AFRICAN HUMAN RIGHTS LAW JOURNAL

The African Commission on Human and Peoples' Rights and the promotion and protection of sexual and reproductive rights

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Summary

The article examines the activities of the African Commission with regard to the advancement of sexual and reproductive health and rights in Africa. The article reviews the importance of applying human rights to sexual and reproductive health issues. It further discusses the promotional and protective mandates of the African Commission with a view to ascertaining whether the Commission has given attention to addressing the sexual and reproductive health challenges facing the region. In this regard, the paper focuses on two important issues – maternal mortality and same-sex relationships. Based on careful analyses of the promotional and protective mandates of the Commission, it is argued that some efforts have been made towards advancing reproductive health and rights in Africa. However, much more effort is needed with regard to sexual health and rights, especially with regard to issues such as same-sex relationships, sex work and violence against women. In conclusion, some suggestions are provided on the role of the African Commission in advancing sexual and reproductive health and rights in the region.

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1 Introduction

In recent times, the conceptualisation of the nature and content of the right to health, including sexual and reproductive rights, has received the attention of the international human rights community. However, under the African human rights system, the African Commission on Human and Peoples' Rights (African Commission) has not yet articulated the nature and content of this right, including sexual and reproductive rights. Generally, the realisation of human rights, especially socio-economic rights, including the right to health, can indeed be challenging for countries with developing economies. This is particularly true for Africa where poverty is rife, and where conflicts and disease continue to threaten lives. It is now accepted that Africa carries the world's burden of sexual and reproductive ill-health. This is tellingly revealed in the devastating effects of HIV and AIDS, the high maternal mortality and morbidity rates, the high incidence of sexually-transmitted infections and unsafe abortions in the region.[1]

According to the Joint United Nations Programme on HIV/AIDS (UNAIDS), Africa accounts for about 23 million people out of the total number of 33 million people said to be living with HIV worldwide.[2] The epidemic tends to affect women more than men. It is estimated that 60 per cent of people living with HIV in Africa are women.[3] The prevalence of HIV in young women in Africa is nearly four times that of young men.[4] Although sub-Saharan Africa remains highly affected, Southern Africa is the epicentre. South Africa, with an estimated 6 million people living with HIV, is said to have the largest number of people living with HIV in the world.[5]

The lack of access to sexual and reproductive health services remains a great challenge for many Africans, while sexually-transmitted infections other than HIV, continue to threaten the lives and well-being of others in the region.[6] In other parts of Africa, such as Western Africa, a woman's lifetime risk of death from pregnancy is said to be one of the highest in the world. For example, in Chad the risk of a woman dying during pregnancy or childbirth is one in 14, which is higher than the average for the region.[7] Even in a relatively prosperous country like Nigeria, the maternal mortality rate is estimated at 840 deaths per 100 000 live births. Nigeria is said to have one of the highest mater-

1 See eg A Glasier *et al* 'Sexual and reproductive health: A matter of life and death' (2006) 368 *Lancet* 1595-1607.

2 UNAIDS *AIDS epidemic update* (2010) 7.

3 UNAIDS (n 2 above) 15.

4 As above.

5 UNAIDS (n 2 above) 28.

6 Glasier (n 1 above).

7 WHO, UNICEF, UNFPA and World Bank *Trends in maternal mortality: 1990 to 2008* (2010).

nal mortality ratios in the world.[8] The likelihood of a woman dying during pregnancy or childbirth in the country is put at one in 23 compared to one in 9 200 in Malta.[9] Also, the child mortality rate in the country remains one of the worst in the world and progress seems to be stagnant in this area.[10]

In many parts of Africa, issues relating to sexual health and sexuality are viewed with suspicion and remain controversial. Due to religious and cultural beliefs, any attempt at expressing homosexuality is condemned as unnatural and ungodly. People in same-sex relationships continue to be vilified and subjected to different forms of abuse and human rights violations, including the threat of death.[11] Increasingly, African countries adopt legislation criminalising same-sex relationships.[12] This has continued to fuel stigma and discrimination against homosexuals, thus raising human rights concerns.

Although the constitutions of most African countries do not explicitly recognise the right to health as a justiciable right,[13] most of these countries have ratified numerous international and regional human rights instruments guaranteeing the right to health. Some of these instruments include the International Covenant on Economic, Social and Cultural Rights (ICESCR);[14] the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);[15] the Convention on the Rights of the Child (CRC);[16] the African Charter on Human

8 n 7 above, 17.

9 n 7 above, 18.

10 Central Intelligence Agency (CIA) *The 2008 world facts book* https://www.cia.gov/library/publications/the-world-factbook/ (accessed 1 March 2011). The child mortality rate in the country is estimated at 94 deaths per 1 000 live births.

11 See D Smith 'South Africa gay rights activists warn of homophobic attacks after murder' *The Guardian* http://www.guardian.co.uk/world/2011/may/03/south-africa-homophobic-attacks (accessed 29 September 2011).

12 See eg Anti Homosexual Bill No 18 of 2009, Burundi government moves to criminalise homosexuality; ''Nigerian anti-gay bill causes protests' *Afrol News* http://www.afrol.com/ articles/24541 (accessed 26 September 2011).

13 See eg sec 6(6) of the Nigerian Constitution 1999, which provides that all rights, including the right to health, listed in ch 2 of the Constitution, shall not be made justiciable; see also sec 4 of the Amended Constitution of Lesotho, which listed the various human rights guaranteed but excluding the right to health; ch 3 of the Constitution of Zimbabwe, 2000, which guarantees various human rights excluding the right to health.

14 International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966; GA Res 2200 (XXI), UN Doc A/6316 (1966) 993 UNTS 3, entered into force on 3 January 1976.

15 Convention on the Elimination of All Forms of Discrimination Against Women GA Res 54/180 UN GAOR 34th session Supp 46 UN Doc A/34/46 1980.

16 Convention on the Rights of the Child, adopted in 1989, UN Doc A/44/49 (entered into force 2 September 1990).

and Peoples' Rights (African Charter);[17] the African Charter on the Rights and Welfare of the Child (African Children's Charter);[18] and the Protocol to the African Charter on the Rights of Women in Africa (African Women's Protocol).[19] While it is recognised that African countries are attempting, through the formulation of laws and policies, to address some of these challenges, the question remains as to whether these steps are in line with the obligations imposed on these countries under international human rights law. The application of human rights principles and standards to sexual and reproductive health issues, such as maternal mortality and same-sex relationships, is important in that it helps to hold governments accountable to the obligations to respect, protect and fulfil human rights relating to these issues. Regional human rights bodies or tribunals such as the African Commission can play important roles in advancing sexual and reproductive health and rights in the region. The African Commission can hold governments accountable to their obligations under regional and international human rights instruments with regard to the right to health, including sexual and reproductive rights. Particularly, the Commission can set standards and create precedents with regard to the nature of states' obligations to promote and protect human rights in the context of maternal mortality and same-sex relationships.

Against this backdrop, the article examines the activities of the African Commission with regard to the advancement of sexual and reproductive health and rights in the region. The article discusses the importance of applying human rights to sexual and reproductive health issues. It further discusses the promotional and protective mandates of the Commission, with a view to ascertaining whether the Commission has paid attention to sexual and reproductive health and rights challenges facing the region. For this purpose, the article focuses on two important issues – maternal mortality and same-sex relationships. The article argues that, based on a careful analysis of the promotional and protective mandates of the Commission, it would seem that some efforts have been made towards advancing reproductive health and rights, including maternal mortality in the region. However, much effort is needed with regard to sexual health and rights, especially as regards issues such as same-sex relationships, sex work and violence against women. In conclusion, a few suggestions are provided on the role of the African Commission in advancing sexual and reproductive rights in the region.

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

18 African Charter on the Rights and Welfare of the Child, OAU Doc CAB/LEG/24.0/49 (1990) entered into force 29 November 1999.

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

2 Application of human rights to sexual and reproductive health

Human rights principles and standards are generally contained in national constitutions and laws and regional and international human instruments. These principles and standards help give direction to government agencies, individuals and institutions on the appropriate shaping of policies and practices.[20] The question may then arise: Are human rights useful in the context of sexual and reproductive health? Put in another way, what are the benefits of applying human rights principles and standards to sexual and reproductive health issues such as maternal mortality and same-sex relationships? Indeed, a few commentators doubt the relevance of the human rights approach in addressing issues affecting women's rights.[21] Human rights can, however, become important tools to empower disadvantaged and marginalised groups in society such as women and people in same-sex relationships, to legitimately assert their interests. Moreover, human rights principles and standards can be useful tools for government agencies to employ with a view to advancing rights in the context of maternal mortality and same-sex relationships. For instance, reports showing that maternal deaths occur in many African countries due to poor medical attention, lack of emergency obstetrics care, hostile attitudes of health care providers, a systemic failure or corrupt practices on the part of health care providers, may indicate the failure on the part of a government to protect and promote a woman's rights to life, dignity, non-discrimination and to be free from inhuman or degrading treatment.[22]

Equally, in the context of same-sex relationships, the adoption of laws or policies criminalising consensual sexual acts between two adults will not only fuel discrimination against gays and lesbians, but will also result in human rights violations. As noted earlier, the criminalisation of same-sex relationships seems to be the norm in many African countries. Punitive laws against gays and lesbians violate their rights to privacy, non-discrimination and dignity guaranteed in the African Charter, and render people in same-sex relationships more susceptible to HIV infection. The South African Constitutional Court in *National Coalition of*

20 R Cook *et al Reproductive health and human rights: Integrating medicine, ethics and law* (2003) 148.

21 M Tushnet 'Rights: An essay in informal political theory' (1989) 17 *Politics and Society* 410; see also C Smart *Feminism and the power of law* (1989) 1-4; A McColgan *Women under the law: The false promise of human rights* (2000) 6.

22 See eg Centre for Reproductive Rights (CRR) *Failure to deliver: Violations of women's human rights in Kenyan facilities* (2007) 24; Centre for Reproductive Rights (CRR) *Broken promises: Human rights, accountability and maternal death in Nigeria* (2008); see also Amnesty International *Out of reach: The cost of maternal health in Sierra Leone* (2009); Human Rights Watch *Stop making excuses: Accountability for maternal health care in South Africa* (2011).

Gay and Lesbian Equality v The Minister of Justice explained that the criminalisation of consensual sexual acts between adults violates the rights to privacy and dignity.[23] Moreover, a failure on the part of a state to prevent acts of violence by non-state actors against gays and lesbians within its jurisdiction may result in a breach of the obligation to protect human rights.

It should be borne in mind that the application of human rights to contentious and emerging issues, such as sexual and reproductive health, may sometimes prove challenging. This is more so when one considers that sexual and reproductive health and rights are a subset of the right to health. Under international law, the right to health has often been criticised for being vague and insufficiently defined or ascertainable such that its enforceability is difficult.[24] This has led to a reluctance to recognise or enforce this right at the national level.

Given that issues relating to sexual and reproductive health and rights evoke emotions and sentiments in many African societies, the application of human rights standards to these issues may face great opposition. It will be recalled that the promotion and protection of rights relating to sexual and reproductive health received a lot of attention during the International Conference on Population and Development (ICPD) in Cairo in 1994,[25] and during the Fourth World Conference on Women in Beijing in 1995.[26] At these conferences, the international community affirmed that the promotion and protection of human rights relating to sexual and reproductive health are matters of social justice, which can be addressed through the application of human rights contained in existing national constitutions and regional and international human rights instruments.[27] These conferences provided an extensive definition of the notion of reproductive health as follows:[28]

> Reproductive health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its function and processes. Reproductive health therefore implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if and when and how often to do so. Implicit in this last condition are the right of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice of regulation of fertility which are not against the law, and the right of access to appropriate health-care services that will enable

23 1999 1 SA 6 (CC); 1998 12 BCLR 1517 (CC).

24 DP Fidler *International law and infectious diseases* (1999).

25 Report of the International Conference on Population and Development (ICPD) 7, UN Doc A/CONF.171/13 (1994).

26 Fourth World Conference on Women Beijing (FWCW) held on 15 September 1995, A/CONF.177/20.

27 Cook *et al* (n 20 above).

28 See para 7(2) of ICPD (n 25 above) and para 94 of FWCW (n 26 above).

> women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant. In line with the above definition of reproductive health, reproductive care is ... a constellation of methods, techniques and services that contribute to reproductive health and well-being by preventing and solving reproductive health problems. It also includes sexual health, the purpose of which is the enhancement of life and personal relations, and not merely counselling and care related to reproduction and sexually transmitted disease.

However, while these conferences recognised the need to address high maternal mortality rates in the world, especially in poor regions such as Africa, scant attention was given to sexual health and rights issues such as same-sex relationships. The conclusions reached at both the Cairo Programme of Action and the Beijing Declaration have subsequently been consolidated as the five-year reviews in 1999[29] and 2000[30] respectively.

A major criticism of the definition of reproductive health at Cairo and Beijing is that it tends to subsume sexual health under reproductive health and rights.[31] This in itself is a shortcoming considering that not all sexual activities lead to procreation. In essence, it may be argued that the deliberations at ICPD and Beijing gave more attention to reproductive health and rights than to sexual health and rights. This is hardly surprising, given that sexual rights when compared with reproductive health and rights are a more recent and evolving set of rights under international law. Indeed, Petchesky referred to this set of rights as the 'newest kid on the block'.[32]

While it is noted that the concepts of reproductive health and sexual health are interrelated;[33] they are to some extent distinct from each other.[34] The World Health Organisation (WHO) has made an attempt

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29 UN follow-up meeting of the ICPD held in New York from March and June 1999.

30 UN Five-Year Review of the Implementation of the Beijing Declaration and Platform for Action (Beijing + 5) held in the General Assembly, 5-9 June 2000.

31 See Report of Paul Hunt, Special Rapporteur, on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, E/CN.4/2004/49, 16 February, 2004.

32 R Petchesky 'Sexuality right: Inventing a concept, mapping international practice' unpublished paper presented at the Conference on Reconceiving Sexuality, Rio de Janeiro, 14-18 April, 1996.

33 For a detailed explanation of this, see R Dixon-Muller 'The sexuality connection in reproductive health' (1993) 24 *Studies in Family Planning* 277, where the author attempts to divide the elements of reproductive health care into two categories – sexual health and reproductive health – each with specific components.

34 For more discussion on this, see AM Miller 'Sexual but not reproductive: Exploring the junction and disjunction of sexual and reproductive rights' (2000) 4 *Health and Human Rights* 86-87. Here the author contends that a discussion on sexual health and rights goes beyond traditionally-conceived notions of reproduction and heterosexuality, and embraces diverse groups of people and issues, including homosexuals and heterosexuals and reproductive and non- reproductive sexual activities.

to clarify the content and nature of sexual health and rights.[35] According to the WHO, sexual rights embrace existing and recognised human rights at national, regional and international levels. These rights are incorporated into the domestic laws of many countries and implemented accordingly. The working definition of sexual rights includes the right of all persons, free of coercion, discrimination and violence, to[36]

- the highest attainable standard of sexual health, including access to sexual and reproductive health care services;
- seek, receive and impart information related to sexuality;
- sexuality education;
- respect for bodily integrity;
- choose their partner;
- decide to be sexually active or not;
- consensual sexual relations;
- consensual marriage;
- decide whether or not, and when, to have children; and
- pursue a satisfying, safe and pleasurable sexual life.

This definition is the most comprehensive and up-to-date. While it is difficult to accept a single definition of sexual health and rights because of diverse sexual desires and the historical background of the concept, nonetheless, human rights, including sexual and reproductive health rights, should be exercised inclusively without a restriction on the rights of anyone.

The recent introduction of the African Women's Protocol has further added to the human rights of sexual and reproductive health in the region. The Women's Protocol contains a number of radical and ground-breaking provisions recognising the sexual and reproductive rights of women. The Women's Protocol explicitly articulates all women's reproductive rights as human rights. It also expressly guarantees a woman's right to control her fertility without being coerced into making any wrong decision(s).[37] Article 14, entitled 'Health and Reproductive Health', provides:

> 1 States parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted. This includes:
>
> (a) the right to control their fertility;
>
> (b) the right to decide whether to have children, the number of children and the spacing of children;
>
> (c) the right to choose any method of contraception;
>
> (d) the right to self-protection and to be protected against sexually-transmitted infections, including HIV/AIDS;

35 World Health Organisation (WHO) *Defining sexual health, Report of a technical consultation on sexual health* (2006) 5.

36 As above.

37 Art 14 African Women's Protocol.

(e) the right to be informed on one's health status and on the health status of one's partner, particularly if affected with sexually-transmitted infections, including HIV/AIDS, in accordance with internationally recognised standards and best practices;
(g) the right to have family planning education.

2 States parties shall take all appropriate measures to:
(a) provide adequate, affordable and accessible health services, including information, education and communication programmes, to women, especially those in rural areas;
(b) establish and strengthen existing pre-natal, delivery and post-natal health and nutritional services for women during pregnancy and while they are breast-feeding;
(c) protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.

From the above provisions it is clear that the African Women's Protocol has contributed greatly to the development and recognition of the reproductive rights of women both internationally and nationally. It remains one of the most radical and progressive human rights instruments in the context of sexual and reproductive health and rights.[38] If implemented well, the Women's Protocol will go a long way in advancing the sexual and reproductive rights of African women.

However, one of the major criticisms of the African Women's Protocol is that it tends to give too much attention to reproductive health and rights compared to sexual health and rights. For instance, the Women's Protocol is surprisingly silent on the issue of same-sex relationships. The Protocol does not contain a specific provision recognising the right of women to exercise their sexual choices regardless of their sexual orientation. Moreover, the language of the Protocol does not explicitly confer on women the possibility of asserting their sexuality. Rather, women are viewed through a stereotypical lens of 'motherhood'.[39] It is hoped that in future, when the opportunity arises for either the African Commission or the African Court on Human and Peoples' Rights (African Court) to interpret the provisions of the African Women's Protocol, a generous and purposive approach will be adopted.

38 See F Banda 'Blazing a trail: The African Protocol on Women's Rights comes into force' (2006) 50 *Journal of African Law* 72; see also Centre for Reproductive Rights (CRR) *Briefing paper: The Protocol on the Rights of Women in Africa: An instrument for advancing reproductive and sexual rights* (2005) 4-7.

39 See eg RS Mukasa *The African Women's Protocol: Harnessing a potential force for positive change* (2009) 5.

3 Promotional and protective mandate of the African Commission and sexual and reproductive rights

The African Commission was established under article 30 of the African Charter. By virtue of article 31, the Commission consists of 11 members, chosen from among African personalities of the highest reputation, and known for their morality, integrity and competence in matters of human and peoples' rights. Members of the Commission are to be elected by the General Assembly of the African Union (AU) and not more than one person should be elected per country. The tenure of members of the Commission is six years. However, members may be eligible for re-election. The mandate of the African Commission can broadly be classified into two – promotional and protective.

The promotional mandate of the African Commission is contained in article 45 of the African Charter; the protective mandate in articles 47 to 55. While articles 47 to 52 relate to communications filed by states to the Commission, articles 54 and 55 relate to communications filed by non-state parties.

The discussions that follow relate to how the promotional and protective mandate of the African Commission intersects with the realisation of sexual and reproductive rights, especially in relation to maternal mortality and same-sex relationships in the region. The authors do not intend to cover all the promotional activities of the Commission. Rather, the focus is on resolutions issued by the Commission and the activities of the Special Rapporteur on Women that may have implications for the enjoyment of sexual and reproductive rights in Africa.

3.1 Promotional mandate of the African Commission and sexual and reproductive rights

The promotional mandate of the African Commission is spelt out in article 45(1) of the African Charter as follows:

(a) to collect documents, undertake studies and researches on African problems in the field of human and peoples' rights, organise seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights, and should the case arise, give its views or make recommendations to governments;
(b) to formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African governments may base their legislation;
(c) to co-operate with other African and international institutions concerned with the promotion and protection of human and peoples' rights.

Since the establishment of the African Commission, its decisions, recommendations and resolutions have challenged African leaders to make good use of their offices, and to respect citizens' rights uniformly.[40] Over the years the decisions, recommendations and resolutions of the Commission have influenced governments, non-governmental organisations (NGOs) and human rights advocates all over the continent. The collaboration between NGOs and the Commission has been critical to the success of the Commission and its efforts to protect and promote human rights, particularly sexual and reproductive rights. This symbiotic relationship has contributed in no small way to the progress made by the Commission towards the promotion of sexual and reproductive rights in Africa. The Commission was able to tap into the expertise of NGOs and other human rights institutions[41] to draft some of its resolutions relating to sexual and reproductive rights.

In terms of the African Charter, the African Commission is charged with (amongst other functions) promoting and protecting human and peoples' rights in Africa. The Commission embarks on promotional state visits during which it gathers information on human rights issues. The commissioners meet with government officials, NGOs and the general public during state visits and raise awareness on human rights issues and responses. The African Commission urges state parties to protect, promote, respect and fulfil human rights by implementing their human rights obligations.

As stated above, the promotional mandate of the African Commission is contained in article 45 of the African Charter. Although this provision does not specifically confer on the Commission the power to issue resolutions, a broad interpretation of article 45(a), particularly the phrase 'and should the case arise, give its views or make recommendations to governments', would seem to permit the Commission to issue important resolutions on human rights. Thus, realising the threats that the HIV/AIDS pandemic poses to millions of lives in Africa and the attendant human rights challenges raised by the pandemic, the Commission in 2002 issued a resolution calling on African governments to adopt a human rights-based approach to addressing the impact of HIV/AIDS in the region. According to the Commission, it is imperative that all efforts adopted by African governments towards curbing the spread of HIV must be respectful of individuals' human rights.[42]

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40 This was demonstrated in cases such as *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) discussed below.

41 The African Commission has continued to received technical support from organisations such as the African Centre for Democracy and Human Rights, the Institute for Human Rights Development in Africa and the Centre for Human Rights at the University of Pretoria.

42 Resolution on the HIV/AIDS Pandemic–Threat against Human Rights and Humanity adopted at the 29th ordinary session of the African Commission held in Tripoli, Libya, ACHPR Res.53/(XXIX)01.

Echoing the decision reached at Abuja,[43] the African Commission calls on African governments to allocate adequate resources to curb the spread of HIV/AIDS and to ensure the provision of care and support services for those in need. Also, the Commission calls on African governments to take concrete steps addressing stigma and discrimination associated with the pandemic, particularly with regard to HIV-positive persons in the region. Concerned with the serious challenge of access to life-saving medications for Africans at that time, the Commission made a passionate call to pharmaceutical companies to ensure that affordable and comprehensive health services, including quality affordable medicines, be made available to African governments in order to address the negative impact of HIV/AIDS.

Given the serious human rights violations that HIV-positive people were encountering at that time in Africa, this important resolution, which emphasises a rights-based approach to addressing the pandemic, could not have come at a better time. While one recognises the legal limitations of resolutions, there is no doubt that they remain important soft law to hold African governments accountable to their obligations under the African Charter and other international human rights instruments.[44] Although the African Commission did not specifically make any link between HIV/AIDS and same-sex relationships, it may be argued that the content of this resolution can be interpreted broadly as protecting the human rights of people in same-sex relationships in the context of HIV/AIDS. However, it would have been better if the Commission had specifically made reference to the plight of people in same-sex relationships. Studies have shown high HIV prevalence among people in same-sex relationships, especially men who have sex with men, in many African countries.[45] Given that most countries in Africa adopt punitive measures regarding same-sex relationships and the negative implications of this for the HIV prevention response in Africa,[46] the Commission could have broken its silence on the issue. The African Commission should have called on African governments to respect the human rights of people in same-sex relationships and to desist from adopting a punitive approach to same-sex relationships.

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43 African Summit on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases, Abuja, Nigeria, 24-27 April 2001, OAU/SPS/ABUJA/3. It was agreed at this meeting that African governments should at least commit 15% of their annual budget to the health sector in order to address the HIV/AIDS pandemic.

44 See eg H Hillgenberg 'A fresh look at soft law' (1999) 10 *European Journal of International Law* 499.

45 See eg AD Smith *et al* 'Men who have sex with men and HIV/AIDS in sub-Saharan Africa' (2009) 374 *The Lancet* 416-422.

46 There are about 38 countries in Africa that currently criminalise same-sex relationships and intimacy, while in other countries laws relating to vagrancy and nuisance can be used to prosecute people in same-sex relationships. See S Ndashe 'The battle for the recognition of LGBTI rights as human rights' http://www.gwi-boell.de/web/lgbt-lgbti-rights-human-rights-africa-2324.html (accessed 31 October 2011).

More recently, the Commission has issued resolutions relating to topical issues affecting the sexual and reproductive lives of Africans. For instance, in 2008 the Commission issued two important resolutions dealing with access to medicines[47] and maternal mortality.[48] The need to promote and protect the sexual and reproductive health and rights of Africans, particularly African women, has, however, remained a great challenge. Women remain marginalised and vulnerable and therefore helpless and hopeless in matters relating to their sexual and reproductive well-being.

African governments are obligated to ensure that Africans, particularly women, have access to good quality and affordable medicines. This statement holds true for most African women as far as the issues of sexual and reproductive matters are concerned. Regrettably, however, the essence of article 16 of the African Charter, which guarantees 'the right to enjoy the best attainable state of physical and mental health and that states must ensure that everyone has access to medical care', is often rendered meaningless or unrealisable for many Africans. Therefore, the progressive position of the Commission relating to access to medicines is a welcome development as it coincides with the views of other commentators on the issue. For instance, Clapham notes that 'the most obvious threat to human rights has come from the inability of people to achieve access to expensive medicine, particularly in the context of HIV and AIDS'.[49] Similarly, Yamin notes that the denial of access to life-saving medications constitutes a great threat to the enjoyment of the rights to health and life guaranteed in international and regional human rights instruments.[50] According to the African Commission, the right to health is not limited to access to health care but to every other supporting treatment, management or service which promotes the highest attainable standard of health for everyone regardless of age, sex or gender.[51]

Influenced by General Comment 14 of the Committee on Economic, Social and Cultural Rights (ESCR Committee), the African Commission in its resolution on access to medicines urges African governments to ensure the availability, accessibility, acceptability and quality access of everyone to medicines. More importantly, the Commission reminds African governments that they have an obligation to respect, protect and fulfil access to medicines for their citizens. The Commission particularly emphasises that African governments must refrain from implementing intellectual property policies that do not take full advantage of all flex-

47 ACHPR/Res 141 (XXXXIIII) 08: Resolution on Access to Health and Needed Medicines in Africa.

48 ACHPR/Res 135 (XXXXIIII) 08: Resolution on Maternal Mortality in Africa.

49 A Clapham *Human rights obligation of non-state actors* (2006) 175.

50 AE Yamin 'Not just a tragedy: Access to medication as a right under international law' (2003) 21 *Boston University International Law Journal* 326.

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

ibilities in the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)[52] that promote access to affordable medicines, including the 'TRIPS-Plus' 'trade agreement'. This is a very significant statement, given that many commentators have expressed concerns with regard to the negative implications of the TRIPS Agreement on access to medicines in poor regions, including Africa.[53] Although TRIPS contains some flexibilities such as compulsory licensing, parallel importation and *bolar* exceptions, which African governments can invoke to facilitate access to medicines for their citizens, many African governments are failing in their obligations to explore these safeguards.[54] More significantly, the Commission mandates the Working Group on Economic, Social and Cultural Rights to further define states' obligations with regard to realising access to medicines and to develop monitoring tools to hold governments accountable. This is a positive development and it will go a long way to ensuring states' compliance with this resolution.

It should be noted that, although this resolution of the African Commission focuses on access to medicines in the context of HIV and AIDS, some of its contents can apply equally to maternal mortality. It is a known fact that pregnant women in many African countries lack basic access to common drugs or medicines such as pain relievers, and this often compounds their problems during pregnancy. Moreover, many women who are susceptible to malaria during pregnancy do not usually have access to anti-malaria drugs during pregnancy. It has been established that malaria during pregnancy can pose threats to the life of the woman and the unborn child.[55] Therefore, the resolution of

52 The TRIPS Agreement was part of the Final Act establishing the WTO, commonly referred to as the Marrakech Agreement, attached as Annex 1C to the WTO Agreement. While it may be argued that most African countries lack the manufacturing capacity to produce life-saving medications, opportunities exist under the safeguard provisions of TRIPS, which can be explored by African governments to facilitate access to medicines to their citizens if there really is the political will.

53 See eg MA Santoro 'Human rights and human needs: Diverse moral principles justifying Third World access to affordable HIV/AIDS drugs' (2006) 31 *North Carolina Journal of International Law and Commercial Regulation* 923; see also JM Berger 'Tripping over patents AIDS, access to treatment and the manufacturing of scarcity' (2001-2002) 17 *Connecticut Journal of International Law* 157; E 't Hoen 'TRIPS, pharmaceutical patents and access to essential medicines. Seattle, Doha and beyond' (2002) 3 *Chicago Journal of International Law* 31.

54 For more on this issue, see E Durojaye 'Compulsory licensing and access to medicines in the post-Doha era: What hope for Africa?' (2008) 55 *Netherlands International Law Review* 33; see also S Sacco 'A comparative study of the implementation in Zimbabwe and South Africa of the international law rules that allow compulsory licensing and parallel importation for HIV/AIDS drugs' (2005) 5 *African Human Rights Law Journal* 105.

55 In areas of Africa with stable malaria transmission, *P falciparum* infection during pregnancy is estimated to cause as many as 10 000 maternal deaths each year, 8% to 14% of all low birth weight babies, and 3% to 8% of all infant deaths. See Roll Back Malaria 'Malaria in pregnancy' http://www.rbm.who.int/cmc_upload/0/000/015/369/RBMInfosheet_4.htm 9 (accessed 29 September 2011).

the Commission on Access to Essential Medicines in Africa serves as a wake-up call for African governments to ensure that they make basic medicines, goods and services available to pregnant women.

Although at the juridical level, the rights to health and sexual and reproductive health remain unachievable in many countries, countries such as South Africa are making headway and setting the pace for many other African countries. This was demonstrated in the *Treatment Action Campaign v Ministry of Health* case (*TAC*).[56] In the *TAC* case, some South African NGOs, led by the Treatment Action Campaign, played a significant role in holding the South African government accountable for failing to ensure access to anti-retroviral therapy that could prevent mother-to-child transmission of HIV. The government was reminded of its obligation under international human rights law and the South African Constitution to respect, protect, promote and fulfil the right to health of South Africans.

Aside from the challenge posed by HIV/AIDS to lives in Africa, there is also a great need for African governments to address the alarming and worrisome rates of maternal mortality and morbidity in the region. As stated above, Africa remains the region that accounts for the highest numbers of maternal deaths each year. And for each woman that dies during pregnancy and childbirth, ten more suffer from debilitating injuries.[57] The issue of maternal mortality and morbidity has attracted media publicity and concern of various stakeholders, particularly civil society groups. Therefore, the African Commission could not help but respond to this continental outcry. The Commission's Resolution on Maternal Mortality[58] noted that African leaders were not doing enough to address the issue of high maternal mortality and morbidity in their respective countries. It was noted that maternal deaths and morbidity in Africa have shown no sign of abating, as Africa still accounts for more than 250 000 maternal deaths annually. Africa has continued to bear the largest burden of maternal deaths and injuries in the world with many African countries listed among those that have not made appreciable efforts in addressing maternal mortality.[59] Worried by this situation, the Commission urges that maternal mortality should be declared a state of emergency in Africa. Already there are fears that many African countries may fail to meet goal 5 of the Millennium Development Goals (MDGs),[60] which requires a 75 per cent reduction in maternal deaths by 2015.

More importantly, the African Commission notes that maternal mortality is a violation of women's rights to life, dignity and non-

56 2002 5 SA 721 (CC).

57 P Barate & M Temmerman 'Why do mothers die? The silent tragedy of maternal mortality' (2009) 5 *Current Women's Health Review* 231.

58 Resolution on Maternal Mortality (n 48 above).

59 WHO, UNICEF, UNFPA & World Bank *Maternal mortality in 2005* (2007) 18.

60 UN Millennium Declaration and Millennium Development Goals launched in 2000.

discrimination recognised under the African Charter and the African Women's Protocol. This is very important in the sense that framing maternal mortality as a human rights violation places obligations on governments, particularly African governments, to ensure that they take the necessary steps to address this health challenge. Conversely, a failure to do so will result in a breach of obligations under international law.[61] The Commission calls on African governments to adopt a rights-based approach to addressing maternal mortality in the region.

Disturbed by the poor mobilisation of resources to address maternal deaths in Africa, the African Commission reminds African governments of their commitment at the Abuja Declaration to allocate at least 15 per cent of their annual budgets to the health sector in order to meet health challenges such as HIV/AIDS and maternal deaths. The Commission further calls on African governments to include in their periodic reports as provided in article 62 of the African Charter the following:

- the general state of maternal health, including the level of mortality and morbidity and challenges faced in implementing related programmes;
- policy and institutional measures taken to give effect to the provisions of article 14 of the African Charter on the right to the best attainable state of physical and mental health for women;
- budgetary and institutional measures dedicated to securing maternal health;
- other programmes and activities undertaken to secure maternal health with results.

This is a welcome development as this will ensure that African governments give priority to addressing maternal deaths in their countries. It is not so much that Africa lacks the resources or manpower to prevent maternal deaths, but what is missing is the political will on the part of African governments.

The lack of access to quality maternal and reproductive health care, treatment and services at the regional level is of concern if one considers the number of women dying from complications arising from pregnancy or childbirth. Maternal deaths are preventable if only African governments have the political will to provide access to sexual and reproductive health care services, particularly family planning services, to women in the region. Various reports have shown that beyond the medical reasons that cause deaths during pregnancy or childbirth,

61 See eg RJ Cook *et al Advancing safe motherhood through human rights* (2001*);* see also E Durojaye 'The Human Rights Council's Resolution on Maternal Mortality: Better late than never' (2010) 10 *African Human Rights Law Journal* 189; V Boama & S Arukumaran 'Child birth: A rights-based approach' (2009) 106 *International Journal of Gynaecology and Obstetrics* 125-127; A Yamin & D Maine 'Maternal mortality as a human rights issue: Measuring compliance with international treaty obligations' (1999) 21 *Human Rights Quarterly* 563; F Leeuwen & R Amollo 'A human rights-based approach to improving maternal health' (2009)10 *ESR Review* 21.

other factors, such as the low status of women, weak health care systems, a lack of infrastructure, poor allocation of resources to address maternal and child care and hostile attitudes of health care providers also contribute.[62]

As stated above, the African Women's Protocol contains important provisions which enjoin African governments to take the steps necessary with a view to meeting the sexual and reproductive health needs (including maternal health needs) of women. One could argue that the increase in untimely and unnecessary deaths of many women and girls in Africa due to pregnancy-related complications undermine the purpose of the African Charter, the Women's Protocol and the existence of the African Commission as a whole. The Women's Protocol explicitly provides in article 14 for the right to health, including reproductive rights. The same provision expressly obligates African governments to 'establish and strengthen existing pre-natal, delivery and post-natal health and nutritional services for women during pregnancy and while they are breast-feeding'. Unfortunately, services related to maternal health remain poor in many African countries. It should be noted that preventable maternal deaths violate a fundamental right protected in article 18 of the African Charter, which regards the African family as the 'natural unit and basis of the society' and 'the custodian of morals and traditional values recognised by the community'. One may ask what is left of a family if its foundation is eroded and left in shambles by a preventable maternal death and a total disregard for women's rights by a government.

So far, the African Commission is yet to issue any resolution relating to the rights of marginalised groups such as sex workers and people in same-sex relationships. Given the constant homophobic attacks on gays and lesbians and attempts by some African countries to enact harsh criminal laws against same-sex relationships, one would have expected that the African Commission would rise to the occasion by adopting a resolution that will affirm the fundamental rights of gays and lesbians. This will go a long way in urging African governments to safeguard the lives of people in same-sex relationships. The Commission can take a cue from the Organisation of American States, which adopted a resolution in 2008 entitled Human Rights Sexual Orientation and Gender Identity. The resolution condemns all acts of violence and human rights violations against all individuals based on their sexual orientation or gender identity.[63]

Most of the people in same-sex relationships daily encounter stigma and discrimination and live under constant fear and apprehension of violence. This calls for urgent intervention on the part of the African Commission, especially when one considers that the African Charter

62 Human Rights Watch (n 22 above); Amnesty International (n 22 above); Centre for Reproductive Rights (n 22 above).

63 Ndashe (n 46 above).

prohibits discrimination on various grounds, including 'other status'. Murray and Viljoen have argued that the use of the phrase 'other status' in the non-discrimination provisions of the African Charter necessarily covers the rights of people in same-sex relationships.[64] This submission tallies with the reasoning of the ESCR Committee in its General Comment 20 on non-discrimination.[65]

In addition to issuing resolutions on human rights issues in Africa, the African Commission also adopts special mechanisms such as the appointment of a Special Rapporteur to complement its promotional mandate.[66] For instance, the Commission has appointed a Special Rapporteur on the Rights of Women in Africa.[67] This Special Rapporteur on women gives specific attention to issues affecting women and deliberates on important matters that affect the rights of women in the region. The Special Rapporteur identifies and addresses any specific challenges facing women in the region. This list of issues is inexhaustive and may include violence against women, HIV, AIDS and access to sexual and reproductive health services for women. The Special Rapporteur may also seek information from governments, individuals or civil liberty groups in various countries on how a particular country is dealing with a specific human rights issue.

The Special Rapporteur's fact-finding mission activities are compiled into a report and the information gathered is submitted to the African Commission for further attention. In recent times, the reports of the Special Rapporteur have addressed some of the challenges relating to the enjoyment of sexual and reproductive health and rights of women.[68] The Special Rapporteur plays a significant role in the promotion

64 R Murray & F Viljoen 'Towards non-discrimination on the basis of sexual orientation: The normative basis and the procedural possibilities before the African Commission on Human and Peoples' Rights' (2007) 29 *Human Rights Quarterly* 86.

65 UN ESCR Committee General Comment 20 on Non-Discrimination in Economic, Social and Cultural Rights E/C.12/GC/20, 25 May 2009.

66 The African Commission took the initiative to establish other procedures to supplement its initial mandate when it appointed for the first time in 1994 the Special Rapporteur on Extra-Judicial Killings, Summary and Arbitrary Executions in Africa, http://www.achpr.org/english/_info/prison_mand..html (accessed 28 September 2011).

67 The African Commission created the position of Special Rapporteur on the Rights of Women in Africa in 1998. The first Special Rapporteur, Commissioner Julienne Ondziel Gnelenga, served from 1998 to 2001; http://www.achpr.org/english/_info/index_women_en.html (accessed 28 September 2011).

68 See eg the Inter-Session Activity Report of the Special Rapporteur on the Rights of Women in Africa, Angela Melo, submitted to the 40th ordinary session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia, 15-29 November 2006, which includes promotional activities to some African countries relating to the provisions of the African Women's Protocol, particularly art 14 and the issue of female genital mutilation; see also the Intercession Activity Report of the Special Rapporteur on the Rights of Women in Africa, Angela Melo, submitted to the 41st ordinary session of the African Commission on Human and Peoples' Rights Accra, Ghana, 16-30 May 2007, which contains promotional activities relating to violence against women and on collaborations reached with other organisations to provide

and protection of sexual and reproductive rights in Africa. Its mission should be respected by African governments when the latter are called upon or expected to implement necessary resolutions or a relevant human rights treaty at the national level.

Unfortunately, the Special Rapporteur has not given attention to the plight of lesbians across Africa. A recent spate of violence and sexual abuse of lesbians, especially in Southern African, requires the Rapporteur's urgent attention. There are documented reports of sexual attacks, including what is known as 'corrective rape', against lesbians.[69] This is an unfortunate development, which further undermines the human rights of people in same-sex relationships. The Special Rapporteur should embark on mission visits to some of the countries where these acts of sexual abuse are rampant. Where necessary, the Special Rapporteur should make a strong statement condemning such acts and call on African governments to uphold the human rights of gays and lesbians.

3.2 Jurisprudence of the African Commission in relation to sexual and reproductive health and rights

This section examines the jurisprudence of the African Commission as it relates to access to health services, including sexual and reproductive health services and violence against women. It is important to bear in mind that since the establishment of the African Commission, few cases have been brought before it that directly touch on the two issues discussed here. Therefore, the discussion includes other cases which may be indirectly relevant to the focus of the discussion. It is surprising that despite the poor health situation in Africa and the fact that African women continue to bear the greatest burden of sexual and reproductive ill-health in the world, few cases that challenge these violation have been brought before the African Commission.

Perhaps one of the reasons for the dearth of cases on sexual and reproductive rights might be that most African countries do not recognise the right to health as an enforceable right under their national constitutions. Hence, it is often difficult to litigate on issues relating to this right. However, given that the African Charter recognises the right to health, there is nothing preventing civil society organisations in Africa from filing cases in their countries to challenge the violation of the right

training for the members of the African Commission on the issue of sexual and reproductive rights; Intercession Activity Report of the Special Rapporteur on the Rights of Women in Africa, Soyata Maiga, submitted to the 45th ordinary session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia, May 2009, where the Special Rapporteur enjoins African governments to ensure access to sexual and reproductive health services, including contraceptive services to girls and women in the region.

69 See JA Nel & M Judge 'Exploring homophobic victimisation in Gauteng, South Africa: Issues, impacts and responses' (2008) 21 *Acta Criminologica* 19.

to health, including sexual and reproductive rights. While it is agreed that litigating such cases might be challenging before national courts, civil society organisations can be more creative in their approach to redress violations of the right to health by seeking remedies based on recognised rights such as the rights to life, dignity, privacy and non-discrimination.[70]

Another reason why cases relating to sexual and reproductive rights have not been brought before the African Commission has to do with the controversial nature of these rights. As noted earlier, in many societies, including African societies, issues relating to sexual and reproductive rights remain contested and are viewed with suspicion. Due mainly to cultural and religious sentiments, many Africans still perceive issues relating to sexual and reproductive rights as threats to the moral fabric of their societies. Indeed, issues such as abortion and same-sex relationships are regarded as ungodly and unacceptable in most African societies.[71] Moreover, due to patriarchal tradition, violence against women is often condoned and not viewed as a human rights violation,[72] while homophobic attacks on people in same-sex relationships are on the increase.

In discussing the jurisprudence of the African Commission as it relates to any socio-economic rights issue, the starting point should be the *locus classicus SERAC*.[73] In that case, two NGOs brought an action on behalf of the Ogoni people against the state oil company, the Nigerian National Petroleum Company, which is also the majority shareholder in a consortium with Shell Petroleum Development Corporation. It was stated in the action that operations of these organisations had caused gross environmental degradation and health problems resulting from the contamination of the environment of the Ogoni people.

The action further alleges that the oil consortium had exploited oil reserves in Ogoniland with no regard for the health or environment of the local communities, and that they had deposited toxic waste into the environment and local waterways in violation of applicable international environmental standards. The consortium had also neglected and/or failed to maintain its facilities, causing numerous avoidable spills in the proximity of villages. The resultant contamination of water, soil and air has had serious short and long-term effects on health, including skin infections, gastro-intestinal and respiratory ailments, increased risk of cancer, and neurological and reproductive problems. The action

70 See eg E Durojaye 'Litigating the right to health in Nigeria: Challenges and prospects' in M Killander (ed) *International human rights law and domestic human rights litigation in Africa* (2010) 149.

71 The Zimbabwean Supreme Court in *Banana v The State* (2000) 8 BHRC 345 held that homosexuality is 'unAfrican' and 'ungodly'.

72 See eg EG Krug *et al World report on violence and health* (2002); Human Rights Watch *Scared at school: Sexual violence against girls in South African schools* (2001); N Toubia *Female genital mutilation: A call for global action* (1995).

73 *SERAC* case (n 40 above).

alleged that the Nigerian government had failed or neglected to monitor the activities of the oil companies operating in the country, and as such was responsible for the human rights violations that had occurred in Ogoniland. Therefore, it was alleged that the rights to life, non-discrimination, health and a healthy environment of the Ogoni people had been violated.

The African Commission agreed with the complainants by holding that the failure on the part of the Nigerian government to monitor the activities of oil companies in Ogoniland was responsible for the violations of the rights to health, life, a healthy environment and discrimination, which are guaranteed under the African Charter. This became the first case where the African Commission adjudicated on the violation of socio-economic rights, including the right to health, under the African Charter. The importance of the *SERAC* case is that it can be relied on to advance access to sexual and reproductive health care services in Africa.[74] In essence, a denial of access to sexual and reproductive health care services as evidenced in unmet contraceptive needs and high maternal mortality rates may amount to a violation of the right to health of Africans. Therefore, where an African country fails to meet the preventive, palliative and curative health needs, including the sexual and reproductive needs of its people, such a state may be in violation of article 16 of the African Charter.

More importantly, the *SERAC* case upholds the doctrine of due diligence, which is to the effect that a violation of human rights, especially the right to health, may occur if a state fails to control or regulate the activities of third parties. It should be recalled that in the UN Declaration on Violence against Women[75] it is affirmed that a state will be held accountable for acts of violence perpetrated against women, if the state fails to take the necessary steps to prevent such acts of violence from occurring. Thus, it is a welcome development that the African Commission has adopted this principle as it is useful in advancing sexual and reproductive rights in the region. It can be relied on to hold African governments accountable for various forms of violence against women, particularly homophobic attacks on lesbians, which are often perpetrated by non-state actors across the region. Moreover, in the context of access to life-saving medications in the region, it can be argued that the failure by African governments to regulate the activities of pharmaceutical companies with regard to the high cost of patented medicines will amount to a breach of the obligation to protect the right to health, including sexual and reproductive rights.

While it may be said that the *SERAC* case laid down the foundation for the affirmation of the right to health under the African Charter, it was

74 It is important to point out that, unlike the newly-established African Court on Human Rights, the decisions of the African Commission do not have a binding effect on African states.

75 Declaration on the Elimination of Violence against Women A/RES/48/104.

in the *Purohit* case[76] that the African Commission explicitly explained the nature of the right to health guaranteed under the African Charter. In this case, the complainants alleged that legislation governing mental health in The Gambia was outdated. It was also alleged that within the Lunatics Detention Act (the principal instrument governing mental health) there is no definition of what a lunatic is, and there are no provisions and requirements establishing safeguards during the diagnosis, certification and detention of patients. The complainants further alleged that there is overcrowding in the psychiatric unit, no requirement of consent to treatment or subsequent review of continued treatment and that there is no independent examination of administration, management and living conditions within the unit itself. Thus, it was alleged that violations of the rights to health, non-discrimination, dignity and privacy had occurred.

The African Commission reasoned in the case that the right to health guaranteed under the African Charter embraces health facilities, goods and services. According to the Commission, the 'enjoyment of the human right to health as it is widely known is vital to all aspects of a person's life and well-being, and is crucial to the realisation of all the other fundamental human rights and freedoms'. [77] The Commission stated further that the right included the right to health facilities, access to goods and services to be guaranteed to all without discrimination of any kind. What can be deduced from this decision is that the realisation of the right to health for Africans will necessarily include ensuring access to emergency obstetrics care services for women and contraceptive services to prevent unwanted pregnancies.

This statement of the African Commission is *in tandem* with the reasoning of the ESCR Committee in its General Comment 14 where the Committee notes that '[t]he right to health must be understood as a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realisation of the highest attainable standard of health'.[78] With regard to the obligations of African governments to realise the right to health under the African Charter, the African Commission notes as follows:[79]

> The African Commission would, however, like to state that it is aware that millions of people in Africa are not enjoying the right to health maximally because African countries are generally faced with the problem of poverty which renders them incapable to provide the necessary amenities, infrastructure and resources that facilitate the full enjoyment of this right. Therefore, having due regard to this depressing but real state of affairs, the African Commission would like to read into article 16 the obligation on the part of states party to the African Charter to take concrete and targeted

76 *Purohit* (n 51 above).

77 *Purohit* (n 51 above) para 80.

78 'The right to the highest attainable standard of health' UN Committee on Economic, Social and Cultural Rights, General Comment 14, UN Doc E/C/12/2000/4, para 12.

79 *Purohit* (n 51 above) para 84.

> steps, while taking full advantage of its available resources, to ensure that the right to health is fully realised in all its aspects without discrimination of any kind.

At first instance, one may be tempted to think that the African Commission is making excuses for the failure on the part of African governments to meet the health needs – including sexual and reproductive health rights – of their people. On the other hand, it could be argued that the Commission is here reinstating the notion of a progressive realisation of the right to health. This is an important fact that cannot be ignored, particularly in a region such as Africa where a considerable number of the people live in deplorable conditions and contend with other challenges such as conflicts and under-development. However, the fact that the Commission requires African governments to take 'concrete and targeted steps' regarding the realisation of the right to health, may imply that a lack of resources or poverty will not suffice as an excuse by African governments for failing to realise the right to health, including the sexual and reproductive health of their citizens. The Commission seems to be echoing a similar view held by the ESCR Committee on the same issue. In General Comment 3, the ESCR Committee has observed that the crucial point to note in interpreting article 2 of ICESCR is to determine whether a state is *unwilling* or *unable* to fulfil its obligations with regard to socio-economic rights, including the right to health, under the Covenant.[80] In other words, even in a state of poverty a state party will still be expected to demonstrate that 'every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations'.[81] Explaining this further in General Comment 14, the ESCR Committee notes as follows:[82]

> If resource constraints render it impossible for a state to comply fully with its Covenant obligations, it has the burden of justifying that every effort has nevertheless been made to use all available resources at its disposal in order to satisfy, as a matter of priority, the obligations outlined above.

Given the grave sexual and reproductive health challenges facing many African countries, the African Commission's response could not have come at a better time. It is true that many African countries are poor and often regarded as underdeveloped. However, it is also true that African countries are given to misappropriation of resources and remain among the most corrupt in the world.[83] Therefore, the problem

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80 'The nature of states parties' obligations' UN Committee on Economic, Social and Cultural Rights General Comment 3, 5th session, UN Doc E/1991/23, Annex III (our emphasis).

81 General Comment 3 (n 80 above) para 10.

82 General Comment 14 (n 78 above) para 47.

83 See Transparency International Corruption Perception Index 2010 http/www.transparency.org/cpi (accessed on 8 May 2011) where six out of the ten most corrupt countries are from Africa.

with Africa is not so much a lack of resources, but often a lack of priority setting coupled with endemic corruption and greed on the part of its leaders. Even with its scarce resources, Africa can still make an appreciable impact in meeting the health needs, including the sexual and reproductive health needs, of its people. This is true for an issue such as maternal mortality, where experience has shown that preventing women from dying during pregnancy or childbirth does not really cost much but requires the political will on the part of African governments to address this challenge. This interpretation is significant when one takes into consideration the copious provisions relating to the right to health guaranteed in article 14 of the African Women's Protocol.[84]

Undoubtedly, the provisions of the African Women's Protocol remain the most radical and comprehensive with regard to the realisation of the right to health, including sexual and reproductive rights, in the region. It is hoped that in future when the opportunity comes to interpret this provision it will receive a generous interpretation from the African Commission or the African Court, as the case may be. Recently, the Commission demonstrated a proactive stance by referring a case concerning gross human rights violations in Libya to the African Court.[85] The Commission can take similar steps in future against any African state found to be in gross violation of the sexual and reproductive rights of its citizens. For instance, the Commission can refer to the African Court the needless deaths arising from pregnancy or childbirth or even homophobic attacks on people involved in same-sex relationships. This would be so if it is found that a state party fails to take adequate measures to prevent such deaths or acts of violence.

Moreover, since the African Court will ultimately be responsible for interpreting the provisions of the African Women's Protocol, it will be useful for the African Court to draw inspiration from the decisions of international and regional human rights bodies. For instance, the European Human Rights Commission has held that a state may be in violation of the right to life guaranteed under article 2 of the European Charter if it fails to prevent unintentional loss of life during pregnancy or childbirth.[86] More recently, the CEDAW Committee in the case of *Alyne v Brazil* has explained that the failure of a state to provide emergency obstetrics care for a pregnant woman amounts to violations of the rights to life, non-discrimination and health guaranteed under CEDAW.[87] Also, the European Court of Human Rights held that laws criminalising same-sex relationships may be in violation of the right to

84 African Women's Protocol (n 19 above).

85 African Court on Human Rights decision in *African Commission on Human and Peoples' Rights v Great Socialist People's Libyan Arab Jamahiriya* Application 004/2011 delivered on 25 March 2011.

86 *Tavares v France* App 16593/90 European Court of Human Rights.

87 CEDAW Committee Communication 17/2008 decided at the 49th session, 11-29 July 2011.

private life guaranteed under article 8 of the European Charter.[88] Such a generous interpretation must clearly articulate the roles and responsibilities of African governments with regard to advancing sexual and reproductive health in the region.

In the *Doebbler* case,[89] the African Commission was called upon to determine whether article 152 of the Sudanese Criminal Law of 1991, which imposes fines or lashes upon conviction of girls, was in violation of the law. In that case, eight Muslim university students on a picnic were arrested and charged with committing, in a public place, acts contrary to public morality, prohibited under article 153 of the Sudanese Criminal Law of 1991.[90] The provision of that law prohibits acts such as girls kissing, wearing trousers, dancing with men, crossing legs with men and sitting and talking with boys. The girls were subsequently convicted and sentenced to fines and lashes, to be carried out in public under the supervision of the national court. The complainants alleged that the punishment violated article 5 of the African Charter. In upholding the claim of the complainants, the African Commission notes that article 5 of the Charter prohibits not only cruel, but also inhuman and degrading treatment. This includes actions that may cause serious physical or psychological suffering, and which humiliate or force the individual against his or her will or conscience.

The African Commission further reasons that the provisions of article 5 of the African Charter deserve a broad interpretation. Thus, the Commission concluded that the prohibition of torture, cruel, inhuman or degrading treatment or punishment is to be interpreted as widely as possible to encompass the widest possible array of physical and mental abuse. Citing with approval the decision of the European Court of Human Rights in *Tyrer v United Kingdom*,[91] the Commission noted that even lashings that were carried out in private, with appropriate medical supervision, under strictly hygienic conditions, and only after the exhaustion of appeal rights, violated the rights of the victim. According to the Commission:[92]

> There is no right for individuals, and particularly the government of a country, to apply physical violence to individuals for offences. Such a right would be tantamount to sanctioning state sponsored torture under the Charter and contrary to the very nature of this human rights treaty.

88 See eg *Dudgeon v United Kingdom* (1981) 4 EHRR 149.

89 *Curtis Doebbler v Sudan* (2003) AHRLR 153 (ACHPR 2003).

90 Art 152 of the Sudanese Criminal Law of 1991 provides as follows: '1 Whoever commits, in a public place, an act, or conducts himself in an indecent or immoral dress, which causes annoyance to public feelings, shall be punished, with whipping, not exceeding forty lashes, or with fine, or with both. 2 The act shall be deemed contrary to public morality, if it is so considered in the religion of the doer, or the custom.'

91 (1978) 2 ECHR 1.

92 *Tyrer* (n 91 above) para 42.

This outcome of the *Doebbler* case provides a good basis for arguing that acts of violence against women, particularly violent attacks on lesbians, amount to a violation of article 5 of the African Charter.

The reasoning of the Commission in the *Doebbler* case can be useful in holding African governments accountable for a failure to address appalling maternal mortality ratios in the region. For instance, the poor state of health care systems in Africa and the hostile attitudes of health care providers towards pregnant women, which often lead to maternal mortality and morbidity, may amount to cruel, inhuman and degrading treatment of women. This is because pregnancy often entails some physical and psychological adjustments. The Human Rights Committee in *KL v Peru* has held that forcing a woman to carry a potentially dangerous pregnancy to term may amount to an act of cruel inhuman and degrading treatment.[93] Although this case relates to abortion, the reasoning of the Human Rights Committee can also apply to maternal mortality, especially when a state fails to prevent an unwanted pregnancy by ensuring access to family planning services, which ultimately results in the loss of a woman's life.

In addition to its jurisprudence, another opportunity for the African Commission to advance sexual and reproductive rights is through monitoring reports submitted by state parties. The Commission may include in the guidelines for submission of reports steps that have been taken by African governments to address important sexual and reproductive health matters such as maternal mortality and discrimination against people in same-sex relationships. Also, the Commission through its concluding observations and recommendations to states can remind African governments of their obligations to respect and fulfil the sexual and reproductive rights of their citizens. Indeed, the Commission has specifically addressed issues relating to sexual and reproductive rights in some of its concluding observations and recommendations to states.[94] This is a positive development on the part of the Commission and deserves to be commended.

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93 Human Rights Committee Communication 1153/2003, decided at the 85th session of the Committee held from 17 October to 3 November 2005.

94 See eg the Concluding Observations and Recommendations of the African Commission to Egypt, adopted at the 37th ordinary session of the African Commission held from 27 April to 11 May 2005, Banjul, The Gambia, where the Commission urges the Egyptian government to address gender inequality in its laws and step up action in addressing female genital mutilation; See also the Concluding Observations and Recommendations of the African Commission to Ethiopia adopted at the 47th ordinary session of the African Commission held from 12-26 May 2010, Banjul, The Gambia, where the Commission expresses concerns about some cultural practices that continue to infringe on the rights of the girl-child, the lack of appropriate legislation to address FGM, HIV/AIDS-related stigma and discrimination and gender-based violence, high infant and maternal mortality rates and preventable deaths arising from diseases such as malaria and tuberculosis in the country. The Commission urges the Ethiopian government to adopt appropriate measures, including the enactment of legislation and the implementation of programmes and policies to address these challenges.

4 Conclusion

The article shows that the realisation of sexual and reproductive rights remains problematic in African countries. Moreover, it notes that the African Commission is in a pivotal position to advance sexual and reproductive rights in the region. Although the international community is committed to promoting human rights and promoting women's rights in Africa, little success has been achieved. Despite the commitment of various human rights institutions, including the Commission, there is still much more to be done in order to realise the sexual and reproductive rights of women in Africa and their counterparts in other developed regions. Significant success cannot be achieved when most African leaders have failed and are still failing to implement the African Women's Protocol and relevant provisions of CEDAW, particularly as regards meeting the sexual and reproductive health and rights of women irrespective of their socio-economic, cultural or religious backgrounds. The efforts of the Commission are further undermined by the fact that its resolutions cannot be legally enforced. Hopefully, the establishment of the African Court will remedy this deficiency. As noted earlier, the decisions of the Court can be enforced against member states that have ratified the Protocol that established the Court.[95]

While it is noted that the African Commission is yet to clearly develop a consistent jurisprudence regarding sexual and reproductive rights, it has through its promotional and protective mandates made important contributions to the advancement of sexual and reproductive rights in the region. The contribution of the African Commission to the advancement of sexual and reproductive rights seems to be more pronounced in its promotional mandate than its protective mandate. This is because very few communications have been brought before the Commission that directly relate to sexual and reproductive rights. This is a cause for concern considering the vibrant nature of civil society organisations in the region.

Furthermore, while it may be argued that the African Commission is not averse to advancing sexual and reproductive rights in Africa, however, it is important to mention that the Commission can do better. From the discussion above, it would seem that the Commission has paid greater attention to reproductive than sexual health and rights. Therefore, the Commission needs to pay more attention to the plight of sexual minorities and marginalised groups such as sex workers and homosexuals. In this regard, the refusal of the Commission during its 48th ordinary session to grant observer status to an organisation known as Coalition of African Lesbians does not tally with its commitments to address all forms of discrimination on various grounds,

95 See art 5 of the Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights.

including 'other status'.[96] With the establishment of the Committee on the Protection of the Rights of People Living with HIV and Those at Risk, Vulnerable to and Affected by HIV,[97] during its 47th ordinary session, an important opportunity now exists for the African Commission to address the human rights of sexual minorities, including people in same-sex relationships.

96 Ndashe (n 46 above).

97 See Resolution ACHPR/Res163(XLVII)2010. The mandate of the Committee includes giving special attention to persons belonging to vulnerable groups, including women, children, sex workers, migrants, men having sex with men, intravenous drugs users and prisoners.