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SPECIAL ARTICLE

The General Comments on HIV adopted by the African Commission on Human and Peoples' Rights as a tool to advance the sexual and reproductive rights of women in Africa

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ABSTRACT

The present article examines the contents and importance of the General Comments adopted by the African Commission on Human and Peoples' Rights on Article 14 (1) (d) and (e) of the Protocol to the African Charter on the Rights of Women in Africa as a tool for advancing women's rights in the context of HIV. Given that discriminatory practices in all facets of life have continued to limit African women's enjoyment of their sexual and reproductive rights and render them susceptible to HIV infection, it becomes vital that African governments adopt appropriate measures to address this challenge. The provisions of the Protocol on the Rights of Women in Africa present great opportunities for this to be realized. The radical and progressive provisions of the Protocol will be of no use to women unless policymakers and other stakeholders have a clear understanding of them and are able to implement them effectively. The adoption of the General Comments is a welcome development, and states and civil society groups must maximize it to advance women's rights.

1. Introduction

According to the Joint United Nations Program on HIV/AIDS (UNAIDS), approximately 35 million people were living with HIV at the end of 2012 [1]. While this would seem to be a slight improvement from a decade ago, the majority of people living with HIV still inhabit Sub-Saharan Africa. More disturbing is that women, especially young women of reproductive age, continue to bear the greatest burden of the epidemic in Africa. It is estimated that 60% of those infected with HIV in the region are women [1]. Several factors including sociocultural, economic, and biological continue to render women susceptible to HIV in the region.

Although great strides have been made in the prevention of mother-to-child transmission of HIV, disparities exist across the region. While countries like Zambia, Namibia, and Botswana have met the goal of providing antiretroviral medicines to 90% of pregnant women living with HIV, other countries such as Angola, Nigeria, Benin, Ethiopia, and Chad are still lagging behind [1]. This indicates that African governments are not living up to the promises and commitments they made at various international and regional meetings and forums. A study showed that of the 19 000 maternal deaths caused by HIV/AIDS worldwide, Sub-Saharan Africa accounts for 17 000 (90%) deaths [2]. Furthermore, in countries such as Botswana, Lesotho, Swaziland, Namibia, and South Africa, an increase in the maternal mortality ratio from 1990–2010 is largely attributed to the HIV/AIDS epidemic [3]. This underlies the point that addressing the HIV epidemic among women will ultimately improve their sexual and reproductive well-being.

In 2001, through the UN Declaration of Commitment on HIV/AIDS, the international community emphasized that gender equality and empowerment of women are crucial to the reduction of women's vulnerability to HIV [4]. A decade later, through the 2011 UN General Assembly Political Declaration on HIV/AIDS [5], the international community agreed to some targets, including zero HIV discrimination, to eradicate HIV worldwide. For this to become a reality, however, greater attention will need to be given to addressing gender inequality. This was further reiterated at a follow-up meeting to the Abuja Declaration by African leaders in July 2013 [6]. At this meeting, African leaders once again recommitted themselves to addressing the gender dimension of the HIV epidemic. While these declarations and commitments are promising, the situation in reality would seem to show that African women are far from enjoying equal rights with their male counterparts as discrimination remains the norm in virtually every facet of human endeavor.

With the entry into force of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Protocol, also known as the Maputo Protocol) in 2005, great opportunities exist for African governments to address the gender dimension of the HIV epidemic. The Protocol, hailed for its radical stance, contains a number of important provisions crucial to advancing women's fundamental

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rights in general and sexual and reproductive rights in particular [7]. Indeed, the Protocol remains the only human rights instrument that explicitly recognizes women's vulnerability to HIV as a human rights issue. Article 14(1) (d) protects a woman's right to self-protection and to be protected from HIV, while paragraph (e) protects a woman's right to know her status and that of her partner [8]. These provisions do not clarify what measures and steps African governments must adopt to fulfill their obligations in this regard. Hence, during its 52nd Ordinary Session in October 2012, for the first time in its 25-year history, the African Commission on Human and People's Rights (the Commission) adopted General Comments to specifically clarify the nature of states' obligations under Article 14 (1) (d) and (e) of the Protocol [9].

The present article examines the contents and importance of the Commission's General Comments on Article 14 (1) (d) and (e) of the Protocol as a tool for advancing women's rights in the context of HIV. Given that discriminatory practices in all facets of life continue to limit African women's enjoyment of their sexual and reproductive rights and further predispose them to HIV infection, it becomes crucial that African governments adopt appropriate measures to address this challenge. The Protocol on the Rights of Women in Africa presents great opportunities for this to be realized. However, its radical and progressive provisions will amount to paper promises if policymakers and other stakeholders do not have clear understanding of them and are not able to implement them effectively.

2. Background to the General Comments

The rationale for the General Comments developed during the NGO Forum that took place prior to the 51st Ordinary Session of the Commission, held in Banjul, The Gambia, from April 18 to May 2, 2012. The NGO Forum is the largest gathering of nongovernmental organizations and civil society groups in Africa. Thereafter, an initial draft of the General Comments was produced by the Centre for Human Rights at the University of Pretoria, South Africa. This was followed by two separate meetings—one in Pretoria, South Africa, and the other in Dakar, Senegal—to discuss and build on the initial draft. The meeting in Pretoria was attended by academics, experts on sexual and reproductive rights, and civil society organizations focusing on women's rights and HIV mainly from Eastern and Southern Africa. At the end of this meeting, another draft was produced, which was then widely circulated across the region for comments. The second meeting in Dakar comprised academics, experts on sexual and reproductive health and rights, and civil society groups working on women rights and HIV mainly from West and Central Africa. Representatives of two special mechanisms of the Commission—the Special Rapporteur on the Rights of Women in Africa and the Committee on HIV—also participated in this meeting, which produced two drafts, one in English and the other in French. These were considered and adopted with minor amendments by the Commission at the 52nd Ordinary Session, held in Yamoussoukro, Cote d'Ivoire, October 9–22, 2012.

3. Contents of the General Comments

The General Comments are divided into four parts: introduction, normative content, general state obligations, and specific state obligations. In the introduction, the Commission notes that women experience various forms of discrimination and that these prevent them from realizing their "right to self-protection and to be protected" [9]. The Commission recognized that African women have the "right to the highest attainable standard of health which includes sexual and reproductive health and rights" [9] (para. 5). It further notes that while the focus of the General Comments is Article 14 (1) (d) and (e), this provision "should not be read and understood in isolation from other provisions of the Protocol dealing with other aspects of women's human rights" [9] (para. 7). This is a crucial clarification by the Commission that will buoy a better understanding of the Protocol. It would seem to emphasize the indivisibility, interdependence, and interrelatedness of all human rights. Moreover, this observation of the Commission accords with other UN treaty monitoring bodies such as the Committee on Economic, Social and Cultural Rights (CESCR) and the Committee on the Elimination of Discrimination against Women (CEDAW), both of which have noted that the enjoyment of the right to health of individuals, in general and for women in particular, is dependent on other rights such as life, dignity, privacy, and nondiscrimination. Indeed, in some of its decisions, such as *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*[10] and *International Pen and Others v Nigeria* [11], the Commission has applied the indivisibility approach to hold that a violation of the right to health will infringe the right to life and other rights. This would require African governments to adopt a broad but not narrow approach to interpreting Article 14 (1) (d) and (e).

3.1. Normative content

The Commission explains that while the Protocol distinguishes between "the right to self-protection and the right to be protected from HIV in Article 14 (1) (d), this provision is interpreted to refer to States' overall obligation to create an enabling, supportive, legal and social environment that empowers women to be in a position to fully and freely realise their right to self-protection and to be protected" [9] (para. 10). Such an enabling environment must respect women's sexual autonomy and discourage coercive testing or treatment in general. This clarification is in accord with the International Guidelines on HIV/AIDS and Human and Rights [12] and the views of other commentators who have argued that a friendly legal environment will go a long way to address discriminatory practices against women, especially in relation to HIV [13]. Ultimately, this will minimize human rights violations that are often experienced by women. Creating an enabling environment where women's fundamental rights are respected will involve repealing outdated laws and practices that are potentially discriminatory and enacting laws and policies that protect women from discrimination. In addition, states must refrain from enacting laws that may further fuel or perpetuate discrimination in society. In this regard, laws that criminalize HIV transmission, including perinatal transmission of HIV may be counterproductive and fuel discriminatory practices [14].

According to the Commission the "right to be informed on one's health status includes the rights of women to access adequate, reliable, non-discriminatory and comprehensive information about their health" [9] (para. 13). On the other hand, "the right to self-protection and to be protected includes women's rights to access information, education and sexual and reproductive health services. The right to self-protection and the right to be protected are also intrinsically linked to other women's rights including the right to equality and non-discrimination, life, dignity, health, self-determination, privacy and the right to be free from all forms of violence" [9] (para. 13). The General Comments discourage disclosure of HIV status unless done in accordance with international standards. Specifically, the Commission refers to the exception for disclosure as provided by the UNAIDS international guidelines on HIV/AIDS [12]. Disclosure of HIV status remains a controversial issue in many parts of Africa owing to the stigma and discrimination still associated with the epidemic.

Women are more likely to experience violence and human rights abuses when their partners become aware of their HIV status [15]. This has made it difficult for partners to share their HIV status with each other. Healthcare providers may compromise the confidentiality of patients, particularly female patients, by disclosing their HIV status to their partners or relatives. This is ethically wrong and a violation of the right to privacy and patient confidentiality. Hence, the General Comments note that disclosure of HIV status should only take place after attempts have been made to counsel the infected person, counselling has yielded no result or the infected person has refused to disclose their status, there is a real risk of infecting others, and the infected