

The SADC Protocol on Gender and Development: Duplication or complementarity of the African Union Protocol on Women's Rights?

*Malebakeng Forere**

Lecturer, University of KwaZulu-Natal, Durban, South Africa

*Lee Stone***

Senior Lecturer, University of KwaZulu-Natal, Durban, South Africa; Attorney of the High Court of South Africa

Summary

This paper is written from the perspective that universal human rights treaties provide minimum standards and that any subsequent regional instruments must not provide for anything less than what was already envisaged in universal treaties. With regard to the protection of women's rights, at the global level, the United Nations adopted the Convention on the Elimination of All Forms of Discrimination Against Women. However, this instrument is inadequate when it comes to the protection of women's rights in Africa. Consequently, the African Union adopted the Protocol to the African Charter on the Rights of Women to cater for prejudices peculiar to African women. In 2008, SADC adopted a Protocol on Gender and Development, to some extent duplicating the AU Protocol on the Rights of Women. The paper seeks to ascertain whether the SADC Protocol on Gender and Development complements or duplicates the AU Protocol on the Rights of Women. It is argued that SADC, in its efforts to pursue regional integration and the consolidation of all instruments that protect women,

* BA, LLB (Lesotho), LLM (Essex); Forere@ukzn.ac.za. I am grateful to Ibrahima Kane, for believing in me, for it is through him that I was able to put this article together. My involvement in the drafting of the SADC Gender and Development Protocol, as well as deliberations around the Protocol by delegates from SADC states, indicated to me that there is a misunderstanding or under-estimation of the extent of integration in Africa, and as such prompted me to carry out this work.

** LLB (Free State), LLM (Human Rights and Democratisation in Africa) (Pretoria); Stonel@ukzn.ac.za

duplicated the AU Protocol on the Rights of Women. While the SADC Protocol on Gender and Development does introduce some new rights and state obligations, its overall effect is that these rights and state obligations do not serve to dramatically enhance the regime for the protection of the human rights of women in the SADC sub-region and, in fact, either merely maintain the status quo or undermine some of the achievements of the AU Protocol and CEDAW. The paper finally suggests that SADC could have adopted a plan of action or adopted robust implementation strategies to give meaningful effect to the imperative of securing the rights of women and the thus far-neglected theme of gender, rather than formulating and adopting a protocol, since the process of adopting a protocol is very costly, especially given the fact that a comprehensive instrument that safeguards the rights of women in Africa already exists.

1 Introduction

The universality of human rights is indisputable.¹ Simultaneously, however, cultural specificity is also recognised and taken into account.² While the United Nations (UN) has adopted many instruments setting out human rights norms to be applied by all UN member states,³ regional bodies have adopted human rights agreements relative to their cultural context.⁴ Although this practice has been widely accepted and has also helped in developing international human rights law, the weight of legal opinion is that regional instruments should

¹ United Nations Charter, 26 June 1945, 59 Stat 1031, TS 993, 3 Bevans 1153, 24 October 1945, art 1(3).

² Vienna Declaration of the World Conference on Human Rights, 1993, in recognising cultural relativism out of universality of human rights provided in its art 5 that '[a]ll human rights are indivisible, universal, independent and interrelated. The international community must treat human rights globally ... While the significance of national and regional particularities and various historical cultural and religious backgrounds must be borne in mind, it is the duty of the states, regardless of their political economic and cultural systems, to promote and protect all human rights and fundamental freedoms.'

³ See eg Universal Declaration of Human Rights, GA Res 217 (III), UN GAOR, 3rd session, Supp 13, UN Doc A/810 (1948) 71; International Covenant on Civil and Political Rights, 16 December 1976, 993 UNTS 3, 3 January 1976; International Covenant on Economic, Social and Cultural Rights, 16 December 1976, 993 UNTS 3, 3 January 1976.

⁴ Eg, the African Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc CAB/LEG/67/3 Rev 5, (1982) 21 *International Legal Materials* 58, entered into force 21 October 1986; Arab Charter on Human Rights, 22 May 2004, reprinted in (2005) 12 *International Human Rights Reports* 893, entered into force 15 March 2008; European Convention on the Protection of Human Rights and Fundamental Freedoms (ETS No 005) 1950 Strasbourg, entered into force 3 September 1953; Inter-American Convention on Human Rights, OAS Treaty Series 36, 1144 UNTS 123, entered into force 18 July 1978. All these instruments have specifically indicated in their respective preambular paragraphs that they drew their inspiration from the Universal Declaration of Human Rights and other UN human rights documents.

not be contrary to the object and purpose of the UN treaties. Furthermore, provisions of the UN treaties must be applied in good faith, and regional agreements cannot be used as an excuse not to comply with UN treaties.⁵ Africa, as a region, has created a human rights system through the African Union (AU) (formerly the Organisation of African Unity (OAU)).⁶ The AU's system of human rights protection has three main components. First, it establishes continental standards through the African Charter on Human and Peoples' Rights (African Charter) and other legally-binding treaties and non-binding declarations. Second, it has created bodies to safeguard human rights protection and promotion within the region⁷ and, third, it has adopted the mechanism of Special Rapporteurs.⁸ Not only is Africa concerned with human rights; it has also paved the way for economic integration in Africa and, as such, it has resorted to the creation of economic sub-regional bodies known as regional economic communities (RECs).

Although the RECs were initially created for economic integration, they have incorporated an element of human rights protection into the treaties establishing them.⁹ Most of the treaties establishing the RECs make explicit reference to the promotion and protection of human rights under the African Charter, either as one of their objectives or as their fundamental principle.¹⁰ In so doing, they have created links between them and the African Charter. This, therefore, gives the courts of justice or tribunals in the RECs authority to apply the provisions of

⁵ Vienna Convention on the Law of Treaties, 1969, 1155 UNTS 331, entered into force 27 January 1980, arts 19(c), 26 & 27.

⁶ Constitutive Act of the African Union, accepted in Lomé, Togo, July 2000, entered into force May 2001, art 3(h).

⁷ These bodies include the African Commission on Human and Peoples' Rights, the African Committee of Experts on the Rights and Welfare of the Child and the African Court of Justice and Human Rights (which represents the merged African Court on Human and Peoples' Rights and the African Union Court of Justice).

⁸ Such as the Special Rapporteur on the Rights of Women in Africa.

⁹ See eg Southern African Development Community Treaty (SADC Treaty) adopted in Windhoek, Namibia, August 1992, as amended in 2001, art 4(c).

¹⁰ See eg Treaty Establishing the African Economic Community, signed on 3 June 1999, Abuja, Nigeria, entered into force 12 May 1994, art 6(d); Treaty Establishing the Economic Community of West African States adopted in Cotonou, 24 July 1993, entered into force 1994, art 4(g). SADC is so far the only REC which does not make explicit reference to the African Charter. However, it mentions human rights in the Preamble to its Treaty, namely, '[m]indful of the need to involve the people of the region centrally in the process of development and integration, particularly through the guarantee of democratic rights, observance of human rights and the rule of law'. The SADC Treaty does not oblige judges of the tribunal to invoke the African Charter in the interpretation and adjudication of disputes. Art 16 of the SADC Treaty provides as follows: 'The Tribunal shall be constituted to ensure adherence to and the proper interpretation of the provisions of this Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it.'

the African Charter.¹¹ In a nutshell, not only do the RECs adopt their own instruments, but they may also have regard to 'applicable treaties' in the adjudication of disputes. This is understood to entail that the African Charter, for example, may be used as an interpretive source by the RECs. As a result, the question is whether the RECs, in adopting their treaties, complement or duplicate the AU treaties. In this paper, the definition of complementarity in the *Oxford dictionary*, namely, as a process whereby 'two or more different things enhance each other or form a balanced whole', is adopted. In international law this has been construed to mean that, since the instruments at the regional and sub-regional levels vindicate rights, they should apply the same principles, both substantively and procedurally.¹² Duplication is defined by the same dictionary as making an exact copy or to do again unnecessarily. This is how the terms will be used throughout this paper.

Although there are several RECs in Africa, the focus of the article is on the Southern African Development Community (SADC). The decision to establish a more distinct body for Southern Africa came in 1979 at a meeting of the leaders from frontline states in the fight for political liberation from colonial rule in the Southern African region. These leaders regarded the establishment of regional co-operation as a weapon against South Africa's economic domination. This meeting was followed by the summit held in 1980.¹³ At this summit, the first legal agreement of the Southern Africa Development Co-ordination Conference (SADCC), in the form of a declaration, was drafted with the objectives of achieving a reduction of economic dependence, particularly on South Africa; creating regional integration; and mobilising resources to promote regional policies as a concerted action to secure economic liberalisation.¹⁴ It was not only the dependence on South Africa which prompted SADCC states to resort to integration of the Southern Africa region, but also the emergence of powerful trading arrangements in other regions of the world that propelled African leaders into finalising their own plans for a pan-African Economic Community (AEC), to evolve from regional economic communities with specific trade liberalisation and market integration targets. SADCC required transformation in order to emerge as the more logical building block for the AEC in Southern Africa, and have a legal identity.¹⁵ As a result,

¹¹ SF Musungu 'Regional integration and human rights in Africa: A comment on conceptual linkages' (2003) 3 *African Human Rights Law Journal* 93.

¹² See C Ryngaert 'Horizontal complementarity' paper submitted to the Research Conference on the ICC and Complementarity: From theory to practice, Grotius Centre for International Legal Studies, 15-16 September 2009; <http://www.grotiuscentre.org/com/doc.asp?DocID=463> (accessed 19 September 2009).

¹³ C Ng'ong'ola 'Regional integration and trade liberalisation in the Southern Africa Development Community' (2000) 3 *Journal of International Economic Law* 485.

¹⁴ African Development Bank, *African Development Report 2000: Regional Integration in Africa* (2000) 152.

¹⁵ As above.

the Declaration and Treaty reconstituting the SADCC as the Southern Africa Development Community (SADC) were concluded in Windhoek, Namibia, on 17 August 1992. The ten SADCC member states, joined by Namibia after gaining its independence, adopted the Declaration and SADC Treaty.¹⁶ South Africa was able to secure membership in 1994 after its attainment of democratic rule, and this called for a revision of the objectives of the organisation to amend references to the 'reduction of economic dependence, particularly on the Republic of South Africa'. The core objectives of SADC have now been amended to 'the achievement of development and economic growth, poverty alleviation, enhancement of the standard and quality of life of the peoples of Southern Africa, and support for the socially disadvantaged through regional integration'.¹⁷

The reason why this paper focuses on SADC is that SADC has adopted a treaty on gender and development,¹⁸ while there is already a treaty on women's rights at the continental level. However, in as much as the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol)¹⁹ is specifically on women's rights and the SADC Protocol on Gender and Development (SADC Gender Protocol) on gender, the contents of those Protocols have triggered the paper. In particular, despite the title of the SADC Protocol 'Gender and Development,' its provisions closely resemble those of the African Women's Protocol. More specifically, six primary objectives of the SADC Gender Protocol are clearly articulated, being the development and implementation of gender responsive legislation, policies and programmes to (i) eliminate discrimination and achieve gender equality;²⁰ (ii) harmonise and co-ordinate the implementation of the various obligations imposed by the instruments to which SADC member states have subscribed;²¹ (iii) address emerging gender issues and concerns and fill gaps where existing treaties are inadequate or insufficient;²² (iv) set realistic, measurable targets, time frames and indicators for achieving gender equality and equity;²³ (v) strengthen, monitor and evaluate the progress made by the member states towards reaching the targets and goals set out in the Protocol;²⁴ and (vi) deepen regional integration, attain sustainable development

¹⁶ The Declaration and SADC Treaty (n 9 above).

¹⁷ n 9 above, art 5.

¹⁸ The SADC Protocol on Gender and Development was signed in August 2008 but has yet to enter into force as not a single SADC member state has ratified the Protocol.

¹⁹ Adopted by the 2nd session of the AU Assembly, CAB/LEG/66.6 (13 September 2000), entered into force on 25 November 2005.

²⁰ SADC Gender Protocol (n 18 above) art 3(a).

²¹ SADC Gender Protocol (n 18 above) art 3(b).

²² SADC Gender Protocol (n 18 above) art 3(c).

²³ SADC Gender Protocol (n 18 above) art 3(d).

²⁴ SADC Gender Protocol (n 18 above) art 3(e).

and strengthen community building.²⁵ From a cursory reading it is apparent that a relationship of complementarity was intended between the SADC Gender Protocol and the African Women's Protocol. However, an in-depth analysis of the substantive provisions of the SADC Gender Protocol reveals that the SADC Gender Protocol has not lived up to its expectations in that it can be argued that it has served to negate or weaken some of the obligations imposed by the African Women's Protocol. This assertion is verified in this paper.

The UN, driven by the principle of equality of human beings and non-discrimination, adopted the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1979.²⁶ Despite CEDAW's vast protective coverage of women's rights, it did not specify the prejudices, such as harmful practices suffered by an African woman, and other limitations peculiar to the African context.²⁷ To this end, the AU adopted the African Women's Protocol. The Women's Protocol was designed to complement CEDAW so that African women could be fully protected. This does not mean that the Women's Protocol substitutes CEDAW; rather, it reinforces CEDAW, in an African context. Both instruments are operational in Africa, and the African Commission on Human and Peoples' Rights (African Commission) can invoke not only provisions of the African Women's Protocol, but also those of CEDAW as interpretive guides.²⁸ The power to invoke the provisions of other instruments outside the jurisdiction of the AU is derived from the African Charter itself. Specifically, articles 60 and 61, which define the applicable principles of the African Commission, oblige the Commission to:

draw inspiration from, among other sources, other instruments adopted by the United Nations and by the African countries in the field of human rights, as well as from the provisions of various instruments adopted within the specialised agencies of the United Nations to which the state parties to the Charter are members.

Consequently, the African Commission has relied on articles 60 and 61 in its decisions. For example, in the case of *Civil Liberties Organisation and Others v Nigeria*,²⁹ the Commission sought aid from General Comment 13 of the UN Human Rights Committee on the Right to a Fair Trial. In the same communication, the Commission relied on the UN Declaration on the Basic Principles on the Independence of Judges.³⁰

²⁵ SADC Gender Protocol (n 18 above) art 3(f).

²⁶ CEDAW was adopted on 18 December 1979, 1249 UNTS 13, entered into force 3 September 1981.

²⁷ Eg, genital mutilation, scarification and inheritance.

²⁸ African Charter, art 60.

²⁹ (2001) AHRLR 75 (ACHPR 2001).

³⁰ AH Jallow *The law of the African (Banjul) Charter on Human and Peoples' Rights* (2007) 93.

Notwithstanding CEDAW and the African Women's Protocol, the SADC states felt a need to adopt the SADC Protocol on Gender and Development. Of course, one wonders whether CEDAW and the African Women's Protocol proved to be insufficient to protect the rights of women in the SADC sub-region to warrant the adoption of another protocol at SADC level. This article therefore seeks to establish whether the SADC Gender Protocol updates the norms to the new realities of the twenty-first century in terms of rights or state obligations or to take into account new legal issues or categories of vulnerable women. (This is a non-exhaustive list, including minorities, indigenous groups, lesbians.) It is on this note that the provisions of the SADC Gender Protocol are considered against the provisions of the African Women's Protocol to establish whether the SADC Gender Protocol introduces new rights or obligations and whether it is likely to serve its stated purpose (despite the slow rate of ratification of the Protocol). The exercise is therefore descriptive since it is not the intention of the authors to compare which of the two instruments is the best; rather, the authors seek to find out whether there are new rights or state obligations enshrined in the SADC Gender Protocol that were not covered by the African Women's Protocol.

2 Assessment of the SADC Protocol on Gender and Development

Described as 'groundbreaking' and as 'the most far-reaching of any sub-regional instrument for achieving gender equality',³¹ the SADC Gender Protocol was conceived to meet the aspirations of African women in the SADC sub-region. It is the analysis of its core objectives, identified earlier, as well as an investigation into whether the SADC Gender Protocol has actually established any new rights or obligations that are not contained in the African Women's Protocol that form the crux of this paper. This section therefore takes the form of a comprehensive comparison between the SADC Gender Protocol and the African Women's Protocol. The comparison investigates those rights that are duplicated; those rights that have been omitted from the SADC Gender Protocol, even though the rights appear in the African Women's Protocol; and the rights that have been inserted to fill gaps encountered in the African Women's Protocol.

³¹ P Zirima 'SADC Protocol: From commitments to action' *Southern African News Features* 9(4) January 2009, <http://www.sardc.net/Editorial/Newsfeature/09040109.htm> (accessed 20 September 2009).

2.1 Duplication of rights in the SADC Gender Protocol

The SADC Gender Protocol obliges member states to enshrine gender equality in their constitutions to ensure effective gender equality without being compromised by any law, including religious and customary laws.³² It further binds member states to eliminate practices that negatively impact on fundamental rights, such as the right to life, health, dignity, education and integrity of women.³³ The African Women's Protocol provides for the same rights.³⁴ Specifically, article 2(a) of the SADC Gender Protocol constitutionalises gender equality, while article 2(b) provides for the elimination of harmful practices which endanger the general well-being of women.

The SADC Gender Protocol places an obligation upon states to ensure equal access to justice, equal treatment in all judicial processes, equal representation in the justice system, accessible legal services for women, equal legal status and capacity in civil law, thus abolishing the minority status of women.³⁵ The elimination of gender-based violence is clearly enunciated in the SADC Gender Protocol.³⁶ The African Women's Protocol has provided sufficiently for equality of men and women before the law and access to justice, including legal aid and equal representation in the justice system.³⁷ The only comparable provision in the SADC Gender Protocol is found in article 7(g), which provides for affordable legal services for women. However, the vagueness of this provision renders it meaningless.

The SADC Gender Protocol obliges member states to commit to the elimination of detrimental practices to the rights of women and appropriate deterrent sanctions thereto.³⁸ When read together, articles 2(a) and (b), article 4(g) and article 3(4) respectively provide for equality between men and women; the enactment of laws that prohibit all forms of discrimination, particularly harmful practices endangering the well-being of women; the punishment of detrimental practices to the rights of women; and the protection of women from all forms of violence. When the SADC Protocol is compared to the African Women's Protocol, it is revealed that article 4(1) of the Women's Protocol tends to go further by prohibiting all forms of exploitation, cruel, inhuman or degrading punishment and treatment. Further, the African Women's Protocol requires law enforcement organs to have the capacity to interpret gender equality rights.³⁹ This discretion to interpret gender

³² SADC Gender Protocol (n 18 above) art 4(1).

³³ SADC Gender Protocol (n 18 above) arts 4 & 5.

³⁴ African Women's Protocol (n 19 above) arts 1(a) & (b).

³⁵ SADC Gender Protocol (n 18 above) arts 6 & 7.

³⁶ SADC Gender Protocol (n 18 above) art 6(d).

³⁷ African Women's Protocol (n 19 above) art 8(a).

³⁸ SADC Gender Protocol (n 18 above) art 6(2)(c).

³⁹ African Women's Protocol (n 19 above) art 8(d).

equality rights can play a significant role in advancing the rights of women. For this reason, it is submitted that the SADC Gender Protocol has ignored a potentially very powerful provision contained in the African Women's Protocol and wasted a valuable opportunity, resulting in an impairment of the effectiveness of the Women's Protocol.

The issue of inheritance is dealt with under article 21(2) of the African Women's Protocol. Most notably, it provides that women and men have the right to inherit, in equitable shares, their parents' properties. It is article 7(b) of the SADC Gender Protocol which replicates the Women's Protocol as far as inheritance is concerned, as it provides that in giving effect to the practical realisation of women's rights, women have a right to equal inheritance. It is inconceivable that the duplication of the right to inheritance without any further qualification in the SADC Gender Protocol can be justified.

The SADC Gender Protocol provides for equal participation of women and men in electoral processes. Thus, it challenges the patriarchal norms and cultures of decision-making structures. Also, it provides for the inclusion of men in all gender-related activities.⁴⁰ Equally, the African Women's Protocol makes provision for the equal and effective participation of women in electoral processes,⁴¹ and the modification of gender stereotypes.⁴² Over and above participation rights, the SADC Gender Protocol obliges member states to ensure equal representation of women in decision-making positions as well as raising awareness for equal participation and representation of women in decision-making positions.⁴³ Article 9 of the Women's Protocol provides, in clear terms, for the equal representation and participation of women in decision-making positions, and at all levels. Therefore, the SADC Gender Protocol has not made any innovations in this regard.

Articles 8(a) to (d) of the SADC Gender Protocol require equal enjoyment of equal rights between men and women in marriage as equal partners. Specifically, it requires free consent of parties to the marriage. It sets 18 years as a minimum age for marriage, and it requires that every marriage be registered. It further provides for the retention of the parties' respective surnames or the use of joint surnames, and also that partners should have reciprocal rights and duties towards children, equitable shares of property acquired during marriage, and choice of nationality. In addition, it provides for equality of partners and reciprocal duties and rights towards children.⁴⁴ Simultaneously, the African Women's Protocol has succinctly provided for the free consent of parties in a marriage;⁴⁵ 18 years as the minimum age for partners to a

⁴⁰ SADC Gender Protocol (n 18 above) art 15.

⁴¹ African Women's Protocol (n 19 above) art 9.

⁴² African Women's Protocol (n 19 above) art 2(2).

⁴³ SADC Gender Protocol (n 18 above) art 14.

⁴⁴ SADC Gender Protocol (n 18 above) art 8.

⁴⁵ African Women's Protocol (n 19 above) art 6(a).

marriage;⁴⁶ registration of marriage;⁴⁷ retention of maiden names;⁴⁸ reciprocal rights and duties towards children;⁴⁹ equitable shares of property;⁵⁰ and choice of nationality.⁵¹ It is, therefore, evident that the SADC Gender Protocol has duplicated the African Women's Protocol virtually *verbatim*.

The SADC Gender Protocol guarantees that widows are not subjected to inhuman, humiliating or degrading treatment. It ensures that a widow shall automatically become the guardian and custodian of her children, have a right to live in the matrimonial home, have access to employment, the right to inherit property of the joint estate, the right to remarry a person of her choice, and to be protected against all forms of violence and discrimination based on her status.⁵² When compared to the African Women's Protocol, it is evident that article 20 through to article 21(1) of the Women's Protocol are almost identical to the SADC Gender Protocol, except that article 21(1) goes further to give a widow the right to live in a matrimonial home after she remarries. Disappointingly, it is clear that the SADC Gender Protocol represents a mere duplication of the Women's Protocol, although it does not extend to the same lengths that the Women's Protocol does.

The SADC Gender Protocol calls for equal access to education as well as the retention of women and girls in primary, secondary, tertiary, vocational and non-formal education.⁵³ In addition, it provides for the implementation of gender-sensitive educational policies, campaigns against gender-based violence in schools, the eradication of illiteracy among women, and the facilitation of day care centres.⁵⁴ Turning to the African Women's Protocol, articles 12(1)(a) and (2) adequately provide for access to education and the retention of women and girls in schools. Article 12(1)(b) provides for the implementation of educational policies, while it goes further to compel state parties to change the syllabus and text books to eliminate gender stereotypes. Article 12(c) not only aims at ending abuse in schools, but seeks to punish perpetrators of such abuse, while article 12(d) even provides for the counselling and rehabilitation of those who suffer abuse in schools. The eradication of illiteracy is provided for under article 12(2)(a) of the African Women's Protocol. This comparison confirms the contention of the authors, which is that the SADC Gender Protocol could quite

⁴⁶ African Women's Protocol (n 19 above) art 6(b).

⁴⁷ African Women's Protocol (n 19 above) art 6(d).

⁴⁸ African Women's Protocol (n 19 above) art 6(f).

⁴⁹ African Women's Protocol (n 19 above) art 7(c).

⁵⁰ African Women's Protocol (n 19 above) art 7(d).

⁵¹ African Women's Protocol (n 19 above) art 6(g).

⁵² African Women's Protocol (n 19 above) art 10.

⁵³ SADC Gender Protocol (n 18 above) art 14(1).

⁵⁴ SADC Gender Protocol (n 18 above) art 16.

appropriately be described as weakening the obligations enshrined in the Women's Protocol.

The SADC Gender Protocol provides for a review of policies to cater for access to, and control of productive resources such as water, property and land.⁵⁵ Also, it provides for equal access to credit, capital and mortgages and appropriate technology.⁵⁶ As with other provisions, this is not an enhancement, since the African Women's Protocol provides for access to and control over productive resources such as property and land,⁵⁷ and further provides for access to credit⁵⁸ as well as providing for water rights.⁵⁹

The SADC Gender Protocol obliges member states to ensure equal wages and benefits for equal jobs between men and women; to eradicate occupational segregation and discrimination; to recognise the economic value of persons in domestic work; minimum wages for persons in domestic work; and a prohibition of dismissal or denial of recruitment on the basis of pregnancy or diseases such as HIV and AIDS.⁶⁰ Article 13 of the African Women's Protocol provides for exactly the same rights as enshrined. Thus, it provides for equal wages and benefits for equal jobs between men and women; guarantees women's freedom to choose their occupation and protects them from exploitation; recognises the economic value of women in domestic work; and ensures transparency in recruitment, promotion and dismissal. With respect to the above-mentioned provisions, the SADC Gender Protocol and the Women's Protocol are absolutely identical and may thus be described as a needless duplication of efforts.

The SADC Gender Protocol prohibits all forms of gender-based violence, punishes the perpetrators, and provides for comprehensive testing, treatment and care to survivors, which shall include emergency contraception, post-exposure prophylaxis, termination of pregnancy and prevention of sexually-transmitted diseases. Further to that, it provides for the establishment of special courts for cases of gender-based violence. It provides for the rehabilitation of perpetrators of gender-based violence. In addition, it provides for the prevention of human trafficking.⁶¹ In the same manner, article 4(2)(b) of the African Women's Protocol provides for the prevention, punishment and eradication of all forms of violence against women, while article 4(2)(f) provides for the establishment of accessible services for effective information, rehabilitation and reparation for victims of gender-based violence. While the SADC Gender Protocol makes a list of services to be provided to women

⁵⁵ SADC Gender Protocol (n 18 above) art 18.

⁵⁶ SADC Gender Protocol (n 18 above) art 20.

⁵⁷ African Women's Protocol (n 19 above) art 19(c).

⁵⁸ African Women's Protocol (n 19 above) art 19(d).

⁵⁹ African Women's Protocol (n 19 above) art 15(a).

⁶⁰ SADC Gender Protocol (n 18 above) art 21.

⁶¹ SADC Gender Protocol (n 18 above) art 20.

who are victims of gender-based violence, the Women's Protocol does not make such a list and leaves flexibility and emerging services that member states can offer to victims of gender-based violence. The only service that the African Women's Protocol pinpoints is the termination of pregnancy,⁶² which is necessary because it is criminalised in many states, and therefore it was important for the Women's Protocol to clearly state that the right to choose to terminate a pregnancy consequent upon gender-based violence is a core component of the recognition of women's rights. Further, the Women's Protocol provides for the prevention, prosecution and condemnation of trafficking against women, and the protection of women most at risk.⁶³

In its article 26, the SADC Gender Protocol provides that service providers, such as law enforcement machinery and social welfare services, should be given gender education, and that they should provide accessible information on services available to survivors of gender-based violence. Article 14(2)(a) of the African Women's Protocol provides for adequate, affordable and accessible health services, including information and education to women, especially in rural areas. This means that service providers will have been given gender education in order to pass it on to the victims. For all intents and purposes, the provisions of the SADC Gender Protocol and the Women's Protocol are therefore *ad idem*.

The SADC Gender Protocol calls on member states to take measures to ensure that the media refrain from promoting pornography, depicting women as helpless victims of violence, undermining the role of women in society and reinforcing gender oppression and stereotypes.⁶⁴ Article 13(m) of the African Women's Protocol prohibits the abuse of women in advertising pornography. Simultaneously, articles 2(2), 4(2)(d) and 12(1)(b) of the Women's Protocol require a commitment to undertake public education, information and communication strategies to eliminate stereotypes on the roles of women, and that the media should promote gender equality. These provisions reinforce the authors' assertion that, for the most part, the SADC Gender Protocol is simply a duplication of the Women's Protocol.

The SADC Gender Protocol calls for the equal participation of men and women in economic policies.⁶⁵ Article 13(1) of the African Women's Protocol caters for an equivalent provision. Essentially, the ambit of this provision requires the adoption and enforcement of legislative and other measures to guarantee women's equal opportunities in work and career advancement and other economic opportunities.

With respect to the objective of the harmonisation and implementation of laws, article 2 of the SADC Gender Protocol specifically provides

⁶² African Women's Protocol (n 19 above) art 14(c).

⁶³ African Women's Protocol (n 19 above) art 4(g).

⁶⁴ SADC Gender Protocol (n 18 above) art 33.

⁶⁵ SADC Gender Protocol (n 18 above) art 15(1).

for harmonisation of policies and strategies relating to gender equality and equity, as well as adopting affirmative action policies and strategies to eliminate the barriers that women had long suffered.⁶⁶ It further provides for co-operation among members for the implementation of the Protocol. In addition, the SADC Gender Protocol requires gender mainstreaming across all sectors.⁶⁷ The SADC Gender Protocol proclaims that it endeavours to achieve the just and fair distribution of benefits, rewards and opportunities between women, men, girls and boys⁶⁸ in light of the fact that gender equality would invariably give rise to sustainable development and democracy.⁶⁹ While this is an important provision, it goes no further than article 2(2) of the African Women's Protocol which places an obligation on states to commit themselves to modify the social and cultural patterns of the conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes. The African Women's Protocol quite obviously had in mind the necessity to bring an end to the condemnation of women to an existence of subordination on the African continent, which the SADC Gender Protocol has merely replicated.

With regard to the co-ordination of obligations, both the SADC Gender Protocol and African Women's Protocol provide for an obligation to adopt legislative and other measures to eliminate all practices detrimental to women.⁷⁰ In addition, they both oblige member states to provide for appropriate remedies to any woman whose rights or freedoms have been violated, and to ensure that a competent authority determines remedies.⁷¹ It is submitted, therefore, that the SADC Gender Protocol did not create anything other than what was already provided for in the Women's Protocol. The only determining criteria in this regard lie with the effectiveness of remedies at SADC or AU level, and this could be assessed by the jurisprudence surrounding these Protocols, which is not the subject of the present paper.

2.2 Rights omitted from the SADC Gender Protocol

There are a multitude of rights which have been omitted from the SADC Gender Protocol without any defensible reasons, although they appear

⁶⁶ Art 5 of the SADC Gender Protocol goes further to unequivocally provide for affirmative action measures.

⁶⁷ SADC Gender Protocol (n 18 above) art 28.

⁶⁸ SADC Gender Protocol (n 18 above) art 1 (definitions).

⁶⁹ SADC Gender Protocol (n 18 above) Preamble.

⁷⁰ African Women's Protocol (n 19 above) Preamble and arts 5 & 6; SADC Gender Protocol (n 18 above) art 3(a).

⁷¹ African Women's Protocol (n 19 above) art 25; SADC Gender Protocol (n 18 above) art 32.

in the African Women's Protocol. A brief synopsis of rights which have been omitted include the protection of women against harmful traditional practices; special protection of women in distress, bearing in mind that the large majority of people in distress in Africa are women; special protection of elderly women; the rights of women to choose the number of children they want to have and the decision concerning the spacing between these children;⁷² and the protection of asylum-seeking women, refugees, returnees and internally-displaced women, as contained in article 11(3) of the Women's Protocol. In addition, article 12(1)(b) of the Women's Protocol compels state parties to change the syllabus and text books to eliminate gender stereotypes, while article 12(c) does not only aim at ending abuse in schools, but seeks to punish perpetrators of such abuse. Article 12(d) of the Women's Protocol has even gone so far as to provide for counselling and rehabilitation of those who suffer abuse in schools. Article 21(1) goes further to give a widow the right to live in the matrimonial home after she remarries. Further, article 8 of the African Women's Protocol requires law enforcement organs to have the capacity to interpret gender equality rights. In the circumstances, the SADC Gender Protocol is disappointing in that it has not taken cognisance of these rights.

As far as specific omissions from the SADC Gender Protocol are concerned, when it comes to women with disabilities, no advancements have been made by the SADC Gender Protocol as article 9 of the SADC Gender Protocol mirrors the African Women's Protocol in that they both protect women with disabilities, particularly against gender-based violence and ensuring access to reproductive health facilities.⁷³ What the SADC Gender Protocol has failed to do, however, is to consider the physical, economic and social needs of women with disabilities when it comes to accessing their employment, training and participation in decision making.

The African Women's Protocol further protects women in the informal sector, which in many countries lack protection.⁷⁴ In this regard, the SADC Gender Protocol has failed to live up to the weight of expectation that was created in its Preamble, where it declared that SADC states recognise the feminisation of poverty, which is particularly prevalent in the informal sector. For this reason, the SADC Gender Protocol has fatally omitted an extremely important aspect.

⁷² African Women's Protocol (n 19 above) arts 5, 24, 22 & 14(b).

⁷³ African Women's Protocol (n 19 above) art 9.

⁷⁴ The omission of specific protection of women in the informal sector is a huge oversight, given that most women find themselves employed in the informal sector and invariably fall outside the protection of labour laws.

2.3 Rights in the SADC Protocol left out by the African Women's Protocol

At first glance, the SADC Gender Protocol appears to be a clumsily-drafted document that is not likely to achieve its stated purpose. However, upon closer inspection, it is revealed that the SADC Gender Protocol is remarkable for the fact that it has innovatively provided for rights that do not appear in the African Women's Protocol and yet are of vital importance in the pursuit of gender equality.

A notable provision in article 33(1) of the SADC Gender Protocol is the introduction of an obligation which binds all government ministries and departments to have in their budget an allocation to gender equality awareness. On the other hand, the African Women's Protocol calls for governments to cut their spending in the military and invest in women's rights.⁷⁵ These two provisions, while similar in intention, are not identical and it is therefore fortunate that SADC have been sufficiently bold to impose specific obligations to make gender-appropriate allocations of budgetary resources. This is markedly different from article 12(3) of the African Women's Protocol and can be regarded as quite an achievement.

The SADC Gender Protocol also protects the rights of the widower as provided for in article 10, which deals with widow's rights. This is of course a new development brought by the SADC Gender Protocol as absolutely no explicit mention is made of the rights of widowers throughout the African Women's Protocol. Having said this, however, the question which arises is whether it is necessary in any event. Had widowers suffered any prejudices before? Widowers had always had their rights protected by African traditional laws and practices to the detriment of widows.

Girl and boy children are also protected under the SADC Gender Protocol. Specifically, article 11 provides for the elimination of discrimination against the girl and boy child to ensure equal access to education and health care, the protection of girls from economic exploitation, trafficking and violence, and to ensure that girl children have access to information on sexual and reproductive health. The African Women's Protocol provides for the protection of the girl child;⁷⁶ however, it does not go into details since children have their rights protected under the African Charter on the Rights and Welfare of the Child (African Children's Charter).⁷⁷ As such, the SADC Gender Protocol has innovatively brought the obligation to respect the rights of children into the realm of the sub-regional level of human rights protection and can therefore be regarded as an important development emanating from the SADC

⁷⁵ African Women's Protocol (n 19 above) art 10(3).

⁷⁶ African Women's Protocol (n 19 above) arts 12(1)(c) & 13(g).

⁷⁷ African Charter on the Rights and Welfare of the Child, OAU Doc CAB/LEG/24.9/49 (1990), entered into force 29 November 1999.

Gender Protocol, especially in light of the fact that four⁷⁸ out of the 14 SADC member states are not parties to the African Children's Charter.

The SADC Gender Protocol's assertive stance concerning the representation of women in decision-making positions is remarkable: Article 12(1) of the SADC Gender Protocol unequivocally provides for the requirement of 50% representation by women in decision-making positions. The African Women's Protocol only calls for 'increased and effective representation and participation of women at all levels of decision making'.⁷⁹ The aspiration towards increased representation in the Women's Protocol arises in the context of political participation and it therefore appears that the SADC Gender Protocol aims to achieve representation of women in all spheres.

Article 15(2) of the SADC Gender Protocol places an injunction on states to ensure gender-sensitive and responsive budgeting at the macro and micro-levels. Absolutely no similar provision is contained in the African Women's Protocol.

If one considers article 27(3)(c) of the SADC Gender Protocol, the SADC Gender Protocol can be regarded as having partially fulfilled its objective of 'filling gaps' when one considers that the SADC Gender Protocol introduces the requirement of the development and implementation of policies and programmes to ensure the appropriate recognition of the work carried out by care givers (usually women) and, further, to provide resources and psychological support for care givers. No similar provision whatsoever exists with respect to the African Women's Protocol.

A novel provision is found in article 17(1) of the SADC Gender Protocol, where it places an obligation on member states to adopt policies to ensure equal access and benefits for women and men in trade and entrepreneurship. No comparative provision exists in the African Women's Protocol. The addition is noteworthy as it represents a radical departure from the mentality that entrepreneurship is regarded as an activity for men and from which women are excluded.

When it comes to access to property, the SADC Gender Protocol provides for the categorical protection of women's property rights (unlike the tangential protection of same in the African Women's Protocol).⁸⁰ With regard to resources, the SADC Gender Protocol introduces a new right, being the provision of appropriate technology. In addition, the African Women's Protocol is silent on the aspect of technology and, as such, the SADC Gender Protocol has effectively 'filled a gap'.⁸¹ Furthermore, the SADC Gender Protocol seeks to ensure universal access to information, communication and technology, especially for women and girls. This right could not be more apposite, given the poor level of

⁷⁸ Angola, Democratic Republic of the Congo, Swaziland and Zimbabwe.

⁷⁹ African Women's Protocol (n 19 above) art 9(2).

⁸⁰ SADC Gender Protocol (n 18 above) art 18(1).

⁸¹ SADC Gender Protocol (n 18 above) art 18(1)(c).

technological utilisation in Africa.⁸² There is no provision to this effect in the Women's Protocol.

It is important to note that the SADC Gender Protocol went further to articulate mechanisms of preventing human trafficking,⁸³ while the African Women's Protocol left it upon member states to adopt appropriate and updated mechanisms of curbing human trafficking. An indication is therefore made that the SADC is cognisant of the high levels of human trafficking within the sub-region and has elected to take decisive action to curb this scourge.

Article 26(a) of the SADC Gender Protocol obliges state parties to undertake to ensure a reduction in maternal mortality by 75% by 2015.⁸⁴ The African Women's Protocol refers in its article 14 to health and reproductive rights, yet makes no reference to maternal mortality, even though this is an extremely pressing concern in the African context.

What is striking and important in the SADC Gender Protocol is the rehabilitation of perpetrators of gender-based violence. This is essential because it works as a preventative strategy for curbing a recurrence of gender-based cases, and thereby making perpetrators better citizens. However, it may be argued for the African Women's Protocol that, since it provides for the prevention of gender-based violence and the identification of causes of violence against women,⁸⁵ the rehabilitation of perpetrators could potentially fall within the ambit of preventive mechanisms as enshrined in the Women's Protocol. However, the Women's Protocol is too vague in this regard to reach a conclusion.

It is important to note, even before looking at the content of the provision on health, that there is the SADC Protocol on Health, which adequately covers health issues in the SADC region.⁸⁶ Turning to the SADC Gender Protocol, it provides for the adoption of appropriate and affordable quality health care to reduce maternal mortality; addresses sexual and reproductive health needs; develops female-controlled

⁸² The statistics show that, with regard to fixed-line telephones and mobile phone subscriptions as of 2000, in every 1 000, Botswana had 396; Democratic Republic of Congo (DRC) had 37; Lesotho had 109; Mozambique had 206; South Africa and Swaziland had no data; Zambia had 34; and Zimbabwe had 55. Regarding the number of people with personal computers, in every 1 000 people, Botswana had 45; there was no data with DRC and Lesotho; and Mauritius had only six people, while Mozambique had 109; South Africa had 82; Swaziland had 32; Zambia had 10; and Zimbabwe had 77. In relation to the number of people who use the internet, in every 1 000 persons, Botswana and Swaziland had 32; DRC had no data; Lesotho with 24 persons; Mauritius with a total of 7; Mozambique had 37; South Africa had 78; Zambia had 20; and Mozambique had 63. These figures are far too low, and need attention, given the usefulness of communication and technology in the world today.

⁸³ SADC Gender Protocol (n 18 above) art 5.

⁸⁴ SADC Gender Protocol (n 18 above) art 26.

⁸⁵ SADC Gender Protocol (n 18 above) art 4(c).

⁸⁶ SADC Protocol on Health, adopted in Maputo, Mozambique, 1999.

methods of contraception, safe abortion and counselling; and ensures the provision of hygiene, sanitary facilities and the nutritional needs of women.⁸⁷ While there is general replication of the rights contained in the SADC Protocol(s) in the African Women's Protocol,⁸⁸ the reduction of maternal mortality and the development of female-controlled methods of contraception are rights which do not appear in the Women's Protocol and have been comprehensively addressed in the SADC Gender Protocol.⁸⁹

The SADC Gender Protocol calls for member states to adopt and implement policies aimed at the prevention, treatment, care and support of people with HIV and AIDS. Also, it requires member states to provide for universal access to treatment for people infected with HIV and AIDS. In addition, it provides for the adoption of policies that ensure support to care givers.⁹⁰ The two provisions on universal access to treatment and support to care givers are very important, and they are not incorporated in either the SADC Protocol on Health or any other SADC treaty. This is a very positive improvement on the African Women's Protocol, to bind members to ensuring universal access to treatment, more so because sub-Saharan Africa is the region hardest hit by the HIV and AIDS pandemic, with 62,5% of 39,4 million people living with HIV and AIDS world-wide. Sadly, women make out 57% of the 62,5 million people living.⁹¹ To this end, the SADC has identified HIV and AIDS as a particularly egregious problem in the sub-region and has consequently adopted a comprehensive approach to the fight against HIV and AIDS.

The SADC Gender Protocol obliges member states to ensure women's representation and participation in key decision-making positions, in conflict resolution and peace-building processes.⁹² Likewise, article 10(2)(b) of the African Women's Protocol provides for women's participation in structures and processes for conflict prevention, management and resolution at all levels. While these provisions may seem very similar, the striking difference is that article 3(e) of the SADC Gender Protocol compels member states to strengthen, monitor and evaluate

⁸⁷ SADC Gender Protocol (n 18 above) art 29.

⁸⁸ African Women's Protocol (n 19 above) arts 14(1)(c) & (b).

⁸⁹ Art 26(a) of the SADC Gender Protocol sets the very ambitious target of reducing maternal mortality by 75% by 2015. The provision on reducing maternal mortality is extremely vital, particularly because of 529 000 maternal deaths, 95% of this number occurred in Africa and Asia as of the year 2000. More shocking is the fact that, while women in developed countries have a one in 2 800 chance of dying during childbirth, women in Africa have one in 20 chance; therefore, given these statistics, there is nothing as important as aiming to reduce maternal mortality in Southern Africa.

⁹⁰ SADC Gender Protocol (n 18 above) art 30.

⁹¹ UNAIDS, 2007 AIDS epidemic update, accessible at <http://www.unaids.org/en/KnowledgeCentre/HIVData/EpiUpdate/EpiUpdArchive/2007/> (accessed 7 July 2008).

⁹² SADC Gender Protocol (n 18 above) art 31.

the progress made towards reaching the targets and goals set out in the Protocol.⁹³

Article 2(1)(c) of the SADC Gender Protocol brought with it a new issue of co-operation (which is now on the international agenda), that countries should provide international co-operation and assistance for the implementation of human rights, with particular emphasis placed on economic, social and cultural rights.⁹⁴ This aspect is not traversed at all in the African Women's Protocol.

3 Implementation of obligations

According to Wandia, provisions on women's human rights in CEDAW and the Beijing Declaration and Platform for Action have not involved a conceptual shift or effected structural changes needed to implement their resolutions.⁹⁵ However, the African Women's Protocol — like the SADC Gender Protocol — is intended to domesticate CEDAW and the Beijing Declaration and Platform for Action in the African context. Therefore, the SADC Gender Protocol ensures implementation at national level, and thus makes reference to human and financial resources, which the African Women's Protocol equally provides for.⁹⁶ It, however, introduces a new element in providing for the adoption of regional action plans with measurable targets and time frames.⁹⁷

At the very least, one would expect that SADC states would introduce new rights altogether not covered by the African Women's Protocol or could have adopted more robust implementation mechanisms of the Women's Protocol. This point raises the important issue of implementation of women's rights at SADC and AU levels. Under the African Charter and Protocol, the AU provides for a reporting mechanism, individual complaints mechanism and has a Special Rapporteur on the Rights of Women. Turning to the SADC, the Gender Protocol has established another reporting mechanism.⁹⁸ However, it is silent on an individual complaints mechanism and does not have procedures such as Special Rapporteurs. Clearly, the SADC Gender Protocol has settled for less than what the AU provides in terms of implementation mechanisms, thus the all-important implementation of rights is undermined in the SADC Gender Protocol, with the result that victims of infringements

⁹³ SADC Gender Protocol (n 18 above) art 3(e).

⁹⁴ UN Charter (n 1 above) arts 55 & 56; ICCPR (n 3 above) arts 22 & 23; OHCHR General Comment 3 (n 3 above) para 38.

⁹⁵ M Wandia 'Ratification of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: Ethiopia and the Comoros lead the way' http://old.apc.org/english/capacity/policy/mmtk_ictpol_humanrights_African_Charter_protocol.doc (accessed 20 September 2009).

⁹⁶ African Women's Protocol (n 19 above) arts 26(1) & (2).

⁹⁷ SADC Gender Protocol (n 18 above) art 3(d).

⁹⁸ SADC Gender Protocol (n 18 above) art 39(3).

of their rights in the SADC sub-region would have to circumvent the sub-regional mechanisms as they are clearly inadequate, and rely on the AU mechanisms to vindicate their rights.

Even if the SADC Gender Protocol provides an individual complaints mechanism or anything equivalent to that, whereby complaints would be brought before the SADC Tribunal, the question is whether the SADC Tribunal has the capacity to deal with gender or human rights issues as contained in the SADC Gender Protocol. To this end, the SADC Tribunal is established under the SADC Treaty to ensure adherence to and proper interpretation of the provisions of the SADC Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it.⁹⁹ The Treaty provides that judges shall be appointed from nationals of states who possess the qualifications required for appointment to the highest judicial offices of their respective states or who are jurists of recognised competence.¹⁰⁰ Unlike the Protocol on the Statute of the African Court of Justice and Human Rights, judges of the SADC Tribunal do not necessarily bring any specialised human rights competence, although their jurisdiction clearly covers human rights issues.¹⁰¹ Indeed, while the SADC Tribunal has high-calibre judges in their own respective fields of law, none of the SADC judges has a degree in human rights law, and understandably so because a major objective of the SADC is economic liberation, therefore one expects that judges will mostly have qualifications in commercial law and related fields.¹⁰²

Both the SADC Gender Protocol and the African Women's Protocol oblige member states to periodically submit implementation reports. It is important to note that this, too, amounts to an unnecessary duplication of efforts, because multiple reporting by member states can be unduly onerous and it is definitely not cost-effective. With the ratification of the SADC Gender Protocol, it would mean that SADC states have to prepare three reports on the same subject to be submitted before the CEDAW Committee, the African Commission and the SADC, respectively.

⁹⁹ SADC Gender Protocol (n 18 above) art 16(1).

¹⁰⁰ SADC Protocol on Tribunal and Rules of Procedure thereof, adopted in Windhoek, Namibia, 7 August 2000, art 3(1).

¹⁰¹ CA Odinkalu 'Complementarity, competition or contradiction: The relationship between the African Court on Human and Peoples' Rights and Regional Economic Courts in East and Southern Africa' 10 http://www.africacourtcoalition.org/content_files/files/ChidionComplementarity.doc (accessed 12 June 2008).

¹⁰² SADC, Biographies of SADC Tribunal Judges, <http://www.sadc.int/content/english/tribunal/docs/Biodata%20for%20SADC%20Tribunal%20Members%20and%20Staff.pdf> (accessed 6 July 2008).

4 Complementarity or duplication?

The comparison between the SADC Gender Protocol and the African Women's Protocol carried out above reflects to an overwhelming extent that the large majority of provisions of the SADC Gender Protocol are the exact replica of the Women's Protocol. As such, it amounts to a duplication, with the following minor exceptions: the inclusion of men in gender issues; day care centres; paternity leave; places of shelter for survivors of gender-based violence; universal access to HIV and AIDS treatment, and support to HIV and AIDS care givers; an obligation on all government ministries to have budgets on gender awareness; and time-frames in which the respective articles are to be implemented; traditional courts; and an undertaking to reduce maternal mortality. These are the only areas that the SADC Gender Protocol could be said to be complementing the African Women's Protocol. In the circumstances, could it be said that the above-mentioned provisions needed the adoption of a new Protocol? Surely, means to cater for these provisions could have been deployed other than embarking on the new instrument altogether. This goes back to one of the objectives of the SADC Gender Protocol — to 'fill in the gaps'. Clearly the SADC Gender Protocol was not able to fill in the gaps as far as the African Women's Protocol is concerned. If the SADC Gender Protocol filled in the gaps, as purported in the SADC Gender Protocol itself, by introducing new rights and state obligations, surely it could potentially be a significant instrument at the continental level since it would complement the African Women's Protocol.

The analysis of the provisions of the two Protocols reflects that not only has the SADC replicated the provisions of the Women's Protocol, it has equally omitted some vital provisions and provided some rights to a lesser degree compared to the Women's Protocol. The result of this could entail that SADC member states could rely on the 'less onerous' provisions of the SADC Gender Protocol, while ostensibly upholding the binding obligations that they have voluntarily undertaken at the AU level. While the SADC as an entity has a right to adopt its legal instruments as it pleases, and not be expected to cover every other provision from either the African Women's Protocol or other relevant international treaties, the SADC has emphatically stated that the objective of the Protocol in question is to consolidate all legal instruments that SADC member states are parties to.¹⁰³ On this note, it is expected that the SADC, in its efforts to consolidate treaties and declarations, would include all the themes of the treaties it seeks to consolidate. However, contrary to expectations, the comparison carried out between the provisions of the SADC Gender Protocol and the African Women's Protocol has shown that the SADC has weakened the Women's

¹⁰³ African Women's Protocol (n 19 above) art 3(a).

Protocol. For instance, it has been indicated in the beginning of this work that regional instruments are adopted to cater for, among others, cultural specificity; yet it is alarming to find the glaring absence of a direct reference to harmful practices that are peculiar to African women while the African Women's Protocol prioritises them.¹⁰⁴ Another missing theme, yet equally important, is the protection of asylum-seeking women, refugees, returnees and internally-displaced women,¹⁰⁵ and this is astonishing because the Protocol was adopted in the wake of the unsettling events in Zimbabwe and Madagascar during July 2008.

Apart from its failure to adequately fulfil its objective of 'filling in the gaps', the SADC Gender Protocol has also failed to meet another objective, namely, 'addressing emerging gender issues', because there is little or no new emerging gender issues in the Protocol. This raises the question of the costs attached to adopting a new Protocol. Clearly, the costs of a new protocol outweigh to a very large extent the duplicative and complementary provisions referred to above. For SADC to reproduce the provisions of the African Women's Protocol amounts to a duplication of efforts, particularly because, with the exception of Botswana, two member states (Madagascar and Swaziland) are signatories to the African Women's Protocol and the rest (11) have ratified the Women's Protocol.¹⁰⁶ It is also striking to find that Botswana is amongst the countries that have not signed the SADC Gender Protocol. Surely, efforts could have been directed at bringing Botswana on board with regard to being party to the SADC Gender Protocol instead of duplicating efforts. Thus, the duplication of efforts is a waste of resources, which could have been invested elsewhere, specifically in lobbying other SADC member states to ratify the African Women's Protocol and adopting robust mechanisms for protecting women's rights, which would make the the SADC region exemplary. In that way, the SADC region could positively have enhanced (complemented) the African Women's Protocol.

While the SADC Gender Protocol has not succeeded in filling in the gaps in existing agreements and also has not succeeded in addressing emerging gender issues, other than duplicating the already existing treaties, the SADC has nevertheless aimed at 'deepening regional integration' as indicated in its objectives. This is indeed a positive act from the SADC member states, to strive to adopt an instrument that will create a uniform environment in relation to gender issues in the region. However, one wonders whether the SADC or women's groups in the SADC appreciate the full picture of integration in Africa as envisaged by

¹⁰⁴ African Women's Protocol (n 19 above) art 5(b).

¹⁰⁵ African Women's Protocol (n 19 above) art 11(3).

¹⁰⁶ African Union, Status of Women's Protocol <http://www.africaunion.org/root/au/Documents/Treaties/List/Protocol%20on%20the%20Rights%20of%20Women.pdf> (accessed 20 September 2009).

the AU.¹⁰⁷ The idea of integration in SADC and other sub-regional blocks is to eventually merge into a single entity under the broad umbrella of the AU.¹⁰⁸ The Constitutive Act of the AU defines regional integration as one of the anchoring pillars for African unity. The Lagos Plan of Action and the Abuja Treaty establishing the African Economic Community spell out the economic, political and institutional mechanisms for attaining this goal.¹⁰⁹ It would therefore be redundant to compete with the AU instead of implementing the AU agenda, given that there is a clear obligation on member states to move towards continental integration. Indeed, it has been determined that one of the fatal problems facing integration in Africa is that some RECs lack clarity of vision resulting in diffuse activities.¹¹⁰ Perhaps it is important for organisations and member states to visit the background on the establishment of the SADC, the primary focus or objectives of the SADC, and the bigger picture of integration in Africa. As indicated in the introductory part of this article, clearly the major objective for regional integration in SADC is economic growth, and this is the area where energies should be directed. What SADC states and women's organisations could do is to mainstream gender in all areas of integration in the SADC, especially because the SADC Treaty provides for gender mainstreaming in community building.¹¹¹ Ironically, in this regard, it is disturbing to find that all the judges in the SADC Tribunal are men, yet the SADC Treaty provides for gender mainstreaming.

In summary, the idea of fostering regional integration by duplicating the efforts of the AU is not only wasteful, but goes against the idea and spirit of continental integration in Africa. The article therefore indicates that there is a need for the SADC to obtain direction in achieving its mandate before the community loses focus. It is disturbing to find that South Africa has signed a free trade agreement contrary to the SADC Treaty,¹¹² and this has not been rigorously addressed by SADC member states and, ultimately, the entire idea of integration in SADC is made a mockery of. The SADC is not the only community which is on the verge of losing direction; many are and there is a need for redirection.

The analysis carried out above has indicated that the SADC, in its efforts to fill in the gaps, addresses emerging gender issues and pursues regional integration as reflected in its objectives, has duplicated

¹⁰⁷ Constitutive Act of the African Union, accepted in Lomé, July 2000, entered into force May 2001, arts 3(c) & (l).

¹⁰⁸ Constitutive Act of the African Union (n 107 above) art 3(l).

¹⁰⁹ The Treaty Establishing the African Economic Community, adopted in Abuja, Nigeria, 3 June 1991, entered into force 12 May 1994, art 4(1).

¹¹⁰ Economic Community for Africa *Assessing regional integration in Africa* (2004) 33.

¹¹¹ SADC Treaty (n 9 above) art 5(k).

¹¹² Trade, Development and Co-operation between EU and South Africa, OJ L 311, Vol 42, 4 December 1999 http://eur-lex.europa.eu/JOIndex.do?year=1999&serie=L&textfield2=311&Submit=Search&_submit=Search&ihtmlang=en (accessed: 13 October 2009).

and weakened the African Women's Protocol, and has further failed to comprehend the full picture of regional integration in Africa. So, what has the SADC achieved in adopting the SADC Gender Protocol? There is a significant theme in the SADC Gender Protocol, which is new to the African Women's Protocol, and that is 'monitoring and evaluating the goals set out in the Protocol'. Indeed, this is the area most peculiar to the SADC Gender Protocol, but the question is, is it appropriate for the treaty to be framed like the SADC Gender Protocol has been framed? Treaties invariably leave room for individual states to implement its provisions in a manner that best suits the respective states, that is, the treaty only provides a framework within which implementation should be done. On the contrary, the SADC Gender Protocol is very detailed and is not flexible to give the respective states the discretion in implementing it, taking into consideration the individual economic, political, and social situations of individual states. Therefore, the Protocol is not practicable. Secondly, the monitoring and evaluation mechanisms peculiar to the SADC Gender Protocol are alien to the traditional treaty in that the framework of the SADC Gender Protocol resembles a plan of action and not a treaty, and therefore it would have been more appropriate had the document been adopted as a plan of action instead. What is striking is that the last paragraph of the Preamble shows that the SADC had in mind a plan of action and not a treaty, but, for whatever reason, the idea dissipated along the way. The last paragraph of the preamble reads thus:

COMMITTED to drawing up a Plan of Action setting specific targets and timeframes for achieving gender equality and equity in all areas, as well as effective monitoring and evaluation mechanisms for measuring progress.

5 Conclusion

The protection of women's rights and the importance of the inclusion of women in a dominant role in all spheres of life cannot be overstated in Southern Africa and elsewhere. Also, for purposes of integration, it is very important that a region shows commitment to establishing a similar approach to common issues of interest as the SADC did with women's rights. While it is important to pursue regional integration by adopting treaties that seek to protect women's rights in the SADC region, it can be argued that despite the notable innovative provisions of the Protocol, the Protocol tends to be redundant in light of the degree of duplication between the SADC Gender Protocol and the African Women's Protocol. In this regard, many of the themes in the African Women's Protocol have been replicated in the SADC Gender Protocol, thus amounting to a duplication of efforts and a misdirection of scarce resources which could have been invested elsewhere. Ideally, the SADC should have adopted a plan of action to effectively and uniformly implement the African Women's Protocol. In addition, given

that the SADC has settled for weaker implementation mechanisms in comparison with the mechanisms of the AU, and has further increased the burden on states with regard to reporting, it was indeed inappropriate to adopt a treaty which weakens the already existing treaties that are equally binding on SADC member states. To sum up, instead of directing scarce resources to replicating the African Women's Protocol, the SADC could have resorted to strengthening the protection of women's rights because, no doubt, the promotion of women's rights is at a peak but protection is very low. Thus, conferences have been held; training and awareness campaigns on women's rights have been conducted and they are continuing. National, regional, continental and international laws have been adopted as a result of promotional efforts by women's groups. However, there is still a long way to go in as far as protection is concerned. Evidence for this assertion is gathered from an analysis of jurisprudence concerning women's rights. Regrettably, there are virtually no cases that have been submitted to the sub-regional or regional treaty-monitoring mechanisms aimed at addressing the desperate plight of Africa's women.