SADC Gender Protocol, these obligations are included as potential obligations on states, which will apply once they have ratified the Gender Protocol.

<sup>4</sup> 'Guidelines for initial reports of state parties to the African Charter on the Rights and Welfare of the Child, para XI, provision 24.

<sup>5</sup> As above, para XI, provision 25.

<sup>6</sup> As above, para XI, provision 26.

and differences between the Protocol and CEDAW, the AU Solemn Declaration and the SADC Gender Protocol should therefore be highlighted in the reporting guidelines to assist states.

#### Overlap and differences between the Protocol and CEDAW

While the significant extent of overlap between the UN and African treaties relating to children made such an approach workable, the much more substantive difference between the CEDAW and the Protocol will pose challenges to the introduction of a similar synergy between the reports under these two instruments. Compared to CEDAW, the Protocol 'speaks in a clearer voice about issues of particular concern to African women, locates CEDAW in African reality, and returns some casualties of quests for global consensus into its fold'.<sup>7</sup> Some particular differences are:

- The Women's Protocol is the first treaty to protect the right to abortion under certain circumstances (art 14(2)).
- A necessary implication of targeting violence against women and 'unwanted or forced sex' in the private sphere is that the Protocol requires domestic violence legislation and the criminalization of 'rape in marriage'. States are under an obligation to enact and enforce laws prohibiting domestic violence.<sup>8</sup>
- Compared to CEDAW, the Protocol provides in greater detail for the protection of women in armed conflict,<sup>9</sup> and reiterates the need to accord women refugees the protection under international law.<sup>10</sup>
- Under the Protocol, the girl-child may, in particular, not be recruited or take direct part of hostilities.<sup>11</sup> The minimum age of marriage must be set at 18, and all marriages must be recorded in writing.<sup>12</sup>
- The Women's Protocol is the first treaty to deal with HIV/AIDS, asserting that women have the right to be informed of the health (including HIV) status of their partners (art 14(1)(d) and (e)). Monogamy is to be encouraged (art 6(c)).
- The minimum age of marriage must be set at 18, and all marriages must be recorded in writing (art 6(b) and (d)).
- The Protocol explores the protection of women in armed conflict in greater depth; especially the girl-child may not be recruited or take direct part of hostilities (art 11(4)).
- The state parties must reduce military spending in favour of social spending, particularly on women (art 10(3)). Women have the right to participate in the maintenance of peace (art 10).
- Women have the right to food security (art 15); and to adequate housing (art 16).

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<sup>7</sup> F Viljoen, *International Human Rights Law in Africa* (2007) 271.

<sup>8</sup> Art 4(2), calling on states to prohibit violence against women 'in private or public'.

<sup>9</sup> Art 11.

<sup>10</sup> Art 4(2)(k).

<sup>11</sup> Art 11(4) of the Protocol.

<sup>12</sup> Art 6(b) and (d) of the Protocol.

- The Women’s Protocol addresses multiple oppressions that some women face on the ground of gender as well as disability, poverty, and ‘the loss of a spouse overlap with old age.’<sup>13</sup>

## Overlap and differences between Protocol and SADC Gender Protocol

The Women’s Protocol and the Gender Protocol are similar in many respects. The Gender Protocol specific areas of domestic law and practice, each of which resonates with a particular provision or provisions in the Women’s Protocol: (1) constitutional rights,<sup>14</sup> (2) affirmative action,<sup>15</sup> (3) domestic legislation,<sup>16</sup> (4) equality in accessing justice,<sup>17</sup> (5) marriage and family rights,<sup>18</sup> (6) persons with disabilities,<sup>19</sup> (7) widows and widowers’ rights,<sup>20</sup> (8) the girl and boy child,<sup>21</sup> (9) representation and participation,<sup>22</sup> (10) gender equality in education,<sup>23</sup> (11) economic policies and decision making,<sup>24</sup> (12) economic empowerment,<sup>25</sup> (13) access to property and resources,<sup>26</sup> (14) laws concerning gender based violence,<sup>27</sup> (15) social, economic, cultural, and political practices,<sup>28</sup> (16) support services,<sup>29</sup> (17) training of service providers,<sup>30</sup> (18) health,<sup>31</sup> (19) HIV and AIDS,<sup>32</sup> (20) peace building and conflict resolution,<sup>33</sup> and (21) gender in media content.<sup>34</sup>

Nevertheless there are also several differences that must be taken into account while considering harmonizing state reports for the Gender Protocol and Women’s Protocol. Three major aspects of the Gender Protocol help to distinguish it from the Women’s Protocol:

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<sup>13</sup> As above.

<sup>14</sup> Southern African Development Community Protocol on Gender and Development, Art 4 and Women’s Protocol Art 2.

<sup>15</sup> Gender Protocol, Art 5 and Women’s Protocol, Art 9(1).

<sup>16</sup> Gender Protocol, Art 6 and Women’s Protocol, Art 2.

<sup>17</sup> Gender Protocol, Art 7 and Women’s Protocol, Art 2(a), 2(b), 3(4), 4(1), 4(2g), 7(g), and 21(2).

<sup>18</sup> Gender Protocol, Art 8 and Women’s Protocol, Art 6.

<sup>19</sup> Gender Protocol, Art 9 and Women’s Protocol, Art 23.

<sup>20</sup> Gender Protocol, Art 10 and Women’s Protocol, Art 20.

<sup>21</sup> Gender Protocol, Art 11 and Women’s Protocol, Art 6(j), 7(c), 8(4), 12(c), 13(g), and 20(b).

<sup>22</sup> Gender Protocol, Art 12 and Women’s Protocol, Art 9(2).

<sup>23</sup> Gender Protocol, Art 14 and Women’s Protocol, Art 12.

<sup>24</sup> Gender Protocol, Art 15 and Women’s Protocol, Art 13.

<sup>25</sup> Gender Protocol, Art 17 and Women’s Protocol, Art 13.

<sup>26</sup> Gender Protocol, Art 18 and Women’s Protocol, Art 19(c).

<sup>27</sup> Gender Protocol, Art 20 and Women’s Protocol, Arts 4(2b) and 4(2f).

<sup>28</sup> Gender Protocol, Art 21 and Women’s Protocol, Arts 2(2) and 4(2d).

<sup>29</sup> Gender Protocol, Art 23 and Women’s Protocol, Arts 8(a), 8(b), and 4(2f).

<sup>30</sup> Gender Protocol, Art 24 and Women’s Protocol, Arts 14(2a).

<sup>31</sup> Gender Protocol, Art 26 and Women’s Protocol, Art 14.

<sup>32</sup> Gender Protocol, Art 27 and Women’s Protocol, Arts 14(d) and 14(e).

<sup>33</sup> Gender Protocol, Art 28 and Women’s Protocol, Art 10.

<sup>34</sup> Gender Protocol, Art 30 and Women’s Protocol, Arts 12(1)(b).

- First, the Gender Protocol provides a timeline. Specifically, it requires State Parties to comply with many of its provisions by 2015.
- Second, the content of the Gender Protocol is more concrete than that of the Women's Protocol. For example, in regard to representation, the Gender Protocol notes that 'State Parties shall endeavour that, by 2015, at least fifty percent of decision-making positions in the public and private sectors are held by women.' In doing so, State Parties are required to use affirmative action measures that are outlined in Article 5.<sup>35</sup> By comparison, the Women's Protocol notes that 'State Parties shall ensure increased and effective representation and participation of women at all levels of decision-making.'
- Third, the content of the Gender Protocol in regard HIV and AIDS is more precise and imposes an obligation on governments to provide post-exposure prophylaxis: 'State Parties shall ensure that laws on gender violence provide for the ... care of survivors of sexual offences, which shall include ready access to post exposure prophylaxis at all health facilities to reduce the risk of contracting HIV.'<sup>36</sup>

### Overlap and differences between Protocol and AU Solemn Declaration

Because of its relatively limited scope, its targeted provisions and the frequency of reporting (which is required on an annual basis), the Solemn Declaration may lend itself better to such an attempt to harmonise reporting. In its eight substantive paragraphs directed at the domestic arena of states, the Solemn Declaration addresses nine specific areas of domestic law and practice, each of which resonates with a particular provision or provisions in the Women's Protocol: (1) addressing the impact of HIV and AIDS on women;<sup>37</sup> (2) the inclusion of women in peace processes and post-conflict reconstruction;<sup>38</sup> (3) the prohibition of recruitment child soldiers;<sup>39</sup> (4) the prohibition of the abuse of women as wives and sex slaves;<sup>40</sup> (5) public awareness and sensitisation about gender-based violence and trafficking in women;<sup>41</sup> (6) observance of the parity principle at the national and local level;<sup>42</sup> (7) the promotion and protection of women's rights, including in particular the right to development;<sup>43</sup> (8) the implementation of legislation to guarantee women's land,

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<sup>35</sup> Southern African Development Community Protocol on Gender and Development, Art 12 (emphasis added).

<sup>36</sup> SADC Protocol on Gender and Development, Art 20(2).

<sup>37</sup> Solemn Declaration on Gender Equality in Africa, para 1, provision 1, arts 14(1)(d) and (e) of the Protocol.

<sup>38</sup> Solemn Declaration, para 2, provision 2 and Women's Protocol, art 10.

<sup>39</sup> Solemn Declaration, para 3, provision 3 and Women's Protocol, art 11(4).

<sup>40</sup> Solemn Declaration, para 3, provision 4 and Women's Protocol, 3(3), 3(4) and 4(2)(g).

<sup>41</sup> Solemn Declaration, para 4, provision 5 and Women's Protocol, arts 2(2) and 4(2)(f).

<sup>42</sup> Solemn Declaration, para 5, provision 6 and Women's Protocol, art 9(1)(b).

<sup>43</sup> Solemn Declaration, para 6, provision 7 and Women's Protocol, art 19.

property, inheritance and housing rights;<sup>44</sup> and (9) the need to ensure the right to education for children and literacy for women.<sup>45</sup>

From this brief analysis, it is clear that there is extensive overlap between the issues to be reported upon under the Solemn Declaration and the Protocol. At the same time, the limited scope of the Solemn Declaration leaves much room for additional information to be provided under the many provisions of the protocol not covered. Reporting guidelines under the Women's Protocol should require states to submit their most recent report under the Solemn Declaration, and should further stipulate which provisions still need to be reported on as part of the state report under the Charter and Women's Protocol.

## Conclusion

The need to develop guidelines on reporting under the Women's Protocol is urgent. In developing these guidelines, lessons from the existing guidelines should be incorporated. Emphasis should be placed on a workable set of guidelines that do not overburden states, and take into account their existing reporting obligations.

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<sup>44</sup> Solemn Declaration, para 7, provision 8 and Women's Protocol, art 13.

<sup>45</sup> Solemn Declaration, para 8, provision 9 and Women's Protocol, art 12.

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## GENDER EXPERT MEETING ON STATE REPORTING ON THE PROTOCOL ON THE RIGHTS OF WOMEN IN AFRICA

6-7 AUGUST 2009, PRETORIA, SOUTH AFRICA

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