

The African Women's Protocol and HIV: Delineating the African Commission's General Comment on articles 14(1)(d) and (e) of the Protocol

*Megan Geldenhuys**

Attorney, Centre for Applied Legal Studies, University of the Witwatersrand, South Africa

*Chisomo Kaufulu-Kumwenda***

Human Rights Officer, Malawi Human Rights Commission

*Satang Nabaneh****

Lecturer, Faculty of Law, University of The Gambia

*Karen Stefiszyn*****

Manager, Gender Unit, Centre for Human Rights, University of Pretoria, South Africa

* BA (Rhodes), LLB (Pretoria), LLM (Human Rights and Democratisation in Africa) (Pretoria); megan.geldenhuys@wits.ac.za

** LLB (Hons) (Malawi), PGDip (Åbo Akademi), LLM (Human Rights and Democratisation in Africa) (Pretoria); ckaufulu@gmail.com

*** LLB (Hons) (The Gambia), LLM (Human Rights and Democratisation in Africa) (Pretoria); satang.nabaneh@gmail.com

**** BA (Western Ontario), MSt (Oxford); karen.stefiszyn@up.ac.za. The authors of this article were part of Expert Group Sessions held in Pretoria, South Africa and Dakar, Senegal, that sought to elaborate on the provisions of articles 14(1)(d) and (e) of the African Women's Protocol. The overall goal of the Expert Group Sessions was to produce a Draft General Comment for presentation to the African Commission for adoption in October 2012. The article was developed while the first three authors were students on the LLM programme in Human Rights and Democratisation in Africa, presented by the Centre for Human Rights, Faculty of Law, University of Pretoria.

Summary

Articles 14(1)(d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa specifically provide for women's sexual and reproductive health rights in the context of HIV. In spite of this unique attribute, the provisions themselves are ambiguous and require further elaboration in order to give effect to their meaning. The article therefore builds upon the recent adoption of a General Comment by the African Commission on Human and Peoples' Rights which seeks to clarify the content of the rights set out in articles 14(1)(d) and (e) of the Protocol. The article aims to provide an expansive and purposive meaning to the above-mentioned articles, and also sets out the research and thinking that went into the drafting of the General Comment prior to its adoption. In highlighting the above, the article is structured as follows: First, it provides an introductory overview of the African Women's Protocol in the context of women's sexual and reproductive health. Second, the article motivates why it is crucial to have a strong legal framework on women's rights in the context of HIV, by taking into account the actual realities faced by African women and the limitations of the current legal framework in addressing such realities. Third, the article examines the need for the adoption of the General Comment as opposed to a resolution or guidelines, as has often been the practice of the African Commission. Lastly, the article sets out the specific state obligations arising out of articles 14(1)(d) and (e), which were drafted through guidance from international best practices and standards whilst also bearing in mind the practical difficulties facing women in the African context.

Key words: African Women's Protocol; sexual reproductive health rights; HIV/AIDS prevention; access to health care; General Comments

1 Background: African Women's Protocol

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) was adopted in 2003 by the African Union (AU) and entered into force in 2005. The justification for the adoption of this Protocol was based largely upon concerns regarding the limited enforcement of women's human rights in the African legal framework.¹ It also emerged as a need to complement the African Charter on Human and Peoples' Rights (African Charter), which lacked elaborate provisions for the substantive protection of women's rights.² While the African Charter provides an important human rights framework, including reinforcing the rights to life, liberty, security and freedom from discrimination, it

1 Preamble African Women's Protocol.

2 F Viljoen 'An introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 16 *Washington and Lee Journal of Civil Rights and Social Justice* 19.

is silent on women's rights in general, and reproductive rights, specifically.

The African Women's Protocol is the first of its kind to include a number of protections specific to women, including reproductive choice and autonomy.³ This is best articulated in article 14 of the Women's Protocol, which provides for women's health and reproductive rights. Under article 14, the African Women's Protocol is the only treaty to specifically address women's rights in relation to HIV, and to identify protection from HIV as a key component of women's sexual and reproductive health rights.⁴ This is an important step for women in Africa, where sexual and reproductive health rights have previously been ignored as issues that are culturally sensitive.

In addition, article 1 of the African Women's Protocol defines the term 'women' to include also 'girls'. This is an important facet of the Women's Protocol, which recognises that the issues facing women in Africa do not necessarily occur in adulthood alone, but stem from societal practices that affect younger girls in their developmental stages. The Protocol further seeks to guarantee women's rights to protection from sexually-transmissible infections (STIs), including HIV, and recognises that to do so, the rights to adequate, affordable and accessible health services are necessary to support and prevent the spread of STIs.⁵ This is critical in the African context, where the spread of STIs, specifically HIV, is surrounded by stigma and unequal power relationships between sexual partners. The Protocol addresses these unequal gender relationships and inequalities that manifest through various factors, many of which have substantially contributed to the disproportionate spread of HIV amongst young women in Africa.⁶ It is in light of this disproportion between the infection rates of men and women in Africa that makes the African Women's Protocol so crucial to the protection of women and their sexual reproductive health rights.

On a continent where women are often treated as second-class citizens, it may be difficult for them to claim their human rights without the protections and assistance offered by the state. As a regional instrument, the African Women's Protocol serves as a benchmark in which state parties ensure adequate protection for women in Africa.

3 Centre for Reproductive Rights 'Briefing Paper: The Protocol on the Rights of Women in Africa: An instrument for advancing reproductive and sexual rights' http://reproductiverights.org/sites/crr.civicactions.net/files/documents/pub_bp_africa.pdf (accessed 2 June 2012).

4 As above.

5 Arts 14(1)(d) & (2)(a) African Women's Protocol.

6 UNAIDS 'Report on the global AIDS epidemic 2013' 78.

2 Women and HIV in Africa

The need for an elaborate and purposive human rights framework on women's rights in the context of HIV is further propelled by the actual realities faced by the African woman. Slightly more than one half of the people living with HIV globally are women,⁷ and 69 per cent of all women living with HIV in the world are in sub-Saharan Africa.⁸ Young women between the ages of 15 and 24 are at particular risk, as they are up to eight times more likely to be living with HIV than young men in the region.⁹ The number of adolescent girls aged between 10 and 19 living with HIV, on the other hand, is approximately double that of adolescent boys in several regions within Africa.¹⁰

Gender inequalities are a key driver of the epidemic in view of the fact that gender norms relating to masculinity can encourage men to have more sexual partners, whilst those norms relating to femininity prevent women, especially young women, from accessing HIV information and services.¹¹ Furthermore, there is an increased vulnerability in girls and young women who are unable to readily access HIV-related services as a result of restrictive laws and policies, as well as adverse cultural norms which perpetuate negative gender stereotypes. UNAIDS has published that, in 2012, non-governmental organisations (NGOs) found that in approximately 60 per cent of countries and national governments there exist laws, regulations or policies which create obstacles to effective HIV prevention, treatment, care and support for key populations and vulnerable groups.¹² As it currently stands, many young women in sub-Saharan Africa do not know their HIV status, with as little as 28 per cent of women having been tested.¹³ UNAIDS has indicated that 'in 26 of 31 countries with generalised epidemic in which nationally-representative surveys were carried out recently, less than 50 per cent of young women have comprehensive and correct knowledge about HIV'.¹⁴

All in all, the need to have an enhanced focus upon women's and girls' rights, especially sexual reproductive health rights, when promoting universal access to HIV prevention, treatment, care and

7 UNAIDS 'Fact Sheet UNAIDS World AIDS Day Report 2011'.

8 UNAIDS 2012 'Regional Fact Sheet: UNAIDS Report on the global AIDS epidemic' 2.

9 As above.

10 'Gender equality, women and HIV/AIDS' http://www.unwomen.org/wp-content/uploads/2011/06/HLMonAIDS_KeyDataStatsOnGenderEqualityWomenAndHIVaids_20110606.pdf (accessed 4 April 2012).

11 UNAIDS (n 8 above).

12 UNAIDS 89.

13 UNAIDS 18.

14 UNICEF, UNAIDS, UNESCO, UNFPA, ILO, WHO and World Bank 'Opportunity in crisis: Preventing HIV from early adolescence to young adulthood' <http://www.scribd.com/UNICEF/d/56824411-Opportunity-in-Crisis-Report-Preventing-HIV-from-early-adolescence-to-young-adulthood> (accessed 4 April 2012); UNAIDS 'Report on the global AIDS epidemic 2012' 18.

support services, cannot be overemphasised. One of the most pervasive manifestations of gender inequality is violence against girls and women of all ages and, in particular, sexual violence. Violence against women fuels the spread of HIV in Africa and contributes to the disproportionate impact of the virus on African women. UNAIDS reports that as high as 60 per cent of women have experienced some form of intimate partner violence in the last year. This substantially increases their likelihood of contracting HIV.¹⁵

It is therefore essential that the HIV-related articles under the African Women's Protocol (contained in articles 14(1)(d) and (e)) be read together with other relevant provisions of the Protocol that guarantee gender equality and the empowerment of women, including through the realisation of the enshrined rights of women to education, social security, economic and welfare rights, in order to obtain comprehensive protection of women in the region.

3 Limitations of the African Women's Protocol: The problem of identifying state obligations from articles 14(1)(d) and (e)

Articles 14(1)(d) and (e) of the African Women's Protocol are drafted very broadly and contain little guidance on the specific nature of state obligations contained therein, or how these are meant to better protect women from being infected and affected by HIV. The articles provide for 'the right to self-protection and to be protected from HIV' and 'the right to be informed on one's health status and on the health status of one's partner'. The reading of these provisions raises various questions, for instance, what is the difference between the right to self-protection and the right to be protected, and does each right entail different obligations on the part of the state? What does the right to be informed on one's health status and on the health status of one's partner require in terms of the information that must be provided, and how should such information be disseminated? In addition, section 14(1)(d) raises the question as to whether the right to be informed on the health status of one's partner would extend such protection to men whose spouses are HIV positive, or whether the intention of the provision was merely to protect the generally-vulnerable status of women in Africa. In the absence of absolute clarity on these provisions, there is a risk of violating the very rights that the African Women's Protocol aims to protect (for instance, through third party disclosure) which can have negative consequences for women.

It was as a result of these ambiguities that a decision was taken to draft a general comment to be presented to the African Commission on Human and Peoples' Rights (African Commission) which would unpack the obligations arising out of the provisions, and set out the

15 UNAIDS (n 8 above) 80.

specific methods in which a state could meet its responsibility under the African Women's Protocol. Below, we trace the thought processes behind the development of the general comment which was adopted by the African Commission in October 2012,¹⁶ and the background information which fed into the drafting process.

We set out the discussion surrounding the decision to adopt a general comment format as opposed to the use of guidelines or a resolution, and look at the reasons why a general comment on articles 14(1)(d) and (e) of the African Women's Protocol was deemed necessary. We delve into the thinking behind the general comment, looking at the specifics of the obligations contained in its text and the drafting process which informed the decisions taken therein.

4 Place of general comments in interpreting human rights at the international level

Before we embark upon the substantive content of the newly-adopted General Comment under the African Women's Protocol, we will first illustrate the role and prominence of general comments at the international level. Generally, treaties are couched in broad terms and they often use ambiguous wordings such as 'measures' and 'steps' in regard to state obligations.¹⁷ As such, it has fallen on human rights treaty-monitoring bodies to articulate the detailed and precise obligations under the various human rights treaties in a formal statement as a legal means of interpretation. Thus, general comments, recommendations¹⁸ and guidelines attempt to 'interpret specific rights or deal with crosscutting issues by providing detailed content in a comprehensive and coherent way to the rather generally-worded provisions of a human rights treaty'.¹⁹ They also have persuasive power on 'decision makers in domestic legal systems and national courts'.²⁰

16 Centre for Human Rights 'African Commission on Human and Peoples' Rights adopts first General Comment, clarifying articles 14(1)(d) and (e) of the African Women's Protocol' <http://www1.chr.up.ac.za/index.php/centre-news-2012/1052-african-commission-on-human-and-peoples-rights-adopts-first-general-comment-clarifying-article-141d-and-e-of-the-african-womens-protocol-.html> (accessed 30 November 2013).

17 J Biegon 'Towards the adoption of guidelines for state reporting under the African Union Protocol on Women's Rights: A review of the Pretoria Gender Expert Meeting, 6-7 August 2009' (2009) 9 *African Human Rights Law Journal* 618.

18 Most human rights treaties use the term 'general comment'. However, 'general recommendation' has also been used by the International Convention on the Elimination of All Forms of Racial Discrimination, specifically in art 9(2), and CEDAW in art 21(1). In a strict sense, the two terms carry equivalent meanings. In this article, we, however, give preference to the use of the term 'general comment'.

19 K Mechlem *Treaty bodies and the interpretation of human rights* (2007) 23.

20 As above.

The existence of general comments or recommendations outlining the obligations of state parties in regard to particular rights in a treaty is widely practised in the United Nations (UN) human rights system whereby all the human rights treaty bodies have adopted general comments or general recommendations. For instance, General Recommendation 19 of the UN Committee on the Elimination of Discrimination Against Women (CEDAW Committee) filled the gap in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which failed to provide for sexual and reproductive health rights of women. It further draws upon state parties to ensure that measures are taken to prevent coercion in regard to reproduction.²¹ General Recommendation 21 on equality in marriage and family relations elaborates on the relevant rights in CEDAW by stating that decisions by women on whether or not to have children must not be limited, and must be informed by information concerning contraceptive measures and their use, acquired through sex education and family planning services.²² General Recommendation 24 of the CEDAW Committee touches on women and health, and thus calls upon state parties to address distinctive features of health and life for women in contrast to men, by taking into account biological factors such as differing reproductive functions, socio-economic factors, psycho-social factors, and health system factors.²³ Thus, states are obliged to prioritise the prevention of unwanted pregnancy through family planning and sex education.²⁴ Similarly, General Comment 14 provides an elaborate definition of the core elements of the right to the highest attainable standard of health. It recognises health as a fundamental human right that is inextricably linked to the realisation of other human rights. It based the realisation of the right to health on certain conditions such as availability, accessibility, acceptability and quality of health care services. Most importantly, on women and the right to health, it emphasises that the realisation of women's rights to health is dependent on the removal of barriers, including in the area of sexual and reproductive health.²⁵

General recommendations also ensure that treaties are living documents by staying relevant in light of emerging issues that may not have been prominent at the time of drafting the treaty, such as the HIV pandemic. For instance, General Recommendation 24 further goes on to provide that state parties must also take steps to prevent unethical practices against women in health care services, such as non-consensual sterilisation or mandatory testing for sexually-transmitted diseases.²⁶ This includes, *inter alia*, the right to self-

21 General Recommendation 1 para 24(m).

22 General Recommendation 21 para 21.

23 General Recommendation 24 para 6.

24 General Recommendation 24 para 31(c).

25 ESCR Committee General Comment 14 para 21.

26 General Recommendation 24 para 22.

protection and to be protected against sexually-transmitted infections like HIV and AIDS-related illnesses as is found in article 14(1)(d) of the African Women's Protocol.

Thirdly, these bodies have also adopted guidelines for state reporting under the various treaties, which mainly seek to help states when discharging their reporting obligations to give adequate information on their efforts taken to realise these rights.

It is through general comments that states are able to understand and appreciate what is expected of them. They serve as yardsticks for state obligations. They also serve as advocacy tools for civil society as well as a tool for exercising their role in monitoring these rights.

5 Rationale of developing a general comment specific to articles 14(1)(d) and (e) of the African Women's Protocol

The implementation of the African Women's Protocol has been marred by several factors which include the confusion and ambiguity that generally surround state obligations under the Protocol. Some may, however, argue that existing international guidelines and recommendations already address women's health rights, and can also be used for interpretative purposes in regard to particular provisions of the African Women's Protocol. The question, therefore, is whether or not there was a need for specific guidelines (in the form of a general comment) to be adopted by the African Commission on articles 14(1)(d) and (e) of the Women's Protocol.

Firstly, it must be noted that the reproductive and sexual rights of women in the context of HIV still remain inadequately addressed, not only within the African context, but also at the international level.²⁷ It is without question that, as the international human rights framework continues to suffer from an ineffective enforcement system, the adoption of a general comment can play an important role in promoting a shared understanding of treaty norms and developing agreement about the detail of their content.²⁸ However, it must also be noted that general comments will always have this function, even when effective enforcement is happening.

Secondly, the nature of international guidelines is rather vague and broad.²⁹ Hence, the absence of clear and specific guidelines, coupled with insufficient knowledge of women's rights principles in the context of HIV, leave African women even more exposed to violations

27 K Stefiszyn *et al* *Addressing the reproductive health rights of women living with HIV in Southern Africa* (2009) 6.

28 As above.

29 UNAIDS 'AIDS at 30 Report: Nations at the Crossroad. See also Statistics: Women and HIV/AIDS' (2011) 26 http://www.amfar.org/About_HIV_and_AIDS/Facts_and_Stats/Statistics__Women_and_HIV_AIDS/ (accessed 4 April 2012).

of their rights in this regard. Proximity of such guidelines to African realities may also enable reliable and on-going monitoring, so as to ensure that the guidelines are adhered to, and emerging problems are resolved promptly, thereby enhancing accountability.

In adopting this General Comment, it was acknowledged that the issues women encounter in the context of human rights *vis-à-vis* HIV are the same worldwide. However, African women have needs and concerns that are unique, especially in regard to cultural influences and resource constraints that expose them to greater risks of HIV and hence to a violation of their rights. The social, economic and cultural contexts within which HIV infects people and spreads across the African continent differ considerably from those in other parts of the world.³⁰ Thus, it is important that appropriate caution is exercised when prescribing policies or guidelines that seem to have worked in other settings for use in Africa.³¹ The General Comment puts special emphasis on HIV within the context of human rights as outlined in articles 14(1)(d) and (e) of the African Women's Protocol. In addition, it is expected that the General Comment will also serve as an important advocacy and monitoring tool for other stakeholders, such as NGOs and development partners who act as human rights watchdogs so that they develop strategic efforts in line with such guidelines.

It is also worth mentioning that, prior to the adoption of the General Comment, concerns were raised about the place of a general comment in the African Commission's jurisprudence. The African Commission has focused mainly upon the development of reporting guidelines. The first set of guidelines for state reporting under the African Charter was adopted in April 1989.³² A new set of guidelines were then adopted in 1998.³³ These guidelines have, however, failed to elicit the desired results.³⁴ The latest Guidelines for Reporting on the Women's Rights Protocol were adopted in 2010.³⁵

Several sets of guidelines relating to various thematic human rights issues on the continent have also been adopted by the African Commission.³⁶ Criticisms about these guidelines have ranged from

30 AD Asante 'Scaling up HIV prevention: Why routine or mandatory testing is not feasible for sub-Saharan Africa' <http://www.who.int/bulletin/volumes/85/8/06-037671/en/index.html> (accessed 10 September 2012).

31 As above.

32 C Heyns (ed) *Human rights law in Africa* (2004) 507-524.

33 C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2007) 169.

34 Biegon (n 17 above) 262.

35 C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2010) 206.

36 These include the Declaration of Principles on Freedom of Expression in Africa (2002); Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (2002); Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa

them being 'very elaborate, but also too lengthy and complicated',³⁷ to being 'too brief and vague'.³⁸ On the other hand, the African Commission has adopted various resolutions,³⁹ even though they, too, have not had the desired results.⁴⁰

This, therefore, leads us to an important question regarding the place for a general comment on articles 14(1)(d) and (e) of the African Women's Protocol. Would the adoption of a general comment, as opposed to a guideline or a resolution, as has been the case with the African Commission, be of any significant impact? This should be queried in light of the fact that there are no previously-adopted general comments on the substantive provisions of the African Women's Protocol. We have no correct answer to this question but, at best, we contend that, although the adoption of a general comment is a shift in the paradigm of the African Commission, it will 'essentially be part of the African Commission's broader initiative to unpack the content of rights guaranteed under the African Charter and the Women's Protocol'.⁴¹ Again, in the absence of a 'clear test case', answers to these questions are merely speculative.

However, we may draw insights from the role of general comments in interpreting rights under the international human rights framework. Through lessons learnt and best practices from the international system, it is hoped that this General Comment will be of more success whilst building upon the experiences of general comments internationally in its application and enforcement. As it stands, the General Comment takes into consideration international standards, together with regional and national standards adopted by African countries. In particular, UN treaties, such as CEDAW, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Convention on the Rights of the Child (CRC), and their respective treaty-monitoring bodies, authoritatively define the standards from which the implementation of articles 14(1)(d) and (e) draw inspiration.

(2003); Guidelines on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (2004).

37 F Viljoen *International human rights law in Africa* (2007) 372.

38 Biegon (n 17 above) 263.

39 Eg, Resolution on maternal mortality (2008); Resolution on the right to a remedy and reparation for women and girl victims of sexual violence (2007); Resolution on the health and reproductive rights of women; Resolution on the situation of women in the Democratic Republic of Congo; Resolution on the status of women in Africa and the entry into force of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2005); and Resolution on the situation of women and children in Africa.

40 Biegon (n 17 above) 265.

41 Biegon 268.

6 Ambiguities within articles 14(1)(d) and (e) of the African Women's Protocol which necessitated a general comment

As mentioned above, the HIV provisions of the African Women's Protocol raise important issues, but fail to provide protections in a manner that is simple to digest and easily executed by African states. These difficulties in the interpretation and implementation of the articles informed the final text of the General Comment. Below, we have set out the questions which raise the need for the development of the General Comment in relation to each of the specific articles.

6.1 Right to self-protection and the right to be protected

Questions regarding the importance of the differentiation, if any, between the right to self-protection and the right to be protected from STIs, including HIV, required consideration. This differentiation needed to be examined in relation to a number of priorities of vulnerable women, including adolescents and their access to sexual and reproductive health care services; the provision of free health care services where necessary; the availability of sexual and reproductive health information; the provision of condoms and female-controlled protection methods; and the protection for exposed groups, such as woman detainees and persons with disabilities.

Secondly, issues regarding the specific nature and practical manifestation of a state's obligation to fulfil the right to self-protection and to be protected from HIV had to be understood. Particular attention was paid to the resource dimensions of these obligations in light of inequitable allocation of resources, goods and services. While these might be contentious, it was important that a general comment is explicit in its treatment of these different issues, as well as clearly grounding the legal obligations in the non-discrimination framework as articulated under article 2 of the African Women's Protocol.

6.2 Right to know one's health status

Article 14(1)(e) provides for the right to be informed about one's health status. A simple reading of this section of the provision would imply that this guarantees the right to undertake a HIV test. However, detailed guidance on this remains lacking. It is unclear what constitutes proper HIV testing without appropriate reference to human rights principles of informed consent and confidentiality. For instance, does the right to know one's health status only border upon undertaking an HIV test freely and without hindrances, or does it entail a broader interpretation that requires the provision of information (during the HIV test) on the implications of one's HIV status, whether positive or negative, through pre- and post-test counselling? Further, what does the right to know one's health status entail for African adolescent girls who often face social and cultural

barriers when seeking to know their HIV status? In addition, what is the duty of the state in ensuring that voluntary counselling and testing (VCT) services are available and accessible for all age groups, specifically girls? Also with regard to girls seeking VCT, what additional considerations should states adopt in ensuring that VCT is provided effectively and appropriately? In developing this General Comment, it was important that proper guidance be drawn from international standards and best practices so as to ensure the appropriate interpretation of state obligations whilst also bearing in mind the specific vulnerabilities that African women face.

6.3 Right to know the health status of one's partner

In respect of the right to know the health status of one's partner (also enshrined in article 14(1)(e)), questions regarding when such a right should be granted, and whether the consent of the partner is required were and remain contentious. Given the inherent stigmatisation associated with a positive HIV status, disclosing a patient's HIV status to his or her partner highlights a number of concerns, not in the least relating to the rights of patient autonomy. Whether these personal rights should be balanced against the state's interest and indeed responsibility to reduce the spread of the HIV virus (especially between sexual partners), and what circumstances would allow for such a disclosure are some of the controversial issues that the right to know the health status of one's partner may advance. A number of international standards elaborate on this right of disclosure,⁴² but there is no specific guidance in article 14(1)(e) of the Women's Protocol itself. Thus, the general comment drew guidance from these international standards, but also bore in mind the possibility of violence perpetuated against African women on the basis of such disclosure.

7 General Comment on articles 14(1)(d) and (e) of the African Women's Protocol

The General Comment was drafted to clarify and elaborate the obligations in the Women's Protocol in order to counter the enormous issues faced by women in respect of their sexual reproductive health rights, especially in the context of HIV. In addition, the General Comment was drafted to respond to the particular barriers faced by women in Africa and the constraints of

42 See L Jossel *A best practice guide to HIV disclosure* (2009); Open Society Foundation for South Africa; UNAIDS and OHCHR *International guidelines on HIV/AIDS and human rights* (2006); Joint United Nations Programme on HIV/AIDS (UNAIDS) HR/PUB/06/9 http://data.unaids.org/Publications/IRC-pub07/jc1252-internguidelines_en.pdf (accessed 2 September 2012); SADC Model Law on HIV in Southern Africa (2008) SADC Parliamentary Forum http://www.justice.gov.za/vg/hiv/docs/2008_Model-Law-on-HIV-in-Southern-Africa.pdf (accessed 2 September 2012).

African governments, whilst also taking into consideration international standards and practices.

7.1 General obligations

There are four recognised general obligations of states to respect, protect, promote and fulfil the rights under the African Women's Protocol. The General Comment takes each of these general obligations and sets them out in the context required by articles 14(1)(d) and (e) of the Protocol.

The obligation to respect requires states to refrain from interfering directly or indirectly with an individual's rights. In respect of the African Women's Protocol, this requires that the state respect the right of women to protection and to self-protection, the right to be informed on their health status and on the health status of their partner. The state is also expected to promote social determinants of good health, such as environmental safety, education, economic development and gender equity, as these are ancillary elements necessary to support the state's role, ensuring that women are able to enjoy their rights under articles 14(1)(d) and (e) without interference.

The obligation to protect requires states to take measures that prevent third parties from interfering with these rights. Special attention must be paid to the health needs of women belonging to marginalised groups, such as refugee women, the girl child, old women, women involved in sex work, indigenous women and women with physical or mental disabilities. These women are often on the fringes of society, and are most likely to be abused or taken advantage of.

With regard to the right to know the health status of one's partner, states must ensure that international best practices are implemented. Legislation enforcing the compulsory testing or disclosure of HIV test results can have a negative impact on women, placing them in vulnerable positions with their spouses and communities, thereby discouraging them from being tested at all.⁴³ It is for this reason that voluntary testing and confidentiality of such results are imperative, and that, only when special circumstances so dictate, the HIV results of a patient be disclosed to his or her partner without consent. The General Comment attempts to guard against this possibility by setting out guidelines for testing and disclosure of HIV results in line with international best practices to ensure that the process is undertaken with due regard and care for the personal circumstances of women in Africa.

The obligation to fulfil requires states to adopt gender-sensitive laws, reform discriminatory laws, allocate adequate resources and take other measures for the full realisation of the rights in articles 14(1)(d) and (e). States must ensure that health services are culturally

43 UNAIDS 'Report on the Global AIDS Epidemic 2010'.

appropriate and that health care staff are trained to recognise and respond to the specific needs of girls and women. People living with HIV in a number of countries have reported being mistreated by health care providers or denied treatment in a manner that is cruel, inhuman or degrading.⁴⁴ A gender perspective should be included in the development of HIV health care programmes and policies and in the training of personnel involved in implementing such programmes. The state should increase and prioritise funding to provide affordable, safe and effective methods of care, support and treatment for women of various ages and support women and girls in making informed choices about their health.

7.2 Specific legal obligations

Apart from the general obligations placed on states, the General Comment delves deeper into the specific requirements of articles 14(1)(d) and (e) in order to spell out the individual obligations that each provision requires.

7.2.1 Right to protection and to self-protection (article 14(1)(d))

The right to protection and the right to self-protection in its very nature, as well as the differentiation of the two, bring a number of issues to the fore. During the drafting process of the General Comment, it was important to embark upon a careful examination as to whether this differentiation (the right to protection and the right to self-protection) is deliberate and draws out a different set of obligations on the part of the state. On the one hand, the notion of the right to self-protection would appear to be an attempt by the African Women's Protocol to address the unequal power relations between men and women in the context of a sexual relationship. Gender power imbalances, which translate into a power imbalance in sexual interactions, are increasingly being recognised as a factor in fuelling the spread of HIV-related illness by increasing the number of unsafe sexual encounters as women are unable to negotiate self-protection against HIV.⁴⁵ Thus, there is a need to see a social paradigm shift that transforms relationships between women and men, from the one of inequality and dominance, as is the case in patriarchal societies, to equality, respect and consideration for one another.⁴⁶ On the other hand, the right to protection is far clearer and would appear to encompass the actual implementation of human rights principles such as non-discrimination, participation, inclusion, transparency and accountability, in order to ensure that women have,

44 I Byrne & R Fleetwood 'Human rights abuses and health care' (2011) 16 *Interights Bulletin* 162.

45 T Langen *Gender power imbalance on women's capacity to negotiate self-protection against HIV/AIDS in Botswana and South Africa* (2005) <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1831928/> (accessed 10 September 2012).

46 As above.

amongst others, unhindered access to the provision of HIV-related services. However, as much as it may be clear to draw out state obligations arising out of the right to protection, it is not an easy exercise to determine the actual state obligations arising out of the right to self-protection.

Broadly, the right to self-protection would necessitate the creation of an enabling environment by the state that promotes behavioural change to correct the gender imbalance that hinders women from exercising their right to protect themselves from HIV through informed choice. The distinct state obligations that are subsequently implied in each instance are not obvious.⁴⁷ It is evident that the challenge for human rights law is twofold: to respond to the realities of women's entrenched gender-based inequality and historical disadvantage, as well as to ensure respect for the diversity of women's choices and the possibility of their full participation in every aspect of society.⁴⁸ In essence, this means that article 14(1)(d) is merely two sides of the same coin. In this case, the General Comment does not endeavour to seek to distinguish the state obligations under the 'two rights', but rather to jointly amass the possible obligations arising out of the need to ensure that women are ably protected, and able to protect themselves from HIV.

The General Comment, with reference to this right, firstly obligates states to take measures to ensure access to information on and education for the specific rights set out under articles 14(1)(d) and (e). In this regard, states are required to recognise the importance of providing information in the public sphere on the right to protection and to be protected. This information should be provided in an accessible manner, but must also be relevant and contextualised in a fashion that makes it understandable to women who may not have access to higher education. This was reiterated in the drafting of the General Comment, where it was felt that it was also important for the state to ensure that information on the sexual and reproductive health rights of women was publicised in a way that deconstructs the inherent stigmas, taboos and misconceptions that tend to perpetuate harmful stereotypes of women's roles in society in an attempt to place women and men on a more equal footing. The information and education obligations on states include the requirement to provide training for health workers and educators on the importance of these rights, and which sensitises them to the specific needs of women. This necessarily includes training on counselling services that must be provided when information regarding sexual and reproductive health is sought. It was also felt that states must be required to provide sexual and reproductive health services to women that are

47 K Stefiszyn *Adolescent girls, HIV, and state obligations under the African Women's Rights Protocol* (unpublished) (2012) 5.

48 D Otto 'Gender comment': *Why does the UN Committee on Economic, Social and Cultural Rights need a General Comment on women?* (2002) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=319202 (accessed 10 September 2012).

appropriate to their particular needs, as well as being sensitive to the HIV treatment that is uniquely required on the African continent. These services should be provided in a manner that integrates woman-centred prevention methods with other services, including family planning, reproductive health, primary health care services, HIV and STI testing, anti-retroviral treatment programmes and antenatal care. Particular emphasis was placed on the state to ensure that women are given the option of choice, and the corresponding ability to exercise that choice through the provision of contraceptive information and devices.

It was also noted that there is a general lack of political will amongst states to make female condoms as widely and freely available as the male condom, as well as an indifference regarding their equal promotion. The unequal status of women in society, particularly within African society, which has a number of cultural practices that fail to promote women as equal members of a community, is a major contributing factor. This places them in a disadvantageous situation when promoting safe sexual relations, particularly in the use of condoms for sexual intercourse. As women are often placed in a position that weakens their ability to protect themselves, the inclusion of the provision of female condoms as a state obligation, as well as access to treatment for sexually-transmitted diseases, are important. Studies show that, whilst 74 per cent of young men know that condoms are effective in preventing HIV infection, only 49 per cent of young women are aware of this fact.⁴⁹ The General Comment specifically included the promotion of female condoms under the specific obligations placed on states in order to try to promote better protection choices for women.

To complement the provision of providing sexual and reproductive health rights services, the General Comment requires that states should also be required to adopt laws and policies that ensure that women can claim and exercise their right to protection. Fundamental in the legal requirements of states is to ensure that laws and policies prohibit any form of discrimination against women in relation to their sexual reproductive health, and should also provide redress for women who may fall victim to stigma, prejudices and practices that perpetuate and heighten women's risk to HIV and related rights abuses.

7.2.2 Right to know one's health status (article 14(1)(e))

In drafting the General Comment, it was borne in mind that it would be largely unfair for African woman if we were to interpret the 'right to know one's health status' as merely requiring the provision of HIV testing facilities and services. The widespread ignorance of HIV status

⁴⁹ E Hayden 'HIV infection rate fell 25% over the last decade' (3 June 2011) <http://www.theatlanticwire.com/global/2011/06/hiv-infection-rate-falls-25-percent-over-last-decade/38449/> (accessed 10 September 2013).

amongst women is not only through the direct result of poor access to HIV testing, but rather through serious problems encountered by women in its delivery. Women (just like all other people) have a right to know their HIV status, through innovative, ethical and practical models of delivery.⁵⁰ The General Comment sought guidance from World Health Organisation (WHO) principles which have long acknowledged that there has emerged a new approach to HIV testing and counselling.⁵¹ Three underpinning principles of HIV testing (the 'three Cs') were established as norms: *counselling* and information about HIV before and after the test; *consent* to be tested given in an informed, specific and voluntary way by the person to be tested; and *confidentiality* of test results and of the fact of seeking a test.⁵² Thus, there is an onus on national governments to provide good quality testing and counselling services from a human rights-based approach.⁵³ In addition, because the confidentiality of test results and because the seeking of an HIV test is part of protecting and respecting the right to privacy, this must also be safeguarded at all costs by state parties. Thus, the General Comment provides that states must ensure that health workers providing such services adhere to a strict code of conduct in this regard.

In regard to counselling services, the General Comment also recognises that the positive duty of the state should therefore be interpreted to not only ensure access to HIV testing, but to provide information about the results of the test; about the virus; about the means of preventing HIV infection should the test results be negative; and preventing transmission to others should the results be positive.⁵⁴ In such cases, the General Comment seeks to ensure that women are well informed on their health status and able to take appropriate measures to protect themselves or to prevent infection.

The General Comment also places a duty upon government to ensure that legal, financial and cultural obstacles to testing and counselling are removed. With regard to financial barriers, VCT services are required to be affordable or (preferably) free. Again, in drafting this section of the General Comment, cognisance was taken of African realities. For instance, some studies reveal that the use of VCT services is low for women and financial barriers are one of the reasons cited for non-testing, as some African governments have user

50 WHO 'The right to know: New approaches to HIV testing and counselling' (2003) http://www.who.int/hiv/pub/vct/en/Right_know_a4E.pdf (accessed 10 September 2012).

51 World Health Organisation 'Knowing your HIV status – The first step to accessing care and preventing further infection' (2003) http://www.who.int/hiv/pub/vct/en/Right_know_a4E.pdf (accessed 10 September 2012).

52 Open Society Institute 'Increasing access to HIV testing and counselling while respecting human rights' (2007) http://www.soros.org/sites/default/files/increasing_20070907.pdf (accessed 10 September 2012).

53 As above.

54 Stefiszyn (n 47 above).

fees in accessing health services.⁵⁵ Consequently, in order for HIV testing to have the maximum impact in Africa, the General Comment recognises that the removal of financial barriers in accessing health care is essential. The General Comment goes further to provide that the state must ensure that VCT services are affordable by taking into consideration the interests of those women less able to meet such costs. These might include rural women, refugee women, woman detainees, migrant women and the girl child, who do not have ready access to health care facilities. In addition, the General Comment also recognises that another dimension of a financial barrier is the cost that women encounter due to the distance of the VCT service from their community. The General Comment provides that states have an obligation to promote geographical accessibility of VCT services in various communities, including to vulnerable groups such as refugee women, the girl child, old women, detained women, women involved in sex work, indigenous women and women with physical or mental disabilities. This may entail the use of mobile clinics or transport services to assist women who are otherwise geographically prevented from accessing treatment.

In regard to legal barriers, the General Comment also drew guidance from WHO and UNAIDS, which recognise that, in addition to expanding access to HIV testing, 'equal efforts must be made to ensure that a supportive legal framework is in place to maximise positive outcomes and minimise potential harm to patients'.⁵⁶ Legal barriers are much more evident in regard to testing of children and adolescents.⁵⁷ There are also varied opinions amongst African countries with regard to what age a child can provide informed consent to HIV testing.⁵⁸ To make this matter worse, laws and policies setting out the rights of children and the age that defines a child also vary by country.⁵⁹ However, the General Comment took cognisance of General Comment 3 of CRC, which mandates government to give children access to 'adequate information related to HIV/AIDS

55 J Namazzi 'Determinants of using voluntary counselling and testing for HIV/AIDS in Kenya' <http://www.na-businesspress.com/JMPP/NamazziWeb.pdf> (accessed 10 September 2012).

56 Open Society Initiative (n 52 above).

57 For further information, see World Health Organisation & UNICEF *Policy requirements for HIV testing and counselling of infants and young children in health facilities* (2010) 1.

58 Age of consent to various health interventions in selected African countries are as follows: Burundi, 21 years; Lesotho, 12 years; Mauritius, 18 years; Namibia, 18 years; Nigeria, 16 years; Senegal, 15 years; South Africa, 12 years; Zambia, 21 years. For a full table, refer to African Regional Dialogue of the Global Commission on HIV and the Law (Issues Brief) 'Children, HIV and the Law' (2011) 9.

59 Algeria, Benin and Botswana, eg, define a child as one below the age of 18 years. Libya and Malawi define a child as one below the age of 16. Burundi puts the attainment of majority at 21 years. There, however, seems to be a growing inclination towards a child being one below the age of 18. See African Child Policy Forum (ACPF) http://www.africanchildforum.org/clr/Harmonisation%20of%20Laws%20in%20Africa/other-documents-harmonisation_1_en.pdf (accessed 11 August 2014).

prevention and care',⁶⁰ and that HIV testing and counselling are 'fundamental to the rights and health of children'.⁶¹ Taking this information into account, it would seem that the best interests of the (girl) child should be the guiding principle in all circumstances.⁶² However, the General Comment was careful not to pre-suppose that the best interests of the girl child is an easy answer to arrive at in light of competing views between parents or guardians and health care workers. In any case, the General Comment provides that it is still the obligation of the state to ensure that it adopts policies and programmes to guide the testing of children in line with the principles of informed consent, appropriate counselling and confidentiality. As such, the General Comment mandates states to provide health care services tailored for all age groups and to address the specific vulnerabilities faced by such children, including child-headed households, girl children who have faced sexual abuse or have been involved in child prostitution, as well as orphaned children.

The General Comment was also inspired by article 12 of CRC, which provides that governments are obliged to offer children, in accordance with their maturity, an increasing role in decisions that affect them. The General Comment is careful to ensure that states do not undertake to apply mandatory testing of children. In enshrining the principles of confidentiality, states must also ensure that the HIV status of the child is not used as a basis upon which to deny a girl child access to other services such as education, basic services or food security.

Women (including adolescent girls) face cultural barriers when accessing HIV-related services. In an attempt to break down the barriers that women face in accessing their sexual and reproductive health rights, the General Comment provides that states must address gender norms, harmful traditional and cultural practices, patriarchal attitudes, discriminative laws and policies. To do so, the General Comment recognises the need for collaboration with societal leaders, including traditional and religious leaders, and other non-state actors in changing patriarchal attitudes and behaviours inherent in communities. Only by engaging with communities on an equal and accessible level, will it be possible to start altering the social stigmas that create obstacles to effective HIV treatment and care. The legal mechanisms enshrining principles of non-discrimination and equality must also be strengthened and duly enforced.

60 CRC General Comment 3 para 16.

61 CRC General Comment 3 para 22.

62 World Health Organisation 'HIV testing in young children' (2002) http://whqlibdoc.who.int/hq/2011/WHO_HIV_11.02_eng.pdf (accessed 10 September 2012).

7.2.3 Right to know the health status of one's partner (article 14(1)(e))

Determining when it is appropriate to divulge the HIV status of a sexual partner is perhaps one of the more difficult aspects of article 14(1)(e). Not only does this require the state to step over the boundary into the private sphere of a person's life, but the consequences of doing so can have tremendously negative effects on the lives of individuals if not treated with care and respect. Stigmatisation towards HIV includes both internal and external elements that can reduce the desire of HIV-positive individuals to voluntarily disclose their status.⁶³

The General Comment takes cognisance of the fact that stigmatisation is particularly evident in Africa, where research has confirmed that the discrimination associated with HIV can result in violence to those who admit to a positive status.⁶⁴ Women are even more so at risk when confiding their positive status to a sexual partner. There have been a number of reports where women have admitted to being HIV positive and were violently beaten or harmed as a result.⁶⁵ This fear of retribution has kept a large portion of people silent about their status, and also had a deterrent effect on those who are unaware of their status from being tested.⁶⁶ The General Comment aims at having VCT as the primary means of determining one's HIV status with the hope that a supportive environment will lead to voluntary disclosure to one's sexual partner. This is, however, not always going to be the case, specifically in environments where the stigma towards HIV is still strong. Thus, the General Comment addresses the issue of when is it appropriate for government to step in and disclose a person's HIV status without their consent.

The General Comment has adopted international best practices that require disclosure to be undertaken by a health practitioner only in circumstances where proper counselling has been given, and the patient is aware of the consequences of this disclosure. In addition, disclosure should only be done in instances where the health practitioner is of the opinion that a sexual partner is at risk of contracting HIV, and there is no danger involved for the patient if his or her HIV status were to be disclosed.

What the General Comment does require is that states provide adequate training of health care staff. It is imperative that health practitioners are aware of the risks to the individual if his or her HIV status were to be divulged, and to be supportive and understanding

63 M O'Grady 'The right to know and the right not to tell: The ethics of disclosure of HIV status' (2011) 2 *Postmodern Openings* 80.

64 O'Grady (n 63 above) 106.

65 Global Commission on HIV and the Law 'Gender and disempowerment' (2012) *Risks, rights and health* 64.

66 C Patton & D Goldstein 'Challenges associated with disclosing one's HIV-positive status' (2008) *HIV and AIDS Information* 2.

of these dangers. In the report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,⁶⁷ the Special Rapporteur noted that cases where 'medical care that causes severe suffering for no justifiable reason can be considered cruel, inhuman or degrading treatment or punishment, and if there is state involvement and specific intent, it is torture'.⁶⁸ The report goes on to say that there have been numerous reports that have documented the mistreatment of or denial of treatment to people living with HIV by health providers, where patients are 'turned away from hospitals, summarily discharged, denied access to medical services unless they consent to sterilisation, and provided poor quality care that is both dehumanising and damaging to their already fragile health status'.⁶⁹ The Special Rapporteur has indicated that the unauthorised disclosure of HIV status to sexual partners, family members, employers and other health workers is a common abuse against people living with HIV that may lead to physical violence.⁷⁰

In this regard, health practitioners are placed in an extremely difficult role having to determine when it is appropriate to disclose the status of an individual. Not only does disclosure undermine the traditional ethical obligation of a health practitioner to protect the confidentiality of a patient's health status, but it also asks the health practitioner to expose the private life of his or her patient to the community. The General Comment takes steps to stress that states must invest in proper training for health practitioners so that they are able to make informed decisions on disclosure. There also needs to be a measure of accountability for health care practitioners who act negligently in the disclosure of results, where such disclosure could result in harm of the patient.

Disclosure of HIV status to sexual partners can help individuals to maintain their own health status and potentially prevent the spread of infection.⁷¹ It is an attempt to quell the spread of HIV through Africa and to give those individuals at risk of infection by their partners the option to test themselves and actively start treatment where necessary. The risks of disclosure, particularly for women, are immense and it is these risks that the General Comment attempts to guard against by incorporating international standards that clearly set out the circumstances under which non-consensual disclosure may occur. It is with this in mind that the General Comment hopes to guide individuals in their right to know their own status, as well as to guide health practitioners whose job it is to help their patients from potentially infecting their partners or family.

67 Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment UN Document (2013) A/HRC/22/53.

68 n 67 above, 9.

69 n 67 above, 17.

70 As above.

71 O'Grady (n 63 above) 98.

8 Violations

Violations of the General Comment are based upon a state's failure to fulfil these rights through their action or inaction. The provisions of the General Comment are an attempt to act as a redress for women whose rights under articles 14(1)(d) and (e) of the African Women's Protocol have been violated. It is important for states to realise that their obligations lie not only with the provision and fulfilment of rights, but also in providing mechanisms that ensure the accountability of those who are responsible when those rights are not provided. Inherent in this is the necessity for states to be transparent. Thus, it is envisioned that the General Comment should be incorporated into the reporting obligations of states to the African Commission.

9 Missed opportunities: Gaps in the General Comment

One of the evident gaps in the General Comment is its silence on the rights of sexual minorities (lesbians, bisexual women and transgender women) in the context of HIV. In as much as the General Comment has attempted to recognise the vulnerabilities of specific groups of women in a non-exhaustive manner (that is, rural women, elderly women, women living with disabilities, and so forth), and thus arguably creating a presumption that lesbian women would nevertheless be included, this was a missed opportunity for the latter's explicit recognition, especially when considering how this particular group of women has been historically and structurally discriminated against in most African societies. Although the risk of female-to-female HIV transmission is low,⁷² this does not imply that their vulnerability is less pronounced. Studies reflect that health care workers do not often cater for the specific needs of lesbian, gay, bisexual and transgender (LGBT) persons, especially in the context of HIV.⁷³ Thus, the General Comment's omission to explicitly outline the rights and duties of the state in this regard may unintentionally reinforce existing prejudices against such groups.

The General Comment also does not provide for a dissemination plan articulating how the contents of the General Comment would be disseminated amongst relevant stakeholders. For instance, the General Comment by the African Committee on the Rights and Welfare of the Child on 'children of incarcerated and imprisoned parents and

72 AIDS MAP 'Female-to-female sexual transmission' (2014) <http://www.aidsmap.com/Female-to-female-sexual-transmission/page/1323529/> (accessed 11 August 2014).

73 See Chivuli Ukwimi OSISA 'Challenges to accessing health services and rights' 6 March 2013 <http://www.osisa.org/open-learning/regional/challenges-accessing-health-services-and-rights> (accessed 11 August 2014).

primary caregivers' (African Children's Rights General Comment)⁷⁴ has a section that outlines how the particular General Comment will be disseminated to both duty bearers, rights holders and other key stakeholders. In that section, the African Children's Rights General Comment explicitly places an obligation upon state parties (with the support of non-state actors) to widely disseminate the General Comment to such stakeholders.

In addition, although the African Women's Rights General Comment provides for a section on state reporting, it is silent on how progress on focus areas of the general comment will be measured. In contrast, the African Children's Rights General Comment (in paragraph 66) provides that in measuring and evaluating progress made in the implementation of article 30 of the African Charter on the Rights and Welfare of the Child (African Children's Charter), the Committee shall require state parties to provide detailed information 'which shall include statistical data, on progress made, achievement, and factors for success or challenges faced in the implementation of the article along identified indicators'. The African Children's Rights General Comment then proceeds to provide indicators. This, therefore, ensures consistency in reporting and also ensures that state party reports submitted are not vague and evasive of the 'actual change' that the General Comment seeks to realise (as has sometimes been the case). These are important monitoring mechanisms that the African Women's Rights General Comment overlooked.

10 Way forward: Civil society and the promotion of the General Comment

Civil society organisations (CSOs) are important for monitoring government fulfilment of its obligations under women's rights instruments and can play an important role in ensuring accountability. CSOs should endeavour to have a fair knowledge of the General Comment and subsequently to create awareness for the African people at the national and regional levels. The popularisation of the General Comment is vital as it can be used as a monitoring and advocacy tool. CSOs should consolidate efforts in the area of awareness creation of the population on women's rights, specifically on the sexual and reproductive provisions of the African Women's Protocol through the promotion of the General Comment. NGOs can also use the General Comment as a guide in shadow reports or human rights situations reports presented before the African Commission every year. The media, religious and traditional leaders, youth associations, academic institutions, private sectors, professional associations, women's organisations and communities can be

⁷⁴ General Comment 1 (art 30 of the African Charter on the Rights and Welfare of the Child) 'On children of incarcerated and imprisoned parents and primary caregivers' (2013).

consulted, and brought together to understand and advocate for women's rights through the General Comment. Strong partnerships between government, civil society and the private sector should be encouraged and fostered.

Additionally, national human institutions have an important role to play in ensuring that the General Comment is made known among people and government institutions. This can be in the form of training or roundtable discussions, the publication of the General Comment in local languages and engaging with government officials. Advocacy, awareness raising and capacity building of frontline protectors and social service providers should be carried out, while recognising the challenge of limited resources. Civil society groups and human rights institutions should also make efforts to cite or refer to the General Comment at any opportunity they have before a court.

11 Conclusion

The implications of HIV in Africa are immense and affect the broader family, community and the overall development of African states. This is particularly the case for women who are disproportionately affected by HIV. The current economic, social, cultural and legal barriers that impede women from obtaining effective treatment and care, or information that could prevent the spread of HIV, keep women in a position of reduced power.

It is hoped that the General Comment will assist in bringing clarity and precision to articles 14(1)(d) and (e) under the African Women's Protocol. Even though there is a developed legal and normative body of standards at the international level, the General Comment is meant to provide a broad interpretation of selected provisions of the Women's Protocol that have been identified as unclear. The General Comment was the first step towards the development of such an 'unpacking' of the articles, and it is now up to states to implement the provisions of articles 14(1)(d) and (e) of the African Women's Protocol in accordance with the guidance set out in the General Comment.

It is also hoped that this document will serve better at setting normative standards in realising HIV-related rights in the African context. This will ensure that governments are held accountable in their obligations to fulfilling the reproductive rights of women, who are the most marginalised and discriminated against group in Africa. It cannot be over-emphasised that the General Comment in relation to articles 14(1)(d) and (e) of the African Women's Protocol should serve a broader purpose in assisting states to implement the rights which they have undertaken to guarantee.