The use of human rights model to address the problem of health care and reproductive rights of women, most importantly victims of obstetric fistula in Africa

Submitted in partial fulfilment of the requirements of the Master of Laws degree (LLM in Human Rights and Democratization in Africa)

by

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Declaration

I Mahaman Hadiza declare that the dissertation, '**The use of human rights model to address the problem of health care and reproductive rights of women, most importantly victims of obstetric fistula in Africa**'
is my work. I declare that it has not been submitted for any degree or examination in any other university.
All the sources used or quoted have been duly acknowledged.

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Date: _____

Dedication

This dissertation is dedicated to my mother for her love, to the memory of my late father, Dorien Deketele. I also dedicate this work to all women who are currently suffering from fistula across the world.

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List of abbreviation

AU	African Union
AUGA	United Nations General Assembly
CRC	Convention on the Rights of the Child
CEDAW	Convention on the Elimination of All forms of Discrimination Against Women
DSDP	Declaration on Social Development and Progress
ICJ	International Court of Justice
ICESCR	International Covenant on Economic, Social and Cultural Rights
UDHR	Universal Declaration of Human Rights
UN	United Nations Organisation

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Chapter 1 Introduction

1.1 Background to the study

Fistula is a specific disease to women, which results in a permanent incontinence of urine or faeces (or both). From the physiological point, fistula is the result of a tear in the body between 'the vagina and bladder/or rectum'.[1] From the medical perspective, fistula can be explained by many reasons. Among others, it occurs mostly after a long labour during childbearing in places where women do not have access to obstetrical emergency care.[2] Most of the time, after days of labour without assistance, the baby is blocked and dies.[3] In addition fistula can occur because the baby is too big to pass trough the normal canal of birth generally, when the mother's pelvis is small as the result of her young age, early childbearing and/or because of malnutrition.[4] Among other reasons explaining fistula, specialists have mentioned surgical radiation, malignant, unskilled abortion and pelvis surgery.[5]

Across the world, an estimated two million women are affected by the disease and every year fifty to hundred thousands of new cases are registered.[6] Sub-Saharan Africa is one of the regions of the world in which the disease is prevalent particularly among women living in rural areas.[7] Cook Rebecca has mentioned poverty both at the national health-services and at family level as one factor that expose women to fistula.[8]. Fistula concern is grave and, the low level of attention given to the issue at the political stage in many African countries, is reflected not only in the lack of health care supply for obstetric care but also by the lack of awareness of fistula problem in the African continent among the majority of the population.[9] This situation is grave

1 RJ Cook ,BM Dickens & S.Syed 'obstetric fistula: the challenge to human rights'(2004) International Journal of Genecology and Obstetric 87,72,7

2 *Centre des nouvelles de l'ONU : fistule obstétricale une maladie qui touche plus de 2 million de femmes* <http ;// www,un.org>.(accessed 13 march 2008)

3 n2 above

4 Cook, Dickens &Syed (n 1 above)87,72,77

5Cook, Dickens &Syed (n1 above) 87, 72, 77.It appears that in the United States of America (USA) and the United Kingdom (UK) over 70% of the fistulas are due to pelvis surgery

6 n 2 above

7 n 2 above

8 . n 2 above

9 . n 2 above

and unacceptable particularly because the expenditure per head of population on health service to the expenditure on weapons considerably, exceeds the reasonable minimum.[10]

Mothers that survive the trauma of obstetric labour, have to carry the disease that takes off their dignity.[11] Indeed, fistula isolates its victims from the rest of the society.[12] It is a source of discrimination, stigma, impossibility to have a family and professional life and exposes the victims to many kinds of infections.[13]

In some cases, fistula results in premature deaths of the women[14]. This is because the victims do not often count for those who take decisions both at national and international level. [15] Sufferers of obstetric fistula are almost completely not considered in government programs in many African states.[16] This situation is reflected not only in the lack of services to meet populations' health needs, particularly women, including those in rural areas by African governments.[17]

A high number of women suffering from fistula consider the social aspect of it the most traumatizing. For this reason, some women would prefer to commit suicide.[18] Despite the gravity of the disease, fistula is one of the problems on which the world has not yet focuses enough. It is indeed one of the most neglected reproductive health problems.[19] The problem was brought in the international arena for the first time, only in 2003 when the United Nations Department of Information decided to put it on the list of the 'ten topics, which the world does not often hear about'. [20]

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[10]. BCA Toebes The Right to Health as a Human Right in International Law (1999) 339

[11]. Cook ,Dickens &Syed (N1 above) 87,72,77

[12]. Victims of fistula are rejected by their husbands and in some cases, their families because of the smell.

[13]. n2 above

[14]. M Gueye *le drame des fistules obstétricales* < www.seneweb.com> (accessed on13 March 2008)

[15] Cook ,Dickens & Syed (as n 1 above) 87,72,77

16 According to an interview conducted by Rosalie Andigue of radio Anfanie with the president of the NGO Dimol in Niamey dealing with the issue women suffering from fistula were sent out of the centre by the police acting under the authority of the ministry of health. See also <www.tamtaminfo.com> (accessed on 16 July 2008)

[17] UNFPA & Engender Health 'Obstetric Fistula Needs Assessment Report: findings from nine African countries (2003) <www.unfpa.org > (accessed 3 July 2008)

18. PM Teubeu *'fistules obstétricales au Cameroun : la femme porteuse de fistule obstétricale préférerait se cache a défaut de se suicider ; une expérience de Maroua, Cameroun'*. < www.gfmer.ch/activites internationalesFr/Teubeu.htm>

[19]. n 2 above.

[20]. Cook , Dickens & Syed (n1 above) 87,72,77

It is possible to cure fistula by surgery. The result can be successful in 90% of non-complicated cases and a victim can restart her normal life.[21] However, the costs of the transport to joint a specialized centre for treatment and the post surgery care are very prohibitive for the majority of women living with fistula in Africa. Poverty as mentioned above remains a serious barrier for the victim of fistula to afford the treatment.[22]

Additionally, the number of hospitals dealing with the disease are very limited due the lack of doctors specialized in this particular domain.[23]

1.2 Statement of the research

In his report on the right to the enjoyment of the highest attainable standard of health, Paul Hunt, the United Nations (UN) special rapporteur on the right to health mentioned that, at the heart of the right to the highest attainable standard of health lies an effective and integrated health system encompassing health care and underlying determinants of health which is responsive to national and local priorities.'[24] States have the legal duty to comply with their obligations under national and internationals instruments. However, in Africa Particularly, giving assistance for women during pregnancy and delivery is a complex problem.[25]

According to the WHO report of 2005, maternal mortality rate in Africa is the highest in the world.[26].In his statement to the UN Human Rights Council, Paul Hunt, mentioned that,' for every woman who dies from obstetric complications, about 30 more suffer injuries, infections and disabilities. [27]

Although the right of access to health has been recognized by the African Charter on Human and Peoples' Rights [28](African Charter), the Protocol to the African Charter on Human

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[21]. n 2 above

[22]. The UNFPA mentioned that for this surgery and post surgery care a women needs an minimum of three hundred dollars

[23]. Addis Ababa Hamlin hospital is the only one in Africa given care to women suffering from this disease but there are temporal assistance in different hospital around the continent, but his intervention can not deal even with the half of women waiting for a surgery

[24]. See the report of the special rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt to the seven session of the Human Rights Council,A/HRC/7/11,31 January 2008 http://daccessdds.un.org/doc/UNDOC/GEN/G08/105/02/PDF/G0810502.pdf accessed on 10 August 2008

[25]. BK Twinomugisha 'the right of access to obstetric emergency care in Uganda.' African Human Rights Law journal (2007)8

[26] See n 25 above

[27] See n 24 above

[28] Art 16 (1) of the African Charter on Human and Peoples' Rights

and Peoples' Rights on the Rights of Women in Africa (African Women Protocol) [29]and many other international human rights instruments that African states have ratified. Access to health care [30]and more particularly, treatment for women suffering from fistula is a serious concern on the African continent. Despite the fact that, the right to reproductive healthcare is expressly provided for in the African Women Protocol[31], access to emergency obstetric services is a real issue on the African continent.

The main question to be asked is whether, the African governments have done all that is necessary, to fulfil their international obligations. More specifically, to end obstacles that prevents this marginalized group of women access to fistula treatment in their respective countries.

The African Charter provides for the indivisibility and interdependence of human rights; both civil and political as well as socio-economic and cultural rights. In addition, the Vienna Declaration and Programme of Action stated that, all human rights are universal, indivisible, interdependent, and interrelated. According to General Comment No.14 of the Committee on Economic, Social and Cultural Rights (the Committee), which the African Commission applied in the case of *Social and Economic Rights Action Centre (SAREC) and Another v Nigeria,*[32] the obligation to ensure reproductive, maternal and child health care is one of the minimum core obligations on the state parties under both the International Covenant on Economic Social and Cultural Rights (ICESCR) and the African Charter.[33] In this regard, Cook Rebecca states that, human rights instruments both at national regional and international level are tools that we can use to protect women's rights.[34]

This study tries to show that African governments' failure to provide for the right to the highest attainable health care of the victims of fistula is a violation of the international human rights they have ratified. Indeed, the Women Protocol, and the Convention on the Elimination of

[29] The Protocol to the African Charter on the Rights of Women in Africa in its art14 provides for the right to health and reproductive rights

[30] R Murray Human Rights in Africa from the OAU to the African Union (2004)151

[31] n 29 above

[32] AHRLR 2000 (ACHPR) In Para 65 and 66, the commission states that the right to food is connected to other rights such as the right to health and decide that the Nigerian government treatment of Ogoni people violated its three minimum duties on the right in question.

[33] The UN Committee on Economic, Social and Cultural rights: general comment no14 the right to the highest attainable standard of health (art 12) Para 43 and 44(A)

[34] R Cook, B M Dickens & M F Fathalla Reproductive Health and Reproductive Rights (2003) 224

all Forms of Discriminations against Women (CEDAW) and African charter and the ICSECR provide for the direct enforcement of the provisions contained in them. For these reasons, the denial of free treatment to the victim of fistula constitutes a violation of the above-mentioned treaties.[35]

Therefore, the question arises as to how the regional or international human rights instruments could be used to compel states to grant general and free access to fistula treatment within the continent and prevent occurring of fistula?

Despite the gravity of fistula problem, African states have not complied with their duty, to set out national plans and strategies to grant for specific treatment to women suffering from fistula. It is their obligation to have a comprehensive national plan and programmes for the disadvantaged persons[36]and this includes women suffering from fistula.

1.3 The objective of the study

The first objective of this study is to show how the lack of awareness of the disease within the majority of the population constitutes a serious issue and consequently explains the extreme distress in which women suffering from fistula are living. It aims at showing the failures of the responsible institutions and how this problem can be solved.

Secondly, the study will show how the neglect of the victims of obstetric fistula constitutes a violation of human rights. More specifically, the study will consider the relevance of the African Women Protocol in the provision of general and free access to treatments for the victims of the disease.

Thirdly, the study aims at asserting the responsibility of states and to urge states to develop the necessary capacity to deal with the disease.

[35] R Cook 'Advancing Safe Motherhood Trough Human Rights in I Marali & V Oosterveld giving meaning to Economic ,Social, and economical rights (2001) 109

[36] In his report to the seventh session of the Human Rights Council, Paul mentioned that one of the legal obligation of the state is to its health system include a number of the features and measures which include the above mentioned conditions

1.4 Significance of the study

Women's rights have been recognized by national, regional and international human rights instruments. In Africa particularly, both the African Charter and the African Women Protocol provide for the right to health. However, the continent offers the highest rate of women suffering from fistula.[37]

The majority of the victims ignore the existence of treatment or most of the time; they cannot afford to pay the price because of the high cost. This constitutes what Rebecca qualifies as, 'the greatest denial of their human rights.'[38]

1.5 Hypotheses

This paper aims to answer the question whether the current level of governments' response to the plight of victims of obstetric fistula, complies with the requirements of international human rights law.

It looks at whether the consideration of victims of fistula from a right-based approach will contribute to affordability and free access to treatment for women suffering from the disease.

1.6 Literature survey

Most of the researches conducted on fistula are recent, and were conducted by the United Nations Fund for Population Programme (UNFPA). Those researches focused on setting the map of fistula to make awareness around the world on the disease. More specifically, focus is on aspect of the need to adequate campaigns to end fistula and the need to also provide for health care services.[39]

Ben Kiromba Twinomugisha wrote on 'Exploring judicial strategies to protect the right to access to emergency obstetric care in Uganda'. The study has the merit to highlight important issues related to emergency obstetric care."[40] However the study focused more of the prevention of the maternal mortality. If fistula is the result of the absence of this emergency

[37] n 17 above

[38] Cook, Dickens& Fathalla n 34 above 224

[39] UNFPA 'reproductive health and safe motherhood' Annual Report 2006 <,http// www.f/unfpa/20/annual/report/202006.mht> (accessed on 29 April 2008)

[40] Twinomugisha (n 25 above)

obstetric care, the current study tries to have a look on this particular aspect of the problem which implicate serious social and human rights issues.

Ferreira Banda and Rebecca also wrote on reproductive health and the productive right in connection with regional and international instruments. However in the latter case, Rebecca wrote an article with Dickens and Fathalla on the disease dealing with the challenge it represents to human rights. However, the article did not touch some key issues of the problem. Most importantly, the article is not specifically focused on the problem of fistula in African.

1.7 Research methodology

The study will focus on library research, discussions with medical staff, fistula victims, and discussion with human rights experts. It also makes use of desktop research.

1.8 scope an limitations of the study

Due to the wide character of the right to health, the study will focus on the access to free treatment of fistula as a fundamental human right and to develop legal mechanisms to make the obligation on states to provide for free access.

1.9 Challenges

Due to the language barrier, administrative problems, and lack of responses from the contacted persons in Mozambique, this writer was not able to realise the field work. Additionally, there lack cases and textual authorities that are specifically focussed on issues of fistula.

1.10 Overview of the chapter

Chapter one of the studies will focus on definition of concepts and general introduction to the topic.
Chapter two will give an overview of the disease and its impact on women. Chapter three will focus on the existing relevant human rights framework.
Chapter four will focus on how to use human rights mechanisms to fistula
Chapter five will cover with the conclusion and recommendations.

Chapter II: Overview of the disease and its impact on women who suffers from it

2.1 Introduction

The WHO has mentioned that five million women suffer serious maternal morbidity in African and fistula is one of the problems that figures at the top of the list.[41] Fistula, 'a routine disaster'[42] for the sufferers, touches every year about more than a 100,000 women.[43] The real prevalence of obstetric fistula is not known with exactitude.[44] This is not only because the problem happens in rural poor areas, but also and more importantly, because of the great stigma around it that makes the victims hide.[45] The majority of women suffering from fistula have little chance of access to surgery.[46] This renders "social ostracism and destitution typically distressful for them"[47]

With the aim of this study, this chapter will focus firstly, on the definition of fistula; secondly, it will deal with the different categories of fistula (vesico-vaginal fistula, recto-vaginal fistula, traumatic). Thirdly, the chapter will consider the main causes of fistula. Fourthly, this chapter will give the general knowledge and perception of the disease and lastly the chapter will give details on the consequences that obstetric fistula has on its sufferers.
The definition of fistula can be given from different perspectives.

2.2 Definition of fistula:

1. According to the free online medical dictionary, fistula is:' an abnormal channel that creates an open passageway between two structures that do not normally, connect.[48]'The same source defines additionally fistula as' a permanent abnormal passageway between two organs in the body or between an organ and the exterior of the body.[49]

[41] World Health Organisation obstetric fistula guiding principles for clinical management and programme development 2006 http://www.who.int/making_pregnancy_safer/publications/obstetric_fistula.pdf > (accessed on 26 October 2008)
[42] BL Benderly 'A mark of shame'(2008) Disease Control Priorities Project <hppt/www.Dcp2.org/features/63/a- mark- of-shame> (accessed on 19 September 2008)
[43] Benderly (n 4 above)
[44] Benderlyn 4 above,see also Muleta and Wall
[45] This view is also confirmed by Benderly
[46] Benderly (n4 above)
[47] Benderly (n4 above)
[48] Http//; <www.medical_dictionary>. (accessed 5 October 2008)
[49] n 48 above

The UNFPA maintains that obstetric fistula occurs during prolonged labour. It happens more particularly when 'the *soft tissues of the pelvis are compressed between the descendy of the baby's head and the mother's pelvis bone'.*[50] Consequently, the compression, results in a lack of blood flow that provokes the death of the tissues and therefore, the appearance of a tear. The hole in the women's body creates serious problems which include incontinence (the impossibility of the sufferers from the disease to control her urine or faeces or both), cruel infections, and ulceration of the vaginal tract. In some cases it may lead to paralysis caused by nerve impairment.[51] Absence of medical assistance on time, more particularly, caesarean intervention to alleviate the pressure is one of the main causes of fistula.

The hole makes the woman uncontrollably incontinent of urine or faeces or both and transforms a healthy person into someone viewed as a leaking, reeking, and 'moving latrine'[52]".

Fistula has on the women who suffer from it both medical, mental, and social consequences. The medical consequences of the disease if untreated can be translated into faecal and urinals leaking as well as heavy smell which one of its physical effects is. Other medical effects can be noticed such as nerve destruction and perilous dehydration due to reduction in intake of water which the sufferers impose on themselves. [53]

According to Beiryl, the word 'fistula' derives its meaning from the Latin word which means 'pipe'. It is an 'abnormal passage' between organs[2] in this case, between the vagina and the bladder, the vagina and the rectum, or both.[54]

In the context of this study fistula should be understood as a brutal 'tear-up' which can develop a hole either between the rectum and the vagina, (*recto vaginal* fistula) or between the bladder

[50] UNFPA 'Frequently Asked Questions Campaign to end Fistula 2004 < http//;www.unfpa.org> (accessed on 13 september2008)

[51] LL Wall, SD Arrowsmith, ND Briggs, A Browning & Lassey 'the obstetric vesico-vaginal fistula in the developing world' in incontinence management volume 2<http://www.icsoffice.org/documents/ici_pdfs_3/book.pdf>

[52]According to Veronica Yakobe. She is a Malawian woman who during 23 years suffered indignity because of fistula.

[53] LL Wall (n 12 above)

[54] Benderly(n 4 above

and the vagina, (*vesico-vaginal* fistula.).[55] Both adults and young girls of any age can be affected by the problem.[56]

2.3 History of the disease

Historically, fistula has existed in all parts of the world. In this regard, Mulu Muleta mentioned that the oldest case of fistula was found in Egypt 'from an Egyptian queen's mummy' approximately in 1550.[57] For the first time, a physician made a connection between obstructed labour and vesico-vaginal fistula in the 11th century.[58]

Since 1838 a Virginia doctor named John Peter Mettauer succeeded in closing fistula by using suture technique.[59] Another doctor in the United States, Marion Sims, received the first fistula case, in 1845 and succeeded in its treatment after 30 interventions on the same patient in 1849; about 4 years after he received it.[60]Consequently, he wrote in 1852 an article on the main rules guiding the repair of fistula. Three years later, he created the first hospital for fistula treatment.[61] Actually, gynaecological surgery is the main cause of fistula in western countries.[62]

In the case of Africa, a study carried out by the Addis Ababa Fistula Hospital, showed obstructed labour as the main cause of the disease. The delays occur not only while the women were at home, but also during transfer between health deliveries units with different levels of care for the potential victim.[63] Fistulas can be classified in different categories. This is considered below.

2.4 Classification of fistula

When dealing with fistula issue, it is important to make a distinction between simple and complicated fistula, as well as vesico-vaginal from recto-vaginal fistula.

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[55] <hppt www.wikipedia.com>. (accessed on the 15 September 2008)

[56] M Muleta,,E Catherine Fantahun RC Kennedy &B Tafesse 'health and social problems encountered by t treated and untreated obstetric fistula patients in rural Ethiopia' women's health school of public health Ethiopia., J Obstet Gynaecol Can 2008 page 469 <http://www.sogc.org/jogc/abstracts/full/200801_WomensHealth_2.pdf > (accessed 24 09 2008)

[57] This connection was made by a Persian Physician named Avenica

[58] n 57 above

[59] n 57 above

[60] n 57 above

[61] n 57 above

[62] n 57 above

[63] n 56 above

Being that these research concerns medical issues and complicated terms, this writer intends to briefly analyse the foregoing classifications of fistulas.

According to Neeraj Kohl, the classification of obstetric fistula depends of the nature or the location, of the cause that create it, its complexity and the site that has been affected by the problem.

2.4.1 Vesico- vaginal fistula

Vesico-vaginal fistula is an abnormal passage between the vagina and the bladder.[64]It can be a simple or complicated one.

Simple form of vesico-vaginal fistula is the one measuring less than 2 to 3 cm close to the Cuff. The complicated case of fistula is the one greater than 3cm and results of previous radiation therapy.[65]

2.4.2. Recto- vaginal fistula

This kind of fistula seems to be a rare one as it is less common than the first type. These cases are not generally mentioned in studies as a clinical phenomenon.[66] Experts have concluded that in cases of fistula, 6 to 24 % of them present a combined recto-vaginal and vesico-vaginal fistula.[67] Recto vaginal involves a permanent communication between the vagina and rectum at the upper end of the healed tear."[68]Experts mentioned that recto-vaginal repairs present more difficulties than the vesico-vaginal one. In addition to the above mentioned cases of fistula, there is a specific one, traumatic fistula.

2.4.3 The specific case of traumatic fistula

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[64] Benderly(n 4 above)

[65] N Kohli,' managing vesico-vaginal fistula', women's health and education centre Harvard Medical School Boston School, Massachusetts/John R Miklos medical college of Georgia

[66] n 56 above

[67] n 56 above

[68] Wall (n 12 above)

Traumatic fistula is an abnormal opening between the vaginal tracts and one or many cavities as result of sexual violence but not necessarily in conflict or post conflict situation. It can be the result of domestic violence.[69] Very few cases traumatic fistula were the result of unsafe abortion.[70]

According to doctor Mukwege, traumatic fistula has causes with are very different from the above mentioned ones.[71] In the view of this writer, fistula is the result of direct gynaecological traumatism such as violent rape, collective rape or introduction of object in the vagina of women.[72] This problem is common in the Democratic Republic of Congo where, women and girls were victim of systematic collective rape during the war.[73]

One of the main challenges concerning this problem is the lack of adequate information about it.[74]

2.5 Causes of obstetric fistulas

Some general common key factors are considered to be main cause of fistula in Africa. Among others, poor economic status of women, lack of education, early marriage, access to obstetric emergency care, lack of equipped facilities, lack of trained staff.[75]

Muleta mentions harms from complicated surgery and infections malignancies as other causes. Other elements such as malnutrition and female circumcision were mentioned as contributing factors.[76]

2.5.1. Lack of education

Lack of information about their physical function and the problem of fistula prevent women and both the rest of the society in rural areas from taking prompt decisions.
In addition lack of awareness contributes to the development of ignorance about the disease.

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[69] *Aquire project 'fistule gynecologique traumatique;une consequence de la violence sexuelle dans des situations de conflit'* J Obstet Gynaecol Can 2006,28(11);92< www.acquireprojet.org> (accessed on 13 september 2008)
[70] n 29 above
[71] n 29 above
[72] 29 above 11
[73] Living with fistula <www.unfpa.org> (accessed on 13 09 2008)
[74] n 29 above
[75] n 29 above
[76] Wall (n 12 above)

2.5.2. Obstructed transport

Distance has a lot to do with fistula issue in African. One of the requirements in international law is physical accessibility of health centres. However many are women, who still remain far from the health centre that may give them assistance both during the pregnancy as well as during labour. In some rural places the distance from a village to the health centre is just preventing many women from accessing emergency health care services.[77] Another major obstacle is that there are no motorable roads and even vehicles to attend to deserving women. In places like Baban Raffi in Southern Niger where this writer once did a field work with Care International, cars go only once in a week. This is attributable to the discriminatory policies of development by which governments focus on the urban areas at the detriment of the rural areas.[78]

The problem is well reflected in Ethiopia, where 80% of the patients travelled more than 700 kilometres to reach the fistula hospital. They travel an average of 34 hours on a bus and 12 more hours on foot to reach the hospital[79]. As regards the long distance issue from the village where a woman is, and a specialised centre for care, Dr Hamlin emphasized that vesico-vaginal fistula results both from 'obstetric labour and obstetric transport'.[80] The transfer of women in labour to specialised or better-equipped medical centres in some cases is blocked by the double injustice translated in the form of poverty. [81]

2.5.3 Poverty a root cause of fistula

Poverty contributes in many ways to the occurrence of fistula. Indeed, malnutrition during young age can contributes to the inadequate development of the women's pelvic, and therefore, greater the risk during deliverer. In the same way, poverty contributes to lower attention to women's health. Indeed, arranging travel to deliver in a clinic or hospital is still an inaccessible reality for many women in Africa who consequently prefer to give birth at their homes.[82]

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[77] M Muleta 'obstetric fistula in developing countries: a review article' J Obstet Gynaecol Can 2006,28 (11) 962-966

[78] Muleta mentioned that fistula concern has been neglected in developing countries and by the Millennium Development Goals which failed to capture the problem.

[79] M Muleta (n58 above)

[80] See also comment made by L.L Wall (special contribution, obstetric fistula: hope for a new beginning. Department of obstetric and gynaecology, Louisiana medical centre, and department of tropical medicine, Tulane University School of public Health and tropical Medicine, New Orleans, LA, USA.

[81] E Edwidge 'Social causes and consequences of maternal morbidity'

[82] E Chong: 'Healing wounds, installing hope: the Tanzanian partnership against obstetric fistula'(2003)Quality/calidad/16< hppt //:www.popcouncil.org/pdfs/qcq/qcq16.pdf >

Lack of funds, as result of low decision-making power of women, in rural areas prevents them from taking a prompt decision during pregnancy till delivery that would avoid obstetric labour and obstetric fistula. Moreover, those who are paying for her medical attention may not meet the urgency that the situation demands.[83] In Tanzania for example, poverty is mentioned as a main cause of fistula.[84]

Fistula is caused in main cases by lack of skilled health professional.

2.5.4 Lack of skilled health care professional.

The particularity of fistula problem is in some cases explained by the lack of skilled health care professional. This lack of skilled professional is really not only encouraging the occurrence of the problem, but also in the cure of the disease. In Tanzania for example, Dr Balthazar Gumodoka developed a keen interest in helping the patients, but was limited by inadequate facilities and trained personnel. [85]

2.5.5 Young age of the victims

In Hamlin Fistula Hospital in Ethiopia, in a series of 9,000 fistula victims in 1996, the average age is 19. While early marriage is a challenge, this writer takes into account also the fact that the victims are most of the time at their first pregnancy.[86]

2.6 Consequences of fistula on the rights of women who suffer from it

Experts mention that some of the victims have been seeking cure for 40 years after the initial accident that provoked the fistula. The tragedy of fistula is explained by the working group on urine incontinence in these words:

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[83] If she has to wait for the husband or her mother–in-law or family to pay the transportation to the hospital and for the service cost.

[84] n above 19 (page 6); early child bearing in general is the result of early marriage, itself due to financial problems face by families that forced them to marry their girls at an early age.

[85] See n 2 above .The operated on about 20 patients a year, but because he was unable to update his skills and because the hospital lacked a training programme for the nursing staff, his effort resulted in a failure rate of about 50%

[86] Wall (n 51 above)1429

"A group of Somali women with fistulas, in despair, chained themselves together and jumped off the dock in Mogadishu in a mass suicide because their suffering become unendurable"[87]

Fistula has serious consequences on its victims. These consequences can be social, physical, psychological, or economical.

2.6.1. Social consequences of fistula

Experts have mentioned that as the problem of fistula occurs during the first labour, the victim in the majority of cases become sterile just after the complication. Very few husbands are willing to stay with them with infertility.

Another problem faced by fistula sufferers is their removal from their immediate family. They are forced to live in the periphery or outskirts of society.[88] They are perceived as exceptions to the ideal woman.

Additionally, the impossibility of the sufferers to maintain hygiene despite their efforts to do so, excludes them from the exercise of the fundamental right to religion. They are considered as "ritually unclean". The treatment reserved to the victims of fistula in some cases is so tragic that some patients would prefer to die. In other cases, although they have been repaired the experience of fistula is so traumatic than even after they are cured, some victims never regain their self esteem[89]
And 52% of victims are abandoned by their husbands while 21.5% live on begging. .[90]

The conference on fistula underlined that although it is impossible to arrive at a common culture of the African continent, it appears however that, in countries with high rate of the disease, one recurrent common point is that, women's social status appears to be lower than the men..[91]The study also shows that the disability of the woman as result of the injury makes her become an economic burden. The sufferer is simply rejected because she can no

[87] This information is reported by Professor Abbo Hassan Abbo, professor of Obstetric fistula and gy naecology at the University of Khartoum in the Soudan. His is an international authority on fistula.

[88] LL Wall in P Abrams,L Cardozo,S Khoury A Wein; Incontinence volume 2 management (2005) 1428

[89] PM Teubeu (N 18 above

[90] E Chong (n 2 above)

[91] n 51 above

longer work in the farm, satisfy the sexual pleasure of her husband, or even have children for the man.[92]
The inability of a woman to bear children, results directly in her disintegration from the marriage relationship with her husband.[93]

This sad reality in reflected in the following caption from a Hausa song (translated into in English) which was formulated by fistula patients to build their group identity:
"My husband rejected me because I am suffering from fistula. If you suffer from this disease, they will reject you end send you away too"

2.6.2. Physical and medical consequences of obstetric fistula (neurologic injury)

The problem of fistula is not only accommodated in the incontinences and other above-mentioned problems. It also result in a physical injury; the formation of 'foot drop' which make the sufferers unable to walk with' normally, dragging their injured foot and using a stick for support themselves.' In the worst situation, the victim's menstrual period can stop, that means the impossibility for her to conceive for ever.

2.6.3 The dermatological effects of fistula

Few weeks after the injury, the victim of fistula can develop oedemas,[94] or loose part of the vagina membrane mucous. There is the formation of an 'offensive' deposit of phosphate from the accumulation of urine that provokes difficulties or impossibility for the victim to walk or even to stand on the two legs, without the greatest agony'. [95]

As result of the permanent incontinence of urine and faeces, the sufferers of fistula can develop various infections. In some cases, severe infections such as skin infection, bladder, or other nearby organs are damaged.

[92] n 51 above

[93] Muleta (n 15 above)

[94] This term means swelling caused by the retention of fluids in the tissues

[95] Muleta (n15 above)

Another problem encountered by the untreated victims of fistula is the permanent incontinence of urine, faeces or both. The continuous flow of urine compels them to wear many and heavy blankets to control the urine. Generally, the heavy nature of the cloths can result in the appearance of serious pain.[96] Furthermore, despite all hygienic efforts, the smell of urine and faeces provokes infection of other diseases. Moreover, the shame, distress, and physical pain are constant. This is because in some cases despite the love of a husband or a friend, it is difficult to stay closer to the sufferers. [97]

The majority of the victims find the social isolation as one of the most difficult to support because of the double problem of shame and humiliation.

According to statistics, Nigeria has the highest rate of women suffering from fistula in Africa with more than four hundred thousand to eight hundred thousand new victims per year. About twenty thousand of registered cases are the result of poor health conditions. Some of the sufferers lose all contact with their families[98]. Fistula sufferers, bear the burden of rejection in the society and disgrace. This is the reason why Louis Lewuis qualifies the problem of fistula as a shame on the international heath community[99]

2.6.4 General knowledge and perception of the disease in the communities

In some communities, fistula is considered a 'divine punishment' or banishment caused by the victim's misbehaviour rather than a pathologic problem.[100]This perception reflects the lack of awareness of the problem and the need of educating people about the disease. As far as the society will ignore the cause of the problem, it will be difficult for them to consider it big issue.

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[96] UNFPA *Les difficultés de la vie avec la fistule/ campagne pour éliminer les fistules/ 2004*< http//;www.unfpa.org> (accessed on 13 september2008)

[97] n 13 above

[98] This is the case of Aisha in Babbar Hospital reported by the UNFPA/ www.enfistula.org (accessed on 25 may 2008)

[99] Wall, L. 'Obstetric Vesico-vaginal Fistula as an International Public-health Problem'. The Lancet. 2006; 368: 120109.

[100] n 13 above

2.7 The challenges

It came out from the above-mentioned conditions that both early marriage of women and their anatomy contribute to the occurrence of fistula. However, the underlying causes of the disease African remain the conditions in which women give birth. Indeed, fistula reflects the failure of the medical health care systems to meet the need of women during pregnancy and delivery. It also shows the need for assistance to African women for safe delivery. This sad reality is confirmed by experts in the field.[101] This is true not only for access to skilled prenatal professional supervision, but also and more importantly, to adequate obstetric emergency care.[102] Fistula concern reflects the unfortunate condition of the woman in Africa. More particularly, uneducated and poor women, living in rural areas are affected. Indeed, those in urban areas do not face this problem as the rural women do.[103]

Another notable cause of fistula is the discriminatory nature of resources distribution. The grave concern of fistula reflects the failure of African governments to set up priorities to meet population health needs, particularly for women.[104] Development is concentrated at the urban areas while the rural area is abandoned.

Moreover, the political and economical structure in many African countries lives much to be desired. The investment in population protection is much in a militaristic tendency than being medical. For this reason, women still die or suffer obstructed labour because they cannot, access health services on time as result of the unbearable distance[105]

Indeed, the bad nature of the roads does not facilitate easy evacuation of women in case emergency. The ambulances in some places are not available. And even when, available, they are in such a bad conditions that they delay the journey to a hospital or a clinic. Consequently, the women will not access the surgery that would solve the life of the baby and protect the mother from the sad condition of fistula. This reduces the woman to what has been described as the “ultimate state of human wretchedness”[106]

Experts are of the opinion that the situation of women suffering from fistula is pitied than the situation of the blind because the blink can work and marry. The desolation of fistula sufferers is

[101] Benderly(n 4 above)

[102] Cook,,Dickens.&Sayed (n 1 above)

[103] Muleta (N 56 above)

[104] Cook(n 65 above)

[105] Wall (n 12 above)

[106] This description was made by RHJ Hamlin and E Catherine Nicholson in 1966.

worse when compared to leper. Cripples appeal to the human sight and heart easily. Unlike victims of fistula, cripples, lepers etc easily attract the attention of national institutions, charitable organizations, and the international communities.'[107]

Fistula sufferers are constantly in pain; they are ashamed of personal offensiveness, abandoned by their husbands, outcast from societies, and unemployed. Except for co-victims, all other friends dessert the sufferers. Because the disease affects those parts of the body which must be hidden from view and which women may not in modesty easily speak about, they endure their injuries in silent shame.[108]

A study has mentioned that the dangerous countries for pregnant women in the world are found to be in sub Saharan Africa. [109] The gaps between Western and African countries in terms of fistula issue require particular attention. It represents the disparity between the rich and the poor nations of the world. In their findings, Rangnekar, Imdad et al in 2000 show how the problem of obstetric fistula in developing countries has been neglected by the bio scientist medical scientist of the industrialised world. [110]

Fistula can be completely eradicated. The example of Western countries is evidence.[111]Therefore, it is a need for the African countries as the developed countries, to create conditions for efficient and effective access to emergency obstetric care for pregnant women. These services must include effective and efficient maternity systems that provide for obstetric emergency care for women developing complications during labour.[112] Also, the disparity in terms of maternal mortality between the West and the South countries is one of the most neglected cases of social injustice in the world.'[113] Safe motherhood becomes' an 'orphan's' initiative as mentioned by Rosenfielld, and co authors[114] There has never been a complete world survey to determine with precision the prevalence of obstetric fistula. Its true magnitude is

[107] Muleta (n 57 above)

[108] n 29 above

[109] Muleta (N 57 above)

[110] Wall (n 12 above)

[111] See Benderly(n 4 above)

[112] This is the best way to deal with fistula because prevention, mentioned the specialists, is the best solution to the problem.

[113] Remember art 15 of ICESCR for international medical cooperation.

[114] In Wall(n 12 above)

unknown. However, it is clear that the problem is great.[115] This reality is reflected for instance by the case of Nigeria where [116] a study carried out in the central Nigeria estimated the number of unrepaired cases of fistula in northern Nigeria to be close to 400,000 cases (J Karhima).[117] These figures are not too different from the figures released by the Nigerian Ministry of Women Affairs which estimated the number at about, eight hundred thousand to one million.[118]

2.8 Conclusion

It appears from the development above that Fistula's negative effects are not only limited to the clinical injury which is the formation of the hole at the woman's vagina, they are extended to multiple injuries. All of these affect the wellbeing of those who are affected in different ways. The understanding that one must treat the whole person with a fistula- and not just her injured bladder or rectum is the single most important concept of fistula care. And doing it effectively requires some understanding of the multi-system consequences of prolonged obstetric labour"[119]

Considering the problems associated with this disease, experts insist that the main solution to fistula problem is to prevent it from happening.[120] This is because of the tragic consequences it leaves behind with the patients.[121]

"Each surgery means the possibility of a new life for one woman"[122]fistula concern is a social injustice against the sufferers and a shame for the whole community.

States have the obligation to provide treatment for those who suffers from the disease and take action to prevent it from happening. This is an obligation under international human rights law deriving from international, regional instruments as well as the domestic legislation.

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[115] This is the general agreement made by experts

[116] Wall(n 12 above)

[117] Wall (n 12 above)

[118] Wall(n12 above)

[119] Wall (n 12 above)

[120] Murphy mentioned in this regard that *'by far the most satisfactory solution to the problem of would be to prevent it.'*

[121] Obstetric fistula labour and the vesico vaginal fistula.< hppt //: www.medscape.com/viewarticle/455965_>(accessed on 1 October 2008)

[122] Chong (n 82 above)

Chapter III: The existing human rights framework on women's right to health in relation to obstetric fistula concern

3.1 Introduction

Although the special role played by women in the society through maternity and motherhood has been recognised by many constitutions and international human rights instruments through maternity protection,[123] an analysis of the available international human rights law framework shows however, that the issue of fistula is not given the attention requires by its particular nature.[124] This reality is reflected even in many writers' works which do not often focus on the problem as a health specific issue.

Under international law, women are considered as vulnerable group and should be given the benefit of a particular attention.[125]As far as fistula issue is concerned, the state has the obligation to provide for medical assistance to low income women and to combat discrimination in access to health services.[126] Fistula is a health issue with special connection with women's right to reproductive health care problem.[127] It reflects the violation of women's rights and the need for the African counties to remedy the issue of fistula.[128]

Although the right to health does not mean the right to be healthy,[129] the international human rights law provides for various instruments to ensure the right to health both at the international, as well as regional level, through the treaties, declarations recommendations and working groups.[130]These human rights law tools oblige states to guarantee safe motherhood[131]. Also, the justifiability of socio-economic rights has been highly contested. However, there is a growing consensus in favour of the justifiability of socio-economic rights. This is reflected in the opinion of

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[123] .Cook Rebecca 'advancing safe motherhood through human rights(in giving meaning to economic, social, and cultural rights edited by Isfahan Merali and Valerie Oosterveld Penn University of Pennsylvania press,Phyladelphia (2001) 109-121.

[124] Even writers dealing with the issue of health, did not take the case of fistula as a specific problem of health.

[125] See Cairo and Beijing declarations

3,TOEBES THE IMPLEMENTION OF THE RIGHTS TO HEALTH; REPORTING PROCEDURE PAGE 114.

[127] CEDAW art 12 , Beijing declaration, Cairo declaration, Vienna declaration

[128] Cook (n123 above) 109

[129] See committee on socio economic and cultural rights general comment 14 of the committee, para 8

[130] Cook (n 123 abve) 111, 112,113

[131] CEDAW art 12(2) see also the African women protocol and the CEDAW committee general comment n 24.

writers,[132] constitutions of states,[133] the provisions of international human rights instruments,[134] and the adoption of these international human rights standards by states' judicial bodies.[135]

The aim of this chapter is to show that human rights instruments could be used to remedy and to prevent the occurrence of vesico-vaginal fistula. International and regional human rights laws as well as national constitutions provided for the protection of this right. Additionally, treaty bodies have made important concluding remarks as well as declarations regarding the right to health particularly those related to women reproductive health.[136]

3.2 The states obligations under international and regional human right instruments

The right to health has been internationally recognised in the treaty establishing the World Health Organisation (WHO) as a binding document upon state parties deriving from the preamble of the WHO constitution.[137] In addition to the WHO constitution, other significant international human right treaties and declarations provided for the right to health. Among these instruments, figures the CEDAW, the Universal Declaration on Human Rights, the International Covenant on Economic Social and Cultural rights, and other instruments.

3.2.1 States' obligation under global human rights instruments

3.2.1.1 The Universal Declaration of Human Rights (UDHR)

Although it is not a legally binding document on states, the UDHR adopted in 1948 is an important internationally recognised human rights document of universal standard. Its principles are considered to have gained force customary international law[138] and therefore, binding on states. Its preamble set the principle universality and inalienability of human rights for all human being. Article 25 states that:

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[132] Cook (n 123 above)111, 112
[133] For instance, chapter II of the South African Constitution of 1996.
[134] Discussed below.
[135] See Indian case, see also *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001).
[136] CEDAW committee general comment n 24
[137] B CA Toebes the right to health as a human rights in international law (1999) 27-29
[138] The ICJ recognised, the binding nature of the UDHR in the case of *United States Diplomatic and Consular Staff in Tehran(US v Iran)* (1980) ICJ Rep. 3, 42

(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, and housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

(2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Even if the article does not define the right to health and has not specifically integrated health in the broader areas of social issue, Toebes suggest that is deductable from the text of the document, a right to medical care and to sickness benefits.[139] This means that women without any distinction can benefit from the provisions contained in it. Besides the UDHR, another treaty that provides for the right to health is the CEDAW.

3.2.1.2 The Convention on the Elimination of all forms of Discrimination against Women (CEDAW).

According to the Vienna Declaration on Human Rights, the human rights of women and the girl child are an inalienable integrated and indivisible part of universal human rights.[140] The achievement of the realisable legal measures and through national actions and international cooperation in such fields as economic and social development, education, safe and maternity and health care, and social support form the core of the declaration.[141].

Adopted by the UNGA, in 1979, the convention is a legally binding document requiring states party to implement its provisions.[142] Moreover, when ratifying it, states committed themselves, to take measures that end discrimination against women. They have also engaged, to take measures such as legislations, temporary special measures, to ensure the facilitation of the enjoyment of the fundamental freedoms and human rights to health of women.[143]

The right to reproductive health care has been generally provided for in the CEDAW under articles 4 (2), 5 (b), 11 (1) (f), and 12. The CEDAW has provided for the right to health, under

[139] Toebes (n 137 above) P40

[140] See also Beijing declaration and Cairo Declaration

[141] Para 18 of the Vienna Declaration and Programme of Action, of the World Conference on Human Rights.

[142] n14

[143]< www.un.org/womenwatch/daw/cedaw> accessed on 1st October 2008

article 12 with a focus on healthy care including pre-natal and post-natal care. More importantly, it constitutes the only human right treaty, which affirms the reproductive rights of women. Additionally, the convention advocate for non discrimination against women on the ground of their role of procreation. It has also provided for special measures for maternity protection with the specification that they should not be considered discriminatory.[144]

Article 12 of the CEDAW states that:

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

2. Notwithstanding the provisions of paragraph I of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary as well as adequate nutrition during pregnancy and lactation.

The convention gives a particular attention to the equal access of women to health care facilities, with specific emphasis on the pre-natal and post-natal health care. More importantly, states are to provide these services free of charge.[145]

Even if article 12 of the CEDAW limits itself to health care service, without any reference to physical and mental health and other related health issues, it has the merit of having given a way for the protection of the women's right to health. Further, the convention puts on the states the obligation to submit to the Secretary General, the legislative, judicial, administrative, and other measures they have adopted to implement the convention a year after its entry into force and every four years or on the request of the committee. In the guidelines, on the reports, states are request to give details on any significant development.[146]

The convention is a tool that women suffering from fistula can use to defend their right to access to health care as an obligation on states deriving from the ratification of the convention.

The ratification of the Optional Protocol to the CEDAW by a state means the recognition by the state of the competence of the committee to receive and consider communications under

[144] CEDAW committee session of the 29 session, 30 June to 25 July 2003 <www.Un.org /womenwatch/daw/cedaw/text/econvention/htm> (accessed on the 10th October 2008)

[145] Article 12(2) CEDAW

[146] CEDAW Committee report. <www. un.org/womenwatch/daw/cedaw/reporting/htm>

the protocol.[147] And both individuals and groups of individual can present a communication or on their behalf. In this regard, the protocol reaffirms the commitment on state parties to ensure the full and equal enjoyment of the human rights and fundamental freedoms of women by taking effective actions that protect from the infringement of these proclaimed rights.

Another outstanding provision of the CEDAW providing for the protection of the women's right to health care is article 14(2) (b).

Article 14 (2) (b)

This provision of the CEDAW gives a specific attention to women living in rural areas, who are most vulnerable to the problem of fistula as a result to extreme poverty. Article 14 (2)(b) provides that,

> States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, which they participate in and benefit from rural development and, in particular, shall ensure to such women the right:
>
> (b)To have access to adequate health care facilities, including information, counselling and services in family planning.

This provision of the convention is an important tool that women suffering from fistula can use. This is because studies show that the problem of fistula usually touches the most vulnerable, which women are living in rural areas.[148]

Besides the CEDAW, another international human rights instrument that provides for the right to health is the ICSESCR.

3.2.1.3 The International Covenant on Economic Social and Cultural Rights

The ICESCR was adopted by the General Assembly of the UN in 1966 and entered into force in 1976.[149] Article 12 of the instrument states that:

[147] Art 1 optional protocol to the CEDAW.
[148] See generally Chapter 2 above.
[149] Preamble of the Covenant on Socio Economic and Cultural Rights.

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

b) The improvement of all aspects of environmental and industrial hygiene;

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

This article provides for the right to the highest attainable standard of health. The duty to provide for health care services required by the article is explained by the Committee on Economic Social and Cultural Rights in its general comment 14.[150] It implies the duty to ensure that health services are, available, accessible acceptable and adequate.[151] Additionally, it puts on the state parties, not only the direct obligation to ensure the right to access to health without any discrimination but also the obligation to respect, to protect and to fulfil and more specifically to restraint from taking actions that can result in discrimination with regards to women access to health services.[152]

The committee in its comment prescribes that the instrument is a tool that individual can use to claim their right in case of their violation by the states parties.[153] Therefore, the convention is an instrument that women suffering from fistula can use to claim the respect, the protection and the fulfilment of the right to free access to fistula treatment.

Another UN instrument that provides for the right to health is the Convention on the Rights of the Child.

[150] This committee is the body which gives authoritative interpretation to the ICESCR.

[151] Committee on Socio Economic and Cultural Rights ,General Comment n 14

[152] (n 51 above)

[153] (n51 above)

3.2.1.4 The Convention on the Right of the Child (CRC)

The CRC has been adopted by the UN General Assembly in November 1989 and entered into force in 1990. It is legally binding instrument on the states that have ratified it. Although the convention deals with the right of the child, it takes into account the natural link between the child and the mother. This article provides for the right to health of women under article 24 of the instrument in the following words:

> 1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.
>
> 2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:
>
> (d) To ensure appropriate pre-natal and post-natal health care for mothers;
>
> (f) To develop preventive health care, guidance for parents and family planning education and services.

Pre-natal and post-natal care (which are directly connected to the issue of fistula), are provided for. Concerning the occurrence of fistula during childbirth, it is clear that, post-natal health care should be interpreted in the wider way to give care, not only to mothers that have safe delivery, but also to those who, as result of the delivery, suffer the tragic condition of fistula.

The CRC is written in an elaborated way that puts clear obligations on the states parties to provide for the enjoyment and the protection of the rights contained in it. The convention is a tangible tool that women suffering from fistula can use to claim the right to fistula care.

3.2.1.5 The Declaration on Social Progress and Development of 1969 (DSPD)

The declaration was proclaimed by the General Assembly of the UN in 1969 through its resolution 2542(XXIV).[154] The DSPD calls for national and international actions for its use as a common basis for social development policies[155]. Health is among the objectives set up by the

[154] Declaration on Social Progress and Development Proclaimed by General Assembly resolution 2542 (XXIV) of 11 December 1969 http://www.unhchr.ch/html/menu3/b/m_progre.htm (accessed on 11 October 2008)

[155] Preamble of the Declaration on Social Progress and Development

declaration. This objective is contained in the second part of the declaration in article 10. Its states in paragraph (d) that:

> Social progress and development shall aim at the continuous raising of the material and spiritual standards of living of all members of society, with respect for and in compliance with human rights and fundamental freedoms, through the attainment of the following main goals:
>
> (d) The achievement of the highest standards of health and the provision of health protection for the entire population, if possible free of charge.[156]

Further, article 11 of the DSPD states that social development shall contribute to the equal and progressive attainment of the goals contained in article 11 written in the following worlds:

> (a) The provision of comprehensive social security schemes and social welfare services; the establishment and improvement of social security and insurance schemes for all persons who, because of illness, disability or old age, are temporarily or permanently unable to earn a living, with a view to ensuring a proper standard of living for such persons and for their families and dependants
>
> (b) The protection of the rights of the mother and child; concern for the upbringing and health of children; the provision of measures to safeguard the health and welfare of women and particularly of working mothers during pregnancy and the infancy of their children, as well as of mothers whose earnings are the sole source of livelihood for the family; the granting to women of pregnancy and maternity leave and allowances without loss of employment or wages;
>
> (c) The protection of the rights and the assuring of the welfare of children, the aged and the disabled; the provision of protection for the physically or mentally disadvantaged.[157]

On the other hand, article 19 states that:

(a)The provision of free health services to the whole population

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[156] Article 11(D) of the Declaration on Social Progress and Development

[157] N 157 above Art 11

(b) And of adequate preventive and curative facilities and welfare medical services accessible to all.

Although the declaration is a legally non-binding on the states,[158] it serves however, as guideline to states in their conduct.[159] Dugard mentioned that such documents can by the passage of time and states practice, in the respect of their standards result into their conversion in customary rule and therefore become useful source of law that can guide states' conduct.[160] In this regard The DSPD sets the goal of the 'achievement of the highest standards of health and the provision of the health protection for the entire population'. More importantly it focuses on the provision of the right to health free of charge when possible.[161]

In the view of Dugard, despite the non binding nature of the resolutions or recommendations of the political organ of the UN, they may through repetition on a particular subject, appear as the evidence of collective practice on the part of the states.[162]The UN General Assembly (UNGA) has proclaimed in 1989, on the occasion of the twentieth anniversary of the DSPD that it is a source of inspiration for national and international effort fort the promotion of social progress and development.[163] Furthermore, the UNGA on this occasion recalls the desire of achievement of the effective application of the provisions of the declaration due to the validity and importance of the principles and objectives proclaimed in it.[164] The UNGA calls on states to the consideration of its provisions. Therefore it is not hazardous to say that the DSPD is an important tool that both the victims of fistula and the court can use to assure their access to fistula treatment.

3.2.1.6 The Beijing Declaration and its Platform for Action (Beijing Declaration)

The Beijing Declaration was adopted during the Fourth World Conference on Women in September 1995. The declaration has among other objective, the full implementation of the rights of women and girl. It proclaims that women rights are human rights[165] and provides for the

[158] J Dugard international law a south African perspective (2005) 4

[159] Dugard (n 159 above) 38

[160] Dugard (n 159 above)38

[161] Article 10(d) of the Declaration on Social Progress and Development

[162] Dugard (n 159 above) 34

[163] A/RES/44/57 78th plenary meeting,8 December 1989(20th anniversary of the declaration on social progress and development(accessed at UN (Http://www.un.org/documents/ga/res/44/a44r057.htm)

[164] As above n 36

[165] Art 14 of the Beijing declaration

inalienability, integrity, indivisibility of this right as part of all human rights and fundamental freedoms.[166] It provides for the promotion and protection of all human rights of women and girls.[167] It gives a clear definition of reproductive health 'as the constellation of methods, techniques and services that contribute to reproductive heath and well-being by preventing and solving reproductive health problems'.[168]

Article 30 of the Beijing Declaration provides for equal access and treatment of women and men in the field of education and healthcare. It enhances women's sexual and reproductive health as well as education. Additionally, article 9 of the Beijing Declaration states that its implementation through national laws, policies, and programmes which prioritise the full enjoyment women's right is the responsibility of states.[169]

The right of women to health is also proclaimed in the Beijing Declaration in art 96. The provision focuses on the problems faced by women to access health care with a special focus on the lack of emergency obstetric services as a particular concern. Additionally the platform focuses on the inadequacy of the health policies and health systems which affect the women's health and to the failure to take into account the socio economic disparities that prevent some women from accessing to health services.[170] The declaration gives particular attention to the problem that women face in terms resources distribution and setting priorities taking into account health issues more particularly, in developing countries.[171]

The declaration defines the right to reproductive health as including the right of women to have access to appropriate health care service that will enable women to go through pregnancy and childbirth safely and the best chance for couples to have healthy children.[172]

The declaration recognises also that health problems and injuries related to women's health as public health problems are preventable through the improvement of access to adequate health care service and emergency obstetric care. Moreover, it recognises that in most countries, women's reproductive rights are neglected and therefore impact negatively on women's rights. The declaration calls states to take all appropriate measure to ensure that

[166] art 9 of the Beijing declaration

[167] Art 3 of the Beijing declaration

[168] Art 95 of the Beijing Declaration.

[169] Art 91 of the Beijing Declaration.

[170] Art 96 of the Beijing Declaration

[171] art 92 of the Beijing Declaration

[172] n 171 above

women benefit from the protection of their. Reproductive rights and give clear details on the role to be played by governments.[173]

Like the DSDP, the Beijing Declaration is not a legally binding document. However, it can be used by states as guidance. In addition, the numbers of declarations in the field defending the right of women to reproductive health care are many. As contended under the UDHR, these declarations have quite obtained the status of a costmary international law. Declaration gives clear details and guidance from which governments, courts and the victims of fistulas can find inspiration. It can be a useful tool that can be used to redress fistula concern.

3.2.1.7 The Cairo Declaration on Population and Development (Cairo Declaration)

The Cairo Declaration is the result of the International Conference of Parliamentarians on Population and Development to discuss population issues, in relation to development. In its article 5, the declaration gives a special family planning. However it gives attention to the reproductive health. In this regard, the above mentioned article calls governments, for the respect of the internationally recognised human rights in their population and development programmes and policies.[174]

The conference urges governments to ensure the right to primary health care by the end of the decade, and to provide for resources that will contribute to the realisation of the rights to health by shifting resources, especially from defence expenditures.[175]

Despite the reference to the right to health, and reproductive health particularly, the Cairo Declaration and the Beijing Declarations do not bring out the issue of fistula. However, as the precedent argument, the principles set by this declaration could be said to have acquired the status of customary international law and serves for inspiration for government.

3.2.2 The right to health at the Africa regional level.

The right to health under the African regional human rights system is protected through the African Charter, the Protocol to the African Charter on the Rights of Women in Africa (African Women Protocol), the African Charter on the Rights and Welfare of the Child (African Children Charter) and recommendations.

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[173] Art 96 of Cairo declaration
[174] Art 5 Cairo declaration.(www. un.org/popin/icpd/conference/bkg/egypt.h/ tml
[175] Art 100 Cairo Declaration

3.2.2.1 The African Charter on Human and Peoples' Rights

The African Charter is the 'pivotal human rights instrument of the AU. It was adopted in June 1981. It is a binding document on the states that had ratified it. The African Charter proclaims the equality of civil and political as well as economic, social and cultural rights. Additionally the charter provides not only for rights but is also includes individual duties toward their families, fellow being as the society as a whole.

The right to health under the African Charter has been provided for under article 16 of the charter in the following words:

> 1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.
>
> 2. States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

The African Charter provides for the best attainable state of physical and mental health and put on the governments, the obligation to provide for medical care to their people when they are sick. Additionally the charter in its article 1 the obligation on the states parties to recognise the rights contained in the charter and to adopted legislative and other measures to give effect to them.

The right to health under the African Charter is a justifiable one and the formulation of the article shows that the states have the obligation not only of providing for sufficient programmes and legislations, but also, the states compliance with regard to the negative obligation.[176] Therefore, this provision is a strong tool for both the sufferers of fistula and the government to deal with the problem of fistula.

In the Pretoria Declaration which deals with economic, social and cultural right on Africa, the African Commission declares that, the right to health of article 16 of the African charter entails not only the availability of resources, but also the accessibility and affordability of health care service. It also require that facilities should be of the good quality and also for all as well as

[176] Thoko Kaime beyond social programmes: the right to health under the African Charter on Human and Peoples' Rights. East African law journal of peaces and human rights volume 10 (2004) 1

other social aspects of life that include good nutrition, shelter, housing, sanitation, adequate supply for safe water.[177]

The right to health under the African Charter implies also access to reproductive, maternal and child health care based on life cycle approach to health.[178] The African Commission in this regards call upon the governments not only to adopt special measures for women but also to take necessary measure to reduce military spending significantly, in favour of increasing spending on the implementation of economic, social and cultural rights.[179]

The African Charter as a binding document on states. Therefore, it is an important instrument that the states can use to deal with fistula issue. It is also a tool that the sufferers of fistula and those who are defending their rights can use to obtain from the African governments, the grant of free fistula treatment.

3.2.2.2 The protocol to the African Charter on the Right of Women in Africa (African Women Protocol)

Adopted in 2003 by the Assembly of Head of States and Governments of the African Union (AU), the African Women Protocol is a binding document on state parties. It covers a wide range of women's rights including the right to health and reproductive rights. It provides also for the right to health and reproductive rights under its article 14 which obligates States to respect and promote the health of women especially in the area of sexual and reproductive health. As part of the African Charter,[180] the protocol intends to ensure that women victims of the violation of their rights under the protocol have the opportunity to seize the African commission or/and the African court to seek appropriate remedies.

The protocol gives the opportunity to other persons who are not the direct victim of the violation or NGOs, to bring a compliant on the behalf of the victims.[181]This is an important tool that can be used to defend the right of those who suffer from fistula. More particularly, because of the problem of smell, constant leaking of fistula patient, discrimination, and the problem of isolation, it may be difficult for them to bring case before the court. Therefore, they relative or NGO defending their rights can provide for such assistance.[182]

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[177] Pretoria Declaration Economic, Social and cultural Right in Africa 2004
[178] n 178 above
[179] n178 above
[180] Art 62 of the Africa Charter contemplates the adoption of protocols to the Charter.
[181] F Viljoen Internatioanal Human Rights Law in Africa (2007)323
[182] This obligation to defend rights is also provides for in preamble to the UDHR.

The last African instrument that provides for the right to health care to women is the African Children's Charter.

3.2.2.3 The right to health of women under the African Children Charter

The African Children Charter provides for women's rights to reproductive health and obligates States to respect and promote the health of women especially in the area health of the children in Africa. In this regards, article 14 of the instrument provides for the right of mother to health care for expectant mother and nursing mothers. It is also a tool that can be used to redress fistula issue.

Also under the African level the, Gaborone Declaration on the Roadmap towards Universal Access to Prevention, Treatment and Care states that there is a need to develop and integrate health care delivery systems based on basic health package and reparation of costly health development plan. Additionally it provides for the achievement of universal access to prevention treatment and care by 2015 by an integrated health care system, more particularly for poor people[183]

Similar concern has been underlined by the Maputo Plan for Action for the Operationalization of the Continental Policy Framework for Sexual and Reproductive Health and Rights 2007-2010 (Maputo Plan for Action) sets down the goal of achieving universal access to comprehensive sexual and reproductive health services in Africa by 2015. Additionally, the Maputo Plan for Action emphasises the need to increase domestic resources for sexual and reproductive health and right which should include human resources and provision for emergency obstetric care.

[183] Art 2 of the Gaberonne Declaration

Chapter IV Applying human rights mechanisms to the problem of fistula

4.1 Introduction

Considering that the human rights framework on women's right to health (and particularly, fistula) has been discussed in the foregoing chapter, this chapter will assess the current situation of victims of fistula.

4.2 Fistula is a violation of women's right to healthcare in general and reproductive health care in particular

The British National Academy on Women Health gives a comprehensive definition of the right to health of women in the following words:

> Women health is devoted to facilitating the preservation of wellness and prevention of ill and includes screening, diagnostic and management of conditions which are unique to women, are more common in women, are more serious in women and have manifestations in women, risk factors or intervention which are different in women.[184]

Fistula integrates easily in this definition not only because it happens to women, but also because it happens to women during childbearing which is unique to women, serious in women and also that has manifestation only in women.

The human rights experts underline that the capacity to access the highest standard of health should not be considered as a privileged that only the elite can attain, but rather as a right for all that derives from the state of human being.[185] Therefore, the right to fistula treatment should not be seen as a privilege for the patient but, rather as a right to health care and the right not to be discriminate and the right of the sufferers to dignity.[186] Indeed, access to fistula is still a big challenge for many women suffering from the disease in Africa. States have the responsibility under international human right law, more particularly under the African Women Protocol to provide for fistula treatment to the sufferers and to invest enough to prevent the risk of its occurring.[187] The best way of dealing with fistula is to prevent it from happening.[188]

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[184] M Agosin *Women Gender and Human Rights, a global perspective* (2001)125,126
[185] M Agosin (n 185 above)
[186] T heyvey,j kenner, Economic Social and Cultural Rights under the EU Charter of Fundamental Rights. A legal perspective(2003) 223
[187] Article 26 of the African Women Protocol

Therefore, taking into account the situation of poverty that women are facing, the law requires states to allocate more resources to health care section and if necessary adopt special programmes for fistula treatment and prevention by making available, access to goods and services. These services should be guarantee to all without any discrimination.[189]

More particularly, the gravity of fistula problem, (due to its exceptional character), requires the governments to redress the problem which is the result of their failure adequate functioning of medical services to provide for this particular obligation.[190]

If the African Commission was able, in interpreting the charter, to see rights that have not been expressly declared in the charter[191], such interpretation should be extended to the issue of fistula. The obligation of the states under the African charter as well as the ICSECR is the obligation to respect, promote, protect and fulfil as regard this socio-economic right. More specifically, the Commission has considered in the case of *Purohit v The Gambia*, that the right to health is a fundamental one, to all aspects of life of a person and her well being. Further, the Commission argued that this right implies the right to health facilities. States poverty or lack of resources cannot be used as an excuse by the African governments to justify their failure or refusal to prevent the occurring of fistula or to provide fistula surgery, to the sufferers.

Equity requires the fair allocation of resources in the society or fair provision of health care services.[192] Therefore, the denial of treatment to persons suffering from fistula constitutes a violation of the patients' rights.[193] In its special session on HIV of 2001, the GAUN observes that 'access to medication' is an essential factor, and that the state must act towards the progressive realisation of the right that everyone has to attain the highest possible standard of mental and physical health.[194] By this declaration particularly, the word 'access to medication', should be interpreted in the same line, when dealing with fistula sufferers. The word medication used by the UNGA, should be given the same understanding when dealing with fistula treatment. The objective is, to protect the sufferers' right to health, right to dignity and protection from unfair

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[188] Muleta (n 56 above)

[189] *Purohit and others v the Gambia* (2003) AHRLR96 (ACHPR 2003)

[190] Toebes (n10 above) 339

[191] In the SERAC case, the commission found that the Charter provides for the right to shelter and the right to food,

[192] E Durojaye 'Advancing gender equity in access to HIV treatment trough the Protocol on the Rights of Women in African', African Human Rights Law Journal vol 6 n01(2006) 190-191

[193] RJ Cook' Exploring fairness in health care reform' (2004) 29 journal of juridical science 1

[194] UN General Assembly Special Session on HIV/AIDS Resolution A/S-26/L2JUNE 2001

discrimination. The failure to demonstrate that such kind of actions have been taken by the government of The Gambia constitutes the violation of article 16 of the African Charter.[195]The same conclusion was made by the CSECR. Therefore, the failure of African governments to show that the conditions mentioned above, have been taken constitute the violation of the right of fistula victims to health.

Although the ICSECR connects the fulfilment of the human rights obligations contained in it to the maximum availability of resources and to progressive realisation, it has however, mentioned that, the failure of a state to provide for the basic essential services which includes health care to a significant number of the population in this state constitute a violation of the covenant. [196]

In this regard, women suffering from fistula constitute a significant part of the population in African countries affected by the disease.[197] They should therefore, benefit from the assistance of their governments to access to fistula surgery. Considering the laws discussed in chapter three of this work, the failure of the states to provide for such treatment constitutes the violation of their obligation under international law. Moreover, in the majority of African countries affected by the disease, there are no specialised centres and doctors to give treatment for fistula repair. In any case, the state's obligation is to provide for the largest achievable enjoyment of the pertinent rights under the circumstances mentioned above.[198]

In interpreting the right to health, the CSECR has mentions that the right to health includes not only, availability of both public health services and health care facilities and good, but also sufficient quantity of these services. These services include adequate sanitation facilities, hospital clinics, other buildings related to health and proper trained health professionals.[199] In this regard, the problem as demonstrated in chapter 2 of this work the requirement under international law is not respected by the majority of African countries more particularly in rural areas where the victims of fistula come from.

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[195] Purohit case (concluding remarks of the African Commission)

[196] Committee on Socio Economic and Cultural Rights General comment n03; the nature of the states parties obligation article 2(1) of the covenant, fifth session, 1990 UN DOC E/191/23 annex III Para 10

[197] In Nigeria, there are estimated at 800000 to 1000000 fistula patients.

[198] n 201 above

[199] n 151 above Para 12.

Availability is not the only requirement under international law, as regards the right to health. States are also required to provide for good, services and health facilities that are accessible to everyone without discrimination. [200]

The accessibility covers four dimensions which are, firstly, the accessibility of health services to all and especially, the most vulnerable. Women and more particularly, women living in rural areas are the most vulnerable of the vulnerable.[201] The accessibility of health service includes physical accessibility. Physical accessibility to health care centre for the majority fistula suffers is still a main challenge. The obligation of the states is to provide for safe and physically reachable health service particularly to the most vulnerable (such as women).[202] In this regards, fistula is a concrete failure of the states to provide for such service.

Economic accessibility implies the affordability of health services for all. More precisely these services should be equality based both in the public as well as in the private hospitals or clinic to give the opportunity to those who are socially disadvantaged to put burden on them with health expenses.[203]

As mentioned in chapter 2, many of the victims of fistula cannot access to treatment because of the cost related to the treatment of fistula which is far above what a poor rural African woman can afford to pay. Therefore, the suffering from fistula, as result of the cost of the treatment, is a violation of the states obligations under international law.

Accessibility includes also, accessibility to the information. In the case of fistula suffers do not know the existence of treatment to the disease. Therefore lack of awareness on the disease constitutes on the states parties, the violation of their obligation under international law.

The third element contained in the right to health is the acceptability and the quality of the health services.

This last condition means among others, that health services should have skilled medical personnel, scientifically approved and equipped and adequate sanitation.[204] In this

[200] n 151 above para 1
[201] See chapter 2.
[202] n 151 above para 12
[203] P Hunt women marginalisation and equity in Reclaiming social rights; International and comparative perspectives(1996) 71
[204] G Alfredsson,K Tomasevski a thematic guide to document onhealth and human rights.global anr regional standards adopted by intergovernmental organisation,international Non organistions and professional associations(1998) 171

regard, the problem of fistula constitutes a double violation of the states obligation to prevent the problem but also to redress it. Indeed, it is because of the lack of sufficient skilled medical personnel and equipped hospitals that fistula not only happens, but also it is the reason why the sufferers do not have access to surgery.[205]

In its comments, the committee states that the right to emergency care provided for under article 12.(2)(a) of the covenant means that states programmes should provide for pre-natal and post-natal care and obstetric emergency care, services and access to information. For many rural women in Africa, access to emergency care service remains an ideal to reach. This is because the states failed to fulfil their obligation under international law[206]. Therefore, fistula constitutes the violation of the victim's right to health. Article 24(4) of the CRC and the African Women Protocol provides for prenatal and post natal care for mothers. Further, article 12(20) of the CEDAW contains clear obligation on the states to ensure that services that are connected to pregnancy, delivery, and the post-natal period, granting *free services where necessary* (emphasise mine). This is an important provision that puts clear obligation on the states and there is no situation to be considered as better or necessary for the provision of free treatment than fistula issue. In this regard, the government's policy of granting free pre-natal and post-natal medical services in Finland must be adopted.[207]

4.3 African regional human rights instruments

The African Charter provides that the rights contained in it are enforceable immediately and are not subject to resources constraints although; the realisation of these rights can in the reality be affected because of lack of resources.[208]In this regard, the right to provide for reproductive, and maternal care, (which includes both pre-natal and post-natal and child health care),[209] should in the view of the committee, be considered an obligation of comparable priority.[210]

Free access to fistula treatment constitutes a fundamental component of the right to health. This needs equity in the provision or protection of health care. It requires that the vulnerability of women suffering from the disease, (which generally is from poor household) should not be encumbering with undeserved payment for fistula treatment. And the states should

[205] See chapter 2
[206] See chapter 3 above
[207] Toebes (n10 above) 341

[208] F Banda, Women Law and Human Rights, an African Perspective (2005) 203 see also SERAC Case

[209] Banda (n 204) above.

[210] 201 para44

take necessary measures to ensure equity in the availability and the accessibility of quality services.[211] The African Commission in the SERAC case held that a violation of the right to health may lead to the violation of not only this specific right, but also the violation of other rights such as the right to health, to dignity and the right to clean and healthy environment.[212]

Beside the African Charter, the African Women Protocol is the first human right instrument which provides expressly for the women's reproductive rights, and the states' obligations with regard to women reproductive health.[213]

The obligation of the states under this instrument is to ensure the protection of the right of women as stipulated in international declarations and conventions.[214] The obligation of the African states under this instrument is to protect the rights of women not only the one contain in the protocol, but also and more importantly, the right of women contained in other international human rights instrument and declarations.[215] The reference made by the preamble of the protocol shows that the obligation of the states is as wide as to include declaration and in this regard it can be interpreted that the integration of declarations gives strong binding force to these tool since the protocol refers directly to them.

Although, the African commission recognised the financial problem face by the majority of countries, it has held that usually, countries bring the argument of resources to justify their refusal to provide for the full realisation of the right to health (socio economic rights).
The African commission held that article 16 of the African charter should be understood to put on the states, the obligation to take concrete and targeted steps, while using the full advantage of resources that are available to ensure the full realisation of the right to health in all its aspects and without any discrimination.[216]

Under international law, the obligation on the states with regards to the right to health is in the view of the African commission, to respect, which prevent the state from interfering in the

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[211] These are the words used by the at the third international consultation on HIV and human right in 2001 by the human rights office of the United Nations Programme on HIV/AIDS.

[212] SERAC case

[213] Article 14 of the African Women Protocol.

[214] Para 3 of the African women protocol preamble

[215] n 210 above

[216] Purohit case para 84

enjoyment of fundamental rights.[217]Secondly, the commission mentioned that, the states have also the obligation to ensure the rights holders protection against others subjects by providing legislation and effective measures to protect the beneficiaries of the rights against economical, political, and social interference.[218]The third obligation on the states with regard this right is the obligation to fulfil the right.[219]

The states' obligation towards women suffering from fistula covers the essential obligation to ensure access to basic health services for women. This must be through good national health policies that devote sufficient percentage of the national resources to health with special focus on fistula. The allocation of higher resources to the military sectors without any war or the possibility of way by states violates the right to health of the population.[220] By the standard of the African Women Protocol, this directly violates the state's obligation and the rights of women.

There should not be any excuse for the government with regards to the issue of fistula to disregard declaration such as the Cairo Declaration which expressly provides for the right to reproductive health of women.[221] This can be used as a serious tool for the protection of women and judges when interpreting the obligations of the states under the African Women Protocol.

It is important to notice that despite the gravity of fistula concerns, and its impact on right of women, during the drafting and the adoption of the protocol, the protocol does not make any specific reference to the problem. This confirms the idea developed under chapters one and two referring to the neglect of the disease for a long period by the society and also the lack of awareness about it. It would have been interesting if this important women rights instrument in African referred directly to fistula issue as it focus on HIV transmission and on the right to birth control. It would have brought not only a strong awareness of the problem and show the attention the African government give to the issue in the continent.

The preamble to the protocol states in paragraph 4 of the instrument that the rights of women are inalienable, interdependent and indivisible human rights.

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[217] SERAC case para 45

[218] SERAC case Para 46

[219]SERAC case para 46

[220] Toebes (n 10 above) 339

[221] Cairo Declaration

4.4 The problem of fistula, freedom from discriminated and the right to dignity

Women vulnerability to fistula reflects the injustice between poor and wealthier women. Indeed the majority of the victims are women from poor rural areas. The problem of fistula is a health issue as far as it is preventable and generally treatable. Indeed, it represents the unwilling of African government to ensure for women proper antenatal and obstetric emergency care by less allocation of resources and attention to satisfy the need of women in terms of health and to save their lives. Women should not suffer of fistula for being poor and living in rural areas.[222]

As noted above, the law also discourages early marriage which often leads to childhood pregnancy. Considering the risks stated above, African state violate their obligation to promote the protection of women from poverty and young girls from early marriage, in violation of the CRC by the failure to provide for young girl protection against early marriage and premature pregnancy.[223] This is also true as far as obstetric fistula is concerned because young girl are not likely to be able to access fistula repair due to their poor economic strength.

4.5 National plans to end fistula in some African countries

The UNFPA mentioned that its active campaign to end fistula concerned 12 African countries when it started in 2003. 35 countries are involved now in sub-Saharan Africa. Additionally, the campaign was followed by the development and the implementation of national strategies for fistula elimination. In December 2007, the UNFPA mentioned that 32 countries have completed their needs assessment and of these 32 countries, 20 have reached implementation of their national programmes, while eleven countries have integrated fistula as part of their relevant health policies and plans. Seven have adopted national fistula strategies and more than 4,500 women have received fistula treatment support from the UNFPA. 600 health personnel of varying cadres have received training in fistula.[224] To meet their obligation under the various international human rights instruments that the counties have ratified (discussed in chapter 3), African countries are trying to carry out their responsibility to structure their health system to provide manage their healthcare delivery.[225]

In the African context, the AU has given some attention to the health of women.[226]

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[222] N 221 Alfredsson& Tomasevski 199

[223] Cook ,Dickens &.Syed (n 1 above) 87,72,7

[224] UNFPA Report on the regional conference on obstetric fistula and maternal health, Nouakchott Mauritania, 10 -13 December 2007 www. endfistula.org

[225] n221 above

[226] See African forum on adolescent reproductive health (doc.CM/1999(LXVI) add.3)CM/R.399(LXVI),para (d) and (e)

The African Plan for Action on women in 1995 stressed that there is a need to take appropriate measures in health in general and among other particular points on which it has focused, the issue of safe motherhood, and pregnancy.[227]

In Mauritania, the conference underlines the three delays that contributed to the occurrence of fistula and is reported to have reflected on the evidence of an insufficient health structures.

However the country has develop with the assistance of the UNFPA and a French NGO, developed a three year-plan (2005-2007).This plan includes some health centre rehabilitation, ambulance provision, and health personnel training, including civil society in the intervention and post operative rehabilitation. The surgery operation is carried out by the French NGO equilibrium and population which repaired 22[228] fistula cases in 2007 in 2oo7. However the actions are far from the needs on the ground. The trained health care is characterised by its paucity.

In DRC, health systems are far from reaching the need of the women affected by the disease, additionally, the problem of ignorance result in poor utilisation of health service and therefore, to the occurrence of fistula.[229]

On the other hand, it has been reported in Angola that as result of the war that took place in the country, an important number of women suffering from fistula lives in poverty and therefore cannot afford to pay for the fistula surgery. Additionally, 160 women were waiting for surgery at the date of surgery in 2007 in Luanda. This situation reflects the government's failure to recognise and value women's right to health and dignity as a human being.[230]

In Senegal; the exact prevalence of fistula is not clearly known. However, it has been reported that, an estimated number of 200 new cases occur every year. The programme to deal with fistula in the country include sensitization, campaign involving treatment, health care providers training, and the integration of surgical specialists in the university curriculum.[231]

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[227] R Murray 'human rights in African from the OUA to the African Union'(2004) 151

[228] n 224 above 10&11

[229] n224 above 11

[230] n224 above.

[231] n224 above 11 & 12

In Niger, there is a programme to eliminate fistula. This was the result of a strong collaboration between, the ministries in charge of health and women issues, NGOs, parliament and associations. The evolvement of the government and the community is reflected in the framework for the prevention, treatment and reintegration. Nevertheless, despite the exiting network, the main problem is the lack of equipment, facilities and proper treatment for the health care providers as well as the need for sensitization.
Against all expectation in Niger, fistula sufferers were chased out from the medical centre by the police in July 2008. This followed the widespread rumour that the Spanish government was willing to assist victims of fistula with $1000000000. [232]

In Benin, despite the existing commitment to reproductive health, there is no policy related to fistula. Fistula has not been acknowledged as an urgent matter.[233] .

In Malawi despite the availability of fistula centres, and fistula treatment free of charge, the low level of knowledge about fistula even among policy makers, is serious obstacle to considering fistula as a reproductive health issue. Malawian plan of action has activities such as training for 10 health worker and treatment of 44 women with fistula. However, the problem with fistula issue in Malawi remains the lack of human resources to provide treatment for those who suffer from fistula. Addition, there is a need for new equipments and supplies for new cases repair sites.

In Rwanda, formally, the country started its campaign to end fistula only in November 2007. The programme includes basic needs assessment on obstetric fistula. This is to say that the country has started its programme only five year after the international campaign to end fistula. And the programme does not have a strong strategic plan with specific target to reach for a very specific period.

As far as fistula issue is concerned, states have the obligation to set a clear plan to eradicate the problem and to grant treatment for those who are already affected by the disease. The regional conference on obstetric fistula and maternal health held in December 2007 in

[232] *RAndigue'des policiers son venus chasse les femmes qui couraient en pleurant'*<hppt://www.tamtaminfo.com> (accessed on 18 July 2008)
[233] Fistula needs assessment for 9 African countries(page 10) www.unfpa.org

Nouakchott has made the remark that there are many challenges in term of fistula prevention, repair and reintegration of the sufferers after surgery.[234]

Indeed, the unmet need for fistula service is estimated between 80 to 99 % in Africa. Little government commitment and poor governance and coordination to deal with the issue are some of the mains barriers to redress fistula issue.[235] As states party to the above mentioned human rights instruments, African states bear the responsibility to take concrete and targeted steps to ensure the full realisation of the right to health of fistula sufferers

The Maputo Action Plan of action gives details on precise framework that can be used by governments, to use leadership to improve in the structure and the delivery of healthcare services.[236]

At the international level, despite the recognition of reproductive rights by international treaties and other non binding documents, the jurisprudence in this area is very poor.[237]

While socio-economic rights are considered non-justiceable in many legal systems.[238] The situation in South Africa makes a positive exception.[239]. The South African Constitutional Court has decided in the case of *Minister of Health and Others v Treatment Action Campaign and Others*[240] that the government's programme for HIV/AIDS infected mothers to access antiretroviral medication does not meet the requirements of the constitution. Although, there appears to be no decided cases, by the courts from victims of fistula, it is argued that such people can easily access state-sponsored medical treatments in South Africa. This meets the reasonableness standard that has been set by the court.[241] The South African situation meets the minimum core obligation of the state to respect, protect, and fulfil their obligations.[242]

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234 *The 2007* Africa Regional Conference *on Obstetric* Fistula *and* Maternal health *hppt//:* mauritania.unfpa.org/**Fistula**2007/docs/Working%20group%20instructions.doc>

235 n 229above.

236 Maputo plan for action

237 R Emerton,et al *International Women's Rights Cases* (2005) xxvii

238 T. Kaime 'beyond social programs; the right to health under the African charter on human and peoplesrights',East African Journal of Peace and Human rights vol:10;2) 192/193

239 See chapter 2 of South African Constitution.

240 (1) 2002 (10) BCLR 1033 (CC)

241 *Government of the Republic of South Africa and Others v Grootboom and Others* (1) 2002 (10) BCLR 1169 (CC).

242 D Bilchitz *Poverty and Fundamental Rights: the Justification and Enforcement of Socio-Economic Rights* (2007) 151

The African Charter which has given economic, social and cultural right the same importance as the one given to civil and political rights, creates therefore, both positive and negative obligations on the states [243] with a solid framework that make possible the concretisation of the right to health.[244] In asserting this argument, this writer is convinced by Toebes' contention that the right to health does not mean the right to be healthy, but rather, the right to be secured from some evident menace to health for which, the state can be held responsible.[245]

The declaration on the elimination of violence against women underlines health issue as critical area. The Maputo declaration on gender mainstreaming and effective participation of women in the African Union mentioned not enough was being done to tackle maternal mortality, harmful and discriminatory risk of death during pregnancy and birth.[246] This reflects the neglect of the issue of fistula even within the AU arena. The risk of suffering from fistula would have been given the same attention as the risk related to mortality during pregnancy and child birth should. Indeed, as mentioned in chapter II, the consequences related to fistula are considered some time by the patients as worse than death.[247] The hope offered by the African Women Protocol should be therefore used for a more comprehensive approach to the right and the situation of women in Africa.

[243] See chapter 3

[244] T Kaime 'Beyond social programs: the right to health under the African charter on human and people's rights' *East African Journal Peace and Human Rights*, vol10,:2004

[245] [245] Toebes (n10 above) V

[246] R Murray (n 127 above) 162

[247] See chapter 2

Chapter 5 Conclusion and recommendations

5.1 Introduction

Briefly, this work has discussed fistula as a disease and its impact on women. It has also discussed fistula as a human rights issue. There is lack of awareness about it. A combined reading of chapters 2, 3, and 4 shows that the problem of fistula is of grave concern and governments of African states have not done enough to fulfil their obligations under international human rights instruments. In view this, the conclusion of this work is reached.

5.2 Conclusion

Fistula continues to remain a challenge to women in Africa. The pain and the trauma that go with it are enormous. This work has highlighted these in more concrete terms. A survey of the existing human rights framework shows that governments' owes the duty to provide free medical health care services to women who are affected by fistula. The jurisprudence also shows that sufferers of fistula have a correspondent right from the governments.

The situation is worse in Africa and more especially among poor rural women. This is the symptom of inadequate attention to women's human rights, particularly to pre-natal and related health care. It represents also, the lack of services to meet population health need particularly women; as a result of inequitable resource distribution and of setting priorities[248] that do not include rural health care. Considering that this work has reflected the complex problem of fistula and the accompanying failures of governments, this writer achieves the set research goals.

A theme that has run through this works is the need to end fistula. In view of this, this writer proceeds to make the following recommendations.

5.3 Recommendations

Many recommendations to the problem of fistula are outstanding. Considering the volume of this work, this writer, intends to highlight the most relevant recommendations in the following paragraph.

[248] K Nbaye *les droits de l'homme en Afrique* (2002) 2O7

5.3.1 End to early marriage

One of the solutions given by R Cook in discussion the issue of fistula is the problem of early marriage and early childbirth.[249] It is true that stooping early marriage can strongly contribute to the eradication to obstetric fistula problem. However, fistula can happen to women of any age.[250] Lack of timely obstetric emergency care is the most important contributing factor. Additionally, access to fistula surgery remains a big concern in Africa. Therefore, the best way to redress fistula issue in Africa is prevention. This is possible by providing for timely and good obstetric emergency care that covers not exclusively urban areas, but also those who are in the most distance rural areas. Additionally doctors should be encourage to serve rural areas.

5.3.2 Women Empowerment

Poverty is a cruel reality that affect many women in Africa and obstetric transport have been underlined as contributing to the occurring of obstetric fistula. Economic independence on men deprives women from taking the decision to consult a doctor on time or to go to hospital in addition to setting priorities that include women in rural areas, government, (especially in Africa) should grant sufferers free access to fistula surgery and empower them for social reintegration.

5.3.3 Awareness campaign

Governments should make policies to bring awareness on the disease. The extent of mobilisation around HIV/AIDS issue should be showed with regards to fistula. Indeed, the policies should include intensive sensitisation not only through media but also through school programmes and all other necessary means to provoke enough awareness. This will help the sufferers to understand that fistula is not a curse. Furthermore, the patients and the whole society will be able to know that there is possibility to cure fistula and to avoid it. The society should not discriminate against fistula sufferers. Consequently fistula sufferers can stop hiding and can be able to go to seek for treatment. School programmes at the university level should include massive education

Traumatic fistula, as result of violence against women, should be prevented. Authors of sexual violence against women should be sanctioned in a very dissuasive way.

[249] Cook, Dickens &Syed (n 1 above)87,72,77

[250] As demonstrated in chapter 2

At the African Union level, fistula should be given a particular attention. The Assembly of Heads of States and Governments should make member states consider fistula, more seriously and as a matter of high priority. In this regard, setting time frame for the eradication of fistula in all African countries affected is necessary. Developed countries were able to reduce sensitively, the rate of obstetric fistula as result of better obstetric health care services. A good programme to end fistula should include a time targeted to be reached. Government should adopt new laws to create new programmes which address the issue of fistula. Additionally governments should establish a section under the ministry of women affairs to handle fistula issues. A special budget should be allocated in this regard.

5.3.4 The role of the judiciary and states accountability

At the domestic level, domestication and implementation of the African Women Protocol and all other international human rights instruments should be more effective. This will give the sufferers the possibility to defend their rights before national courts. In this regard, the gravity of fistula issue should be considered by judges. UN declarations can be used to clarify laws that do not provide expressly for fistula issue. The Indian jurisprudence for instance, has made a gateway to international instruments in interpreting the Bill of rights in the Indian constitution. This should guide the judges for a more progressive interpretation of the law. The judiciary should like in South Africa be responsive to particular requirements of each and every case instead of relying on strict conceptualist distinctions to establish its reasoning and findings.[251]
Moreover the judiciary should be educated in this special areas to deal appropriately with the issue of fistula.

At the international level, the African commission and the African court are competent to receive cases on fistula.[252] Therefore, NGOs involve in the area of fistula can bring cases on behalf of the victims when there are not able to do so.

5.3.5 Cooperates responsibility and the responsibility of everyone

[251] F Coomans justicability of economic and social rights,experiences from domestic systems (2006) 236
[252] See chapter 4 for the justifiability of the right to health

The UDHR places the obligation to defend and uphold human rights on 'people;'[253] which include society and companies. At the regional level the African Charter refers to 'attitude of human being and good corporate governance'. The inevitable conclusion to be drawn from these instruments is that the law upholds corporate social responsibility of companies on the part of companies and individual responsibility for everyone to contribute to society. Although governments bear the primary responsibility to protect human rights, the evidence is that they can do so only, when businesses, and individuals acknowledge their responsibilities by raising local conditions. Additionally, giving greater respect for human rights will lead to sustainability and better performance for business companies.[254] Companies must bear the responsibility to contribute to the eradication of fistula by including, programmes for the prevention and treatment of fistula in their annual budgets.

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[253] Preamble UDHR para 6 & 7
[254] P Alston Non State Actors and Human Rights (2005)317/337

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