Chapter 12  Reclaiming Rights of the African Child at Risk of Abortion

Reasons for revoking new “authorising medical abortion” Protocol language

The “authorising medical abortion” Protocol language in Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa (2003) contravenes one of the founding principles of modern international human rights law—that unborn children are entitled to the protection of the law. As one of the Nuremberg judgments, this principle was mandated to be codified in the International Bill of Rights.

The original commitment to recognition of the State’s duty to protect the rights of the child before as well as after birth was made in the Universal Declaration of Human Rights (1948)—this was confirmed and reaffirmed in the UN Declaration on the Rights of the Child (1959) as well as in the International Covenant on Civil and Political Rights (1966).

These international human rights instruments served as the foundation of the African regional human rights declarations and charters, especially the following:


The preambles and texts of these subsequent African human rights instruments have all pledged and renewed African commitment to all the fundamental human rights principles contained in the original UN declarations and covenants.

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1 Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa (2003), 16(c).
2 UN Resolution 95(1): Affirmation of the Principles of International Law recognized by the Charter of the Nuremberg Tribunal. Resolution 95 (1) of the United Nations General Assembly, 11 December 1946. The UN committee on the codification of international law was directed to establish a general codification of “the principles recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal”. These became the foundation of modern international human rights law.
3 See above Ch.1: UDHR Recognition of Child before Birth: the Historical Context and Ch.2: UDHR Recognition of the Child before Birth: Analysis of the Texts.
Abortion language irreconcilable with human rights

By removing the protection of the law from selected unborn children, the Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa (2003) (Women’s Protocol) has broken grievously with one of the original human rights principles—to provide legal protection for the child before as well as after birth. This principle was recognized at Nuremberg, enshrined from the earliest years of the United Nations as a fundamental obligation in the International Bill of Rights and reaffirmed in the relevant subsequent international and regional human rights instruments. The African Women’s Protocol breaks with this human rights tradition when it instructs States 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. [16(c)]

This language of “authorising medical abortion” of “the foetus” is incompatible with the language of all previous UN human rights instruments in which it was understood that “legal protection” was to be provided for the child “before as well as after birth”. To exclude the child before birth from the protection of human rights law is to return to Nazi concepts condemned by the international community at Nuremberg:

“...protection of the law was denied to the unborn children...”

Abortion language incompatible with African values

The abortion language of the Women’s Protocol is incompatible also with the language of African values, and in particular with the language of the African Charter on Human and Peoples’ Rights (1981) which upholds the human rights of the mother and the child. A specific commitment is made to “the rights of the woman and the child”:

The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions. [Article 18(3)]

In the Preamble to the Women’s Protocol, it is legally questionable and morally indefensible to have distorted Article 18 of the African Charter by removing the significant words “and the child” from the original text:

Further considering that Article 18 of the African Charter of Human and Peoples’ Rights calls on all States Parties to eliminate every discrimination against women and to ensure

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