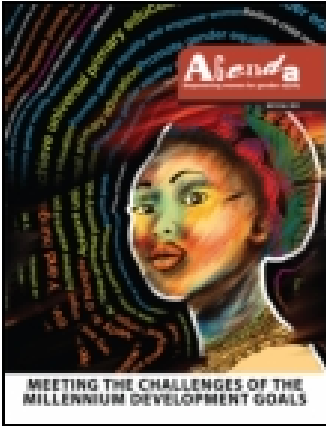


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## Agenda: Empowering women for gender equity

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### Think globally, act locally: using international treaties for women's empowerment in East Africa

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# Think globally, act locally: using international treaties for women's empowerment in East Africa

*Women activists in Africa need to develop innovative ways to use international treaties and instruments in a way that strengthens domestic guarantees of equality for women in their countries writes SYLVIA TAMALE. She looks at the ways in which two such instruments, CEDAW and the Banjul Charter, have been used to advance women's empowerment*

Like a superior general in battle, women have to employ several strategies in their struggle against oppression and marginalisation. The struggle for liberation is pursued at various levels – local, national, regional and international. The linkage between these different levels however is weak; our efforts at every level do not complement each other. In particular, the tool of international and regional instruments tends to be under-utilised by African women's movements. Part of the reason for this may be that many of us feel far-removed and alienated from the legalistic formulation of international instruments, dominated by Western actors. Another reason may lie in women's general dislike for confrontation, which characterises the legal process of pursuing human rights enforcement.

Whatever the reasons, my view is that we ignore such treaties at our own peril. First, we lose out on the huge potential that this platform holds for advancing the women's cause. Secondly, each time we, as African women, fail to engage international instruments, we miss the chance of placing our concerns on the international women's human rights agenda.

In this era of economic globalisation, the odds are stacked against marginalised social groups such as women. This is especially true for African women, who live on the periphery of the global village. We therefore need to expand our horizons and options by injecting new ideas into the struggle towards women's emancipation. This

*profile* focuses on some innovative ways to use international and regional treaties in addressing the infinite number of issues that affect women in Africa. How can we employ international laws and conventions to our advantage? How can local women make their voices heard using global tools? Can we actually penetrate the patriarchal walls of oppression in our countries using international means?

Of particular importance are international conventions (as opposed to declarations). Signing a declaration signifies a broad projection of what state parties ascribe to; ratifying a convention makes state parties legally bound to its terms<sup>1</sup>. Ratification indicates a commitment by the state party to the progressive implementation of the terms of a particular convention. This *profile* looks at two treaties, namely, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the African Charter for Human and People's Rights (The Banjul Charter). All three East African countries discussed here have either ratified or acceded to the two instruments<sup>2</sup>.

### Overview of the two instruments

What follows is a brief overview of the instruments. For purposes of this *profile*, I focus mainly on the positive aspects of the treaties. This, however, does not mean that the instruments do not have limitations<sup>3</sup>.

## PROFILE

### Convention on the Elimination of All Forms of Discrimination Against Women

CEDAW, which came into force in 1981, is the most powerful bill of rights for women worldwide. This treaty has successfully created an international standard against which the treatment of all women can be measured in all spheres of life – including educational, civil, political, economic, social, and cultural rights. Kenya<sup>4</sup>, Uganda<sup>5</sup> and Tanzania<sup>6</sup>, are among the 166 countries worldwide that are party to CEDAW. Significantly, all three East African countries unreservedly ratified CEDAW. States are entitled to enter reservations when they sign a convention or treaty. This means that those reserved provisions do not apply to such states. CEDAW is one of the most heavily reserved United Nations (UN) conventions, and in many cases the reservations undermine the purpose of CEDAW.

The nerve centre of CEDAW lies in its broad definition of the phrase, ‘discrimination against women’:

*[A]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field [Article 1].*

This definition includes both discrimination which is intentional and that which is the result of laws, policies and practices which, when applied, have the impact of discriminating against women. The possibilities for African women to advance their rights by adopting such a definition in their local struggles are endless. Such success may either be pursued through domestic courts or through CEDAW’s enforcement body – the Committee on the Elimination of All Forms of Discrimination Against Women (hereinafter referred to as ‘the CEDAW Committee’).

Until recently, CEDAW had no mechanism for individual complaints. This limitation ended with the passing of the Optional Protocol to CEDAW that acquired the force of law on December 22, 2000. The Optional Protocol in effect created a new enforcement mechanism for member states. It allows individual women and groups of women to make direct complaints to the CEDAW Committee after exhausting all domestic remedies.

### The African [Banjul] Charter on Human and People’s Rights

The African [Banjul] Charter on Human and People’s Rights, which came into force in 1986, underscores the importance of group rights (as opposed to individual rights). Despite its emphasis on group rights, the Charter makes only scant reference to women’s rights. Moreover, there is a basic tension written into its text in that it simultaneously proclaims the principle of non-discrimination while making extensive reference to the unqualified maintenance of African culture and traditions – the keystone institutions for gender discrimination (Dawit, 1994). These limitations notwithstanding, the Charter holds some potential for aiding women’s struggles in Africa. As Lisa Kois (1996:92) put it, ‘It [the charter] might not quite be a sword, but it can act as an effective shield’. Some of the provisions under the Banjul Charter that can make transformative interpretations for women include the following:

#### Article 2

*Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status (my emphasis).*

#### Article 3

- (1) Every individual shall be equal before the law.*
- (2) Every individual shall be entitled to equal protection of the law.*

## PROFILE

### Article 18

*(3) The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman... as stipulated in international declarations and conventions<sup>7</sup>.*

Article 18(3) of the Banjul Charter effectively domesticated CEDAW (as well as other conventions and declarations that address women's rights) to the African continent. Thus, the Banjul Charter reinforced the status of CEDAW as a legal framework governing the situation of women. Furthermore, Article 55 of the Banjul Charter implicitly allowed for the African Commission to receive individual complaints. The enforcement body under the Charter is the African Commission on Human and Peoples' Rights (hereinafter referred to as 'The African Commission').

Next, I turn to some innovative ways that African women can employ the two treaties to advance women's empowerment. I provide some examples to illustrate how such treaties have been used in the past for this purpose. At the same time, I highlight some opportunities which have been lost by women's movements through its consistently ignoring international and regional treaties.

### **Innovative ways of using international and regional treaties to women's advantage**

#### **Instruments of political advocacy**

I believe that we can turn international and regional treaties into real instruments of accountability with which to challenge governments. Most of our governments ratify international human rights instruments not so much because of a political commitment, but because of political expediency and maintaining a good image among the international community. At best, such ratification is a *pro forma* exercise; at worst, it is a nuisance that they must live with. However, once ratification is effected, our governments are pledging

to be accountable for adhering to all the provisions (except where they entered reservations for specific provisions) of the treaty.

It is the duty of the citizenry, especially political representatives of the people, non-governmental organisations (NGOs), the media and other civil society organisations, to make our governments more accountable. We need to force our governments to translate their political rhetoric into substance, to incorporate treaties into domestic laws. For example, we must ask our governments to inform the general public about who is in charge of implementing treaties. The citizenry will then have a mechanism (through lobbying, campaigning, demonstrations etc) to which it can direct its concerns.

Ugandan women used this strategy during the Constituent Assembly, which debated and drafted the new Constitution in 1995. The women delegates to the Assembly formed a women's caucus; they drew many sympathetic and moderate male delegates to their side in order to augment their numbers. Working very closely with the Ugandan women's movement, the caucus worked tirelessly to incorporate women's rights into the new Constitution. The minimum standard and yardstick for all their proposals was the CEDAW. Indeed, Article 33 of the Constitution that articulates the rights of women, fully reflects the spirit of CEDAW. Furthermore, constitutional provisions for gender-based affirmative action at the local and national levels were also a direct result of women's advocacy based on CEDAW's conceptualisation of equality<sup>8</sup>.

CEDAW was used again as a reference point in 1998 when Ugandan women lobbied for land rights under the revised Land Bill. Women's organisations, led by the Uganda Land Alliance, fought tooth and nail to ensure that land reform outlawed the culturally backed gender inequities that plague land ownership and land use policies. Most significantly, women were successful in convincing Parliament to pass a provision for routine spousal co-ownership of the matrimonial home.

## PROFILE

However, through some technical manoeuvring and trickery, the co-ownership clause was missing from the published legislation! Today, Ugandan women are still fighting to have that clause reinstated in the land law.

Furthermore, most human rights treaties provide for a monitoring and reviewing mechanism to ensure that member states are progressing towards the objectives of the instrument. CEDAW, for example, requires member states to file periodic (within a year after ratification and at least every four years thereafter) reports to the CEDAW Committee in New York, with an account of what has been put in place in compliance with the treaty. Similarly, the Banjul Charter requires state parties to submit progress reports every two years.

The periodic reviews create a political opportunity for gender-sensitive members of parliament, together with women's NGOs, to examine, comment upon, and criticise their country's performance, and to draw government and public attention to its strengths and weaknesses (Day and Clote, 1998). Moreover, both the CEDAW Committee and the African Commission encourage 'shadow national reports' to complement the official ones authored by government<sup>9</sup>. A shadow report prepared by non-governmental bodies provides alternative information to the CEDAW Committee/African Commission other than from the self-assessment report from government.

After reviewing country reports, the CEDAW Committee prepares 'concluding comments' in response to each country report. Unfortunately, hardly anyone (not even women's activists) ever reads the Committee's concluding comments for any country. We need to make it our business to know and ask our governments what they have put in place to implement the concluding comments.

Another important landmark for African women in CEDAW lies in Article 14, which specifically addresses the rights of rural women<sup>10</sup>. As we are well aware, over 80 percent of our populations are poor rural dwellers. Despite this, none of our

Constitutions address the specific needs of rural women who face double oppression on account of gender and class. We owe it to our rural-based sisters to place a spotlight on Article 14 of CEDAW, which draws attention to their rights.

### **A human rights framework for gender equity**

Recently, a female doctor who specialises in women's reproductive health approached me; she challenged me with a very direct question: 'What are women's human rights?' For a minute or so, I was at a loss for words. Odd as it may sound, many of us, including women's activists, have scant knowledge of human rights in general. This is true despite our continued persistence that women's rights **are** human rights. Women's human rights can be categorised under the traditional headings of civil, cultural, economic, political and social. Examples of such rights include the: right to education; right to economic resources including property rights; right to equal pay for equal work or work of equal value; right to participate in government; right to health; right to control reproductive choice; and protection from violence. A crucial place to begin learning about basic human rights is in international and regional treaties.

The 1993 World Conference on Human Rights held in Vienna, Austria, helped to consolidate women's rights as human rights. Women have discovered worldwide that placing their issues and concerns within a human rights framework is an effective way of combating and pre-empting gender inequality. To this end, international human rights instruments may be utilised as tools through which a human rights standard can be applied when examining policies and laws for our different countries. We must endeavour to popularise and illuminate the discourse of human rights. This is especially important because international human rights laws and instruments often offer women broader and more comprehensive protection than domestic laws<sup>11</sup>.

## PROFILE

A few African countries have successfully used test cases in the domestic arena, that hinge on international treaties to win big gender battles. The strategy is to interpret domestic legislation and/or public policy by drawing on international human rights norms, especially from ratified international instruments. I provide some examples here to illustrate such important precedents<sup>12</sup>.

### **The case of Unity Dow (Botswana)**

Unity Dow was a lawyer, married to an American citizen with whom she had three children. She challenged the 1984 Citizenship Act under which children of a woman married to a foreigner were not entitled to citizenship, while children of a man married to a foreigner were<sup>13</sup>. While significant benefits accrued to individuals deemed citizens; serious liabilities are attached to the lack of citizenship.

Dow claimed that the Citizenship Act violated both constitutional and international law, including CEDAW to which Botswana had acceded. The Appeals Court cited CEDAW in its opinion, invalidating the law as unconstitutional. After losing two major court decisions, the Government granted citizenship to Dow's children and others similarly situated. Unity Dow's case is exemplary in illustrating how CEDAW can be used to challenge sexist laws that continue to relegate women to second-class citizenship. Indeed, this precedent has already been successfully used in other African courts<sup>14</sup>. An auxiliary and striking outcome from this landmark case was the appointment in 1998 of Unity Dow to sit on the High Court of Botswana – the first woman ever. Already, her impact on the bench is being felt regarding women's human rights.

### **The case of Sara Longwe (Zambia)**

Zambia ratified CEDAW in 1985 and in 1991 extended its Bill of Rights to cover sex discrimination. The Intercontinental Hotel in Lusaka had a

policy prohibiting women from entering the hotel unless accompanied by a man. Sara Longwe was denied entry into the hotel bar for this reason. She sued the hotel for unlawful discrimination. The High Court found that the hotel's exclusion policy amounted to discrimination contrary to the Constitution and could no longer be applied<sup>15</sup>. It ordered that the policy be 'scrapped forthwith'.

With respect to using international human rights law in domestic courts, the judge remarked that if a matter came before the court, which was not covered by domestic legislation, a court could look to international treaties and conventions, such as the African Charter and CEDAW, which had been ratified without reservation by the state.

In the words of Justice Musumali:

*Ratification of such [instruments] by a nation state without reservations is a clear testimony of the willingness by that State to be bound by the provision of such [an instrument]. Since there is that willingness, if an issue comes before this court which would not be covered by local legislation but would be covered by such international [instrument], I would take judicial notice of that Treaty or Convention in my resolution of the dispute.*

Thus, Sara Longwe's proactive measure to challenge the hotel's sexist policy paid dividends for Zambian women's autonomy and freedom of movement.

### **The case of Pastory (Tanzania)**

Pastory's deceased father left a will bequeathing a piece of land to her. She subsequently sold the land to a third party. Pastory's nephew, Ephraim, challenged her right to sell clan land and sought a court declaration that the sale was void because under Haya customary law, the power to sell clan land was vested in men and not in women. The primary court agreed with Ephraim and ordered Pastory to return the purchase money to the buyer. On appeal, the district court set aside this judgment on grounds that it violated the Tanzanian Constitution, which forbade discrimination on the basis of sex.

## PROFILE

Ephrahim appealed to the High Court, seeking to overturn the decision of the district court.

The High Court denied the appeal and affirmed the decision of the district court<sup>16</sup>. It held that Haya custom that denied women the right to own and dispose of clan land violated Tanzania's Bill of Rights as well as CEDAW and other international human rights treaties to which Tanzania has acceded. In his judgment, Justice Mwalusanya explained:

*The principles enunciated in the above named documents are a standard below which any civilized nation will be ashamed to fall.*

### The Case of Muojekwa (Nigeria)

In a recent Court of Appeal case from Nigeria, a father attempted to impose the *Nrachi* – a local custom, which involved the performance of a ceremony by which a man could keep one of his daughters unmarried perpetually, in his home to raise children (especially males) for him<sup>17</sup>. The court found the custom to be discriminatory and in violation of the right to marry and freedom of association. The court declared the custom to be unenforceable. Reference was made to CEDAW, and in particular, to Article 5 which calls on states to eliminate discriminatory customary practices.

In all the four cases cited here, domestic courts applied international human rights standards to disqualify discriminatory customs and practices. Individual women or groups of women activists pursued test cases that had the potential to establish positive legal precedents that would benefit the women in their societies.

Unfortunately, the kind of judicial activism that exists in countries such as India<sup>18</sup>, where the judiciary is well known for its judicial activism, cannot be taken for granted on our continent. This fact was dramatically highlighted in the 1999 Zimbabwean case of *Magaya v Magaya*, which marked a serious setback in the advancement of women's rights for that country and African women as a whole.

### The Case of Venia Magaya (Zimbabwe)

The main issue in this case was whether a woman could inherit her father's estate if he died without leaving a will. The Supreme Court stunned human rights activists worldwide by denying 58-year-old Venia Magaya her inheritance right, holding that the 'nature of African society' dictates that women are not equal to men, especially in family relationships. Awarding the father's estate to her half-brother, the court made reference to unwritten African cultural norms that date back centuries, which say that the head of the family is a patriarch, or a senior man, who exercises control over the property and lives of women and juniors. The 5-0 ruling equated the status of a woman to that of a 'junior male' or a minor<sup>19</sup>. This dangerously repressive precedent deliberately overlooked domestic law<sup>20</sup>, the Constitution, CEDAW and other international instruments that were cited by the defence. The *Magaya* case demonstrates that the struggle for women's human rights confronts resilient structures and institutions of patriarchy whose primary role is to maintain the status quo. Nevertheless, as the cases discussed earlier established, international and regional treaties **can** be used successfully to dismantle the patriarchal fabric.

### A tool for networking

An active engagement of international and regional treaties presents great potential for women's networking. One of the few positive products of the globalisation process for African women lies in the ability to transform their local and fragmented struggles against patriarchy and oppression into a globalised transnational effort (Tamale, 2001). The globalisation of international women's human rights through instruments such as CEDAW, has greatly boosted respect for and attention to the plight of women around the world.

The implementation and monitoring of international and regional instruments especially, present opportunities for women from all corners of the

## PROFILE

world to share experiences and strategies to combat women's oppression. The latest illustration of this phenomenon was the Beijing +5 meeting held in New York in 2000, to evaluate progress on governments' implementation of the Beijing Platform for Action that was endorsed at the Fourth International Women's Conference in 1995. Only by continuing to mobilise and organise at local, national, regional and international levels will we overcome the systemic global oppression and subordination of women and ensure every woman's ability to fully and equally participate in all spheres of life.

### An additional legal forum

If our countries ratify the Optional Protocol to CEDAW, it will serve as a backup implementation mechanism that will also enhance the effectiveness of national mechanisms<sup>21</sup>. We should also explore the possibility of filing individual petitions to the African Commission under Article 55 of the Banjul Charter. This would bolster the mechanism of test cases discussed earlier. African women must venture beyond the domestic judicial system and petition both the African Commission and the CEDAW Committee under the individual complaints mechanisms.

### Conclusion

African women need to think globally and act locally. The challenge for women activists is to develop innovative ways to invoke international treaties in a way that will strengthen domestic guarantees of equality for women in our countries. The significance of test cases for furthering women's rights is lost to many of us in the women's movement. This was apparent in Botswana and Zambia where women's organisations offered negligible support to both Unity Dow and Sara Longwe in their long and difficult test case trials.

Both CEDAW and the Beijing Platform for Action should become staple items in the home libraries of every woman politician and all key people involved in national and local decision-

making. In fact, we should turn CEDAW and other relevant treaties into household names by popularising them through education and awareness programmes. Women, particularly those in rural areas should be the target group for such programmes. Of particular importance to women in decision-making such as women members of parliament, CEDAW is extraordinarily useful as a guide for developing policies and laws, which are sensitive to women's human rights.

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# PROFILE

*Quarterly*, 17.

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## FOOTNOTES

1. Ratification means domesticating the international instrument by incorporating it into national law. Many countries ratify but never actually implement the provisions in the treaties. In fact several African constitutions include a section that requires the 'domestication' of international treaties as a precondition to their implementation, which in effect places a caveat on the ratification. Article 123 of Uganda's Constitution, for example, places the responsibility of domesticating international treaties on Parliament.
2. The distinction between ratification and accession is essentially irrelevant: accession has exactly the same effects as ratification. The distinction refers to two different procedures to becoming a State Party. Technically, a country in favour of a Convention signs shortly after it has been adopted (eg Uganda and Tanzania ratified CEDAW). Countries that have not signed can become State Parties through accession to the Convention (eg Kenya acceded to CEDAW). In practice, the terms are used more loosely and even interchangeably.
3. For a detailed discussion of some of the weaknesses of these two instruments see Oloka-Onyango and Tamale (1995).
4. Acceded March, 9 1984.
5. Ratified July 22, 1985.
6. Ratified August 20, 1985.
7. Note that the drafters of the Banjul Charter talked about both declarations and conventions. This means that they adopted a broad conceptualisation of discrimination against women as stipulated in binding, as well as non-binding international instruments.
8. Compare Article 4 of the Convention with Articles 32 and 33(5) of the 1995 Ugandan Constitution. In order to preempt arguments of 'reverse discrimination', CEDAW exempts gender-based affirmative action policies from the broad definition of 'discrimination'.
9. See Article 22 of CEDAW and Article 46 of the Banjul Charter.
10. Inclusion of this Article was a direct result of pressure exerted by third world women at the time of drafting

CEDAW. See Nyamu (2000)

11. For a useful online international women's human rights resource see, <http://www.law-lib.utoronto.ca/diana/property/documents.htm>
12. For more detail on some of the illustrations see the University of Toronto online resource at: <http://www.lawlib.utoronto.ca/diana/religion/documents.htm>
13. See *Attorney General v Unity Dow* (1992) 103 ILR 128; [1992] LRC (Const) 623 (CA of Botswana).
14. For example, *Rattigan & Others v Chief Immigration Officer & Others*, Decision of the Supreme Court, Harare, Zimbabwe, 1994 (2) Zimbabwe Law Reports, 54.
15. See *Longwe v Intercontinental Hotels* [1993] 4 LRC 221 (HC of Zambia).
16. See *Ephrahim v Pastory and Kaizingele*, (1990)87 L.L.R. 106; [1990] LRC (Const) 757 (HC of Tanzania).
17. See *Muojekwu v Ejikeme* [2000]5 Nigerian Weekly Law Reports 402.
18. The judiciary in India is well known for its judicial activism. Since the early 80's, India has witnessed a vigorous process of social action litigation whereby judges advocate active assertion of judicial power to address societal injustices (Baxi, 1985).
19. See *Venia Magaya v Nakayi Shonhiwa Magaya* Judgement No. S. C. 210/98/Vivil Appea; No 635/92 of the Supreme Court of Zimbabwe (Unreported). Also see Oloka-Onyango (2000).
20. The 1982 Majority Age Act of Zimbabwe specifically provided that women over 18 could not be treated as minors.
21. So far only three African countries have ratified/acceded to the Optional Protocol, namely Namibia, Senegal and Mali.

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