

Reconciling the need for advancing women's rights in Africa and the dictates of international trade norms: The position of the Protocol on the Rights of Women in Africa

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Summary

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (Women's Protocol) is unique in that it acknowledges that the implementation of trade rules may adversely impact on the human rights of women and attempts to find a solution for this dilemma. This article examines the basis and essence of this novel approach, its significance and its efficacy in addressing the challenge that international trade obligations pose to achieve gender equality, particularly in countries of Africa where women are highly marginalised and discriminated against in almost all spheres of life.

1 Introduction

The atrocities committed during World Wars I and II triggered the development of two fields of international law, international human rights law and international trade law. Trade was seen as a potential solution to deter human rights violations in the future, and it was not envisaged at the time that trade would come in the way of the protection and promotion of human rights. With the proliferation of trade rules and the increase in the volume of trade, there is growing concern that trade rules may come in the way of the protection, realisation and defence of human rights in general. The situation is worse when it comes to the human rights of women.

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The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Women's Protocol) is the first human rights instrument on women to recognise the adverse impact that the implementation of trade rules may have on the rights of women. It is also the first instrument to attempt a solution to address this problem, by requiring state parties to take all appropriate measures to reduce to the minimum the adverse impact of trade rules on women.¹

The first section of this paper briefly sketches the manner of development of the two fields of international law, human rights and trade. The second section looks into current developments that have brought about a close interaction between the two fields of international law. The third section examines the importance of women's rights and places the emphasis on the Women's Protocol. Section four discusses the adverse impact of trade rules on the human rights of women with reference to particular sectors that are significant to the lives of women in Africa: agriculture, services and intellectual property. The way forward in the face of the tension or contradiction between norms of human rights and trade law is discussed in section five. The novel approach employed by the Women's Protocol in this regard is explored in this section. Conclusions are included in the last section of the paper.

2 International human rights and trade law

International human rights law and international trade law² enjoy what can be said to be a common foundation. They are regarded as important instruments for ensuring peace and stabilising relations between states.³ Both are by and large the fruits of the post-World War II period. The international protection of human rights emerged as a response to the gross violations of human rights committed during the two world wars, in particular during World War II,⁴ and the cause of this same event was primarily attributed to economic motivations.⁵

¹ Art 19 of the Protocol reads: 'Women shall have the right to fully enjoy their right to sustainable development. In this connection, the State Parties shall take all appropriate measures to: . . . (f) ensure that the negative effects of globalisation and any adverse effects of the implementation of trade and economic policies and programmes are reduced to the minimum for women.' No comparable provision is found, eg, in the Convention on the Elimination of All forms of Discrimination Against Women.

² International trade law as used in this paper mainly refers to multilateral trade rules or laws as administered by the World Trade Organization.

³ T Cottier 'Trade and human rights: A relationship to discover' (2002) 5 *Journal of International Economic Law* 116.

⁴ K Drzewicki 'Internationalisation of human rights and their juridisation' in R Hanski & M Suksi (eds) *An introduction to the international protection of human rights* (1999) 31.

⁵ According to Jackson, the primary and often overlooked objective of the Bretton Woods Conference (which later led to GATT) was the prevention of another world war, impliedly underlying the economic reasons behind the war. See JH Jackson 'The perils of globalisation and the world trading system' (2000) 24 *Fordham International Law Journal* 371.

The period between the two world wars saw the erection of protectionist trade policies in the international trade relations of states. These policies were followed by high economic and political costs at the global level. Protectionist measures led to retaliatory measures by trading partners, which in turn harmed exports greatly.⁶ Politically, state relations were adversely influenced by exporting industries, which played an important role in determining state trade and foreign policies.⁷ Hawkins recognises:⁸ 'Trade conflicts breed non-co-operation, suspicion, bitterness. Nations which are economic enemies are not likely to remain political friends for so long.' Hence, protectionist policies are regarded as the main reason for World War II. The devastating effects of World War II underlined the need for economic co-operation among states, not only for the purpose of economic gains, but also for world peace.

Economic co-operation was reflected mainly in the commitment of major political leaders to the establishment of international economic institutions. This initiative saw three processes: a multilateral negotiation on tariff reduction, a clause on general obligations to tariff reductions (General Agreement on Tariff and Trade (GATT)) and the establishment of the International Trade Organisation (ITO). GATT was completed in 1947. ITO, which was supposed to serve as an umbrella institution, did not come into being. As a result, GATT came to be used as a forum to handle problems concerning trading relationships among signatory countries.⁹ In 1995, GATT was replaced by the World Trade Organization (WTO). With the emergence of the WTO, the reach of international trade rules was expanded as new disciplines were incorporated into the international trade regime.¹⁰ Of particular significance under the WTO is the establishment of a strong enforcement mechanism in the form of the dispute settlement body.¹¹

On the human rights front, too, it was only with the end of World War II that attempts in articulating standards on international human rights got underway. Indeed, 'international protection of human rights

⁶ AM Ezrahi 'Opting out of opt-out clauses: Removing obstacles to international trade and international peace' (1999) 31 *Law and Policy in International Business* 123.

⁷ Ezrahi (n 6 above) 3.

⁸ Quoted in JH Jackson *World trade and law of GATT* (1969) 38, as quoted in Cottier (n 3 above) 116.

⁹ See JH Jackson *The World Trade Organization, constitution and jurisprudence* (1998).

¹⁰ Trade in services, agricultural product trade and the protection of intellectual property rights are among the new disciplines that came into the picture with the birth of the WTO.

¹¹ Of the four major differences between the WTO and its predecessor, GATT, the dispute settlement system under the WTO is one. See 'WTO vs GATT: Main differences' http://www.wto.org/english/thewto_e/whatis_e/eol/e/wto01/wto1_8.htm (accessed 4 April 2006). See also World Trade Organization *A handbook on the WTO dispute settlement system* (2004).

... arose as a reaction to the atrocities of the Second World War'.¹² For many, the United Nations (UN) Charter of 1945 accorded 'implicit recognition [to] the principle of international respect for human rights [which] established a framework for the progressive development and codification of human rights'.¹³ The UN Charter recognises the importance of realising human rights and fundamental freedoms to the maintenance of international peace and security.¹⁴

Within this framework, human rights standard setting and the establishment of monitoring institutions followed. The Universal Declaration of Human Rights of 1948 (Universal Declaration) marked the first step in the formulation of international human rights law. The Universal Declaration encompassed the whole range of political, economic, social and cultural rights. Instruments that gave these rights binding force of law came into being in 1966 with the adoption of the two UN Covenants: the International Covenant on Economic, Social and Cultural Rights (CESCR), the International Covenant on Civil and Political Rights (CCPR), and the Optional Protocol to the Covenant on Civil and Political rights (OP).¹⁵ Specialised conventions dealing with specific categories of people such as women, children and specific issues such as education, forced labour, employment and such, marked the development of this field of international law.

Despite a common foundation, the development of these two fields of international law is characterised by 'splendid isolation'.¹⁶ The isolation is seen on many fronts. Institutionally, while human rights law has primarily been the domain of the UN, trade rules have been administered by GATT and later on by the WTO. This division is still maintained. On another front, while human rights law received a relatively comprehensive scope of coverage from the outset, it is rather through progressive negotiations that trade rules have come to be what they are now. Hence, top-down and bottom-up approaches of development characterise human rights and trade laws respectively.¹⁷

The substantive contents of the rules or laws differ widely. The fields have developed without any consideration whatsoever as to the possible interaction or relationship between the two. 'Human rights ... did not attempt to conceptually integrate trade regulation.'¹⁸ Likewise, the WTO has been insistent in its position that the human rights issue is not a trade agenda and that it certainly is not a matter for consideration

¹² Drzewicki (n 4 above) 31.

¹³ Drzewicki (n 4 above) 32.

¹⁴ See Preamble to the UN Charter.

¹⁵ These three instruments, CESCR, CCPR and OP, together with the Universal Declaration, make up the International Bill of Human Rights.

¹⁶ Cottier (n 3 above) 112.

¹⁷ Cottier (n 3 above) 119.

¹⁸ Cottier (n 3 above) 112.

within a WTO framework.¹⁹ This steadfast belief has meant that in the event of interaction, especially one in which the implementation of trade rules tamper with the requirements of human rights law and *vice versa*, a mechanism for the resolution of such tension is lacking in both fields of international law.

2.1 Interaction between the two fields of international law

2.1.1 Factual issues

Different factors have contributed to bringing to the forefront the link between human rights and trade. The inclusion of new disciplines, namely trade in services and intellectual property protection, to the international trading system that came with the birth of the WTO 'extended [international trade] into the areas of domestic regulatory standards as opposed to the traditional realm of foreign policy'.²⁰ As a result, domestic regulation became a matter not only of government discretion, but also the concern of the international trading system.

The emergence of problems at the global level in the form of the HIV/AIDS epidemic is another important factor.²¹ The demand to access medicine (either through the production of generic medicine locally or parallel importation) came to clash with the patent protection accorded to pharmaceutical companies under the Trade Related Intellectual Property Rights (TRIPS) Agreement of the WTO. Thus, trade came to be seen as a threat to an important human right, that of the right to health. Last, but not least, the appearance of actors other than states, in particular non-governmental organisations (NGOs) in international fora significantly contributed to put the relationship of trade regulation and the protection of human rights on the agenda in various international fora.²² All these and other related factors raised the concern that 'WTO rules, supported by its enforcement mechanism, elevate free trade over and above human rights protection and promotion, leaving legitimate concerns without adequate protection and consideration'.²³

¹⁹ The WTO hosts discussions on issues other than these agreements using various special committees and working groups set up for this very purpose. Issues such as the environment, investment and competition are examples in this regard. The closest human rights concerns have come to such a status is through what are called 'core labour standards'. However, the WTO has declared in unequivocal terms that this is neither a matter currently of importance within the WTO, nor is it a matter for future consideration.

²⁰ M Williams *Gender mainstreaming in the multilateral trading system. A handbook for policy makers and other stakeholders* (2003) 4.

²¹ T Cottier *et al* 'Linking trade regulation and human rights in international law: An overview' in T Cottier *et al* (eds) *Human rights and international trade* (2005) 2.

²² Cottier (n 3 above) 111.

²³ Cottier (n 21 above) 3.

2.1.2 Legal issues

International human rights and trade law equip states with a different set of mandates and impose complex and perhaps potentially contradictory obligations. A combination of these is partly responsible for the downside of the relationship between the two fields of international law.

Originally, international trade rules were designed to address protectionist policies of states. To this end, the emphasis was on negative integration.²⁴ Negative integration is the imposition of negative obligations on states, obligations that require states to refrain from engaging in certain activities or behaviours. The principle of non-discrimination,²⁵ made up of most favoured nations and national treatment, which is the underlying tenet of the international trading system, is a good example in this regard. Most favoured nation treatment obliges a state not to accord a lesser treatment to a trading partner than it accords another partner. Similarly, national treatment requires a state not to discriminate between a foreign and a national trader. The ban on quantitative restrictions,²⁶ such as quotas, except in emergency situations, is another example.

In the latter days of its development, in particular under the WTO, the manner of regulation in international trade law changed. The birth of the WTO marked an important expansion, not only in the international trade regime, but also in the reach of trade laws in domestic regulation. This is particularly true of the new disciplines — trade in services and protection of intellectual property rights — which came with the WTO. Unlike trade in goods, trade in services is physically carried out within the national boundaries of a state. The state traditionally enjoyed the freedom to determine the terms and conditions of service delivery. This is particularly true for essential services. The regulation of the services sector through the international trade regime meant the definition of domestic regulation for states by this regime.²⁷

In the field of protection of intellectual property rights, domestic laws are the main implementing instruments for the TRIPS Agreement. Patents, trademarks, trade secrets and copyrights are increasingly being shaped by the dictates of the TRIPS Agreement.²⁸ These developments in international trade law indicate a move towards positive integration, where states are required to take positive action mainly in

²⁴ Cottier (n 3 above) 117.

²⁵ As above.

²⁶ As above.

²⁷ Cottier (n 3 above) 118.

²⁸ Z Randriamaro *Gender and trade: Overview report* (2006) 23 <http://www.bridge.ids.ac.uk/reports/CEP-Trade-OR.pdf> (accessed 31 March 2006).

the form of rule or law making.²⁹ This trend has caused trade rules to transgress purely international transactions and to define domestic law.³⁰ The implication is a serious limitation on the domestic regulatory capacity of states.

International human rights law, on the other hand, started from the outset with a combination of both negative and positive obligations on states, even though historically the two sets of obligations have not received similar attention. 'The cold war era . . . [witnessed] an ideological split between negative and positive [obligations] . . .'³¹ in which the importance of civil and political rights was emphasised over economic, social and cultural rights. Of these two sets, categories of rights that impose positive obligations on states are relevant for the discussion at hand:³²

The human rights framework places the onus on the state to be responsible for the promotion and protection of human rights . . . [however] progressive bargaining away of state sovereignty under international trade [law] . . . [limits] the state's capacity to proactively fulfil its human rights obligations . . .

This is particularly true of economic, social and cultural rights, which by and large require positive action on the part of states for their realisation. This is where the contradiction between the demands of international human rights law and international trade law becomes evident. While the former requires states to take measures, the latter requires states to refrain from taking measures, including the ones that the former mandates. And it is usually the case that human rights measures such as subsidies, affirmative measures and, in general, social protection programmes are found to be trade restrictive. The tension is acute when it comes to the human rights of women.

3 Women's human rights and the Women's Protocol

3.1 Women's human rights

The equality of women and men is a guiding principle recognised in the Charter of the UN. Subsequent human rights instruments, such as the Universal Declaration and the two UN Covenants, have also reaffirmed the principle of equal rights of the sexes. This principle laid an important foundation for the recognition of the rights of women in the field

²⁹ Cottier (n 3 above) 117.

³⁰ Cottier (n 3 above) 118.

³¹ Cottier (n 3 above) 117.

³² International NGO Committee on Human Rights in Trade and Investment Policy Statement *Investment, trade and finance: The human rights framework: Focusing on the Multilateral Agreement on Investment (MAI)* (1998) 3.

of human rights. Nevertheless, the recognition of equality of the sexes and the corresponding principle of non-discrimination has not been instrumental in improving the situation of women in all walks of life.

From its inception, international human rights law was concerned with the relations between a state and its subjects, whereby the state guaranteed the rights of subjects against the state. As a result, the protection of human rights in the public domain has received more attention than is the case with the private domain. This (perhaps unintended) divide between the public and the private domain has undermined the practical relevance of the principle of equal rights as a confirmation of women's rights as human rights. The inequality and discrimination that women experience in the private domain necessitated the need for the adoption of human rights standards that specifically address this problem. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) manages to cater for this particular need and elevate it to the standard of human rights. CEDAW identifies important areas of the private realms of women's lives and subjects them to state protection. Cultural and customary practices and marriage and family relations are important in this regard. These are the areas of private life where women mostly experience discrimination. The various provisions of CEDAW require of state parties either to modify or eliminate discriminatory practices in these areas. For instance, article 16 of CEDAW is fundamental in that it requires states to take measures to ensure equality between women and men in the family (which includes equal rights of women and men to choose spouses, to enter into marriage, during and at the time of dissolution of the marriage), an institution which has served to maintain discrimination against women without any intervention of protection from the state.

However, the historical step towards the affirmation of women's rights as human rights was made at the 1993 World Conference on Human Rights in Vienna, where it was declared that '[t]he human rights of women and of the girl child are an inalienable, integral and indivisible part of universal human rights'. This view was emphasised again at the Beijing Conference on Women in 1995.

3.2 The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

The Women's Protocol is not any different in its articulation from the development of the human rights of women at the international level. In fact, it is a continuation of the process aimed at asserting the importance of the recognition of the rights of women in the public as well as private domains. According to the background document to the draft Protocol, the Women's Protocol came as a result of the recognition of

the importance of the place of the rights of women in socio-political priorities of Africa.³³

The Women's Protocol addresses within a human rights framework experiences that are mostly peculiar to women. Issues such as harmful practices, health and reproductive rights, cultural issues, widows' rights and rights to inheritance are concerns that affect women disproportionately. These concerns often occur within the private realm, but are reinforced in the public realm, which fails to outlaw customary practices that perpetuate violations of the human rights of women.

The Women's Protocol has also adopted gender mainstreaming to promote gender equality and empower the women of Africa. Gender mainstreaming as a strategy helps to address both woman and gender-specific concerns in the private and public realm. The provision of the Women's Protocol under consideration in this paper, article 19(f), is under the heading 'right to sustainable development'. This article is generally influenced by the Beijing Platform for Action,³⁴ which has brought about a conceptual shift in the understanding of gender issues by requiring the assessment of policies from a gender perspective from inception to implementation. In this regard, the article requires an account of women and their concerns in development planning at all levels. By so doing, it incorporates matters previously considered gender-neutral to be inspected and assessed from a gender perspective.

4 Trade rules and their adverse impact on the human rights of women

There are two points of analysis to assess the adverse impact of international trade law on the human rights of women: an analysis based on the content of the rules themselves, and an analysis that examines any possible tension between the rules and the commitment of a state towards improving the situation of women.³⁵ These two sets share similarities in analysis.

4.1 Analysis based on the content of a trade rule

To start with the first set, the very content of trade rules is at times found to be biased against women. There are various programmes that

³³ Background: Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa CAB/LEG/66.6.1.

³⁴ Eg, arts 19(a) and (d) are inspired by the Beijing Platform for Action, Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 6 January 2003 Markup from the meeting convened on 4-5 January 2003 in Addis Ababa by the Africa Regional Office and the Law project of Equality Now 17 CAB/LEG/66.6?Rev 1.

³⁵ S Gammage *et al Trade impact review* (2002) 23 <http://www.womensedge.org/documents/tradeimpactreviewfinal.pdf> (accessed 31 March 2006).

governments have undertaken to improve the lives of women in their respective countries. These programmes range from reform in the legal or regulatory system to conform with international standards on the rights of women, to special support programmes aimed at improving the conditions of women. Training, low-cost loans, tax breaks and subsidies for woman-owned businesses or those that predominantly employ women are examples falling under the latter category of support programmes.³⁶

However, the multilateral Agreement on Subsidies and Countervailing Measures (ASCM) entitles states to grant subsidies without fear of repercussions on a limited number of grounds, namely narrowly defined research and development programmes, environmental aid subsidies to disadvantaged regions (the last set expired in December 1999).³⁷ Therefore, by excluding other grounds for support, such as economic or historical disadvantage (within which women as a group can be accommodated), it excludes government support programmes for women perpetuating the disadvantaged position of women in society.³⁸

4.2 Analysis based on the interaction of trade rules with other rules on women

The second analysis tries to examine a potential conflict between the trade commitment of a state and its various international commitments that are relevant to women.³⁹ As trade commitments are made by various sectors, the rights affected also differ from one sector to the other. Agricultural, services and intellectual property rights protection are sectors under consideration for this analysis.

Agriculture is the sector where the structural inequality between women and men is most evident. This is particularly true in the case of Africa. There is a marked division of labour in Africa, and women dominate subsistence farming aimed at household consumption and production for the local market, while men concentrate on cash crop production.⁴⁰ Women do not have control over and access to productive resources such as land and production inputs such as fertilizers and extension services. Agricultural trade liberalisation opens up local markets to cheap subsidised imports which displace the home-grown

³⁶ As above.

³⁷ As above.

³⁸ As above.

³⁹ Gammage *et al* (n 35 above) 26.

⁴⁰ According to FAO, the division of labour varies from region to region and from one community to the other, but generally women tend to take care of the household food production, while men concentrate on large-scale cash cropping. The involvement of women outside of subsistence farming is limited to small-scale production aimed at the local market.

products of women.⁴¹ Furthermore, liberalisation in the agricultural sector encourages the production of export crops. The prioritising of export has diminished the land used by women subsistence farmers. Such a take-over is encouraged by government policies.⁴² The provision of production inputs, such as extension services and credit schemes, no doubt follows the prioritised areas.

What is the net effect of these on women? Primarily it is food security that is compromised: no land, no production and hence no food for household consumption. Again, with no income from the sale of agricultural products, women cannot sustain their families; they are forced to look for other possible sources of income. Jobs on large export farms and off-farm jobs are the likely options. Such jobs usually come with low wages and poor working conditions. Both scenarios add to the burden of women.

The services sector is another sector which is feared to threaten important human rights of women, such as the rights to health, education and generally to an adequate standard of living. Access is the main issue in relation to trade in the services sector. The liberalisation of services opens up basic services to private ownership, leading to privatisation. Experience in a number of countries has shown that this in turn leads to the introduction of user fees⁴³ and prohibitive prices.⁴⁴ Services of both infrastructural nature⁴⁵ and natural resources⁴⁶ have a direct bearing on the reproductive roles of women. As a result, any shortfall experienced due to problems of access typically falls on the shoulders of women.⁴⁷

Similarly, in the field of intellectual property, gender concerns arise. Access to medicine, in particular those related to reproductive health, the protection of traditional knowledge and food security, are important in this regard.⁴⁸

What are the human rights implications of trade rules for women? The rules affect various sets of rights guaranteed under a number of human rights instruments, including those on women. The rights to food, life, health, education and affirmative measures are among the range of human rights affected by international trade rules.

⁴¹ H Rupp *Gender and agricultural trade* (2004) 3 http://www.glow-boell.de/media/de/txt-rubrik_5/SuS_Rupp.pdf (accessed 31 March 2006).

⁴² Z Garcia *Impact of agricultural trade on gender equity and rural women's position in developing countries* (2004) 3 http://www.glow-boell.de/media/de/txt_rubrik_5/Sus_Garcia.pdf (accessed 31 March 2006).

⁴³ S Walker 'Human rights, gender and trade' in A Tran-Nguyen & A B Zampetti (eds) *Trade and gender: Opportunities and challenges for developing countries* (2004) 332.

⁴⁴ A B Zampetti 'The impact of WTO rules on the pursuit of gender equality' in Tran-Nguyen & Zampetti (n 43 above) 311.

⁴⁵ Such as health care and education.

⁴⁶ Eg water and energy.

⁴⁷ Randrimaro (n 28 above) 27.

⁴⁸ Randrimaro (n 28 above) 23.

5 Article 19(f) of the Women's Protocol as a solution to the adverse impact of trade on women

5.1 Conflict resolution at the international level

When a contradiction or conflict between the demands of trade rules and human rights provisions arise, how should one go about resolving this conflict? Should trade rules take precedence over human rights provisions? Or should trade rules give way to human rights provisions? On what possible legal ground(s)? Is there any other mechanism of resolution? What mechanisms does international law provide in this regard?

Lawyers in both fields give different opinions with regard to how a conflict between the two fields should be resolved. Among the diverse views, two are worthy of consideration here. One view, mostly emphasised and favoured by human rights lawyers, stresses the primacy of human rights law over trade rules. There are some legal provisions as well as scholarly opinions that are cited in support of this view. Article 103 of the UN Charter affirms the pre-eminence of the obligations of states to respect human rights. Howse and Mutua, writing on the issue, have argued that the 'reference to human rights in the UN Charter are sparse and erratic'.⁴⁹ A broad reading of the Charter would 'place obligations on member states to promote and protect human rights'⁵⁰ elaborated in specific human rights treaties. Therefore, the two scholars argue that in case of conflict between the obligation to protect human rights and other obligations, the former obligation prevails over the other.

An indisputable claim, even among trade lawyers, is to the primacy of human rights of a peremptory nature and that have attained the status of *jus cogens* over all rules of international law, including trade rules.⁵¹ However, the list of peremptory norms is limited to quite a few norms or human rights,⁵² and as it stands now, it certainly does not include the human rights of women. To the extent that the list of *jus cogens* equally applies to women, women enjoy protection. However, the harms from which women most need protection⁵³ are not incorporated within the

⁴⁹ R Howse & M Mutua 'Protecting human rights in a global economy: Challenges for the World Trade Organization' (2000) '<http://www.ichrdd.ca/english/commdoc/publications/globalization/wtoRightsGlob.html> (accessed 14 February 2006).

⁵⁰ As above.

⁵¹ G Marceau 'WTO dispute settlement and human rights' (2002) 13 *European Journal of International Law* 69 http://ejil.org/forum_tradehumanrights (accessed 31 March 2006).

⁵² Crimes against humanity, torture, genocide, slavery, racial discrimination and prohibition against aggression are within the accepted list of peremptory norms.

⁵³ H Charlesworth & C Chinkin 'The gender of *jus cogens*' (1993) 15 *Human Rights Quarterly* 69-71.

list of those norms that have attained the status of *jus cogens*. The non-appearance of sex discrimination, which affects the lives of half of the world's population and from which women need most protection, within the list of *jus cogens*, leads one to correctly assume that the manner in which *jus cogens* have been constructed obscures the most pervasive harms suffered by women.⁵⁴

In all other cases, the view of human rights lawyers is that human rights norms should also receive primacy. Article 103 of the UN Charter stipulates that respect for human rights is an all-time obligation which supersedes any other obligation of states that may come under any other international law. Article 103 of the UN Charter reads:

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

This view is further strengthened by the 1993 Vienna Declaration and Programme of Action which reaffirmed that 'human rights and fundamental freedoms are the birth right of all human beings; their protection and promotion is the first responsibility of governments'.⁵⁵

On the other hand, trade lawyers argue that there is no legal ground giving human rights primacy over trade rules. Human rights are not of a higher rank than other sources of treaty law.⁵⁶ The implication is therefore that human rights do not prevail over other rules of international law.⁵⁷

The issue seems far from settled. Even the International Law Commission, assigned the task of codification and progressive development of international law, agrees. The Commission underlines the problem faced by judges and practitioners emanating from the diversification of international law. The need for further study was underscored in its report of 2002, where it recommended 'hierarchy in international law: *jus cogens*, obligations *erga omnes*, article 103 of the Charter of the United Nations, as conflict rule was identified for further study'.⁵⁸

The lack of absolute direction in this regard is attributed to the 'splendid isolation'⁵⁹ that the two fields of international law have enjoyed, despite a common foundation. An inquiry into possible directions to resolve the contradiction will bear no fruit when neither field has shown

⁵⁴ As above.

⁵⁵ The Vienna Declaration and Programme of Action on Human Rights (1993) para 1.

⁵⁶ Cottier (n 3 above) 114.

⁵⁷ As above.

⁵⁸ International Law Commission Report of the work of its 54th session (29 April to 7 June and 22 July to 16 August 2002) General Assembly Official Records 57th session Supplement No 10 (A/57/10) 241 <http://untreaty.un.org/ilc/reports/2002/2002report.htm> (accessed 1 March 2006).

⁵⁹ Cottier (n 3 above) 112.

a willingness to recognise the possibility of one coming in the way of the realisation of the other. Therefore, any attempt at a compromise should start with such recognition. The steps taken by the Women's Protocol are a good start in this regard.

5.2 Article 19(f) of the Women's Protocol and its relevance

Article 19(f) of the Women's Protocol reads as follows:

Women shall have the right to fully enjoy their right to sustainable development. In this connection, the States Parties shall take all appropriate measures to:

...
(f) ensure that the negative effects of globalisation and any adverse effects of the implementation of trade and economic policies and programmes are reduced to the minimum for women.

The Women's Protocol acknowledges that the implementation of trade rules may adversely impact on the human rights of women. Though the provision speaks in general terms of the negative impact of globalisation, trade and economic policies and programmes, international trade rules are important determinants of the process of globalisation in general, and of economic policies and programmes of states in particular. This is because, although globalisation is a multidimensional process with political, economic, social and cultural aspects, it is first and foremost an economic process.⁶⁰ Economic liberalisation, spearheaded by multilateral trade rules constituting measures targeted at removing barriers to the free flow of goods and services across borders, is a characteristic feature of the economic aspect of globalisation. Even other aspects of globalisation, such as the political aspect, are tuned to the rhythm of economic liberalisation. Neo-liberal thinking which assigns primacy to market economy by limiting the regulatory power of the state and its advocacy for privatisation and commercialisation⁶¹ is but one illustration of this fact.

The recognition of this adverse impact is commendable as it is a recognition made in a human rights instrument on women. Where the mainstream human rights discourse has failed, an instrument dealing with the human rights of women has attempted to fill the gap. One argument made in support of women's human rights is the view that there are experiences or needs peculiar to women worthy of protection and recognition as human rights of women. Apart from the obvious sex-based or biological needs which have resulted in a defined category of reproductive rights of women, similar needs or experiences arise

⁶⁰ R McCorquodale & R Fairbrother 'Globalization and human rights' (1999) 21 *Human Rights Quarterly* 737.

⁶¹ Williams (n 20 above) 8.

when a seemingly neutral policy or rule disproportionately disadvantages women. The disproportionate impact then becomes a concern for women worthy of recognition, which is precisely what this provision has attempted to do.

The highlighting of the provision is its attempt to give direction to resolving tensions between the two fields of international law. It is the first human rights instrument on women to do so. However, the attempt is not without shortcomings. The provision obliges state parties to take all appropriate measures to reduce to the minimum the adverse impact of trade rules on women. However, the formulation 'reduced to the minimum' makes the stand of the provision imprecise. This formulation is not a common standard in human rights discourse. In human rights discourse, states' obligations are often formulated in a way that gives reasonable, if not absolute, guidance as to what is expected of states. States' obligations are ordinarily framed either negatively or positively. When framed negatively, state parties are required to abstain from certain acts. When framed positively, the state is expected to take certain positive actions to fulfil its obligations, although the exact scope of such state action cannot be mathematically ascertained. In this formulation, however, it is not clear how to determine the nature and extent of state obligation. The meaning is therefore subject to interpretation.

Earlier versions of the draft of the Women's Protocol advocated absolute preference to the protection of human rights of women. Article 20 of the Draft Protocol⁶² reads as follows:

With reference to articles 21, 22 and 24 of the African Charter on Human and Peoples' Rights, women have the right to fully enjoy their right to development. State parties shall take all measures to . . . avoid the negative impacts of commercial and economic policies, such as structural adjustment policies, which accentuate the impoverishment of women.

The formulation 'to avoid the negative impacts' was the standard employed. This standard, though not a common language in the human rights discourse, is clear in its stand. If a conflict arises where a trade rule is found to negatively affect the rights of women, the trade rule would be set aside in favour of women's rights. That way, the negative effect of the trade rule on women will be avoided.

What then are the policy implications of article 19(f)? The formulation 'are reduced to the minimum' gives an indication that alternative measures that would have the effect of reducing the negative effect of trade rules on women, to the minimum, should be sought. Therefore, before

⁶² Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa Experts Meeting on the Preparation of The Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, International Commission of Jurists CAB/LEG/66.6 Vol I 8.

embarking on the implementation of a trade measure, there are certain considerations. These include:

- Does the trade measure in question have an overt adverse impact on women?
- Is the trade measure in question gender-neutral but has an indirect adverse impact on women when implemented?
- What possible measures can be implemented to reduce the adverse impact on women to the minimum?

These considerations are important, because policies and programmes of states, especially as they relate to economics, finance and generally trade, are considered gender-neutral. This is true both at national and international levels. As a result, starting from inception until actual implementation on the ground, the possibility that such policies may have a differential impact on men and women is not analysed. The questions as outlined above can help governments to assess policies. This provision can thus serve as controlling or monitoring mechanism.

To the extent that alternative measures to reduce the adverse impact to the minimum exist, this provision ensures their consideration and implementation. However, in the absence of such alternatives, setting aside the trade rule or measure in favour of the rights of women does not seem to be an option. Therefore, reducing to the minimum, as the words rightly suggest, does not mean wiping out the negative impact. The implication is that there will be times when the human rights of women would be violated by the dictates of trade rules.

This takes us to the next question: What then is the measuring gauge for a positive or a negative finding of the implementation of this provision? When is a state said to have done enough to reduce to the minimum the adverse impact of trade rules on women? What is the minimum? What kinds of measures may be envisaged as legitimate measures for operationalising this provision? Would compensatory measures come under consideration in this regard? These are some of the issues that deserve further examination to ensure the effectiveness of the provision.

Apart from its imprecise standard, the provision is short-sighted in its attempt at ensuring the protection of human rights of women. It could have gone further in its assertion of protecting the human rights of women. There have been higher standards adopted in political documents such as the Beijing Declaration and Platform for Action of 1995. With regard to women and the economy, the Platform, in its paragraph 165(k), calls on governments to 'ensure that national policies related to international trade agreements do not have an adverse impact on women's new and traditional economic activities'.

This paragraph carves out for protection women's traditional and new activities. However, its application may be extended to the whole range of women's human rights. The most important point to

be underlined is the extent to which it has gone to protect women from the adverse impact of trade rules. The formulation 'ensure that ... do not have an adverse impact' sets a higher standard of protecting the rights of women. Priority goes to protecting the rights of women rather than to implementing trade rules.

Adopting such a higher standard would have made the provision in the Women's Protocol more meaningful. It would also have made the commitment that African states have undertaken in the Beijing Conference meaningful. Failure to reflect and incorporate such commitment in legal instruments makes one question the value of committing in the first place. The stand taken in the Women's Protocol can perhaps be explained by the pressure of states — particularly African states — find themselves experiencing in the globalised economic order where African states do not have the upper hand in negotiations. It is indeed true that 'globalisation [trade rules] can restrict the choices open to governments and people, particularly in the human rights area ...'⁶³ The issue therefore becomes more of a policy choice than a legal one.

6 Conclusion

The Women's Protocol is an important instrument, which has attempted to address the concerns of women both in the public and private realms. It provides concrete measures aimed at advancing the human rights of women on all fronts. However, its birth and implementation are in an era in which human rights are faced with other competing claims for their realisation, among which trade is the forerunner. The Women's Protocol recognises these competing claims and goes a step further in providing a mechanism to resolve such tension. Before embarking on the implementation of a trade measure, it demands of states to consider the gender implications, if any, of a trade measure. Further it requires of states to minimise any adverse gender implications. However, the lack of adequate guidelines on how to go about giving effect to the provision is worrying.

⁶³ McCorquodale & Fairbrother (n 60 above) 747.