

**A PURPOSIVE INTERPRETATION OF ARTICLE 14(2)(C) OF THE
AFRICAN WOMEN'S PROTOCOL TO INCLUDE ABORTION ON
REQUEST AND FOR SOCIO-ECONOMIC REASONS**

**A dissertation submitted in partial fulfilment of the requirements of the
degree LLM (Human Rights and Democratisation in Africa)**

By

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30 October 2012

PLAGIARISM DECLARATION

I, SATANG NABANEH, declare that the work presented in this dissertation is original. It has not been presented to any other university or institution. Where the work of other people has been used, it has been duly acknowledged.

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DEDICATION

This work is dedicated to my best friend and soul mate, Mam Mbye Cham. You have been an extraordinary blessing to me. Truly, you provide one of the greatest miracles of my life-undeserved, unconditional love.

It is dedicated to my parents, Sheriffo Nabaneh and Natoma Ceesay for your ongoing love, prayers and inspiration.

For all the women who are finding their voices, for heeding the call and joining other women who use their power to create a better world. *Fulfilling the deep calls of our womanheart!*

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LIST OF ACRONYMS AND ABBREVIATIONS

African Women's Protocol	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
African Charter	African Charter on Human and Peoples' Rights
African Court	African Court on Human and Peoples' Rights
AU	African Union
AUC	African Union Commission
ANC	Antenatal Care
BOR	Bill of Rights
BPA	Beijing Platform of Action
CEDAW	Convention on the Elimination of All forms of Discrimination Against Women
CC	Constitutional Court
CESCR	Committee on Economic, Social and Cultural Rights
CO	Concluding Observations
CRR	Centre for Reproductive Rights
CSOs	Civil Society Organisations
ECA	Economic Commission for Africa
FAO	Food and Agricultural Organisation
FEMNET	The African Women's Development and Communication Network
GC	General Comment
HC	High Court
HRC	Human Rights Council
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
ICPD	International Conference on Population and Development

IPPF	International Plan Parenthood Federation
MDGs	Millennium Development Goals
MPOA	Maputo Plan of Action
OHCHR	Office of the High Commissioner for Human Rights
POA	Programme of Action
SSA	Sub-Saharan Africa
RHRs	Reproductive Health Rights
UN	United Nations
Universal Declaration	Universal Declaration of Human Rights
UNICEF	United Nations Children Fund
UNFPA	United Nations Population Fund
UNPD	United Nations Population Division
UNPF	United Nations Population Fund
UN Women	United Nations Entity for Gender Equality and the Empowerment of Women
VAW	Violence Against Women
WB	World Bank
WHO	World Health Organization

Table of Contents

PLAGIARISM DECLARATION ii

DEDICATION iii

ACKNOWLEDGMENT iv

LIST OF ACRONYMS AND ABBREVIATIONS vi

Table of Contents viii

CHAPTER ONE: INTRODUCTION 1

1.1 Background 1

 1.1.1 Abortion as a human right-International and regional standards..... 2

1.2 Problem statement 3

1.3 Research questions..... 4

1.4 Objectives of the study 4

1.5 Limitations 5

1.6 Literature review 5

1.7 Significance of the study..... 7

1.8 Methodology 7

1.9 Chapter outline 8

**CHAPTER TWO: THE HISTORY AND NORMATIVE CONTENT OF ARTICLE 14(2)(C) OF
THE AFRICAN WOMEN’S PROTOCOL 9**

2.1 Introduction..... 9

2.2 Setting the context for the right to abortion: The Protocol’s drafting history.. 10

 2.2.1 Reservations and interpretative declarations: implications 12

2.3 Review of medicalised abortion grounds 13

 2.3.1 Grounds of sexual assault, rape and incest..... 14

 2.3.2 Endangering the woman’s mental and physical health ground 16

2.3.3	Endangering the woman's life ground	17
2.3.4	Endangering foetus' life ground.....	18
2.4	Abortion laws and practice in Africa.....	19
2.4.1	Highly restrictive abortion laws.....	20
2.4.2	Liberal abortion laws	21
2.4.3	Radical abortion laws.....	23
2.5	Conclusion	28

CHAPTER 3: JUSTIFICATION FOR EXPANSION OF ARTICLE 14(2)(C) OF THE AFRICAN WOMEN'S PROTOCOL TO INCLUDE SOCIO-ECONOMIC REASONS AND UPON REQUEST

30		
3.1	Introduction.....	30
3.2	Incidence of unsafe abortion and its consequences.....	30
3.3	Socio-economic reasons and abortion.....	31
3.3.1	Feminisation of poverty in Africa	32
3.3.2	Impact of culture and religion	34
3.4	Case for expansion.....	35
3.4.1	Justification for abortion on socio-economic reasons and upon request.....	36
3.5	Contextualising and interpreting rights.....	37
3.5.1	Purposive interpretation of the African Commission	39
3.6	Conclusion	43

CHAPTER 4: CONCLUSION AND RECOMMENDATIONS

4.1	Brief Summary.....	44
4.2	Conclusion	44
4.3	Recommendations.....	46

Bibliography.....

A PURPOSIVE INTERPRETATION OF ARTICLE 14(2)(C) OF THE AFRICAN WOMEN'S PROTOCOL TO INCLUDE ABORTION ON REQUEST AND FOR SOCIO-ECONOMIC REASONS

CHAPTER ONE: INTRODUCTION

1.1 Background

Reproductive health has been recognised to be embodied in human rights instruments at the International Conference on Population and Development (ICPD). The Programme of Action (POA) defined it 'as a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and process.'¹

The Beijing Platform of Action (BPA) further provided that reproductive health 'implies that people are able to have a satisfying and safe sex life and that they have the capacity to reproduce and the freedom to decide if, when and how often to do so.'² Eriksson has argued that, reproductive freedom 'is a fundamental component of their human rights and of their human dignity.'³ The BPA further provided a 'holistic view of health and the social, political and economic factors affecting health.'⁴ These two agreements have contributed immensely to the 'notion that women's reproductive rights are human rights.'⁵ The UN Millennium Development Goals (MDGs) also furthers the reproductive health agenda with a commitment to universal access by 2015.⁶ Reduction in the number of mortality from unsafe abortions is one of the objectives of the POA.⁷ Therefore abortion was included in the concept of comprehensive health care on reproductive health.

It is estimated that more than 48 million abortions occurred in 2008, while unsafe abortions worldwide are estimated to be about 22 million with approximately 6.1 million occurring in Africa

¹ ICPD Programme of Action UN doc A/CONF. 171/13 (18 October 1994) para 7.2.

² UN Doc A/CONF. 177/20.

³ Eriksson, *Reproductive Freedom: In the context of international human rights and humanitarian law* (2000) 10; Counter arguments against abortion is based on moral and ethical grounds of which a critical question is focused on whether the unborn child is a human being. Mother Teresa argued, simply, 'If abortion is not wrong, nothing is wrong.' These arguments will be addressed in chapter 2 of this study.

⁴ S Tamale *African Sexualities: A Reader* (2011) 315.

⁵ C Zampas & J Gher 'Abortion as human right- International and regional standards' (2008) 8 *Human Rights Law Review* 252.

⁶ B Austveg 'Perpetuating power: some reasons why reproductive health has stalled' (2011) 19 (38) *Reproductive Health Matters* 28.

⁷ Eriksson (n 3 above) 171.

every year.⁸ More than 60 per cent of unsafe abortions are procured by women below thirty-years of age. In Africa, in 2008, about 92 per cent of women of child bearing age were subject to restrictive abortion laws.⁹ There is a documented link on the relationship between restrictive abortion laws and maternal mortality rates. About 40 per cent at a rate of 31 per 1000 women who undergo an unsafe abortion die as a result of the complications.¹⁰ High maternal mortality is thus associated with a lack of access to safe and legal abortions. While the international agreements are non-legally binding, the statements serve as a useful guide in legislative and policy reform in relation to reproductive rights.¹¹

1.1.1 Abortion as a human right-International and regional standards

Global and regional human rights protection mechanisms affirm the right to safe legal abortion for women. Among these include human rights instruments, their interpretations and applications which identified abortion as a human rights issue. For example, in a manner that departs from other international and regional human rights instruments, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol)¹² is ground breaking in the area of abortion. The Protocol fills in the gap in relation to women's rights in the African Charter on Human and Peoples' Rights (African Charter).¹³ It pioneers substantive recognition of abortion as a human right in an international treaty. Article 14(2) (c) of the African Women's Protocol is very explicit in providing that state parties take all appropriate measures to:

protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.

At the global level, the UN Committees established for monitoring compliance of the international instruments through their interpretations have issued general comments and recommendations to further clarify states' obligations relating to women's rights.¹⁴ These serve as crucial tools for holding governments accountable under international human rights law.¹⁵

⁸ WHO et al 'Unsafe abortion: Global and regional estimates of the incidence of unsafe abortion and associated Mortality in 2008' (2011) 18.

⁹ WHO et al 'Trends in maternal mortality 1990 to 2010' (2012) 22.

¹⁰ G Sedgh et al 'Induced abortion: incidence and trends worldwide from 1995 to 2008' (2012) 379 *Lancet* 629-630.

¹¹ See J Dugard *International law: A South African perspective* (2011) 33.

¹² Protocol to the African Charter on Human and Peoples' Rights and on the Rights of Women in Africa, adopted 11 July 2003, 2nd Ordinary Session of the Assembly of the African Union, AHG/Res. 240 (XXX) (entered into force 25 Nov 2005).

¹³ F Viljoen *International Human Rights Law* (2012) 251.

¹⁴ For example CEDAW Committee 'General Recommendations No 19 on violence against women' A/47/38 (1992); CESCR 'General Comment No 20 on non-discrimination' E/C12/GC/20 (2009).

¹⁵ MA Miller & MJ Roseman 'Sexual and reproductive rights at the United Nations: frustration or fulfilment' (2011) 19 (38) *Reproductive Health Matters* 106-107; See the OHCHR *United Nations Treaty Body Database* <http://tb.ohchr.org/default.aspx> (accessed 15 April 2012).

The Committee on the Elimination of All Forms of Discrimination against Women (CEDAW Committee) has interpreted the Convention in its concluding observations and general recommendations that the issue of abortion forms part of state parties' treaty obligations.¹⁶ The Human Rights Committee (HRC) found unsafe abortion to be inhumane or degrading treatment.¹⁷ In addition, article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁸ oblige states to reduce maternal mortality rate. The Committee Against Torture (CAT Committee) has also expressed concern over restrictive abortion legislation and acknowledging that they have authority to look into the restriction to voluntary abortion.¹⁹

It is important to note that the Protocol is the only international legally binding instrument that explicitly affirms abortion rights but in the prescribed minimum limits. Although 33 countries of the African Union (AU) have ratified the African Women's Protocol, abortion laws in these countries remain varied.²⁰ Majority of African countries also have restricted legal regimes on abortion contrary to their obligation to comply with the Protocol. Only four countries in Africa have radical abortion laws: Zambia allows abortion on socio-economic grounds, and Cape Verde, South Africa and Tunisia permit abortion without restriction as to reason.²¹ These countries provide for the right to abortion beyond the grounds envisaged in the Protocol.

1.2 Problem statement

Article 14(2)(c) of the African Women's Protocol excludes socio-economic reasons and upon request as grounds for abortion. Studies have shown that limiting women's access to safe, legal abortion services leads to increase in unsafe abortions.²² The World Health Organisation (WHO) has defined unsafe abortion as a procedure meant to terminate unintended pregnancies that are performed by unqualified individuals or in unacceptable environments or both.²³ Article 14(2)(c) of the Protocol does not go far enough to the extent that, it inappropriately medicalises the

¹⁶ See CEDAW Concluding Observations including: Kenya CEDAW/C/KEN/CO/7 (2011); Cameroon CEDAW/C/CMR/CO/3 (2009); Burkina Faso, CEDAW/C/BFA/CO/6 (2010); Botswana, CEDAW/BOT/CO/3 (2010); Malawi, CEDAW/MWI/CO/6 (2010); Ethiopia, CEDAW/C/ETH/CO/6-7 (2011); Cote d'Ivoire, CEDAW/IV/CO/6-7 (2011); Zimbabwe, CEDAW/C/ZWE/CO/2-5 (2012).

¹⁷ Communication 1153/2003, *KL v Peru*, HRC (24 October 2005), UN Doc CCPR/C/85/D/115 (2003) para 6.3.

¹⁸ International Covenant on Economic, Social and Cultural Rights, GA Res 2200A (XXI), 999 UNTS 171 (1966/1976).

¹⁹ See CAT 'Concluding observations on Peru' C/PER/CO/4 (2006), para 23.

²⁰ List of Countries Which Have Signed, Ratified/Acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women, African Union, <http://www.africa-union.org/root/au/Documents/Treaties/List/Protocol%20on%20the%20Rights%20of%20Women.pdf> (accessed 8 April 2012).

²¹ Gutmacher Institute 'Facts on abortion in Africa' Briefing Paper (2012) http://www.gutmacher.org/pubs/IB_AWW-Africa.pdf (accessed 2 June 2012) 2.

²² Sedge et al (n 10 above) 626.

²³ WHO 'Safe abortion: Technical and policy guidance for health systems' (2012) 18.

grounds for abortion and implicitly makes health professionals and courts decision-makers rather than women. The circumscribed abortion grounds do not give sufficient 'enabling rights' to women to request for abortion.²⁴

The grounds for abortion which exclude socio-economic reasons and upon request is a refusal to accept that the majority of women seek abortion because of their socio-economic circumstances and that 'women are entitled to safe, legal abortion and that restrictive legal regimes do not eliminate the need for abortion, but merely fuel unsafe abortion.'²⁵ Restricting access to abortion violates women's human rights of autonomy, dignity and liberty.²⁶ The question arises as to what method of interpretation can be applied to ensure the inclusion of grounds of request and socio-economic reasons for abortion?

1.3 Research questions

The study seeks to answer three key questions:

1. Does the abortion grounds under article 14(2)(c) of the African Women's Protocol adequately advance women's right to abortion?
2. What is the importance of socio-economic reasons and request, as grounds for abortion?
3. How can an expansion of article 14(2)(c) of the African Women's Protocol be made through a purposive interpretation to encapsulate socio-economic reasons and on request as grounds for abortion?

1.4 Objectives of the study

The study takes the 'medicalised' abortion grounds as the main subject of examination. It furthers reasons for its expansion to include socio-economic reasons and on request with an evaluation of its prospects of the realisation and respect of such a right. This will be in the context of international law and emerging jurisprudence from international and regional human rights systems.

In particular, this study has three main objectives:

1. To explore the development and content of women's right to abortion with a focus on human rights instruments that deal or impact on sexual and reproductive rights;

²⁴ C Ngwena 'Inscribing abortion as a human right: Significance of the Protocol on the Rights of Women in Africa' (2010) 32 *Human Rights Quarterly* 843.

²⁵ C Ngwena 'Access to legal abortion: developments in Africa from a reproductive and sexual health rights perspective' 19 *South African Public Law* (2004) 334.

²⁶ *KL* case (n 17 above) para 7.13.

2. To examine the scope and shortcomings of the abortion grounds of article 14(2)(c) of the African Women's Protocol in assessing the extent of access to legal abortion; and
3. To propose an expansion of the abortion grounds to include socio-economic reasons and on-request through a purposive interpretation.

1.5 Limitations

Abortion still remains a taboo and a controversial issue in most African countries and cultures. This study is not without limitations. One of the major limitations is the lack of jurisprudence of the African Commission on Human and Peoples' Rights (African Commission) on sexual and reproductive health rights. Generally, this may be due to inadequate understanding of the obligations and duties arising from article 14 of the Protocol. In addition, while the Special Rapporteur on the Rights of Women in Africa (SRRWA)²⁷ a mechanism modelled after the UN special human rights mechanisms was instrumental in realizing the adoption of the Protocol and in encouraging ratification of the treaty by states, past and present mandate holders have yet to use their position and voice within the Commission effectively to make an impact on women's rights jurisprudence.

1.6 Literature review

There is limited literature on abortion in the context of article 14(2)(c) of the African Women's Protocol. Majority of literature on the Protocol focuses on its challenges and opportunities. For example, Nsibirwa traced the history of the Draft Women's Protocol and explored some of its provisions even though he paid less attention to women's sexual and reproductive rights.²⁸ In 2005, Stefiszyn explored how the Protocol can serve as a significant opportunity in advancing the rights of women.²⁹ Viljoen argues that it seeks to 'extend the substantive scope of the existing law.'³⁰

An unsettling fact therefore, is that not many people have analysed the right to abortion in the African context with the exception of Ngwena. In 2004 before the coming into force of the African Women's Protocol, he examined the extent of access to legal abortion in Africa in light of the

²⁷ ACHPR/Res 38 (XXV) 99.

²⁸ M Nsibriwa, 'A brief analysis of the Draft Protocol to the African Charter on Human Rights' Rights on the Rights of Women' (2001) 1(1) *African Human Rights Law Journal* 40.

²⁹ K Stefiszyn 'The African Union: Challenges and opportunities for women' (2005) 5 *African Human Rights Law Report* 376-382, 358.

³⁰ Viljoen (n 15 above) 251.

high incidence of unsafe abortion.³¹ Special focus has also been on the appraisal of abortion laws in Southern Africa.³²

In 2010, Ngwena examined critically the complexities of the abortion provisions of the African Women's Protocol. He contends that the enumeration of abortion rights in the Protocol makes it a 'ground breaking' one, although, he conceded that the Protocol cannot be said to be truly transformative, because of the circumscribed abortion grounds.³³ While this study generally agrees with the above, a significant portion missing in Ngwena's work is a detailed and substantial examination of the limited scope of the abortion rights in their exclusion of grounds of socio-economic reasons and on request contrary to the reproductive health rights paradigm and how it is unable to meet the abortion needs of women. Ngwena further examined how some member states are progressively or retrogressively fulfilling their obligations in the domestic level.³⁴ Notwithstanding, he did not give a more holistic mapping of national trends of abortion rights in Africa, with a focus on countries that have liberal laws like South Africa to serve as best examples.³⁵

In addition, Banda in her work contended that the limited grounds are a product of political compromise to ensure support for the Protocol by majority of states that would not have otherwise given their support.³⁶ Banda's assertion is analysed in the study based on the *travaux preparatoires*.

On literature focusing on the international level, Zampas and Gher explored the international and regional standards on abortion as a human right even though they recognised the African Women's Protocol as the only treaty that explicitly provides the right to abortion. The authors assert that while the UN instruments do not explicitly provide for the right to abortion, through the interpretative mandate of the treaty bodies, the right to abortion has been recognised.³⁷ The article's focus on the international level especially on Europe failed to address the unique problems of Africa.

³¹ C Ngwena 'Protocol to the African Charter on the Rights of Women: Implications for access to abortion at the regional Level' (2010) 110 *International Journal of Gynecology and Obstetrics* 163-166.

Ngwena (n 36 above) 163-166.

³² See C Ngwena 'An appraisal of abortion Laws in Southern Africa from a reproductive health rights perspective' (2004) *Journal of Law, Medicines & Ethics* 708-717

³³ Ngwena (n 24 above) 811 & 843.

³⁴ n 24 above, 827-842.

³⁵ See C Ngwena 'Accessing abortion services under the Choice on Termination of Pregnancy Act: realising substantive equality' (2000) 25(3) *Journal for Juridical Science* 19-44.

³⁶ F Banda 'Blazing the trail: the African Protocol on Women's Rights comes into force' (2006) 50 *J Africa Law* 72-84, 82 as cited in Ngwena (n 31 above) 166.

³⁷ Zampas & Gher (n 6 above) 256-61. See R Cook et al *Integrating Medicine, Ethics, and the Law* (2003) 345-384.

As shown above, many of the articles published on the right to abortion in Africa focused on the normative content of article 14(2)(c) of the African Women's Protocol. This study furthers the debate on whether the grounds are sufficient to make the article a truly transformative provision on abortion rights. Moreover, it goes beyond the issue and analyses, argues and recommends the expansion of the relevant provision for the inclusion of socio-economic reasons and on request in ensuring access to abortion 'become a gender-sensitive socio-economic right... rather than a mere civil and political right.'³⁸

1.7 Significance of the study

The significance of this study rests on its attempt to analyse critically the provision of article 14(2)(c) of the African Women's Protocol with a view to suggesting an expansion of the grounds for abortion through a purposive interpretation. The study is further aimed at stimulating an intellectual debate among African human rights scholars and activists with the aim of enhancing the overall protection and fulfilment of the right to abortion for women. Given that abortion is prevalent, and the socioeconomic disadvantages faced by women are numerous, an attempt to address some of these challenges will contribute towards ensuring substantive equality. The author's attempt to have such an input where other writers did not, will contribute immensely to the development of research which the African Commission can subsequently use.

1.8 Methodology

The analysis of the research questions of this study will be made within a framework of qualitative research, of which comparative and textual approaches will be adopted. The study is based on the analysis of primary sources including national legislations, treaties, protocols of the AU, case law and relevant secondary sources particularly text books, journals, and internet resources. As there is no interpretative practice on the right to abortion from the African Commission, reliance will be made on existing human rights framework in order to give content and justify the need for an expansion.

The author will subsequently elaborate on the grounds of sexual assault, rape, incest; endangering the woman's mental and physical health; endangering the woman's life; and the life of the foetus. This will be done in accordance with international human rights norms and principles such as concluding observations and general comments of treaty bodies and cases

³⁸ Ngwena (n 25 above) 332.

adjudicated in regional and international human rights systems dealing with abortion. An attempt will also be made to highlight national abortion trends and practices in Africa. There are fifty-three member states of the AU, it will be beyond the scope of this study to survey all these countries. Therefore, 11 countries were chosen based on geography and the categorization of their abortion laws into highly restrictive and mildly restrictive to illustrate abortion laws found in Africa. In this regard, Cape Verde, The Gambia, Ghana, Libya, Mozambique, Rwanda, South Africa, Togo, Tunisia, Uganda and Zambia are chosen to serve as the case studies.

1.9 Chapter outline

The study is divided into four chapters with chapter one introducing the background and justification of the study. Chapter two is devoted to examining the scope and significance of article 14(2)(c) of the African Women's Protocol. Chapter three of the study looks at the expansion of the grounds of abortion. A central issue to be addressed in this chapter is why there is a need and importance of such an expansion. As well as critically examining how an expansion of the circumscribed grounds can be attempted. An argument for a purposive interpretation of the grounds will be grounded on laws and guidelines on implementation of abortion rights. Finally, chapter four provides a conclusion and recommendations. It contains views on the way forward which can provide ideas for regional strategies.

CHAPTER TWO: THE HISTORY AND NORMATIVE CONTENT OF ARTICLE 14(2)(C) OF THE AFRICAN WOMEN'S PROTOCOL

2.1 Introduction

The African Women's Protocol was adopted in July 2003 and came into force on 25 November 2005. As of 14 August 2012, the Protocol has been ratified by 33 of the 54 member states of the AU with the newest member state, South Sudan yet to sign and ratify the Protocol.³⁹ The Protocol's emergence was largely to bridge the gap in the African Charter which did not have elaborate provisions for the women's rights. Article 18(3) of the African Charter requires state parties to 'ensure the elimination of discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions.'

Proponents for the Protocol lamented the inadequacy of this provision in which women, children, the disabled and the aged are all put in one article which deals with family thereby reinforcing the gender stereotyping of women as foremost caregivers.⁴⁰ This article puts emphasis on the family without questioning the stereotyped gender roles of women. Although article 2 of the African Charter provides for non-discrimination, the Charter lacks detailed provision on the issues of women's rights, especially sexual and reproductive rights of women. Thus, the African Women's Protocol aims to ensure the substantive equality of women in the African continent. This was also premised on the concerns in relation to the non-enforcement of human rights obligation of states in the international and regional legal frameworks, resulting to the ongoing subordination of women in Africa.⁴¹ This is recognised in the preamble of the Protocol which states that:⁴²

... despite the ratification of the African Charter on Human and Peoples' Rights and other international human rights instruments by the majority of States Parties, and their solemn commitment to eliminate all forms of discrimination and harmful practices against women, women in Africa still continue to be victims of discrimination and harmful practices.

But why was there a need to have such a Protocol when majority of African countries are parties to CEDAW? An argument that has been posited is that the unique needs of African women were not completely addressed in light of the disadvantaged and marginalised circumstances of the

³⁹ Congo last deposited on 6 August 2012. Other states that are yet to ratify include Botswana, Burundi, Central African Republic, Congo, Cote d'Ivoire, Egypt, Eritrea, Ethiopia, Kenya, Madagascar, Niger, Sahrawi Arab Democratic Republic, Sao Tome and Principe, Sierra Leone, Somalia, Sudan and Tunisia.

⁴⁰ F Viljoen 'An introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 16(1) *Washington and Lee Journal of Civil Rights and Social Justice* 19.

⁴¹ n 40 above, 17.

⁴² See Preamble of African Women's Protocol.

majority of African women.⁴³ The African Commission has held that ‘international law and human rights must be responsive to the African circumstances.’⁴⁴ Viljoen further noted that the Protocol:⁴⁵

speaks in a clear voice about the issues of particular concern to African women, locates the CEDAW in African reality and returns some casualties of quests for global consensus in its fold.

As a Protocol to the African Charter, it enumerates civil, political and socio-economic rights.⁴⁶ This is in recognition of the inextricable link of civil and political rights ‘which cannot be disassociated from economic, social and cultural rights.’⁴⁷ In order to ensure that women’s *de jure* rights translates into *de facto* equality, the principle of substantive equality is aptly provided in the Protocol.⁴⁸ State parties are thus required to not only enact laws but ensure that it translates into real and tangible benefits for women.

Article 14 of the Protocol is unique in providing for women’s reproductive health rights with a special focus on abortion rights. This is ground breaking in international law as it is the only instrument that explicitly provides for abortion rights. It represents a first in the development of normative standards for the protection of human rights of women.

2.2 Setting the context for the right to abortion: The Protocol’s drafting history

Historical analysis of the drafting history of the African Women’s Protocol’s shows how the Protocol was drafted but most importantly how the abortion article evolved into what it is today. A regional meeting on women’s rights was organised in 1995 by the African Commission to provide a unique platform to discuss the deploring situation of women in Africa. An outcome of the meeting was the drafting of a Protocol to the African Charter with the active participation of civil society.⁴⁹

In November 1999, the Draft Protocol provided in article 16(2)(c) for state parties to take appropriate measures to ‘protect the reproductive right of women particularly in cases of rape

⁴³ See Viljoen (n 40 above) 20.

⁴⁴ *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) para 68.

⁴⁵ Viljoen (n 13 above) 253.

⁴⁶ Viljoen (n 40 above) 20 (explaining the reinforcement of the indivisibility and interdependence of rights in the Charter through the Protocol’s provisions of civil, political and socio-economic rights.)

⁴⁷ Preamble of the African Charter.

⁴⁸ For the first time in the history of the African Union Commission (AUC), a woman has been elected to serve as chairperson, Nkosazana Dlamini-Zuma on 15 July 2012.

⁴⁹ F Banda *Women, Law and Human Rights: An African perspective* (2005) 68.

and incest.⁵⁰ Notably, there was no explicit reference to abortion but it generally referred to the protection of reproductive rights of women who have experienced rape and incest. A merged document was prepared by the OAU Secretariat between the 1999 Draft Protocol and the Draft OAU Convention on the Elimination of All Forms of Harmful Practices Affecting the Fundamental Human Rights of Women by the Inter-African Committee (IAC) on Traditional Practices.⁵¹

A meeting of experts on the Draft Protocol was held in November 2001 in which 44 member states participated. The meeting was convened for the drafting of a Protocol on the Rights of Women in line with Resolution 240.⁵² Angela Melo, the then SRRWA observed the need for the Protocol for African women. While Ambassador Makhan, the former Secretary General of the OAU [now the African Union] in his opening statement underscored the need for the Protocol in addressing the low consideration of the value of women which will enable women to have the means to affirm themselves and articulate their rights.⁵³ Subsequently arising from the expert meeting, the sub-article was amended to read: ‘... protect the reproductive rights of women particularly by authorising medical abortion in cases of sexual assault, rape and incest.’ Sexual assault was added to the grounds. More importantly was the explicit reference to ‘medical abortion’ in the article. The delegation of Senegal entered reservations on the article.⁵⁴ The amendment was subsequently adopted.⁵⁵

During the preparatory meeting for civil society which was convened in Addis in January 2003 and attended by national and regional women rights organisations, it was proposed that the grounds of danger to life, physical or mental health of the mother be included as abortion grounds.⁵⁶ This approach succeeded as it served as an avenue for women rights advocates for have their input in the document as well as lobbied for the inclusion of these grounds. This led to the inclusion and subsequent adoption of article 14(2)(c) in the Draft Protocol at the meeting of

⁵⁰ Article 16 of Draft Protocol to the African Charter on the Rights of Women in Africa, Doc/OS/ (XXVII)/159b (adopted in Kigali on 15 November 1999).

⁵¹ Viljoen (n 13 above) 250; see Banda (n 49 above) 69

⁵² Report of the Meeting of Experts on the Draft Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, Expt/Prot.Women/Rpt(1) (12-16 November 2001 in Addis Ababa, Ethiopia).

⁵³ n 52 above, 2.

⁵⁴ n 52 above, 20.

⁵⁵ Article 13 of the Draft Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, CAB/LEG/66.6/Rev1 (as adopted by the Meeting of Government Experts in Addis Ababa on 16 November 2001).

⁵⁶ 6 January 2003 Mark-Up from the meeting convened on 4-5 January 2003 in Addis Ababa, by the Africa Regional Office and the Law Project of Equality Now (6 January 2003) which includes notes in the text which indicated where provisions of the 2001 draft Protocol fell below existing international standards, and footnotes to provide additional information on relevant international standards.

ministers.⁵⁷ Libya, Rwanda and Senegal entered a reservation on article 14(2)(c) of the Draft Protocol at that meeting.⁵⁸ The wording of the article is the same as found in the final version of the Protocol adopted in 2003.

The African Women's Protocol's drafting history reveals that an explicit abortion right was only included after much lobbying and advocacy by women rights activists. The first drafts of the Protocol did not include abortion in its text. It is however acknowledged that a holistic approach was adopted by the drafters to the protection of women's reproductive rights. Article 14(2)(c) of the Protocol is innovative in providing for abortion rights. It went beyond provisions of CEDAW which was heavily relied upon during the drafting.⁵⁹ Whereas the drafters of the Protocol provided for a legal right, the drafters of CEDAW omitted to explicitly include the right to abortion although the right has been subsequently recognised in its various concluding observations, general comments and communications.

2.2.1 Reservations and interpretative declarations: implications

The African Charter and the Protocol are both silent on reservation. This does not mean that reservations cannot be made. Article 19 of the Vienna Convention on the Laws of Treaties (Vienna Convention)⁶⁰ which allows states to enter into a reservation to a treaty will thus apply. It is important to observe that the drafting history of the African Women's Protocol revealed that several states that entered into reservations during the drafting period did not repeat their reservations upon ratification. South Africa, Namibia and The Gambia entered into reservations. South Africa entered reservations in relation to articles 4(j), 6(d) and 6(h) of the Protocol, while it also made an interpretative declaration on articles 1(f) and 31 of the Protocol. On the other hand and of particular interest is The Gambia's blanket reservation to articles 5, 6, 7 and 14 of the Protocol.⁶¹ In its failure to provide an explanation, the government of The Gambia shown that it reserved on article 14 without any tangible reason and not for the protection of Gambian women.

⁵⁷ Art 14(2)(c) of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, MIN/WOM.RTS/DRAFT.PROT (II) Rev 5 (as adopted by the Meeting of Ministers in Addis Ababa, Ethiopia on 28 March 2003).

⁵⁸ As above.

⁵⁹ See Banda (n 49 above) 66 – 83 for an overview of the history and drafting of the Protocol including how it was influenced by CEDAW.

⁶⁰ Vienna Convention on the Law of Treaties (1969) 1155 UNTS 331.

⁶¹ Viljoen (n 13 above) 256.

In addition, other countries that have entered reservations are Uganda, Kenya and Rwanda on provisions of the African Women's Protocol.⁶² Uganda made a reservation on article 14(1)(a) of the Protocol contending the right to control their fertility will apply regardless of their marital status. Uganda's reservation on article 14(2)(c) of the Protocol reads:

Article 14(2)(c) of the Protocol is interpreted in a way of conferring an individual right to abortion or mandating a state party to provide access thereto. The state is not bound by this clause unless permitted by domestic legislation expressly providing for abortion.

Kenya also entered the following reservations:

The Government of the Republic of Kenya does not consider as binding upon itself the provisions of Article 10(3) and Article 14(2)(c) which is inconsistent with the provisions of the Laws on health and reproductive rights.

Rwanda also made a reservation on article 14(2)(c) of the Protocol, although it is currently working on removing it. It is submitted that the reservations made by the abovementioned states on article 14(2)(c) of the African Women's Protocol does not reflect the Protocol's commitment to protecting the rights of women. States should withdraw these reservations. For example due to immense pressure and lobbying preceding the AU summit meeting held in June 2006 in The Gambia, the government withdrew the reservations in March 2006.⁶³ Thus, article 14(2)(c) of the Protocol establishes two very important points: first, that abortion is a human rights issue; and second, that it has a an enormous impact on women and girls in Africa.⁶⁴ However, despite the good intentions of the drafters, the abortion grounds are circumscribed. The next section of this study will be an analysis of the abortion grounds provided in the relevant provision of the Protocol.

2.3 Review of medicalised abortion grounds

Article 14(2)(c) of the African Women's Protocol obligates states to take appropriate measures to 'authorised medical abortions.' This has been the vision of the drafters of the Protocol from the beginning as discussed above. The obligations arising from this is ambiguous as to whether abortion can only be done when it is medically required or whether it should be only carried out through medical procedures by qualified health personnel.⁶⁵ As Viljoen succinctly puts it, the Protocol suffers from 'inelegant and unfortunate drafting deficiencies.'⁶⁶ The deficiency of the

⁶² The update of reservations is based on an email from Administrative Assistant, Office of Legal Counsel, African Union Commission on 10 October 2012.

⁶³ Interview with Ms. Sainabou Jaye, Programme Officer, ACDHRS, in Banjul, The Gambia (15 November 2006) as cited in Viljoen (n 13 above) 256.

⁶⁴ Women is defined as 'persons of the female gender including girls'; See E Durojaye 'Realizing access to sexual health information and services for adolescents through the Protocol to the African Charter on the Rights of Women' (2009) 16 *Washington and Lee Journal of Civil Rights and Social Justice*.

⁶⁵ Ngwena (n 24 above) 847.

⁶⁶ Viljoen (n 13 above) 255.

article is that it makes medical personnel decision makers on this very important right rather than women, as the right holders. This is in contrast to recognizing the right of persons ‘to make decisions concerning reproduction and to security in and control over their bodies.’⁶⁷ This is not respectful of the views and genuine choice of the 6.1 million African women who resort to unsafe abortions every year.

2.3.1 Grounds of sexual assault, rape and incest

Rape constitutes ‘inhumane treatment’.⁶⁸ It is closely allied to incest and it comprises one of the permitted grounds for abortion. The claim for marital rape remains problematic as to whether it falls under this category. 52 states in the world have explicitly recognised marital rape as a crime and of these only 6 are African countries namely Burundi, Cape Verde, Namibia, Rwanda, South Africa and Zimbabwe.⁶⁹ The CEDAW Committee in recognising this problem recommended to Djibouti in 2011 to criminalise marital rape and decriminalise abortion in case of rape.⁷⁰ In addition, the Supreme Court of Nepal, in an unprecedented landmark case of *Forum for Women, Law and Development (on behalf of Meera Dhungana) v HMG*,⁷¹ held that:⁷²

sexual intercourse in conjugal life is a normal course of behavior which must be based on consent. No religion may ever take marital rape as lawful because the aim of a good religion is not to have a cause loss to anyone.

It is a violation of women’s right to endure pregnancy arising out of rape.⁷³ This was affirmed in a landmark decision in Argentina when a 15 year old girl was raped by her stepfather. The Supreme Court decided in her favour to have an abortion.⁷⁴ This is also applicable in times of conflict in which women are raped during and after conflict. A case in point is when women were rape in Rwanda as a method of genocide and they were denied abortion services based on religious reasons.⁷⁵ The International Criminal Tribunal for Rwanda (ICTR)⁷⁶ considered rape as both an instrument of genocide and a crime against humanity.⁷⁷

⁶⁷ Preamble of the South Africa’s Choice on Termination Pregnancy, 1997.

⁶⁸ See art 5 of the African Charter.

⁶⁹ See UN Women ‘2011-2012 Progress of the world’s women: In pursuit of justice’ 136.

⁷⁰ CEDAW Committee ‘General observations on Djibouti’ CEDAW/C/DJI/CO/1-3 (2011) para 21(b).

⁷¹ *Forum for Women, Law and Development (on behalf of Meera Dhungana) v HMG* as cited in UN Women (n 69 above) 17.

⁷² As above.

⁷³ R Cook & B Dickens ‘Human rights dynamics of abortion law reform’ in B Lockwood *Women’s rights: A human rights quarterly reader* 565. See BPA (n 2 above) 135.

⁷⁴ Amnesty International ‘Argentina: Safe abortion for young victims of rape’ <http://www.amnesty.org/fr/node/15836> (accessed 10 October 2012).

⁷⁵ See Cook & Dickens (n 73 above) 565; see *Prosecutor v Tadic*, ICTY (15 July 1999), IT-94-1-A.

⁷⁶ UNSC Resolution 955 (1994).

⁷⁷ *Prosecutor v Akayesu*, ICTR (2 September 1998) ICTR-96-4-T, para 685.

More than half of African countries have not recognised rape and incest as circumstances for abortion.⁷⁸ These countries have restrictive abortion laws that result to forced pregnancy which is considered a crime against humanity.⁷⁹ The issue remains on whether the ground of sexual assault should be regarded as a separate ground or as part of a 'generic category'.⁸⁰ It is argued that, violence against women encompasses both sexual assault and rape, thus making it one category.

The difficulty faced with the abortion grounds of rape, incest and sexual assault is that there are hardly regulations or guidelines that ensure access to timely abortion for victims.⁸¹ The evidentiary standards required are burdensome. This makes it difficult for rape to be proven which unnecessarily takes a very long process and victims end up having to carry the pregnancy as it becomes late to abort. Justice systems reflect power imbalances and are disadvantageous to women. In most African societies, women are less powerful than men.⁸² They face both social and institutional barriers; in terms of lacking knowledge and the capacity gap in the justice system which does not respond to women's particular needs. These barriers are not recognised by service providers.⁸³ The rule of law thus becomes weak especially in their right to be free from sexual violence.

The CEDAW Committee noted that there must be a 'mechanism for rapid decision-making'.⁸⁴ According to the Committee, Peru's failure to ensure access to abortion in cases of sexual abuse and rape, is a factor that can pose a danger to the physical and mental health of the woman.⁸⁵ In *LMR*,⁸⁶ the HRC found the three times court appearance by the complainant despite meeting the criteria for legal abortion to be a violation of the right to an effective remedy

⁷⁸ These include: Burundi, Central African Republic, Chad, Comoros, Congo, Cote d'Ivoire, Democratic Republic of Congo, Djibouti, Equatorial Guinea, Eritrea, Gabon, The Gambia, Lesotho, Madagascar, Malawi, Mauritania, Mauritius, Mozambique, Niger, Nigeria, Rwanda, Sao Tome and Principe, Senegal, Sierra Leone, Somali, Swaziland, Uganda, and Tanzania. This list of countries is taken from Annex 3: 'Women's Sexual and Reproductive health and rights: Legal abortions' in the UN Women 2012 Report (n 69 above) 132.

⁷⁹ Art 7(2)(g) of the Rome Statute; 33 African countries have ratified the Rome statute <http://www.icc-cpi.int/Menus/ASP/states+parties/> (accessed 20 August 2012).

⁸⁰ Ngwena (n 24 above) 847.

⁸¹ R Cook & C Ngwena 'Women's access to health care: The legal framework' (2006) 94 *International Journal of Gynecology and obstetrics* 222.

⁸² UN Women (n 69 above) 11.

⁸³ n 69 above, 57.

⁸⁴ Communication 22/2009 *LC v Peru*, CEDAW Committee (17 October 2011), UN Doc CEDAW/C/50/D/22 (2009), para. 8.17. (2011).

⁸⁵ n 84 above, para 8.18.

⁸⁶ Communication 1608/2007, *LMR v Argentina*, HRC (29 March 2011), CCPR/C/101/D/168 (2007).

as provided under article 2(3) of the ICCPR in relation to articles 3 (right to equal enjoyment of rights), 7 (right to be free from inhuman and degrading treatment) and 17 (right to privacy).⁸⁷

2.3.2 Endangering the woman's mental and physical health ground

Article 14(2)(c) of the African Women's Protocol obligates ratifying states to take measures '...where the continued pregnancy endangers the mental and physical health of the mother.' This is aligned with WHO definition of health 'as a state of complete physical, mental and social well-being, and not merely the absence of disease or infirmity.'⁸⁸ Article 16(1) of the African Charter provides that 'every individual shall have the right to enjoy the best attainable state of physical and mental health.' This has been affirmed by the African Commission in *Purohit and Another v The Gambia*⁸⁹ when it stated that:⁹⁰

Enjoyment of human right to health as it is widely known is vital to all aspects of a person's life and well-being, and is crucial to the realization of all the other fundamental human rights and freedoms. This right includes the right to health facilities, access to goods and services to be guaranteed to all without any discrimination of any kind.

In many African countries abortion is allowed when a woman's mental or the physical health is threatened. The Protocol would thus seem to have a narrower construction of the right than what is provided in member states. Ngwena has asserted that the ground is flawed and can only be 'enabling' if the mental and physical health grounds are interpreted separately.⁹¹ The ground of mental and physical health highlights the continuous barriers that women face in the medicalization of abortion scheme. This requires the certification by qualified health personnel before a woman can become eligible. This assumes that doctors are accessible to women and thus the right becomes redundant. Under Zambian law, three medical practitioners should agree unanimously making it a complicated procedure.⁹²

LC v Peru,⁹³ concerns a 13 year old sexually abused girl who became pregnant attempted suicide. Though she survived, she suffered serious injuries that a surgery was needed. However, upon discovering the pregnancy, the doctors refused to perform the surgery even though she requested for it according to Peruvian law which allows abortion on the grounds of

⁸⁷ n 86 above, para 9.4.

⁸⁸ Preamble of the WHO 'Constitution of the World Health Organisation' (entered into force on 7 April 1948)100.

⁸⁹ *Purohit and Another v The Gambia* (2003) AHRLR 96 (ACHPR).

⁹⁰ n 89 above, para 80.

⁹¹ Ngwena (n 24 above) 848.

⁹² Art 4 of the Termination of Pregnancy Act of Zambia (1972),

⁹³ *LC* case (n 84 above).

risk to the woman's life or to prevent serious harm to her health. She later miscarried and the spinal surgery was performed, three months after it was to be done. This led to her paralysis from the neck down.⁹⁴ In *LC*, the CEDAW Committee found violations of articles 1 and 12 of the Convention. In reaching this decision, the Committee noted that Peru failed to 'establish an appropriate legal framework that allows women to exercise their right.'⁹⁵

A similar case was *KL v Peru*,⁹⁶ in which a 17 year old Peruvian girl got pregnant in 2001 with an anencephalic foetus. She was accordingly advised by the gynaecologist to terminate the pregnancy due to the foetal abnormality, a continuation of which will be risky for her life. When the victim requested through her mother, since she was underage, for authorization from the hospital director, she was informed that termination could not be carried out as to do so would be unlawful. An assessment carried out concluded that the continuation of the pregnancy will lead to distress and emotional instability for KL. Regardless, she was then forced to carry her pregnancy to term and then she gave birth to an anencephalic baby girl in 2002, who survived for four days, during which KL had to breastfeed her. She then fell into a state of deep depression.⁹⁷ A communication was then filed to the HRC, in which the victim alleged a violation of article 2 of the ICCPR since the state did not comply with its obligation to ensure the exercise of the right to a therapeutic abortion. She further alleged discrimination on the grounds of her sex and age.⁹⁸ The Committee found the state of Peru to be in violation of articles 2, 7, 17 and 24 of the Covenant in its failure to ensure a timely enjoyment of the right to abortion available to the victim that led to severe depression suffered.⁹⁹

2.3.3 Endangering the woman's life ground

Abortion to save the woman's life has been historically recognised in all African states. The right to life is guaranteed in both the African Charter and the African Women's Protocol.¹⁰⁰ There is 'no law that precludes abortion undertaken in the honest belief that it is necessary to save a woman's life.'¹⁰¹ For instance, in Angola there is no express exception to the general prohibition of abortion, but the general criminal principle of necessity permits abortion on the ground of

⁹⁴ n 84 above, paras 2.1-2.10.

⁹⁵ n 84 above, para 7.12.

⁹⁶ *KL* case (n 17 above).

⁹⁷ n 17 above, paras 2.2, 2.4 & 2.5.

⁹⁸ n 17 above, paras 3.1 & 3.2.

⁹⁹ n 17, para 6.6.

¹⁰⁰ See art 4 of the African Charter & art 4 of the African Women's Protocol.

¹⁰¹ Cook & Dickens (n 73 above) 569.

saving the life of the woman.¹⁰² A mere risk will suffice which therefore enables women to access abortion. However, it will be disabling if a diagnosis looks at imminent danger. This has been further emphasised in article 4 (j) of the Protocol with the non-execution of pregnant women. The HRC in its General Comment No 6 requires state parties to take positive measures to ensure the right to life, particularly measures to increase life expectancy.¹⁰³

2.3.4 Endangering foetus' life ground

The Protocol provides for the ground of danger to the life of the foetus. This ground is hardly useful to many African women in light of the high maternal rate in Africa. This is premised on the fact that a medical abortion on this ground requires antenatal care (ANC) which is not accessible to majority of women. A study reveals that 69 per cent of pregnant women in sub-Saharan Africa have at least one ANC visit.¹⁰⁴ This is particularly true for rural women where studies have shown that only about 48 per cent have access to three or more ANC visits compare to 80 per cent of rich women with the same level of access. The reasons for this include financial barriers in terms of travel costs and culture.¹⁰⁵ The CEDAW Committee in its concluding observations regarding Togo 'noted the lack of access to prenatal and post-natal care particularly those in the rural areas.'¹⁰⁶ It therefore, urged the government to take 'appropriate measures to improve women's access to health care and health-related services and information, including access for women who live in rural areas.'¹⁰⁷

In addition, the exclusion of 'foetal life' from 'danger to the health of the foetus' serves as a limitation on women's right to abortion. The Protocol does not have a limitation clause; hence any limitation will be subjected to article 27(2) of the African Charter. This has been interpreted by the African Commission to 'be strictly proportionate and absolutely necessary for the advantages which are to be obtained.'¹⁰⁸ This provision further creates a contentious situation in which a foetal claim to life against the right to abortion can arise. In *Christian Lawyers Association of South Africa v Minister of Health*,¹⁰⁹ the Court held that a foetus is not protected by the right to life provided in Section 11 of the Bill of Rights (BOR). The court reasoned that:

¹⁰² UNPD *Abortion policies: A global review* <http://www.un.org/esa/population/publications/abortion/index.htm> (accessed 10 August 2012) 27.

¹⁰³ HRC 'General Comment No 6 on right to life' (1982) para 5.

¹⁰⁴ O Lincetto & et al 'Antenatal Care' in J Lawn & K Kerber 'Opportunities for Africa's newborns: Practical data, policy and programmatic support for newborn care in Africa' (2006) 56.

¹⁰⁵ As above.

¹⁰⁶ CEDAW Committee 'Concluding observations regarding Togo' CEDAW/C/TGO/CO/5 (2006) para 28.

¹⁰⁷ n 106 above, para 29.

¹⁰⁸ *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) para 69.

¹⁰⁹ *Christian Lawyers Association of South Africa v Minister of Health* 1998 11 BCLR 1434 (T).

1) that there was no express protection as such in the text of the Constitution, and this omission was dispositive; and 2) a foetus could not be recognized as a child because the constitutional definition of “child” included only young people who had been born.

Fetal claim’s right to life must not be read into women’s right to life. It would seem that article 4(j) of the Protocol strengthens this argument. The above reasoning of the South African court was confirmed by the European Commission of Human Rights (EcomHR) in the case of *Paton v United Kingdom*,¹¹⁰ in holding that the right to life does not include foetuses. This case involved an application by the husband who argued that his pregnant wife should be prevented from performing abortion based on the foetus’ right to life as provided under article 2 of the European Convention on Human Rights. The European Commission dismissed the complaint and asserted that the foetus’ potential right to life does not outweigh the interests of the mother.¹¹¹

It should be noted that neither article 4(j) of the African Women’s Protocol nor article 4 of the African Charter explicitly provides a foetus’ right to life. However, article 4(j) of the Protocol urges countries ‘where the death penalty exists, not to carry out death sentence on pregnant or nursing mother.’ Pro-life activists may be able to rely on this provision to argue for the protection of the right to life of the unborn. However, the Protocol’s drafting history did not confirm that the drafters’ intention was to confirm that the foetal’s life started at conception or whether it was more important than the woman’s life or health. The Special Rapporteur on Violence Against Women, Its Causes and Consequences (SRVAW) during her mission to Zambia noted that the expression:¹¹²

life begins at conception” in article 40 of the draft Constitution ... may limit women’s access to reproductive health services including access to safe abortion services even when their lives were at risk.

2.4 Abortion laws and practice in Africa

Abortion laws in Africa are varied. Each country has its own statutory or common law regarding abortion rights. Some laws are hangovers from colonial-era statutes, and others have been enacted in the last forty years. This section aims to examine the current abortion laws in ratifying states and their compatibility with the Protocol. Eleven sample countries namely Cape Verde, The Gambia, Ghana, Libya, Mozambique, Rwanda, South Africa, Togo, Tunisia,¹¹³ Uganda, and Zambia are chosen as the author’s choice based on the different geographical areas in sub-

¹¹⁰ *Paton v United Kingdom (X v United Kingdom)* (1981) 3 EHRR 48.

¹¹¹ n 110 above, paras 7,9, 19 & 23

¹¹² Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo Addendum ‘Mission to Zambia’ A/HRC/17/26/Add.4 (2 May 2011) para 52.

¹¹³ Tunisia has not ratified the Protocol, but it is chosen based on been the only Muslim country with radical abortion laws.

Saharan Africa; and categorisation of their abortion laws into highly restrictive or liberal laws. Recent developments relating to abortion are also observed. Against the backdrop of the abortion grounds provided in the Protocol, discrepancies between the national abortion laws and the Protocol are discussed below. Of the countries discussed in this section, The Gambia, Libya and Uganda are categorised as having highly restrictive abortion laws; while Ghana, Mozambique, Rwanda and Togo have liberal abortion laws; and Cape Verde, South Africa, Tunisia and Zambia have radical abortion laws.

2.4.1 Highly restrictive abortion laws

The Gambia, Libya and Uganda fall into the category of countries with highly restrictive abortion laws. In The Gambia, abortion is limited to the ground of saving the life of the woman based on the principle of necessity. Abortion laws are enshrined in the Criminal Code enacted in 1934. It follows the precedent set in the English case of *Rex v Bourne*¹¹⁴ as its legal system is based on English Common Law.¹¹⁵ In *Bourne*, it was held that the abortion performed by a physician on a 15 year old girl who had been rape and might become 'a physical and mental wreck' was lawful.¹¹⁶ Illegal abortion is a common practice in The Gambia.¹¹⁷ Unlawful abortion is subject to 7 years imprisonment for the woman.¹¹⁸ The Gambia has signed and ratified the Protocol, but it does not adhere to its international obligations under article 14(2)(c) of the Protocol, although, it has codified the Protocol in the 2010 Women's Act. HRC has noted that The Gambia's restrictive laws that criminalise abortion even in the case of rape, is contrary to the right to life under article 6 of the ICCPR.¹¹⁹

In 1953, Libya enacted the Penal Code which made abortion illegal. A woman who performs her own abortion or consents to it and the person who performs it with her consent is subject to at least six months imprisonment.¹²⁰ However, abortion may be performed to save the life of the woman according to a Health Law of 1973 which provides that a specialist in gynaecology may perform an abortion if the specialist believes that the abortion is necessary to safeguard the pregnant woman's life. The physician must obtain a second opinion from a fellow physician. This

¹¹⁴ *R v Bourne*, 1 King's Bench 687 (Central Criminal Court, London 1938).

¹¹⁵ Sec 7(d) of the 1997 Constitution of The Gambia.

¹¹⁶ As above. See Cook (n 76 above) 563.

¹¹⁷ UNPD (n 102 above) 20.

¹¹⁸ See secs 140-142 & 198-199 of the Criminal Code.

¹¹⁹ HRC 'Concluding observations on The Gambia', CCPR/CO/75/GMB (2004) para 17.

¹²⁰ UNPD (n 102 above) 107.

ground is further reinforced in the 1986 law concerning medical responsibility which allows abortion to be performed in saving the mother's life.¹²¹

On account of article 22 of the Constitution of Uganda no person has the right to terminate the life of unborn child except as may be authorised by the law. Nonetheless, under other provisions of the Penal Code an abortion may be performed to save the life of a pregnant woman, and the preservation of the physical health or the mental health.¹²² Section 217 of the Code provides that a person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon an unborn child for the preservation of the mother's life.¹²³ Notwithstanding, the statutory requirement that, the mother's life must be in danger to permit abortion, practise has shown that health care service providers require a certificate from three doctors even though the law does not specifically state this. This makes legal abortions very rare given the stringent conditions, demanding process of obtaining approval.¹²⁴ The procedure is performed in secrecy and often under dangerous and unsafe conditions. Studies have shown that more than 40 per cent of the births in Uganda are unplanned. Reports indicate that there are 297,000 abortions every year in Uganda. Out of these 21,000 women are admitted each year due to complications that arise as a result of unsafe abortions which are done in backstreet clinics. 2,600 of these women admitted eventually die due to complications caused by unsafe abortion.¹²⁵ In 2010, the CEDAW Committee noted with concern the high maternal mortality rates 'with clandestine abortions being a major cause.'¹²⁶

A common feature of countries with highly restrictive abortion laws is their reliance on their national laws not to comply with international obligations observed from their reservations under article 14 (2)(c) of the Protocol.

2.4.2 Liberal abortion laws

Ghana, Mozambique, Rwanda and Togo belong to the category of countries with liberal abortion laws. The legislative framework on abortion in Togo is unique. The country inherited the 1810 French Penal Code that generally prohibited abortion. This Code was repealed in 1981 with the new Criminal Code which does not mention abortion at all. Thus where there is no law, there is

¹²¹ As above.

¹²² UNPD (n 102 above) 149.

¹²³ This is based on the *Bourne* precedent.

¹²⁴ UNDP (n 102 above)148.

¹²⁵ S Singh et al 'Unintended pregnancy and induced abortion in Uganda: Causes and consequences' (2006)10.

¹²⁶ CEDAW Committee 'Concluding Observations on Uganda', UN Doc CEDAW/C/UGA/CO/7 (2010) para 35.

no punishment. This will mean that the omission of abortion from the Penal Code means decriminalisation.¹²⁷ Abortion is performed through the third month of pregnancy when the woman's life or health would be endangered by continuation of the pregnancy, as well as when there is evidence of foetal impairment or when the pregnancy results from rape or incest. However, the ambiguous nature of the law prevents women from accessing abortion services as the decision has to be taken by a physician leading to unsafe abortions taking place.

Mozambique in 1886 inherited from colonial Portuguese the Penal Code which outlawed abortion.¹²⁸ The Code provides for up to eight years of imprisonment of persons who conduct abortion, even though prosecution hardly occurs.¹²⁹ In 1981, a policy of the former Minister of Health, Dr. Mocumbi allows abortion to be provided in cases where the woman's health is at risk and where contraceptives have failed. It has been observed that the ground of contraceptive failure might encompass the ground of upon request as it is condoned by the state.¹³⁰ This is to stem Cook's argument that 'gender inequality results from the fact that women's health is affected by contraceptive failure.'¹³¹ The pronouncement resulted to the provision of safe abortion in central hospitals in Mozambique. Nonetheless, many Mozambicans cannot access abortion services readily because of the exuberant fee charged.¹³² In addition, since abortion still remains illegal according to the Penal Code, the Ministry of Health cannot legally inform women openly about the safe services available.¹³³ In giving spirit to article 43 of the Constitution of Mozambique which enjoins the state to harmonise its laws with the African Charter, a gradual process of liberalisation of the abortion laws is ongoing.¹³⁴ A bill was introduced into Mozambique's legislature in early 2012, intended to legalize abortions on demand in the first 12 weeks of pregnancy.¹³⁵

¹²⁷ UNPD (n 102 above) 131.

¹²⁸ See article 378 of the Penal Code.

¹²⁹ UNDP (n 102 above) 149.

¹³⁰ MB Utsa et al 'Who is excluded when abortion access is restricted to twelve weeks? Evidence from Mozambique' (2008) 16 (31) *Reproductive Health Matters* 28.

¹³¹ RJ Cook *International Human Rights and Women's Reproductive Health*, 261 as cited in Eriksson (n 3 above) 309.

¹³² V Agadjanian 'Quasi-legal abortion services in a sub-Saharan Setting: Users' profile and motivations' <http://www.gutmacher.org/pubs/journals/2411198.pdf> (accessed 20 August 2012) 111.

¹³³ F Machungo 'Unsafe abortion in Maputo' (2004) *Other Voices*, No 8 Bulletin supplement.

¹³⁴ See art 43 of the Constitution of Mozambique, 1990.

¹³⁵ Interview with Ms Maria Arthur, Communication Coordinator, Women and Law in Southern Africa (WLSA) Mozambique, in Maputo, Mozambique (19 October 2012).

These efforts are also reflected in Rwanda where abortion is generally prohibited with few exceptions; danger to the life, physical and mental health of the woman.¹³⁶ Women who performed abortion outside these exceptions are subject to an imprisonment of three years and a fine of up to 200,000 Rwanda francs.¹³⁷ The illegality of abortion results to the occurrence of more than 60,000 abortions every year.¹³⁸ In 2009, the CEDAW Committee was concerned ‘that illegal and unsafe abortions ... are a punishable offence under Rwandan law.’ It further recommended the state to review its laws relating to abortion to make it accessible to women.¹³⁹ In responding to this concern, the Penal Code was reviewed in which article 165 of the Draft Penal Code stipulates that there is no criminal liability for either the woman or the medical doctor when conditions such as:

when a woman is pregnant as a result of rape, **forced married**, incest in the second degree and when the condition of pregnancy jeopardizes the health of the unborn baby or that of the pregnant wife.

This goes beyond the grounds in the Protocol in providing for abortion on the ground of forced marriage which is one of the most prevalent problems facing women in Africa. The new Penal Code has already been passed by the members of the Chamber of Deputies with the majority voting for the abortion provision.¹⁴⁰

2.4.3 Radical abortion laws

Although there are countries that have laws, which can be interpreted purposively to support abortion on request or on socio-economic grounds, South Africa, Cape Verde, Tunisia and Zambia have the most radical abortion laws in Africa. This part of the study is intended to present an overview of few countries that have made radical legal reforms to ensure effective realisation of abortion rights.

South Africa has the most radical abortion reform in Africa with the enactment of the Choice on Termination of Pregnancy Act (CPTA)¹⁴¹ in 1996, which liberalised abortion laws. This was a response to prevent the maternal deaths of South African women.¹⁴² The move was a complete departure from the Sterilization Act of 1975 which had stringent grounds excluding socio-

¹³⁶ Minister in the Prime Minister’s Office in charge of Family and Gender Promotion ‘Rwanda: Single report equal to fourth, fifth and sixth reports on the implementation of the Convention on the Elimination of all Forms of Discrimination against Women: 1994-2005’ (2007) 58.

¹³⁷ P Basinga et al ‘Abortion Incidence and postabortion care in Rwanda’ (2012) 1(1) *Studies in Family Planning* 11.
¹³⁸ n 137 above, 17.

¹³⁹ CEDAW Committee ‘Concluding observations on Rwanda,’ CEDAW/C/RWA/CO/6 (2009) paras 35 & 36.

¹⁴⁰ As above.

¹⁴¹ Act 92 of 1996

¹⁴² RE Mhlanga ‘Abortion: developments and impact in South Africa’ (2003) 67 *British Medical Bulletin* 115.

economic reasons and mere request and further compounded by a long administrative procedure.¹⁴³

The Act provides for all grounds based on three gestational periods. First, abortion on request is allowed until the twelfth week (first trimester). During this period, in addition to a doctor, a midwife with the requisite training can also conduct the abortion. After the twelfth week, a woman can obtain abortion on social or economic grounds. Other conditions include: pregnancy being the result of rape, severe foetal abnormality, and severe maternal physical or mental disease. After the twentieth week, the pregnancy can be terminated if a medical practitioner opines that continuance will be a risk to the health of the woman or foetus.¹⁴⁴ This radical approach follows the judicial trend in the American case of *Roe v Wade*¹⁴⁵ where it was held that the state's two legitimate interest for regulating abortion are: protecting prenatal life and protecting the mother's health. The SC went further to suggest a balancing act as it held that states interest becomes stronger as the pregnancy progresses.¹⁴⁶

One of the most striking features of the Act is that it is applicable to all women regardless of age. Minors are not required to get consent of their parents or guardians even though they are counselled to notify them.¹⁴⁷ If the girl does not choose to inform the guardian or parent, access to termination services are not to be denied.¹⁴⁸ It must be noted that consent of the spouse is not required. Abortion in South Africa has been gradually 'de-stigmatised.' Ngwena has noted that liberation of the abortion laws was on the premise 'that the Constitution recognises the right to make decisions concerning reproduction as part of the right to bodily and psychological integrity.'¹⁴⁹ This is emphasised in the Preamble of the Act which stipulates that:¹⁵⁰

the decision to have children is fundamental to women's physical, psychological and social health and that universal access to reproductive health care services includes family planning and contraception, termination of pregnancy, as well as sexuality education and counselling programmes and services.

¹⁴³ Ngwena (n 32 above) 713; See C Ngwena 'The history and transformation of abortion law in South Africa' (1998) 30(3) *Acta Academica* 32-68.

¹⁴⁴ See sec 2(1)(a)-(c) of the CTPA.

¹⁴⁵ *Roe v Wade* 410 USA 113 (1973).

¹⁴⁶ *Roe* case, section XI

¹⁴⁷ See *Christian Lawyers case* (n 109 above).

¹⁴⁸ See sec 5(3) of the CTPA.

¹⁴⁹ Ngwena (n 32 above) 715.

¹⁵⁰ This affirms art 12 of the South African Bill of Rights.

Nevertheless, it is important to observe that illegal abortion these takes place outside the ambit of the Act. The reason for which might point to a lack of knowledge of the Act and abortion services offered thereof.¹⁵¹

Secondly, Cape Verde enacted a liberal abortion law in 1986 which allows for abortion on request before the twelfth week of pregnancy. This should be based on the woman's consent and should be conducted in a hospital. After the twelfth week, abortion can be performed based on grounds of danger to physical and mental health and threat to the foetus¹⁵². Thus Cape Verde compared to other African countries in the region, have more quality health services with comprehensive coverage. Services are offered free of charge at government services.¹⁵³ A case in point regarding abortion on request is *Baby Boy*.¹⁵⁴ This case involved the prosecution of an American doctor on manslaughter after performing an abortion based on a request of the teenage girl and her mother. A petition was subsequently submitted to the Inter-American Commission on behalf of the aborted foetus, alleging violation of the right to life in the American Declaration of Rights and Duties of Man (American Declaration).¹⁵⁵ The petition was rejected by the Commission based on the reasoning that the absolute protection of the right to life will be contrary to the death penalty laws of many member states.¹⁵⁶

Thirdly, Tunisia is the only Muslim country in Africa which has liberalised its abortion laws. A new Penal Code came into force in 1973 which allows for abortion on request during the first three months of pregnancy. In addition, women do not need to seek spousal consent or be married to obtain abortion. Tunisia's abortion law is based on a generous interpretation of Islamic beliefs.¹⁵⁷ After this period, abortion can be performed based on grounds of risk to mental or physical health of the woman or on ground of risk to the foetus. In order to ensure access to abortion services, the government of Tunisia subsidizes it resulting to free access to abortion for those that are entitled to free health care.¹⁵⁸ With such a functioning abortion services, unsafe abortion is at its minimal.¹⁵⁹

¹⁵¹ P Tucker 'MPOA Scorecard: An assessment of Southern African Development Community responses and reporting on sexual and reproductive health and rights' (2012) 24.

¹⁵² UNPD (n 102 above) 87.

¹⁵³ As above.

¹⁵⁴ *Baby Boy v United States of America*, Inter-American Commission of Human Rights, IAmComm of HR (6 March 1981), OEA/Ser I/V/II 54 Doc 9 Rev 1.

¹⁵⁵ Adopted by the Ninth International Conference of American States, Bogotá, Colombia, 1948)

¹⁵⁶ *Baby Boy* case, para 18.

¹⁵⁷ L Hessini 'Abortion and Islam: Policies and practice in the Middle East and North Africa' (2007) 15 *Reproductive Health Matters* 79.

¹⁵⁸ As above.

¹⁵⁹ See J Blum et al 'The medical abortion experience of married and unmarried women in Tunis, Tunisia' (2004) 69 *Contraception* 64.

Finally, Zambia enacted the Termination of Pregnancy Act in 1972, providing for abortions to be carried out in cases when there is a danger to the woman's health or the foetus.¹⁶⁰ Article 3(b) of the Termination of Pregnancy Act further allows for consideration to be given to the woman's 'actual or reasonably foreseeable environment or of her age,' suggesting that abortions may be carried out for socioeconomic reasons.¹⁶¹ Despite the fact that this is a very progressive abortion reform, rights in the Act remain illusory for many Zambian women. In 2011, the CEDAW Committee was:¹⁶²

especially concerned about the high rates of maternal mortality and morbidity, related in particular to maternal deaths and disabilities resulting from unsafe abortions, in spite of abortion laws that do not prohibit women from seeking safe abortions at health centres.

It is estimated that as nearly 85 times as many women were treated for complications resulting from unsafe abortion as the number who underwent legal abortions in five major Zambian hospitals. It is also the cause of 30 per cent of maternal deaths.¹⁶³ This is due to the exceptions provided such as freedom of conscience, and the requirement for the certification of three medical practitioners.¹⁶⁴ Ngwena observed that this is an 'unrealistic requirement in a country where in common with other developing nations, the doctor-to-patient-ratio is unfavourable.'¹⁶⁵ This was reiterated by the HRC when it raised concerns with the stringent requirements which 'constitute a significant obstacle for women wishing to undergo legal and therefore safe abortion.'¹⁶⁶ This restricts the abortion law in effect.¹⁶⁷

Assessing the impact of radical abortion laws on access to abortion services for women

An important element to making abortion safe is by making abortion legal.¹⁶⁸ The question in relation to radical abortion laws after their passage is, whether women have access to the abortion services? In other words, what is the legal impact of these radical laws? According to a study commissioned by the Department of Health, since the coming into force of the Act in South

¹⁶⁰ Art 3(1)(a) & (b) of the Termination of Pregnancy Act of Zambia (1972).

¹⁶¹ UNPD (n 102 above) 187.

¹⁶² CEDAW Committee 'Concluding observations on Zambia, C/ZMB/CO/5-6 (2011) para 33.

¹⁶³ Guttmacher Institute 'Unsafe abortion in Zambia' (2009) <http://www.guttmacher.org/pubs/IB-Unsafe-Abortion-Zambia.pdf> (accessed 15 September 2012) 1.

¹⁶⁴ See S Schuster 'Women's experience of the abortion law in Cameroon: "What really matters" (2010) 18(35) *Reproductive Health and Rights* 138.

¹⁶⁵ Ngwena (n 32 above) 714.

¹⁶⁶ HRC 'Concluding observations on Zambia' CCPR/C/ZMB/CO/3 (2007) para 18.

¹⁶⁷ See M Berer 'A critical appraisal of laws on second trimester abortion' (2008) 16(31 supplement) *Reproductive Health and Rights* 8.

¹⁶⁸ M Berer 'Making abortions safe: A matter of good public health policy and practice' (2002) 10(19) *Reproductive Health and Rights* 33.

Africa, it is estimated that abortion related deaths between 1994 and 2001 has dropped to 9 per cent, though unsafe abortion still happens.¹⁶⁹ It is important to acknowledge that statistics have shown the linkage between liberal abortion laws and low maternal mortality, for instance, Cape Verde has the lowest maternal mortality rate in sub-Saharan Africa.¹⁷⁰ However, liberalise abortion laws may not always reflect the maternal mortality rates in these countries.

The precise impact of radical abortion laws such as those found in South Africa, Cape Verde and Tunisia does not always translate into access to safe abortion services. For example, in accessing abortion services, single women face barriers in Tunisia.¹⁷¹ The majority of women in these countries still fall victims to unsafe and illegal abortion. The case of Zambian women as illustrated above is an example. This situation points to the need to have more concerted efforts in the provision of abortion services as well as education of the public and service providers.¹⁷² Abortion reforms are necessary for ensuring that abortion becomes safe and accessible, even though as illustrated it is not enough in itself.

Beyond reforming the law, resources are needed to ensure that abortion is included as part of a comprehensive health care services. The Guttmacher Institute noted that:¹⁷³

a liberal abortion law does not ensure the safety of abortions. Service guidelines must be written and disseminated, providers must be trained and governments must be committed to ensuring that safe abortions are available within the bounds of the law.

In light of the fact that these countries have radical abortion laws, the legal question here is, are these countries required to domesticate article 14(2)(c) of the African Women's Protocol in their local laws given what they already have? The answer lies in article 31 of the Protocol which states that:

None of the provisions of the present Protocol shall affect more favourable provisions for the realization of the rights of women contained in the national legislation of States Parties or in any other regional, continental or international conventions, treaties or agreements applicable in these States Parties.

Therefore for states such as South Africa, Cape Verde, Tunisia and Zambia which have more progressive laws than those envisioned in article 14(2) (c) of the Protocol will not be required to downgrade their laws to make it in conformity with the relevant provision. South Africa's declarative interpretation on article 31 of the Protocol strengthened the state's argument that it

¹⁶⁹ Mhlanga (n 142 above) 123.

¹⁷⁰ WHO (n 9 above) 19.

¹⁷¹ CEDAW Committee 'General recommendation on Tunisia,' CEDAW/ C/TUN/CO/6 (2010) para 50.

¹⁷² Tucker (n 151 above) 24.

¹⁷³ Guttmacher Institute 'Facts on Abortion in Africa' Briefing Paper (2012) http://www.guttmacher.org/pubs/IB_AWW-Africa.pdf (accessed 2 June 2012) 2.

has more generous provisions in its Bill of Rights than the Protocol. This will imply that the Protocol would not obligate states with more generous laws than the Protocol to conform to it.

2.5 Conclusion

This chapter has focused on the advocacy and the process for the African Women's Protocol and the inclusion of abortion rights. It gives a general overview of the Protocol and the rationale behind the drafting and its consequent adoption. These are marked by two notable features. The inclusion of the abortion rights unsettled the public-private divide. It also highlights how implementation calls for scrutiny of violations whether they are perpetrated in public or private.

The medical abortion that is authorised by article 14(2)(c) of the African Women's Protocol has also been discussed. While acceptance of the claim that the failure to ensure abortion rights is a violation of human rights signals a major departure in the human rights thinking or discourse in Africa, important caveats should be noted. The abortion grounds which are critically analysed are inadequate as they cannot fully enable women to enjoy their rights as guaranteed under the Protocol. It sees women 'as victims of circumstances.'¹⁷⁴ Women are unable and do not have the freedom to make their own choices in relation to abortion as the final decisions lies in the hands of health care providers who are empowered by the abortions laws in the various African countries.

In addition, the abortion grounds provided in the Protocol are vague and unclear. In majority of African countries, there are no clear guidelines and standards in governing grounds of rape, incest and sexual assault. However, in Ethiopia, which reformed its abortion laws in 2004, implementing guidelines provides that in cases of rape or incest, the only requirement is a statement from the woman to prove she was a victim of abuse.¹⁷⁵ This is different in many countries which have burdensome authorisation processes and inextricably ties access to abortion services with law enforcement.

The appraisal of the legislative framework governing abortion laws in majority of the countries with highly restrictive abortion laws show that 'the more disconcerting fact is the failure by post-colonial Africa to overhaul the legacy of restrictive law on abortion.'¹⁷⁶ It shows discrepancies between national laws and the Protocol. The African Commission has held that to ratify the

¹⁷⁴ Berer (n 168 above) 34.

¹⁷⁵ C Ngwena 'State obligations to implement African abortion laws: Employing human rights in a changing legal landscape' (2012) 119 *International Journal of Gynecology and Obstetrics* 199.

¹⁷⁶ Ngwena (n 25 above) 348.

Charter without bringing domestic laws in conformity defeats the object and purpose of the Charter.¹⁷⁷ The same reasoning applies with non-complying states, which are susceptible for constitutional challenges based on Protocol on their limited grounds of abortion.

¹⁷⁷ *Lawyers for Human Rights v Swaziland* (2005) AHRLR 66 (ACHPR 2005) para 51

CHAPTER 3: JUSTIFICATION FOR EXPANSION OF ARTICLE 14(2)(C) OF THE AFRICAN WOMEN'S PROTOCOL TO INCLUDE SOCIO-ECONOMIC REASONS AND UPON REQUEST

3.1 Introduction

The abortion grounds of 'sexual assault, rape, incest and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus' under article 14(2)(c) of the African Women's Protocol as discussed in chapter 2 are not sufficient from the perspective of women. The Protocol gives doctors the power to be the arbiters and it limits women's entitlement to decide. It is nonetheless important to acknowledge that the Protocol is the first international human rights instrument to provide for a right to abortion.¹⁷⁸ Despite the innovative stance of the Protocol, the non-inclusion of the grounds of socio-economic reasons and on request limits the rights of women. As Banda rightly argued, the African Women's Protocol is a product of 'compromise' as aptly demonstrated in the exclusion of these two grounds. The compromise of the Protocol was to satisfy those that support the stance that 'motherhood should be forced on women.'¹⁷⁹ Cape Verde, South African, Tunisia and Zambia are the only African countries that give rights to women for abortion on all grounds without limitation including socio-economic reasons and on demand.¹⁸⁰ Other countries as captured in the chapter 2 of this study have differing abortion laws which either partly or completely prohibit abortion.

The author will attempt in the following paragraphs, to provide for a legal basis for an expansion of the abortion grounds. This debate is largely premised on case law analysis and statutes that explicitly deals with the right to abortion.

3.2 Incidence of unsafe abortion and its consequences

Unsafe abortion is one of the most neglected health issues and the leading underlying barrier to women's sexual and reproductive health. An estimated 6.1 million of the global total of 22 million women going through unsafe abortion every year occur in Africa.¹⁸¹ One of the major consequences of unsafe abortion is maternal death. Maternal deaths are estimated at 284,000

¹⁷⁸ See art 12(2) of the African Women's Protocol.

¹⁷⁹ M Berer 'The Cairo "Compromise" on Abortion and Its Consequences for Making Abortion Safe and Legal' in L Reichenbach & MJ Roseman, *Reproductive Health and Human Rights: The Way Forward* (2009)155.

¹⁸⁰ Guttmacher Institute (n 173 above) 2.

¹⁸¹ WHO et al (n 8 above) 18.

deaths in developing countries which adds up to 99 per cent of the global maternal deaths estimates in which sub-Saharan Africa accounts for the majority with 162, 000 deaths every year. At the national level, for example, Nigeria has 40,000 maternal deaths.¹⁸² In Kenya in 2010, findings show that 35 per cent of mortalities are attributable to unsafe abortion.¹⁸³ Mortality due to unsafe abortion is approximately 13 per cent of all maternal deaths. Globally, WHO estimates that 68,000 women die every year as a result of unsafe abortion. In sub-Saharan Africa, this translate to 80 deaths per 100, 000 live births.¹⁸⁴

A study conducted in Malawi, Uganda and Zambia illustrates how abortion is a public health problem.¹⁸⁵ The study indicated that more than 82 per cent of patients that have gone through unsafe abortion in Malawi suffer from vaginal bleeding with symptoms including abdominal pain and fever.¹⁸⁶ Apart from death, it results to infertility and other short-term sickness, and disability.¹⁸⁷ For many women that are hospitalised, there are many that do not turn to medical care but have had unsafe abortion.¹⁸⁸ The study also identifies poor and unmarried women as the majority of unsafe abortion patients hospitalised. Young women aged 15 and 25 make up for 60 per cent of all unsafe abortions in the region.¹⁸⁹ The lack of control over sexual lives for many married or unmarried women prevents them from freely choosing and determining when to become pregnant.¹⁹⁰

3.3 Socio-economic reasons and abortion

The African Women's Protocol never recognises that for many poor women, 'unsafe abortion is a form of economic discrimination.' This is based on the premise that women with money or who come from rich families can afford to pay for safe abortions.¹⁹¹ Thus the lack of economic resources prevents majority of women from accessing abortion services.¹⁹² Findings from Uganda found that 76.5 per cent of patients seek abortion for lack of financial resources.¹⁹³ The

¹⁸² n 8 above, 22.

¹⁸³ CRR 'In Harm's Way: The Impact of Kenya's Restrictive Abortion Law' (2010).

¹⁸⁴ See WHO et al (n 9 above) 28.

¹⁸⁵ S Kinoti et al 'Monograph on Complications of Unsafe Abortion in Africa' (1995) 85.

¹⁸⁶ n 185 above, 52.

¹⁸⁷ WHO et al (n 8 above) 27 & 31.

¹⁸⁸ n 8 above, 14.

¹⁸⁹ Kinoti et al (n 185 above) 80; See J Kinaro et al 'Unsafe abortion and abortion care in Khartoum, Sudan' (2011) 17(34) *Reproductive Health Matters* 73.

¹⁹⁰ IPPF 'Death and Denial: Unsafe Abortions and Poverty' (2006) <http://ippf.org/resources/publications/death-and-denial-unsafe-abortion-and-poverty> (accessed 1 September 2012) 4.

¹⁹¹ Berer (n 179 above) 155.

¹⁹² OHCHR 'Human Rights and Poverty: A Conceptual Framework' (2004) 8.

¹⁹³ Kinoti et al (n 185 above) 50 & 61.

most common reason given by 21 per cent of women for seeking an abortion in Ghana is inadequate financial means to take care of a child.¹⁹⁴ The socio-economic circumstances of majority of African women are troubling. The next section gives a general overview of women's economic status and explores linkages between poverty and abortion.

3.3.1 Feminisation of poverty in Africa

This section of the study argues that the poor economic circumstances, which is as a result of feminisation of poverty in Africa contributes immensely to unsafe abortions leading to mortalities. Poverty is one of the major development issues faced in Africa. Poverty is defined by the United Nations as 'a denial of choices and opportunities, a violation of human dignity. It means lack of basic capacity to participate effectively in society.'¹⁹⁵ According to the CESCR, poverty is defined as:¹⁹⁶

sustained or chronic deprivation of resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights.

Sen simply defines poverty 'as the failure of basic capabilities to reach certain minimally acceptable levels.' His capability approach deals with 'how well a person can do or be the things she has reasons to value.'¹⁹⁷ It defines poverty from the perspective of human rights as the 'absence or inadequate realisation of certain basic freedoms... Freedom here is conceived in a broad sense, to encompass both positive and negative freedoms.'¹⁹⁸

Poverty in Africa is 'feminised' as it affects women and men differently in majority of African countries.¹⁹⁹ It remains higher for women in Africa as they continue to be defined in their social role as caregivers by culture and society while men are regarded as productive element (breadwinners). This in turn constitutes a barrier to wage employment for women.²⁰⁰ For example, it has been shown that men play a more active role in economic activity than women

¹⁹⁴ Guttmacher Institute, 'Abortion in Ghana: In Brief' 2010 Series No 2 (2010) 1.

¹⁹⁵ UN Statement, June 1998: See World Summit on Social Development in Copenhagen in 1995.

¹⁹⁶ CESCR 'Poverty and the International Covenant on Economic, Social and Cultural Rights,' UN Doc E/C12/2001/10 (2001) paras 7-8.

¹⁹⁷ A Sen *In-equality Re-examined* (1992) as cited in OHCHR (n 192 above) 5 & 6.

¹⁹⁸ OHCHR (n 192 above) 10.

¹⁹⁹ See ILO 'Global wage report 2010/2011: Wage policies in times of crisis' (2010) 13.

²⁰⁰ J Kehler 'Women and Poverty: The South African Experience' <http://www.bridgew.edu/soas/jiws/fall01/kebler.pdf> (accessed 29 August 2012) 4. See World Bank 'Gender equality data and statistics' <http://datatopics.worldbank.org/gender/region/sub-saharan-africa> (accessed 10 September 2012).

in Madagascar and South Africa.²⁰¹ This is further supported by a recent study conducted by the International Labour Organisation (ILO) which has estimated that 86.5 million women were unemployed globally in 2010.

An analysis by UN Women shows that in sub-Saharan Africa there are more women living in poor households.²⁰² Thus women's work 'tends to be undervalued,' as their economic lives follow different patterns than men.²⁰³ This difference is marked especially for those living in rural areas where poverty is more concentrated. Rural poverty is three times as high as urban poverty in Ghana, Zambia, Cape Verde and Rwanda for example.²⁰⁴ Women's inadequate access to resources including 'land, capital and technology' is a major factor in the feminisation of poverty in Africa.²⁰⁵ This is supported by the Food and Agricultural Organisation (FAO) which has illustrated that the status of millions of women especially those in rural areas in their incapacity to control land and other productive resources causes food insecurity.²⁰⁶ Drawing on the statistic above, it would imply that rights such as life, dignity, liberty and security of person, health, equality and non-discrimination are all interrelated rights that are affected by poverty. From a sexual and reproductive perspective, poverty affects women's right to have children and to decide the number and spacing of children.

Linkage between unsafe abortion and poverty

Unsafe abortion is argued to be both 'a cause and consequence of poverty'.²⁰⁷ On a closer inspection, it appears that this statement is controversial. Unsafe abortion as a 'consequence' of poverty would mean that due to the poor economic circumstances of women for instance, they are not in a position to continue with the pregnancy which will not be in the interest of the unborn baby. This is the argument that this study adopts. The socio-economic circumstances of women affect their ability to take care of their families. Poverty has multiple dimensions including the

²⁰¹ ECA 'African Women's Report: Measuring Gender Inequalities in Africa - Experiences and Lessons from the African Gender and Development Index' http://www.uneca.org/eca_resources/publications/books/awr/AWR09_FIN.pdf (accessed 10 September 2012) 126.

²⁰² UN Women (n 69 above) 104.

²⁰³ AUC et al 'MDG Report 2012: Assessing Progress in Africa toward the Millennium Development Goals' (2012) http://new.uneca.org/Portals/mdgreports/2012/MDGReport2012_ENG.pdf (accessed 10 September 2012) 6.

²⁰⁴ WB 'Poverty head count ratio at rural poverty line' <http://data.worldbank.org/indicator/SI.POV.RUHC/countries> (accessed 10 September 2012).

²⁰⁵ FEMNET 'The Africa women's regional shadow report on Beijing +15: A Regional Analysis on the Status of Women 15 Years after the Adoption of the Beijing Declaration and Platform for Action' http://www.unngls.org/IMG/pdf_1272966511_196.200.26.62_Africa_NGO_Report-Beijing_15_FINAL-ENG.pdf (accessed 10 September 2012) 24.

²⁰⁶ FAO *Gender and Land Rights database* www.fao.org/gender/landrights; See FAO 'The State of Food and Agriculture: Women in Agriculture: Closing the gender gap for development' (2011).

²⁰⁷ IPPF (n 190 above) 3.

lack of capacity to enjoy human rights, lack of economic resources, poor health and access to health care and a lack of choice.²⁰⁸ Women's lack of control over resources contributes to their unequal status in society.

As shown above, there is an established link between poverty and unsafe abortion. For example, in Kenya, poverty was identified as 'a critical factor in both causing unwanted pregnancies and motivating women's decisions to terminate a pregnancy.'²⁰⁹ In short, the above statistics depicts the poor circumstances of majority of women in Africa that results to poor health and lack of choice.

3.3.2 Impact of culture and religion

Abortion is still considered a taboo in many parts of Africa based on cultural and religious values and principles. The UN SRVAW has defined culture as 'the set of shared spiritual, material and emotional features of human experience that is created and constructed within social praxis.'²¹⁰ It thus 'informs a person's moral values as well as gender patterns.'²¹¹ These beliefs are manifested in societies' portrayal of 'women as mothers and homemakers and men as breadwinners and agents in the public sphere.'²¹² While pre and extra marital sex for men is generally accepted, the same is not true for women.²¹³ Those that get pregnant outside marriage are considered promiscuous, and are stigmatised together with their families. Thus cultural stereotyping in Africa leads many women to seek unsafe abortion.

Religion also remains an integral part of African society.²¹⁴ Christianity and Islam are the major religions in Africa. According to Christian teachings, abortion is prohibited in all accounts. There are no exceptional circumstances. For example, Father Boquet, the President of the Human Life

²⁰⁸ n 190 above, 4; See M Langford *Social rights jurisprudence: Emerging trends in international and comparative law* (2008) 556-7.

²⁰⁹ CRR (n 183 above) 52.

²¹⁰ Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences on Intersections between Culture and Violence against Women, UN Doc A/HRC/34 (2007) 8.

²¹¹ M Eriksson *Defining Rape: Emerging Obligations for States under International Law* (2011) 508

²¹² Lecture by Navi Pillay, United Nations High Commissioner for Human Rights 'Valuing Women as Autonomous Beings: Women's Sexual and Reproductive Health Rights' at the Helen Kanzira Lecture, Pretoria, South Africa (15 May 2012) 8.

²¹³ A Glasier et al 'Sexual and reproductive health: a matter of life and death' (2006) 368 *Lancet* 1603.

²¹⁴ S Nabaneh 'The Power of Women's Political Participation in ECOWAS' n° 29 ECHO Bilingual quarterly newsletter of Association of African Women for Research and Development (AAWORD) (2012) 19.

International (HLI), a Christian NGO stated recently that abortion in the African Women's Protocol.²¹⁵

is a radical attempt to reshape and refocus the minds and lives of millions of people, with a propaganda of death that destroys the very foundation of a society and brings into question its future existence.

On the other hand, Islam permits abortion on the grounds of saving the woman's life or when it is a danger to the foetus.²¹⁶ However, Islam does not permit abortion on the ground of socio-economic reasons. This is based on the Qu'ranic verse 'kill not your offspring for fear of poverty; it is we who provide for them and for you. Surely, killing them is a great sin.'²¹⁷ Even though this is consistent with article 14(2)(c) of the African Women's Protocol, assertions of culture and religion should not be used to justify violations of women's rights.²¹⁸

3.4 Case for expansion

Although the African Women's Protocol recognises that unsafe abortion is a major cause of maternal mortality, it does not take into account the non provision for the grounds of socio-economic reasons and upon request as contributing factors. Article 14(2)(c) of the Protocol in its limited scope of grounds further reinforces gender stereotyping of the expectation that a pregnant woman becomes a mother. Berer on the consequences of the Cairo 'compromise' which reflects the same in the Protocol stated that:²¹⁹

the stance on abortion is not based on evidence of what is required to promote and protect the reproductive health or reduce maternal mortality... Instead it washes their hands of the responsibility for the harm that results from unsafe and illegal abortion.

The Colombian Constitutional Court in declaring a law that criminalises abortion on all circumstances, unconstitutional had held that 'legislature must not impose the role of procreation on a woman against her will.'²²⁰ However, it is important to acknowledge that the compromise in the African Women's Protocol unlike that of the Cairo compromise can be enabling to make abortion rights in the Protocol effective through a purposive interpretation.

²¹⁵ A Fides 'AFRICA - The damage of the Maputo Protocol" on women and African societies' *News Vat* 7 September 2012 <http://www.news.va/en/news/africa-the-damage-of-the-maputo-protocol-on-women> (accessed 13 September 2012).

²¹⁶ Hessini (157 above) 76.

²¹⁷ The Quran verse 17:3.

²¹⁸ See SW Nowicka 'Sexual and reproductive rights and the human rights agenda: controversial and contested' (2011) 19 (38) *Reproductive Health and Rights* 126.

²¹⁹ Berer (n 179 above) 154.

²²⁰ Decision C-355 of 10 May 2006 as cited in Ngwena (n 24 above) 845.

3.4.1 Justification for abortion on socio-economic reasons and upon request

The first and most important ground for justification for an inclusion of socio-economic reasons and upon request would be based on respect for women's human dignity. The interpretation of rights in the African Women's Protocol must be made in light of the fundamental dignity inherent in every human being.²²¹ A denial of women's dignity will mean a denial of the equality and freedom of women. The right to have access to abortion based on socio-economic reasons and upon request is inextricably linked with the dignity of women and complete autonomy over their bodies and their personhood. Although women's right to choice and autonomy is affirmed in the African Women's Protocol, article 14(2)(c) does not provide an absolute protection of the autonomous rights of women to have control over their fertility, and make decisions about whether to have children.²²² Its limited scope is a violation to the 'right of protection from arbitrary interventions in decisions that, in general, are based in the intimacy and autonomy of each human being.'²²³ This reinforces the stereotyped perception of African men in that the autonomy of a woman is eroded once a woman is carrying a man's child.

The second justification is that 'choice' in a woman's life is affected by several considerations one of which is the socio-economic circumstances and disadvantages faced by women.²²⁴ It could be plausibly argued that when women are denied the exercise of their right to abortion, it can have negative consequences for the child who is born unwanted or unplanned. Women's incapacity to take care of such a child once born, or where the woman's economic or educational future will be in jeopardy should be grounds for termination. In addition, when women are unable to make decisions or have control over their fertility it will disable them from making 'the necessary choices in other areas,'²²⁵ and being allowed to live the life one chooses.²²⁶

The third justification is the increasing concern for the consequences of unsafe abortion as aptly illustrated above.²²⁷ The BPA requires states to 'deal with the health impact of unsafe abortion as a major public health concern.'²²⁸ This will mean that states need to provide quality health care including abortion services. In addition, a justification is premised on the notion that where

²²¹ See art 3 of the African Women's Protocol.

²²² See art 14(1)(a) & (b) of the African Women's Protocol.

²²³ LC case (n 84 above) para 7.13.

²²⁴ See MI Plata 'Reproductive rights as human rights: the Colombian case' in RJ Cook *Human Rights of Women: National International Perspectives* (1994) 516.

²²⁵ African Platform for Action, UN Doc. E/CN.6/1995/Add.2 para 15.

²²⁶ I Currie & JD Waal *The Bill of Rights Handbook* (2005) 309.

²²⁷ For example in Malawi it is estimated that 17 per cent of maternal mortalities are related to unsafe abortions.

²²⁸ BPA (n 2 above) para 106(j).

abortion is restricted, states are likely to spend more money on treating post-abortion complications. A study in Malawi has estimated that approximately \$1.06 million is spent annually in public health facilities that provide post-abortion care for complications. On the other hand if safe abortion services are provided, approximately \$435,000 can be diverted for other health care needs.²²⁹

Fundamentally, an argument for *de lege ferenda* for the African Women's Protocol can be based on the above several reasons. An argument for a more restrictive or at best a strictly textual interpretation as opposed to the 'expansive' reading that this study advocates may be based on the reservations on article 14 of the Protocol made by several states prior to adoption and upon ratification. Perhaps this might explain the lack of jurisprudence but more importantly it may also show that this right is not one that obtained general acceptance even at its current form as conceptualised in the Protocol. Against this background, it is argue that the reservations made are indefensible. A state should not invoke its domestic laws in order to defeat its international obligations.²³⁰ In this instance, one could argue that this will be defeating states' obligations under the Protocol. Secondly, such a position will be contrary to the core provisions of equality and non-discrimination in the Protocol.

In sum, the exclusion of these two grounds serves as a tool of discriminatory treatment contrary to the aims of the Protocol. Ratifying governments of the Protocol need to be accountable to women whose abortion needs are not met because they cannot seek for quality abortion services based on their socio-economic circumstances or because they choose to do so.

3.5 Contextualising and interpreting rights

The arguments in this section assumes that one cannot directly seek to change the text of article 14(2)(c) of the African Women's Protocol in order to further the discussion. The study argues for a purposive interpretation of the provisions of the article to include socio-economic reasons and upon request. In this view, the power of interpretation of the Protocol is vested on the African Court on Human and Peoples' Rights (African Court),²³¹ though the African Commission has

²²⁹ 2012 Preliminary report on 'Health system costs of providing post abortion care in Malawi' as cited Tucker (n 151)

24.

²³⁰ *Constitutional Rights Project and Another v Nigeria* (2000) AHRLR 191 (ACHPR 1998) para 40.

²³¹ See art 27 of the African Women's Protocol.

interpretative powers by virtue of article 45(3) of the African Charter because the African Women's Protocol is a protocol to the African Charter.²³²

Human rights treaties depend on interpretation to give meaning to words and ensure that treaties become progressive. Article 31 of the Vienna Convention provides that a 'treaty shall be interpreted in good faith.'²³³ Arising from this, are three main juridical interpretation mainly the 'textual, teleological and the intentions of the parties.'²³⁴ First, the textual method gives the literal and grammatical meaning of the words in the treaty. From a common sense perspective, whatever is not explicitly written in a treaty should not belong or read into it. However, in this case, if the ordinary meaning of the text is read, it will not be able to accommodate these two grounds.

Second, if the Protocol's object and purpose is taken into account in the teleological method of interpretation, it may follow that these grounds will be included taken into account the present conditions and developments.²³⁵ The African Commission has noted that the African Charter must be 'interpreted holistically,'²³⁶ by extension the Protocol. This will give the 'maximum effect to the main purpose and object.'²³⁷ Finally, the interpretation of the grounds based on the intentions of the parties.²³⁸ From the examination of the drafting history in chapter two of this study, it does not show that the drafters intended to include socio-economic reasons and on request as grounds for abortion under article 14(2) of the African Women's Protocol. The Commission's interpretative style does not take into account the intention of the drafters but interprets instruments in light of the needs of the continent. Thus a treaty must take into account the current social challenges.

Looking at the practice of the African Commission, the author proposes an expansion of the grounds for abortion under the African Women's Protocol to include socio-economic reasons and on request reasons through the teleological and contextual approaches by taking into account the social, economic and political context of women in Africa. The Commission had held that 'international law and human right must be responsive to African circumstances.'²³⁹ The peculiar circumstances of women in Africa in relation to the high rate of unsafe abortions and

²³² See art 66 of the African Charter.

²³³ Art 31 of the Vienna Convention.

²³⁴ Dugard noted that there is no hierarchy of rules of interpretation (n 11 above) 425.

²³⁵ Eriksson (n 3 above) 309

²³⁶ *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001) para 70.

²³⁷ Dugard (n 11 above) 425.

²³⁸ See article 32 of the Vienna Convention which permits 'supplementary means of interpretation, including the preparatory works of the treaty and the circumstances of its conclusion.'

²³⁹ SERAC case (n 44 above) para 68.

other consequences of forced pregnancy legitimate the demand for an expansion of the abortion grounds.

3.5.1 Purposive interpretation of the African Commission

An examination of the jurisprudential tradition has shown the African Commission's adoption of two ways of interpreting rights: reading new rights or broadly interpreting a right. First, the reading of new rights entails the doctrine of reading 'imply' rights that are not expressly guaranteed in other rights that are explicitly provided for. The Commission made this unprecedented interpretation in *SERAC* where it found that the right to food was implicit into the rights to life, health and the right to economic, social and cultural development.²⁴⁰ The Commission further found that forced evictions by government are a violation of the right to shelter which is implicit in articles 14, 16 and 18(1) of the African Charter.

In contrast, in *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan*,²⁴¹ the complainants following the same reasoning in *SERAC* argued for the Commission to read the right to water into articles 4, 16 and 22 of the African Charter.²⁴² The Commission however, broadly interpreted the right to health under the African Charter to include serious risks of lives to the victims resulting to a violation while relying on General Comment No 14 of CESCR rather than reading it as an implied right.²⁴³ A close examination shows that the African Commission is hardly consistent in its own interpretative practice, though the findings in *SERAC* and the *Sudan case* illustrate how the African Charter can be generously interpreted to make rights more effective. Viljoen supports this assertion when he argues that the African Commission should be more engaged in its own jurisprudence.²⁴⁴ This will ensure that interpretation becomes consistent.

It is important to observe that although the African Women's Protocol does not provide for abortion on request and on socio-economic grounds, the Commission can employ a purposive interpretation by reading implicitly into article 14(2)(c) of the Protocol these two grounds or broadly interpreting the right to health. A counter argument that can be posited would be why in an African setting, in the context of a Charter that recognises 'African traditions' would pro-life,

²⁴⁰ n 44 above, para 60.

²⁴¹ Communication 279/03-296/05, *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan*.

²⁴² *Sudan case* (n 241 above) para 126.

²⁴³ n 241 above, 207-212.

²⁴⁴ Remarks made at the special session on the jurisprudence of the African Commission as part of the public session of the 52nd ordinary session of the African Commission in commemoration of the 25th anniversary of the Commission, in Yamoussoukro, Cote d'Ivoire (9-22 October 2012).

adoption or extended family responsibility stance not be preferable to what the study proposes? The answer to this lies in the utilisation of culture as a resource to implement women's rights to abortion and not only as an obstacle to address. Thus, it will be useful to take into account anthropological approaches to support this study's argument for an expansive interpretation in order to shape the identity and personhood of women. Anthropology's emphasis on culture also means an emphasis on autonomy, choice, bodily integrity and equality for women.²⁴⁵

i. Abortion as a socio-economic right

Ngwena has convincingly argued that the Protocol's provision on abortion is a 'health issue that takes the form of a socio-economic right.' This he stated requires state parties to both 'decriminalise abortion and incorporate abortion services within mainstream health services.'²⁴⁶ Governments are obliged to provide reasonable access to safe health care services for women. The consideration of abortion as a socio-economic right and the nature of the relating obligations arising from it can be a valuable source for expansion. Articles 60 and 61 of the African Charter enjoin the Commission to draw inspiration from relevant international and regional human rights instruments and principles. In interpreting and applying the African Charter, the Commission is:²⁴⁷

more than willing to accept legal instruments with the support of appropriate and relevant international and regional instruments, principles, norms and standards taking into account the well recognised principle of universal, indivisible and interdependent, and interrelated.

International norms recognise women's right to 'the highest attainable standard of health.'²⁴⁸ These include the Universal Declaration, ICESCR, CEDAW and CRC.²⁴⁹ The linkage between reproductive rights and other rights is reiterated in the POA of the ICPD which states that:²⁵⁰

reproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other consensus documents.

These rights are regarded as the 'underlying determinants of health.'²⁵¹ In addressing the concern of the need to take a 'socio-economic approach' rather than the state to invest in

²⁴⁵ SE Merry 'Transnational human rights and local activism: Mapping the middle' (2006) 108 *American Anthropologist* <http://onlinelibrary.wiley.com/doi/10.1525/aa.2006.108.1.38/pdf> (accessed 20 September 2012) 49.

²⁴⁶ Ngwena (n 24 above) 853

²⁴⁷ *Purohit* case (n 89 above) para 48.

²⁴⁸ CESCR 'General Comment No 14 on the right to the highest attainable health' E/C12/2000/4 (2000) para 12.

²⁴⁹ See art 12(1) of the ICESCR; art 12 & 16 of the CEDAW; art 24 of the CRC; and art 14(1) of the African Children's Charter.

²⁵⁰ POA of the ICPD (n 1 above) para 7.3.

²⁵¹ CESCR (n 248 above) para 4.

orphanages or the promotion of adoption, the principles of non-discrimination and equality must be given due attention. Article 18(3) of the African Charter obligates states to eradicate discrimination against women, while article 2 of the Protocol guarantees equality by obliging states to eliminate discrimination against women.²⁵² The HRC has held that denial of access to abortion discriminates against women and prevents them from having an equal footing with men in the enjoyment of their human rights.²⁵³ Along this line, the CEDAW Committee is of the view that respect for women's rights to health care requires the elimination of obstacles including 'laws that criminalise medical procedures only needed by women and that punish women who undergo these procedures.'²⁵⁴ Thus, equality is required in 'access to health care services.'²⁵⁵

The CESCR in General Comment No 9 obliges states to guarantee equality and non-discrimination 'to the greatest extent possible, in ways which facilitate the full protection of economic, social... rights.'²⁵⁶ The CEDAW Committee has expressed concern at the lack of health services for women and particular group of women.²⁵⁷ The question remains: is the exclusion of abortion on request and on socio-economic ground in the Protocol consistent with the principle of substantive equality? It is submitted that the denial of women to seek abortion on request or on socio-economic grounds will prevent equal enjoyment of their rights and limit access to essential reproductive health care services. The principle of substantive equality 'requires the law to ensure equality of outcome.'²⁵⁸ The exclusion of these grounds promulgates discrimination because it fails to take cognisance of the social and economic circumstances of women.

Zampas and Gher have further argued that this requirement would also mean that states are obliged to provide abortion services to women on request and based on socio-economic grounds such as on the basis of 'economic resources, age, number of children and/or or marital status.'²⁵⁹ Thus the refusal to allow for abortion on request or socio-economic reasons which results to high maternal mortality means that states are in breach 'of their duties to ensure

²⁵² States have included an equality clause in their various constitutions for example, section 8 of the South African Constitution (1996).

²⁵³ *LC case* (n 84 above) 7.12.

²⁵⁴ CEDAW 'General Recommendation No 24 on women and health' A/54/38/Rev.1 (1999) para 14

²⁵⁵ Art 12 of the CEDAW; See art 12(1) of the ICESCR & art 24(1) of the CRC

²⁵⁶ CESCR Committee 'General Comment No 9 on the domestic application of the Covenant' U.N Doc E/C.12/1998/24 (1998) para 15.

²⁵⁷ CEDAW Committee 'Review of Morocco' UN Doc A/58/38(2003) para 172.

²⁵⁸ Currie & Waal (n 226 above) 233.

²⁵⁹ Zampas & Gher (n 5 above) 287.

women's access to health care,' contrary to article 14(2)(c) of the Protocol.²⁶⁰ Thus, a purposive interpretation can be made on the reasoning of abortion as a socio-economic right.

ii. Expansive interpretation of physical or mental health grounds

Generally, human rights treaty cannot be so widely interpreted to read into rights that were not initially envisioned by the drafters.²⁶¹ Viljoen has cautioned against the Commission including abortion on request and socio-economic reasons as implicit rights or grounds but rather to broadly interpret the health grounds to accommodate these.²⁶² This fear may have arisen by the fact that reading new rights into the Protocol leads the Commission to overstepping its mandate and consequently result in states being reluctant to ratify treaties since they may not be sure of what they sign up at the time of ratification.

It thus follows that if the African Women's Protocol cannot be interpreted to implicitly recognise abortion on request and socio-economic grounds, then the right to health under article 14 of the Protocol will be the most enabling to accommodate resort to these two grounds. The health ground for abortion provides a viable opportunity for an expansive interpretation because a mere risk is sufficient to be able to make a case.²⁶³ Focusing on the application of the Protocol's object and purpose of non-discrimination and promotion of equality, it would seem an expansive interpretation of the 'physical and mental health' as grounds for abortion can include grounds on request and socio-economic reasons. This is more so when one considers both the WHO's definition of health and the POA of the ICPD's definition of reproductive health which encompasses not only physical but mental health.²⁶⁴ This means that reproductive health should be considered holistically with due consideration to social and economic factors. Studies have shown that women are more vulnerable to depression and psychological disorder due to social, economic and cultural factors beyond their control.²⁶⁵

Admittedly, at the international level, human rights treaty monitoring bodies have not interpreted any provision of the treaties to include the right to obtain an abortion based on request or based

²⁶⁰ CEDAW (n 252 above) para 17.

²⁶¹ DJ Harri et al, *Law of the European Convention on Human Rights* (1995) 8 as cited in Eriksson (n 3 above) 309.

²⁶² Comments made while lecturing for the LLM in human rights class of Universidade Eduardo Mondlane, Mozambique (18 September 2012).

²⁶³ Interpretation must utilise art 14(1)(a) and (b) which provides for the right to fertility and the right to decide whether to have children, the number and spacing of children.

²⁶⁴ POA of the ICPD (n 1 above) para 7.2

²⁶⁵ WHO 'Mental health aspects of women's reproductive health: A global review of the literature' (2009) http://www.searo.who.int/LinkFiles/Publications/Mental_Health_Aspects_of_Women's_Reproductive_Health.pdf (accessed 15 September 2012) 18.

on socio-economic reasons.²⁶⁶ However, the treaty monitoring bodies have adopted concluding observations that recognises the inextricable link between restrictive abortion laws and violation of women's health and life.

3.6 Conclusion

From the foregoing discussion, it will be appropriate for the African Commission to adopt a purposive interpretation of grounds for abortion under article 14(2)(c) of the African Women's Protocol. In this chapter, it has been demonstrated that there is a need for an expansion of the abortion grounds to include on request and socio-economic grounds. This can be through implicit reading into the existing grounds or a broad interpretation of article 14(2)(c) of the Protocol. While these two approaches have a shared commitment to substantive equality and do engage with the disadvantaged circumstances of women, they differ on how such an approach should be taken. The statistics have indicated the urgent need to address unsafe abortion and its consequences. One of the most compelling arguments the author uses for the recognition of these two grounds is its potential to curb the high prevalence of unsafe abortion and the maternal deaths resulting from it. In addition, when women seek abortion it is not always for concern about their health or life, but also in the pursuance of personal and economic opportunities.

Thus, a purposive interpretation of the relevant provision with either of the two approaches will be visionary in setting a precedent for other adjudicatory bodies to draw inspiration from. Inclusion of socio-economic reasons and upon request should be the logical last step looking at the clear textual basis. In light of new developments and challenges facing women in Africa such as poverty, the African Women's Protocol needs to be interpreted in such a way so as to make it a dynamic treaty.

²⁶⁶ Zampas & Gher (n 5 above) 287.

CHAPTER 4: CONCLUSION AND RECOMMENDATIONS

4.1 Brief Summary

This study is structured to respond to three fundamental questions. Firstly, does the medicalised abortion grounds of sexual assault, rape, incest, or where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus, adequately advanced women's rights to abortion? Secondly, what is the importance of socio-economic reasons and request, as grounds for abortion? Thirdly, how can an expansion of the abortion grounds be made to include on request and socio-economic reasons? This chapter therefore provides a brief summary of what has been previously discussed in the three previous chapters and general conclusions. An attempt will also be made to assess the extent to which this study has answered the research questions.

This study is designed to broaden the discussion for an interpretation of the relevant article to include on request and socio-economic reasons as abortion grounds.

4.2 Conclusion

The African Women's Protocol is the most innovative instrument that provides for the right to abortion for women. On the other hand, Africa still has the highest rate of unsafe abortion. This study has been able to show the prevailing circumstances of women and why they resort to unsafe abortion. The current abortion grounds under the Protocol which excludes socio-economic reasons and upon request does not correspond to the current circumstances and are out of sync with the daily realities of women in Africa. A treaty that does not take into account the changing social realities becomes redundant for the people it was promulgated for. According to the author, these two grounds are central to addressing high prevalence of unsafe abortions in Africa and its resultant consequences.

This study has directed itself to examine in chapter two the history of the formulation of article 14(2)(c) of the Protocol. The *travaux preparatoires* has mapped out how the relevant article has evolved through the different drafting stages of the Protocol into what it is today. It further went on to examine whether the abortion grounds provided for in the Protocol are sufficient. Critique of the abortion grounds points to its ambiguous nature, and that it is not always enabling bearing in mind long administrative procedures and the contentious nature of these grounds.

In addition, a review of the abortion laws is attempted in eleven African countries in their legal compliance with the African Women's Protocol. The compliance review shows a trend in which majority of African states still have highly restrictive abortion laws. On the other hand, countries with liberal and radical laws and policies that facilitate women's right to abortion have also been identified.

The author demonstrates the inadequacy of the abortion grounds in article 14(2)(c) of the African Women's Protocol in providing for minimum standards that fail to recognise the issues faced by women that result to unsafe abortion. An assessment of the causes and consequences of unsafe abortion such as poverty is made. It is noticeable in this work the alarming statistics of unsafe abortion and maternal death ensuing from it. Article 14(2)(c) of the Protocol does not take into account these circumstances. This normative gap is what this study in chapter three tries to fill.

It is the author's view that an innovative interpretation of article 14(2)(c) of the African Women's Protocol is required. The study argues for placing abortion as a socio-economic right or subsuming socio-economic reasons and upon request through a broad interpretation under the right to health as provided in article 14 of the Protocol. The recognition of women's dignity, autonomy and self-determination over their lives and health serve as justification and support for such an interpretation.

The assessments in the study have employed available data sources and have looked in depth into laws and decisions of regional and international bodies. International monitoring bodies continue to abstain from taking a clear stance in the inclusion of on request and socio-economic reasons as grounds for abortion. One of the reasons may be because none of the international conventions provide for the right to abortion even though their monitoring bodies have enumerated this right in general comments, recommendations and concluding observations. It must however be acknowledged that these are soft law and not binding on states, but which guides states on what needs to be done to bring laws in compliance with human rights standards. This can be used to enumerate states' obligations to respect, protect and fulfil the realisation of the right to abortion under Protocol in their individual jurisdiction, while taking into account underlying social and economic conditions of women.

Generally speaking, this study sought to provide a compatibility assessment of abortion laws in Africa with the African Women's Protocol while addressing the root problems of unsafe abortion

such as poverty and culture. It addresses barriers such as social, economic and legal conditions that infringes on women's rights to safe abortion. On the basis of the facts presented in this study, it can safely be established that the African Women's Protocol has the potential of taking the abortion debate further and to ensure that women have a comprehensive right over their lives, bodies and health. Finally this author recognises the significance of inclusion of socio-economic reasons and upon request through a generous interpretation to make the right effective and available to all.

4.3 Recommendations

If the African Women's Protocol is to address the plights of millions of African girls and women, the African Commission²⁶⁷ and the African Court²⁶⁸ through their contentious and advisory jurisdictions need to adopt a purposive interpretation to article 14(2)(c) of the African Women's Protocol to include abortion on request and on socio-economic grounds. The clarification of the normative content of article 14(2)(c) of the African Women's Protocol through an expansive interpretation can provide the benchmark against which governments can take measures and steps which can be then be examined. Otherwise in Cook's language, it would be 'worth very little to women where there are no corresponding duties on the part of governments, organizations and individuals to respect those rights.'²⁶⁹

In addition, the African regional system's commitment to women which can be further harnessed by the SRRWA will ensure that the Protocol is not only ratified by member states but a pronouncement of such should be made to form part of the jurisprudence of the Commission. The effectiveness of the Protocol must be tested to ensure that application of the relevant provision does not remain out of reach for women. Such an interpretation will better address the specific concerns of women. This will be in line with states obligation to 'take up the multifaceted challenges that confront our continent and its peoples in the light of the economic, social and political changes taking place in the world'²⁷⁰

In ensuring that the law that exist on paper translates into equality and justice for women, governments should be held accountable for their treaty obligations in relation to the relevant provision. First, states that have ratified the African Women's Protocol but still maintains highly

²⁶⁷ Art 45(3) of the African Charter mandates the African Commission to give advisory opinions based on a request from states, AU and its organs and a broader undefined group of 'African organizations.'

²⁶⁸ Art (4)(1) of the African Court Protocol.

²⁶⁹ Eriksson (n 3 above) 270.

²⁷⁰ Preamble of the Constitutive Act of the African Union (2000/2001) para 6.

restrictive abortion laws should embark on reforms immediately in conformity with their obligations under the Protocol. The Maputo Plan of Action (MPOA)²⁷¹ scorecard among Southern African countries has shown that while countries have made progress with regard to programmes and policies to curb unsafe abortion, abortion remains illegal in some countries.²⁷² The method of reform should therefore be one that ensures access to abortion rights on all grounds including for socio-economic reasons and upon request. Otherwise, the promise of abortion for women right will remain unfulfilled.

More importantly in translating abortion rights to duties, countries like Zambia with liberal laws but where access to safe abortion remains great challenge, should ensure availability, accessibility and acceptability of safe abortion to all women, particularly those in rural areas.²⁷³ This is further enumerated in the MPOA which requires governments to provide abortion services to the 'fullest extent of the law.'²⁷⁴ States by virtue of article 14 of the African Women's Protocol are obligated to ensure access to evidence-based, facts-based, rights-based, non-judgemental information regarding abortion.²⁷⁵ Thus 'access to safe abortion is an inextricable element of effective realisation of reproductive health, not least on account of maternal mortality.'²⁷⁶

In addition, governments are required to enact 'policy and legal frameworks to reduce the incidence of unsafe abortion.'²⁷⁷ This demonstrates the necessity for an enabling supportive environment through legal and policy framework that address social barriers which prevents women from realising their right to safe abortion services. Measures such as educational programmes and awareness-raising on socio-cultural practices and attitudes that obstruct women's enjoyment of abortion are needed.²⁷⁸ As has been rightly observed by Navi Pillay:²⁷⁹

A human rights-based approach requires that women are seen as agents who have control and decision-making power over their own health, as entitlements, rather than as passive recipients of a charitable service.

²⁷¹ AU 'Maputo Plan of Action for the Operationalisation of the continental policy framework for sexual and reproductive rights 2007-2010' (2006) has recently been extended to 2015 to coincide with the time frame of the Millennium Development Goals (MDGs).

²⁷² Tucker (n 151 above) 24.

²⁷³ This is in line with art 26(2) of the African Women's Protocol.

²⁷⁴ MPOA (n 271 above) para 4.1.

²⁷⁵ The obligations relating to information has been enumerated in a General Comment on art 14(2)(d) & (d) of the African Women's Protocol recently adopted by the African Commission at its 52nd ordinary session in Cote d'Ivoire (October 2012).

²⁷⁶ Ngwena (n 32 above) 716; See Ngwena (n 175 above) 202.

²⁷⁷ Tucker (n 151 above) para 4.3.

²⁷⁸ These should be implemented in line with arts 2 and 5 of the African Women's Protocol.

²⁷⁹ Pillay (n 212 above) 13.

Thus, the Protocol provides women with a right to abortion which is only attainable to women when the requisite services are available and accessible to women on all circumstances including grounds of socio-economic reasons and upon request.

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