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***REINVIGORATING WOMEN'S RIGHTS IN AFRICA:
THE CASE FOR THE SPECIAL RAPPORTEUR AND
ADDITIONAL PROTOCOL.***

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OCTOBER 2003

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DECLARATION

I, EVA LUSWATA KAWUMA, do hereby declare that this dissertation is my own original work and that it has not been submitted for examination for the award of a degree at any other university.

Signed:

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Signed:.....

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DATE: 27 OCTOBER 2003

DEDICATION

This work is dedicated to my mother Mrs. Bakwana Luswata and my husband John, two people who have always rejoiced when I excel.

AND

*to my children Julia and Jonah.
Thank you for being patient while mammy went back to school.*

AND

To all the women of Marchè Mvog-mbi, Yaoundè. Watching you everyday, busy as bees, trying to make ends meet for you and everybody else, confirmed my conviction that much more still needs to be done for African women.

ACKNOWLEDGEMENTS

I specifically acknowledge the following people for their support in the completion of this work:

- *Dr. Atangcho N. Akonumbo, my supervisor: Thank you for your intrusive comments and patience for a restless mind.*
- *Professor Michelo Hansungule: Thank you for starting me off on this topic, helping me to comb the maze of possibilities.*
- *Professor Frans Viljoen: For the useful material, and a very eventful year!*
- *Dr.Sylvia Tamale: For your wise counsel and fellow scholarship in African feminism.*
- *Revai: For the Pretoria connection.*
- *Nima and Piet: for the good and bad times that we shared!*

ABBREVIATIONS AND SYNONYMS

<i>AU</i>	<i>African Union</i>
<i>CEDAW</i>	<i>Convention on the Elimination of all Kinds of Discrimination Against Women.</i>
<i>CHARTER</i>	<i>African Charter on Human and Peoples' Rights.</i>
<i>COMMISSION</i>	<i>African Commission on Human and Peoples' Rights</i>
<i>FGM</i>	<i>Female Genital Mutilation.</i>
<i>FIDA</i>	<i>Federation of women Lawyers (Kenya Chapter)</i>
<i>IACHR</i>	<i>Inter American Commission on Human Rights</i>
<i>ICHRD</i>	<i>International Centre for Human Rights and Development</i>
<i>NGOs</i>	<i>Non Governmental Organisations</i>
<i>OAU</i>	<i>Organisation of African Unity</i>
<i>SADC</i>	<i>Southern African Development Committee</i>
<i>SRRWA</i>	<i>Special Rapporteur on the Rights of Women in Africa</i>
<i>UDHR</i>	<i>Universal Declaration of Human Rights</i>
<i>UN</i>	<i>United Nations</i>
<i>WILDAF</i>	<i>Women in Law and Development in Africa</i>

INTRODUCTION.

A. Background and justification of the research.

The past three decades have witnessed increasing and more organized demands by women's rights activists worldwide for the recognition of the rights of women. Groundbreaking proclamations were reached at several United Nations (UN) World Conferences for women, which have served to 'galvanise the international women's movement, to increase the visibility of women and to show that women matter to world development'¹. Gaer has further noted that the efforts of women advocates have 'forced' the international community to understand that,

*[n]ot only do women have human rights, but these rights are not beyond the reach of the growing number of human rights mechanisms and programs set up by international and national institutions.*²

Response to this movement has been an increased, or more focused interest in women's human rights by the various international, regional and domestic human rights legislation and institutions. One well established and perhaps most innovative achievement in the UN human rights regime has been the appointment of special rapporteurs some of whose mandates are partly or wholly on issues concerning the rights of women.

Currently, part of the African human rights regime is embodied in the jurisprudence of the African Charter on Human and People's Rights³ (hereinafter the Charter) which has created as its principle monitoring organ, the African Commission on Human and People's Rights (hereinafter the Commission)⁴ and established its procedures.⁵ Notably, the charter does not explicitly provide for the appointment of special rapporteurs. Their appointment is a clear innovation of the Commission to move beyond its text to fill a perceived need in the system. Since its inception in 1987, the Commission has appointed three special rapporteurs. The first, on summary, arbitrary and extra judicial executions, (hereinafter

¹ Chen 'Engendering world conferences: the international women's movement and the UN' in Weiss & Gordenker (eds) (1996) 139.

² Gaer 'Mainstreaming the concern for human rights of women. Beyond theory' in Agosin (ed) (2001) 98.

³ The Charter was adopted on 27/6/81 and came into force on 21/10/86. OAU.CAB/LEG/67/3, rev.5.

⁴ Article 30 of the Charter.

⁵ State periodic reporting under Article 62, examination of state and non state communications under

Special Rapporteur on Summary Executions) was appointed in 1994. The second, on prisons and conditions of detention in Africa (hereinafter Special Rapporteur on Prisons) was appointed in 1996, and the third on Women's rights was appointed in 1998.⁶ This dissertation proposes to discuss the last mandate, but with inference to the other two, where necessary.

The existence of the Special Rapporteur on the rights of women in Africa (hereinafter SRRWA) indicates that there has been conscientious recognition and action by the Commission to improve women's lives. Unfortunately, this has hardly diminished the marginalized position of women in Africa. For example, women in many African countries are still considered legal minors suffering inequality in written, customary or religious laws. Again, although women produce up to 80% of basic food stuff in Africa, they have no, or limited access to productive resources and no control over the proceeds of their labour, making them more susceptible to extreme poverty than their male counterparts.⁷ Worse still, poverty, social and family expectations conspire against the education of girls and women, meaning that many are illiterate and ignorant of the laws and institutions that can protect them. For example, Guinea's female literacy rate is as low as 13%.⁸

Violence against women is pervasive and growing both in rural and urban Africa. For example, South Africa has recorded one of the highest levels of rape in the world with 32,107 cases being reported in 1994. This figure represents a 16% increase from the previous year, but because the crime remains largely unreported, it is a reflection of only 2.8% of the actual level of the crime.⁹ Further, discriminatory cultural and religious practices continue to violate women's rights to dignity, expression, privacy and health. It is estimated that female genital mutilation (hereinafter FGM) occurs in 36 African countries, being practiced on an estimated 90% of women living in Ethiopia.¹⁰

Unfortunately, violations against the rights of African women have largely remained unreported and unverified. This has reinforced African States to ignore or deny their

Articles 47 to 59 and promotion, protection and interpretation (etc) under Article 45.

⁶ See 8th (annex VII), 10th (annex VII) and 11th Annual Activity reports of the Commission respectively.

⁷ Annup Shap 'Women's rights' at ><http://www.globalissues.org/HUMANRIGHTS/women/RIGHTS.asp><(accessed on 4 October 2003).

⁸ Global Fund for Women report at <http://www.globalfundforwomenn.org/4news/africa-report/08-Guinea.html>>(accessed on 4 October 2003).

⁹ Report of the Special Rapporteur on violence, its Causes and Causes on the Issue of Rape in the Community GENERAL E/CN.4/1997/47/ADD.3 of 24 February 1997.

¹⁰ (n 8 above) at <http://www.globalfundforwomenn.org/4news/africa-report/07-Ethiopia.html>>.

national and international obligations to protect and promote women's rights. Again, history has shown that, progressive legislation has not yet been transformed into actual benefits for African women because of a poor or inefficient monitoring system. It has therefore become necessary to take stock of the achievements so far made by African feminists and measure these up with women's actual experiences.

The degenerating situation of African women has heightened the African feminist movement and, following concerted efforts by Non Governmental Organisations (hereinafter NGOs), individual feminists and the Commission which has lasted at least eight years, the Assembly of the African Union (AU) officially adopted the Protocol to the African Charter on Human and People's Rights Relating to the Rights of Women (hereinbefore Additional Protocol and hereinafter the Protocol) on 11 July 2003.¹¹ It was reported by the designated ministerial meeting that the Protocol would fill the vacuum in the Charter in respect of women's human rights, complement universal instruments dealing with equality of the sexes and represent a legal shield for women against all kinds of abuses.¹²

However, the passing of this instrument will not necessarily result into immediate emancipation of African women. This is because it shall come into force only after 30 days of the 15th ratification¹³ and for African states that have so far shown much reluctance in championing human rights in general, this may take several years. So far, only the Gambia has ratified the Protocol (in September 2003).¹⁴

However, it is definite that the mandate of the Commission has now been widened to meet a specific group who are in fact in the majority. There is therefore a serious need for it to "sharpen its claws", through the mandate of the SRRWA firstly to garner support for ratification of the Protocol and eventually, to monitor its compliance. Unfortunately, the mandate of the SRRWA has so far not been effective in addressing rights of African

¹¹ 2nd AU SUMMIT of the Assembly of Heads of State and Government Maputo, Mozambique 10-12 July 2003.

¹² Report of the interim chairperson on the proceedings of the ministerial meeting on the draft protocol to the African Charter on Human and Peoples' Rights relating to the rights of women. Assembly/AU (II)Rev.1.

¹³ Article 29 of the Protocol.

¹⁴ Information obtained from the Legal officer at the Commission Secretariat.

women. In fact, there has been a call for the Commission to review the whole process of its special rapporteur mechanisms¹⁵.

B. Problem statement

The presence of a Special Rapporteur on women in the Commission has not improved the status of women in Africa. The SRRWA is currently beset with a number of problems, which puts into question her ability to execute the mandate and enforce the newly adopted Protocol.

C. Literature Review.

The topic of human rights of women at the international and regional level has attracted considerable interest. Most literature overviewed agrees that theoretical advances in ensuring the equality of women are evident. For example, Welch has observed that non-discrimination is the single theme characterising all major post World War II human rights instruments especially, the Universal Declaration of Human Rights (UDHR) and the Convention on the Elimination of All kinds of Discrimination Against Women (CEDAW). She advises however that, this has not necessarily resulted into better lives for women and years on, deep-rooted systems that support their discrimination cannot be transformed by mere legislation.¹⁶ Ginther has noted, that the reason for this is the fact that international law is male biased and fails to take into account interests outside endocentric parameters. This is because:

*The dominant position of men is not just their control of international legal institutions but follows from, the fact that they created modes of thought and figures of speech by which these institutions understood and by which international law operated and developed.*¹⁷

Against this backdrop, several writers have noted that the basic challenge to the human rights revolution especially in Africa is that of implementation. Mugwanya notes that the priority facing the revolution now is to channel half a century's worth of international norms

¹⁵ A call was made by Amnesty International and Insights at the 27th and 28th sessions. See Evans 'The special rapporteurs in the African system' in Evans & Murray (eds) (2002) 303.

¹⁶ Welch (1993) 15 *Human Rights Quarterly* 553.

¹⁷ Ginther 'Re-defining international law form the point of view of decolonisation and development of African regionalism' in Murray (2001) 2 *African Human Rights Law Journal* 210.

and standards into national legislation and practice.¹⁸ The UN High Commissioner for Human Rights has also supported the importance of implementing human rights.¹⁹

Mugwanya further appreciates the pivotal role of the global system but demonstrates that regional systems are better placed and can be more effective in impacting human rights at the grassroots level.²⁰

Although much has been written about the Commission as a monitoring body generally,²¹ very little has been written on its special procedures. Although Evans and Harrington have made some effort to write about the special rapporteurs in the Commission, theirs is notably a factual account, which does not explore the full meaning and parameters of the mandates.²² It also still remains unclear how African women are responding to the SRRWA in particular, or how international and regional mechanisms can complement its improvement.

Tamale introduces a new dimension to the debate by stating that African women have under-utilised the regional instrument and mechanisms much to their detriment.²³ However, she earlier explained that part of the problem is that the international community chooses to treat the specifics of local oppression within the domain of the family (*where cultural norms dominate*) and outside the concern of the state (*which is the subject of international law*).²⁴

Stemming from the above, this research brings to bear the changes in consciousness experienced by women in the last three decades into the human rights discourse, in order to build a perception of what human rights mean as viewed from the lives of women. This dissertation will show that this aspect of human rights has been missing from the largely male-defined concepts on what is central to humanity. Most significantly, however, is the fact that current literature on the topic overviewed precedes the Protocol and the

¹⁸ Mugwanya (1999) *Indiana International and Comparative Law Review*.

¹⁹ U.N. ESCOR. 52d Sess., qt 4 U.N. Doc. E/CN.4/1996-/50/Add.1

²⁰ Mugwanya (n 18 above).

²¹ For example Evans & Murray (eds) (2002); Nmehielle (2001) etc.

²² See Evans & Murray (eds) (2002) chapter 9 and Harrington, J (2002) 2 *African Human Rights Law Journal* 247-267.

²³ Tamale (2001) workshop report on the role of Parliamentarians in the implementation of international treaties, Nairobi.

²⁴ Oloka-Onyango & Tamale (1995) *Human Rights Quarterly* 710 (Emphasis mine).

innovative provisions for women's human rights it is meant to represent. Therefore, this is an area virgin, and ready, for the investigations and contributions by African feminists.

D. Objectives of the Study.

The objectives of the study are as follows:

1. To critically examine the efficacy of the mandate of the SRRWA with particular emphasis on the new legal framework created by the Protocol.
2. To investigate the operation of some universal and regional organs with comparable mandate, and their possible relevance to the improvement of the SRRWA.
3. To put forward recommendations for the improvement of the mandate of the SRRWA that will enhance its impact on the promotion and protection of women's rights in Africa.

E. Hypothesis

The study will test the following hypotheses:

1. The mandate of the SRRWA has not been effectively used or equipped in order to protect women's rights in Africa.
2. African women are still significantly absent from the regional discourse; they are prevented by various factors from using the available mechanisms.
3. Experiences of other universal bodies can be a useful reference in improving the SRRWA.

F. Methodology

This being a study on women, the dissertation was largely informed by women's law methodologies, which take women and their lived reality as the focus from which, investigations of the law, formal institutions and other social norms are carried out.²⁵

²⁵ For a deeper analysis of these methodologies see, Dahl (1987) and Bentzon & Hellum (etal) (1998) 25.

Gender was also used as a tool to analyse the legal, economic and social situation of African women before suggesting suitable recommendations for their improvement. The methodology thus emerged as investigative, descriptive and prescriptive.

The research itself was largely a deductive analysis drawing from and then adding to previous feminist literature and comments in books, journals, Internet sources and reports on the topic. An extensive perusal of country reports and communications to the Commission, various Commission Activity Reports and other similar material were undertaken. Interviews with personnel at the Institute for women and Gender Studies of the university of Pretoria, as well as a legal assistant at the Commission (by structured questionnaire) were carried out.²⁶

The research was carried out over a period of three months between August and October 2003 at the University of Pretoria and the Catholic University in Yaounde.

G. Limitations of the study.

The research was seriously impaired by the dearth of information on the topic.²⁷ Further, the Protocol being a new legislation resulted into an investigation that lacked sound backing from previous theories. The location of the research (i.e. Yaounde) also militated against information gathering because of lack of literally material in English. Further, The language of operation in the field was mainly French for which I have only rudimentary knowledge.

H. Summary of Chapters.

Following this introduction, the study is divided into three chapters. The first chapter traces the evolvment of the SRRWA in the Commission, provides its current operations and briefly expounds on the other mechanisms in the Commission targeting women. The second chapter evaluates both the terms of the mandate (within the context of the Protocol), and its successes and shortcomings. The third chapter explores comparative international and regional protection mechanisms and their possible relevance to the

²⁶ A copy of the questionnaire (administered by electronic transfer) is attached as appendix A).

²⁷ Reports of the SRRWA are very poorly documented.

SRRWA. The fourth chapter contains recommendations on improving the mandate and concluding remarks.

CHAPTER ONE

THE PROTECTION OF WOMEN'S RIGHTS IN THE AFRICAN COMMISSION.

1.1 Introduction.

The protection of the rights of women is increasingly becoming a firm preoccupation of the Commission and has been targeted in the various mechanisms that it has adopted to promote and protect human rights. This chapter gives a description of the mandate of the SRRWA and will in the first place, trace the development of protection of women's rights in the Commission. The role of NGOs and other mechanisms in the Commission relating to women's rights will also be investigated.

1.2 Evolution of the promotion and protection of women's rights in the African Commission.

It has been generally argued that when the Organisation of African Unity (OAU) (now AU) was founded in 1963, issues of human rights did not feature prominently on its agenda.²⁸ The adoption of the Charter and subsequently the Commission did not improve matters much, especially as the latter has still fallen short of the promotional and protectionist mandate that it was entrusted. This is partly because African states emphasized and continue to stress domestic sovereignty and not international accountability.²⁹ Also, although the Commission is strictly a non-political and independent institution, and the Commissioners serve in their personal capacity, their nomination, election and remuneration are the prerogative of the State Parties.³⁰ The Independence of the African Commission is further watered down by the fact that many retain their professional positions in their governments.³¹

²⁸ See for example Naldi 'Future trends in human rights in Africa: the increased role of the AU?' in Evans and Murray (n 21 above) 1.

²⁹ Welch (n 16 above) 556.

³⁰ Articles 33, 34, 35, 37, 41 and 44 of the Charter.

³¹ Of the eleven Commissioners elected to the first Commission, five were high-ranking civil servants and judicial officers. See Harrington (n 22 above).

Also, Article 59 of the Charter indicates that all measures taken by the Commission while executing its mandate must be in collaboration with the Heads of State and Government and the threat of political interference cannot be ignored. In fact, invoking the instrument has no tangible remedies or punitive functions against non-complying states and in practice, remains effective only in cognitive terms.

It must be understood that the Commission, being an international body, was based upon the principle of non-discrimination and decent catalogue of human rights. Therefore, its effectiveness depended heavily on two factors. The first being the standard it was prepared to take with regard to the rights of the Charter, and second, the attitude of the potential users toward the various mechanisms it created. Addressing the first factor, the element that makes the difference is the composition of the organ. Although non-discrimination and women's rights featured in the Charter.³² no representation of women was made on the Commission at its inception. It was only after six years of pressure from women and human rights groups that the first woman was appointed to the Commission in 1992.³³

The Charter itself is woefully deficient on the rights of women. Culture was reinforced in the preamble when State Parties based the foundation of the instrument on 'tradition and values of African civilisation' and, gender only appears in the middle of a lengthy list of grounds on which individual rights may not be distinguished.³⁴ Further, only one out of the sixty-eight articles expressly makes reference to women and as Oloka-Onyango notes, it is placed in an omnibus clause covering family rights and traditional values 'thereby reproducing the essential tension that plagues the realisation of human rights by women.'³⁵ In Welch's view, the end result is that,

[t]he Charter conveys a potentially ambiguous message in its attempt to recognize both deep-seated African values (which arguably include clear differentiation of roles and rights based on gender) and emerging global values (among which non-discrimination on the basis of sex figures prominently).³⁶

It was therefore in such a set-up that the SRRWA was created and following agitation from feminists and human rights activists alike, that the Protocol was promulgated.

³² Articles 2 and 18.

³³ Oloka-Onyango & Tamale (n 24 above) 720.

³⁴ Article 2.

³⁵ Oloka-Onyango *Buffalo Human Rights Law Review* (2000).

³⁶ Welch (n 16 above) 554.

1.3 The mandate of the Special Rapporteur on the Rights of Women in Africa.

1.3.1 Genesis and terms of reference of the mandate.

The Commission was well aware of the fact that the appointment of thematic rapporteurs was outside their mandate when they set out to appoint the first Rapporteur on Summary Executions. They defended their action citing the necessity of going beyond the Charter itself '[i]n search of more courageous terms'.³⁷ Therefore, this mechanism became a kind of benchmark, indicating the measure of importance that the Commission was prepared to attach to particular issues.

The earliest recorded discussions on the appointment of the SRRWA came in 1995 during a seminar on the rights of women in Africa where it was proposed that a person be appointed to be responsible for the protection of women's rights.³⁸ However, approval for the creation of the mandate was only made during the 19th session in 1996, after the draft terms of reference had been prepared.³⁹ The Commission justified the appointment after its realisation that the provisions of the Charter did not ensure an effective protection of fundamental rights of women. It was also reasoned that it was necessary to appoint such a person to assist in the effective implementation of the Commission's mandate.⁴⁰

Evans explains that it appears to have been the intention of the Commission to consider applications from experts in the field other than limit themselves to serving commissioners.⁴¹ In spite of this, during its 23rd session, the Commission went ahead to pick from among them Commissioner Ondziel-Gnelenga to occupy the position.⁴² It is

³⁷ Commissioner Ndiaye in Harrington (n 22above) 251.

³⁸ Final communiqué of the 17th session; paragraph 28.

³⁹ The African Commission was perhaps learning from past mistakes. The Special Rapporteur on Summary Executions was appointed before the terms of reference were finalised and this adversely affected the mandate for the short period that it existed.

⁴⁰ Paragraph 1 of the draft terms of reference contained in the report of the first meeting on the working group on the Protocol to the African Charter on Women's Rights, Banjul 26-28 January 1998 reprinted in Murray & Evans (2001) 781.

⁴¹ Evans & Murray (n 21above) 296.

⁴² The appointment was formally endorsed in the 25th session during April/May 1999, this being retrospective with the appointment taking effect from 31/10/98. Resolution of the Designation of a Special Rapporteur on the Rights of women in Africa, 12th Activity report 1998-99, Annex IV in Murray & Evans (2001) 11.

important to note that the appointment was made without clear terms of reference, funding or offer of administrative assistance. The impetus for her immediate appointment could have stemmed from the ongoing processes within the Commission to prepare a specific instrument on the rights of women and in which Ondiziel-Gnelenga was playing a significant part.

The terms of reference of the SRRWA provide that that she/he is.⁴³

- a) *To carry out a study on the situation of the human rights of women in Africa.*
- b) *To draw up guidelines on the drafting and examination of State Parties reports on the rights of women in Africa.*
- c) *Ensure or make a follow up on the implementation of the Charter by State Parties. In this vein, the Special Rapporteur will prepare a report on the situation of violations of women's rights and propose recommendations to the Commission.*
- d) *The Special Rapporteur will assist African governments in the development and implementation of their policies of promoting and protecting women's rights in Africa.*
- e) *To encourage and work with NGOs in the field of promotion and protection of women's rights.*
- f) *He/she will serve as a link between the Commission and intergovernmental and NGOs at regional and international levels in order to harmonize the initiatives on the rights of women.*
- g) *In this regard, the special rapporteur will collaborate with special rapporteurs from the UN and other regional systems.*
- h) *Finalize the drafting of the Draft Protocol on the Rights of Women and follow the process of adoption.*
- i) *Report to the Commission as well as any recommendation for the improvement of the situation of women's rights in Africa.*⁴⁴

The mandate was set to expire in 2002 with the requirement that an interim report addressing the subject matter of the mandate be submitted within two years along with proposals for the future.⁴⁵ The SRRWA was in addition required to submit a progress report at each session of the Commission, as well as present an annual report to the

⁴³ (n 40 above) 781.

⁴⁴ Terms (h) and (i) were not included in the draft terms of reference reprinted in Murray & Evans (n 40 above) 78. They first appear in the report of the SRRWA at the 12th session. The respondent from the Commission interviewed explained that it was the Commission that specifically requested the SRRWA to follow up the drafting process and make reports to its sessions.

Assembly of Heads of State and Government annexed to that of the Commission.⁴⁶ The post is currently held by Commissioner Angela Melo who is also a jurist (specializing in intellectual property) and legal advisor to the Justice Ministry of her home country, Mozambique.⁴⁷

1.3.2 Promotional activities of the mandate.

The promotional mandate requires that the SRRWA visits different countries promoting the Commission's activities in respect of women's rights and policing protectionist endeavours by State Parties. Apart from keeping the Commission informed of violations, such activities should to some extent, reveal the extent, to which the SRRWA is impacting on women around the continent. This could give an estimation of the attitudes and responses of women towards this particular mechanism. The SRRWA has begun promoting the Protocol and calling for its ratification at these visits where she targets government authorities in particular.⁴⁸

Unfortunately, it is still not very clear how African women are responding to the activities of the SRRWA and this could be because she has not done enough promotional work. Worse still, for even the little done, her reports are hardly reported in the Commission's documents. There is evidence to show that Commissioner Ondizel-Gnelenga presented a preliminary report six months after her appointment and it was mentioned at both the 26th and 27th sessions. However, the report did not appear in the 13th Activity Report and technically remains a restricted document. Also, in contrast to the lengthy and detailed reports of the Special Rapporteur on Prisons, Commissioner Ondizel-Gnelenga's reports are only few pages in length and likewise only feature minimally in the Activity report.⁴⁹

Even in the absence of the reports of the SRRWA, it is a well-established fact that the voices of African women are conspicuously missing from the human rights discourse at the regional level. There may well be several reasons for this, but one significant bottleneck is

⁴⁵ Evans & Murray (n 21 above) 297.

⁴⁶ As above at 298.

⁴⁷ See African Commission on Human and Peoples' Rights <http://www.achpr.org/html/membersofthe_commissio.html> (accessed on 18 October 2003). Information on the mandate's profession was provided from the source at the Commission's Secretariat.

⁴⁸ Information obtained from the respondent at the Commission Secretariat.

⁴⁹ Evans & Murray (n 21 above) 298.

the prohibitive and discriminatory political and cultural environment in which women pursue their rights. Discriminatory attitudes, cultural norms and male dominant juristic traditions and laws have ensured that women's rights remain within the private spheres of the family and community. Further, international human rights law with its traditional focus on the state, concentrates on public relationships and concerns failing to account for the private domain in which women's roles and rights have largely been defined and violated. Therefore, despite the presence of a SRRWA at the regional level, widespread violations against African women as domestic violence, spousal homicide, rape, FGM, girl child marriages, widow inheritance, discriminatory religious practises and economic oppression (to mention a few), continue widespread and more or less unabated.

1.3.3 The Role of Non-Governmental Organisations.

NGOs have played a pivotal role in supporting the Commission throughout its 16 years of existence extending to its various mechanisms, including that of the SRRWA. The birth of the Protocol and the mandate itself was due to the lobbying and overt involvement of a number of NGOs. In particular, Women in Law and Development in Africa (hereinafter WILDAF) joined hands with the Commission to organize a seminar recommending the formation of the mandate and subsequently, a meeting of several NGOs assisted the Commission in refining the draft of the Protocol and terms of reference of the mandate.⁵⁰ NGO support in these two ventures persisted to the time they both became a reality.

As part of her mandate, the SRRWA is required to work with NGOs in the promotion and protection of women's rights and also act as a link between them and the Commission. To this end, WILDAF provided funding and assistance for the first mission of the SRRWA to Liberia and the Montreal based International Centre for Human Rights and Development paid the assistant who worked for the SRRWA in Banjul and Lome.⁵¹ NGOs have also assisted the mandate to identify areas of concern regarding rights of women after which she was able to initiate thematic studies on issues such as violence against women, poverty⁵² etc.

⁵⁰ As above at 267. The NGOs involved were WILDAF, The African Centre for Democracy and Human Rights as well as representatives from the International Commission of Jurists.

⁵¹ Evans & Murray (n 21 above) 265.

⁵² As in n 48 above.

While appreciating the value NGOs bring to this mandate, there is the genuine concern that special rapporteurs are in general relying too heavily on NGOs than on the Commission that created them. This could result for example into concentration by the SRRWA only on those issues that concern NGOs that regularly offer support but may not necessarily address issues relevant to societies' needs. It may also result into the Commission's control and responsibility over the mandate being usurped by NGOs, some of which may not necessarily have rights of African women at heart.

The Commission is open to communications from NGOs and individuals and through out its history, NGOs have been at the forefront of presenting communications. However, NGOs have not been diligent in bringing cases that augment women's rights and even when they do present communications, their areas of interest have mainly been political and civil rights.⁵³ In particular, NGOs have so far failed to champion issues as that of shelter, education, food and health; rights that are extremely pertinent to African women. The reason could be that the number of NGOs concerned with women's rights is still small,⁵⁴ lack effective funding, logistical and technical support to feature prominently at the regional level. It has also been observed that most NGOs are focusing on development than rights, reasoning that the sheer struggle for survival occupies the attention of most African women.⁵⁵ Such tendencies signify a lack of understanding of what 'human rights' entail and a failure to conceptualise development into mainstream human rights.

1.4 Other comparable and contemporary mechanisms with respect to women's rights.

The dismal performance of the promotional mandate of the SRRWA has resulted into an equally dismal number of communications relating to women's rights. Only one case has so far resulted into recommendations directly focusing on women⁵⁶. The communication was brought against the state of Mauritania of complaints on human rights violations by Arab Berbers against the Black minority of Soninkes and Wolofs. Although none of the communications mentioned women specifically, the Commission gave some focus to abuses against women. In particular, it noted that a law promulgated in June 1993 to benefit widows and families of those killed during the massacres between 1986 and 1992,

⁵³ This is the case even for countries like Nigeria whose NGOs have constantly featured in the Commission.

⁵⁴ For example by 2001 there were only 16 NGOs specialising in women's rights with observer status before the Commission out of the total of 236. See Welch (n 16 above) 208.

⁵⁵ As above at 557.

had left out widows (and their children) of those who had not contracted legal marriages. This was held to be discriminatory. The Commission thereby directed the government of Mauritania to take appropriate measures to ensure payment of compensatory benefit to those widows.⁵⁷

The dearth of communications on women's rights can also be attributed to the three-tier barrier confronting African women when accessing their rights. At the local level is the family and community, followed by the State. The international human rights system constitutes the 'head' of these barriers for it is also fortified by formidable legal, economic, technical and physical barriers that women are yet to transcend.

However, more restrictive is the requirement for the exhaustion of local remedies, which according to the Commission, must be of a judicial nature and based upon 'legal' principles.⁵⁸ In essence, the complainant must first exhaust judicial remedies at the domestic level. The requirement fails to take into account the legal, economic, technical and physical barriers that prevent women from accessing domestic courts. In Africa, women traditionally have limited access to productive resources and cannot control the proceeds of their labour. They are therefore poor, illiterate and ignorant and often enslaved by discriminatory cultures and traditions. Most live in rural areas, too far from judicial institutions and even the few who manage to get to these institutions, are overwhelmed by the technical requirements and discouraged by prohibitive costs of legal representation. It appears that even at the regional level, the issue of costs works against women because the Commission has been reluctant to waive the exhaustion of local remedies rule for indigent complainants.⁵⁹

The situation seems to have been compounded further by the Protocol on women, which permits communications only to the African Court on Human and People's rights.⁶⁰ The Protocol to the African Charter on Human and People's Rights on the Establishment of the African Court on Human and People's Rights (hereinafter the Protocol of the Court) has permitted States to have the option (at the time of ratification of the Protocol of the Court)

⁵⁶ Institute of Human Rights and Development (1999-2000) and Welch (n 16 above) 572.

⁵⁷ Communications 54/91, 61/91, 98/93, 164/97 and 210/98, *Malawi African Association & Others v Mauritania* in Institute of Human Rights and Development (1999-2000) 161. Communication 48/90, 50/91, 52/91, and 89/93, *Amnesty International and others v Sudan* (As in n 57 above) 335.

⁵⁹ Communication 207/97 *Africa Legal Aid v The Gambia* (As in n 57) 126.

⁶⁰ Article 27.

to declare or withhold consent to be subject to cases of individuals and NGOs.⁶¹ The meaning of this provision is that interpretation of the Protocol of women's rights is dependent on the whims of States Parties. Thus the ability of women and NGOs to fight for women's rights at this important regional judicial institution has been deliberately wrestled out of their hands into that of States that have traditionally given little thought of uplifting the status of women.

Alongside the SRRWA are two other thematic rapporteurs whose mandates cover the right of specific categories of women. In particular, the Special Rapporteur on Prisons is required to focus on conditions of prisons in Africa with special attention to problems of gender.⁶² To that end, the Special Rapporteur included in his first report to the Commission, a detailed account of prison conditions in Zimbabwe disaggregated by sex. He was able to show not only the female population in different prisons, but also the problems they face on account of their gender as well as efforts by the government to prepare them for life after prison.⁶³

As part of its mandate, the Commission undertakes promotional visits to State Parties, which may result into protectionist activities being carried out as well. Each Commissioner is assigned a number of countries where he/she meets relevant governmental and non-governmental officials in order to solicit information on human rights observance. The visiting commissioner can also collect all types of documents (including legislation) on human rights from the host country.⁶⁴ The SRRWA was part of the group that visited Chad and Liberia and she was able to collect information on violations of women's rights especially during the long civil war in Liberia.⁶⁵

Unfortunately, there has been minimal concern on women's rights at these visits and the only situation that women's issues have been specifically raised is in relation to the visit to Mauritania in 1997. The Commission met with the secretary for women from government and NGO representatives, to deal with specific complaints by widows alleging that no prosecutions had been undertaken in relation to soldiers of a particular ethnic group who had been killed in the massacres that took place between 1988 and 1992. In addition, the

⁶¹ Articles 5 and 34(6) of the Protocol of the Court.

⁶² Terms of reference of the Special Rapporteur on Prisons in Heynes (ed)(1999) 225.

⁶³ 21st Session of the Commission in Murray and Evans (n 40 above) 253.

⁶⁴ Evans & Murray (n 21 above) 342.

⁶⁵ As above, 272 and 343.

Commission issued a report highlighting violations against women including harmful traditional practices like FGM, early marriages and discriminative marriage and divorce laws and concluded that 'the promotion of women's rights is deficient in the country and merits particular attention'⁶⁶.

This chapter has shown that the mandate of the SRRWA is currently executed within the general framework of the Commission but done in special procedure. It is also apparent that the promotional mandate is still lacking for women's voices are still conspicuously absent from the regional human rights discourse. The terms of reference also appear to be blind to the barriers preventing women from accessing the regional procedures, meaning that the mandate is yet to capture women's lived realities in Africa. However, the importance of the SRRWA is augmented by the fact that the other procedures of the Commission appear to be making only minimal impact on women.

⁶⁶ Report of the Mission to Mauritania of the Commission, Nouakchott 19-27 (as above) 209.

CHAPTER TWO

AN EVALUATION OF THE TERMS OF REFERENCE OF THE SPECIAL RAPPORTEUR ON WOMEN WITHIN THE CONTEXT OF THE PROTOCOL.

2.1 Introduction.

The justification for the appointment of a SRRWA and the passing of the Protocol was to achieve more effective protection of women's rights in Africa and this signifies their close relationship. Therefore, this chapter evaluates the mandate of the SRRWA within the context of the Protocol provisions. It was also deemed necessary to understand the motive behind the drafting of the Protocol and therefore, a brief outline of its history is given as part of the evaluation. Also included in this chapter is an investigation of developments at the domestic level.

2.2 Tracing the history of the Protocol and its provisions

The history of the Protocol is quite phenomenal. Despite the presence of CEDAW and its application to Africa, African women felt that they needed an African specific human rights document; one that would directly and more relevantly address their human rights needs. Reasons for this are discussed briefly.⁶⁷

Despite its well articulated articles on women's rights, the drafters of the Charter were only minimally influenced by CEDAW's provisions, incorporating it only by reference and not by name.⁶⁸ Even then, CEDAW has the weakest implementation and enforcement mechanism of any of the international human rights instruments and did not until October 1999 allow for individual petitions⁶⁹. Further, CEDAW has recorded the highest number of reservations, which further weakened its impact.⁷⁰ The reservations made by African Islamic governments to CEDAW (on the basis that it violates the teachings of the Shari'a),

⁶⁷ Much of what is discussed as the history of the Protocol was picked up by this researcher at a workshop organised by the Centre for Human Rights of the University of Pretoria in early 2003, to comment on the draft Protocol. In attendance were prominent women politicians, jurists, NGOs and women activists.

⁶⁸ Article 60 of the Charter.

⁶⁹ Additional Protocol to CEDAW, which came into force on 22 December 2000.

⁷⁰ Oloka-Onyango & Tamale (n 24 above) 110.

outnumber all reservations made by such governments to all other human rights instruments.⁷¹

In particular to African women, CEDAW did not make any sufficient provision on dignity for women, violence against women, or protection against harmful practices. Again, no special attention was given to widow's rights or elderly women. All these were to feature in the Protocol.⁷²

Prior to the Protocol, women NGOs and human rights activists had continuously drawn the attention of African governments and regional bodies to the plight of African women and girls suffering from harmful religious and cultural practices. The African Committee on Traditional Practices Affecting the health of Women and Children headed the call. This NGO in cooperation with the OAU drafted the 'OAU Convention on the Elimination of All forms of harmful Practices Affecting the Fundamental Human Rights of Women and Girls'. The draft was eventually integrated with the Draft Protocol on Women to form the current Protocol in which provisions protecting African women from harmful practices feature prominently.

Currently, Africa is one of the two most war torn regions in the world with more than one quarter of African countries hosting armed conflict in their territory.⁷³ In light of the massive unrest affecting millions of African women and children, it was felt that there was need for special protection for women and girls in armed conflict and their participation in peace processes. This was achieved in Articles 10 and 11 of the Protocol.

Having been passed in 1979, CEDAW could not have provided for new and emerging rights in the Commission. In particular, the Commission had through the case of the *Social and Economics Rights Action Centre and the Centre for Economic and Social Rights versus Nigeria*, not only recognized the rights to food security and shelter, but connected these to the right to health, property and family life which are very pertinent to African women. In the same case, the Commission examined the so called 'third generation' rights to development and a healthy environment within the realm of the individual and

⁷¹ Zeid 'Equality, discrimination and constitutionalism in Muslim Africa' in Oloka-Onyango (ed) (2001) 171.

⁷² Articles 3, 4, 5, 20, 21 and 22.

⁷³ Regehr, E 'Armed conflict report 2003 at <<http://ploughshares.ca/CONTENT/AR/ACROO/ACR03-introduction.htm>> (accessed on 25 September 2003).

community and, brought to fore human rights obligations of non-state actors in their (usually) exploitative activities.⁷⁴ All these rights were to find their way into the Protocol.⁷⁵

Further, the Aids pandemic had by the early 1990s posed an unprecedented threat to the African population. It is estimated that 25% of people living in sub-Saharan Africa are infected with the Aids virus, with women and girls being exceptionally vulnerable.⁷⁶ For example, infection rates in young girls are rising at an alarming rate because they are now targeted due to a widely held myth that having sex with a virgin cures the disease. It was therefore necessary for the Protocol to make provision for women and girls living with Aids with particular emphasis on their particular health needs, issues with regard to self protection, and privacy during testing and treatment procedures. Some of these concerns are accounted for in Article 14 of the Protocol.

The result of a myriad of discussions and lobbying was the drafting of the Protocol, which contains an impressive catalogue of rights ranging from protection from discrimination and harmful practices, rights to dignity and physical security, civil and political rights. Further, included are family rights, access to justice and peace rights. Also included are rights to a sustainable environment and development, economic, cultural, welfarist, health, and reproductive rights. Some of the rights discussed above were introduced in the African regime for the first time, coming as an elaboration of CEDAW, and also expanding existing rights in the Charter, especially Articles 2 and 18. This makes the Protocol 'truly African', and its provisions more women specific and gender responsive.

2.3 Shortcomings of the Protocol.

Despite the innovative provisions of the Protocol on the rights of women, it does have some pitfalls. For example, the rights to privacy and freedom from forced labour were omitted. Again, access to legal aid was not made a matter of statute, thus failing to bring to bear commitments made by State Parties in Beijing to promote women's capacity to claim their rights⁷⁷ and, taking cognisance of the fact that the Commission⁷⁸ and even some African States have already made declaratory and statutory provision for legal aid.⁷⁹

⁷⁴ Communication No. 155/96 at ><http://www1.umn.edu/humanrights/Africa/comcases/156-96.htm>< (accessed on 30 July 2003).

⁷⁵ Articles 15, 16, 18 and 19.

⁷⁶ (As in n 8 above) (accessed on 4 October 2003).

⁷⁷ Beijing Platform of Action U.N. GAOR. U.N. DOC. A/CONF.177/20 1995. Strategic object 3.

Further, no mention was made of bride price, yet, it is one cultural institution practiced across the African continent that has cemented women's subordinate position in the family. Again, by making registration a precondition for the recognition of marriages meant that there is virtually no provision for the protection of women and children in informal relationships, and these do account for the larger part of unions in Africa, cutting across nationality, tribe, class and age.⁸⁰ Further, in providing only for judicial decrees for divorce,⁸¹ the Protocol ignored the fact that many African women are for various reasons unable to access formal courts for all types of judicial redress.⁸² Such omissions are a reflection of the middle class bias in the drafting process, which is quite removed from the realities of the majority of grassroots African women.

Further, the Protocol failed to guarantee protection against dismissal from employment on account of pregnancy or motherhood, and no special attention was paid to conditions of work for pregnant women or even, the provision of child care facilities to ease the burden of working mothers with young children. This would ensure that women are not forced out of the formal labour force and at the same time, fulfil the 'best interest' principles of children. The right to medical abortion should have been extended to include easy access to safe, confidential and gender sensitive facilities especially in view of the moral, cultural and traditional abhorrence and secrecy that is still associated with this operation.

It should however be appreciated that the drafting process was carried out within a restrictive environment and therefore the need to compromise. For example, the debate over the retention or prohibition of polygamy was long and heated. The drafters had to strike a balance between providing for monogamous unions (that in theory represent equality of sexes in marriage) and at the same time accommodate for Islam and culture where the practice is accepted. The result was Article 6 (c), which accommodates both factions and calls for equal protection of women in both types of union. Moreover, it is highly unlikely that the conservative AU Assembly consisting entirely of men would agree to pass unconditional abortion rights or abolish polygamy entirely.

⁷⁸ Resolution of the Commission on the Right to Fair Trial and Legal aid in Africa (1991).
⁷⁹ For example, The Constitution of Uganda, 1995 for those charged with capital offences and the Legal Assistance and Representation Act of Zimbabwe chapter 9:13.
⁸⁰ Article 6 (d).
⁸¹ Article 7(a).

Also, the Protocol failed to be more definitive on the important rights of sustainable development and environment. It is not clear what the rights entail and this may hamper progressive policies and gender mainstreaming in important sectors like that of agriculture, commerce and credit extension services which directly affect the economic rights of women. Lastly, amendment of the Protocol was left in the discretion of State Parties alone.⁸³ This is a serious oversight for it means that the Protocol was deprived of progressive amendments that the Commission could have proposed as a result of developments encountered while executing its mandate. This will in the long run limit the development of normative jurisprudence on human rights of women in the regime. It has taken so long for African countries to pass a law that protects women's rights and after making such a 'concession', it is highly doubtful that they will be willing or diligent to make any amendments to it especially if they are to drastically upset strong patriarchal institutions in place.

2.4 An overview of the terms of the mandate.

In her study on the topic, Harrington distinguished the mandate of the special rapporteurs from the other procedural innovations of the Commission in that it is not necessarily or logically required to fulfil the Commission's mandate.⁸⁴ The terms enumerated above seem to indicate the opposite and are at first glance, couched in expansive terms to require the SRRWA to engage in activities that cover nearly the full range of the mandate of the Commission.⁸⁵ Taking into consideration the time space for preparing reports or the period of the mandate, the terms appear too wide to be achievable or effective.

Firstly, the task of making an evaluation of women's rights in Africa is of immense scope and complexity and may require considerable time and input to be adequately achieved. Secondly, the lack of a clear mandate has further impaired the work of the SRRWA. For example, it is not clear how the mandate is to assist African governments in the development and implementation of their policies in promoting and protecting women's rights. This appears even more impossible to achieve in light of the difficult political climate in Africa, where states hold domestic matters sacrosanct. International mechanisms by nature operate on the good will of states and the SRRWA will thus experience difficulties in

⁸² These reasons are discussed in more detail on pages 16 and 17.

⁸³ Article 30.

⁸⁴ Harrington (n 22 above) 249.

penetrating States that have deplorable human rights records, or have no desire to improve rights of women.

The mandate's terms of reference called for a candidate with 'high consideration and competence in matters of women's rights'.⁸⁶ Although highly qualified in her chosen profession, the present Commissioner does not seem to meet with these criteria. Even then, it is not apparent that the office is availed with adequate support staff with experience in women's human rights in Africa.⁸⁷

Africa as a continent boasts of more than fifty States with varying political, social, economic and cultural practises that impinge on women's rights and freedoms in quite diverse and unique ways. It is inconceivable that one person will be adequately versed with or collect knowledge of all these practises in order to make proper assessments and advise effective policies for the different countries. In fact, the area of investigation was widened to include other States or organs (presumably beyond Africa) likely to have information on women's rights in Africa further complicating matters.⁸⁸

The Protocol having come into force, the SRRWA needs to prepare a new set of guidelines for the effective examination of State reports on the rights of women in line with this new legislation. This may appear a relatively precise and achievable task, but it should be noted that, this comes as a new venture with hardly a sound point of reference.

The only available point of reference for drafting the guidelines on women's rights are the existing guidelines on the examination of state reports in respect of the Charter; there appear to be two sets of these which further complicates the matter⁸⁹. The first set has been criticized for being too detailed, lengthy and in some areas repetitive and unnecessarily complex.⁹⁰ The Commission also acknowledged that they had become a disincentive to States to report on their human rights conditions.⁹¹ The second set which is

⁸⁵ On the Commission's mandate see (n 5 above)

⁸⁶ Paragraph 5 Murray & Evans (n 40 above) 78.

⁸⁷ The SRRWA has only one assistant who sits at the Commission Secretariat.

⁸⁸ As in 40 above at 225.

⁸⁹ The first were adopted in 1988 (Guidelines for national periodic reports, 2nd Annual Activity report 1988-99, ACHPR/RPT/2ND, Annex XII in Murray & Evans (2001) 49. The second set was adopted in 1998. Amendment of the General Guidelines for the Preparation of Periodic Reports by State Parities, DOC/OS/27 Annex XIII.

⁹⁰ Evans & Murray (n 20 above) 279.

⁹¹ 'Memorandum to proposed guidelines for state reporting under the African Charter on Human and

meant to be an amendment of the first guidelines, is short and severely abbreviated with only eleven parts and has been termed as 'too brief to the point of being vacuous'.⁹² The second set afforded very little thought and space to women's rights placing them with other vulnerable groups with no clear and precise guidance on how, and what State Parties should report on rights of women.

The importance of reporting guidelines for women's rights cannot be underestimated, for this mechanism has been referred to as the backbone of the mission of the Commission.⁹³ So far, the Commission has by practically using the guidelines managed to solicit useful information on the status of women in Africa.

For example, the examination of Burundi's report during the 27th Ordinary Session, clarified the legal and *de facto* problems that women are faced with in inheritance matters and access and ownership to land. The Commission was also able to note the absence of women in politics especially in the Arusha Peace Accord, where as civil society organs, women were only permitted observer status. During the same session, the SRRWA appreciated the fact that a woman was appointed to the second highest political office in Uganda's government, but put the delegation to task to show the situation of other women in politics. She also probed the delegation to show the measures taken by the government in rehabilitating girls who were returning after being abducted in the long ongoing civil war in northern Uganda. The delegation admitted that the country was facing difficulties in the repatriation process but had put into place a special office of disaster preparedness (now a full ministry) to handle 'returnees'.⁹⁴

2.5 Developments at the domestic level.

It is important to note that, despite progress at the regional level, human rights are largely about the meeting of international obligations by individual states within their specific domestic contents. Therefore, the SRRWA can draw heavily from developments in laws and policies of State Parties that protect women's rights. Indeed this has been given

⁹² People's Rights' prepared by three students of the LLM Class 2003 (of which the author was a member) at 1. Evans & Murray (n 21 above) 45.

⁹³ Badawi Elsheit, a former Chair of the Commission in Quashigah (2002) 2 *African Human Rights Law Journal* 261.

⁹⁴ Frans Viljoen who was present at the 27th ordinary session of the Commission recorded comments during Burundi and Uganda's report. Parts have been reproduced here with his consent.

specific prominence in the Protocol.⁹⁵ Many African governments have through domestic legislation, judicial activism and policy previously made considerable progress in protecting the rights of women or superseded some of the Protocol provisions. For reasons of space, the few discussed here are intended to be illustrative rather than exhaustive.

The Constitution of Uganda affords women affirmative action, grants them equal status to men and makes recognition of their unique status, natural and maternal functions⁹⁶. Similarly, the Cameroon Labour Code prohibits termination of the employment of contract of women on account of pregnancy. The same law further set leave for pregnant women at fourteen weeks, with full pay, and a daily allowance payable by the National Social Insurance Fund. In addition, nursing mothers are allowed nursing breaks of up to an hour a day for the first fifteen months following the birth of a child.⁹⁷

South Africa has also made commendable progress in the area of violence against women by for example setting up gender desks in all government ministries. Further, the creation in some provinces in South Africa of “G” Courts specializing in sexual offences, had by 1996, resulted into a 30% improvement in convictions of rape on a nationwide scale⁹⁸. Tunisia has legalized clinical abortion and outlawed polygamy, an indication that positive developments are taking place in the Maghreb region as well.⁹⁹

One case that has now gained regional prominence in human rights jurisprudence of women in Africa is that of *Unity Dow* in which the Botswana Court of Appeals, relying on CEDAW and the OAU Convention on Non Discrimination determined that it was discriminatory to deny women in Botswana the right to pass on their citizenship to their children¹⁰⁰. In coming to this decision, the Court adhered to some of the principles for promoting women’s rights arrived at a conference of Commonwealth Judges in Zimbabwe, requiring courts to give full effect to internationally and regionally stated human rights norms, resisting from considering them as alien to domestic law and national courts.¹⁰¹

⁹⁵ Article 31 provides in part that, the provisions of the Protocol shall not affect more favourable provisions for the realisation of the rights of women contained in national legislation of State Parties.

⁹⁶ Article 33.

⁹⁷ Articles 84, 85 and 89(1). Law No. 92.007 of 1992.

⁹⁸ (As in n 9 above).

⁹⁹ Al-Afifi ‘The feminist movement in Tunisia’ in Al-Afifi & Hadi, (eds) (1996) 93 and Zeid (as in n 71 above) 181.

¹⁰⁰ *Unity Dow v The Attorney General* (1992) LRC (Const) 623 in Welch, (n 16 above) 523.

¹⁰¹ Paragraph 8 of the Victoria Falls Declaration of Principles for Promoting Human Rights of Women; August 1994.

Similar advances have been reported in Egypt where the President has recently commissioned Government to prepare a new national law allowing women to pass their citizenship to their children.¹⁰²

Even with such progressive reports, set backs in the protection of women's rights are still present in many African countries. One area where governments appear reluctant to show progress is within the cultural domain, whose strong patriarchal tendencies are entrenched not only in societal consciousness, but in national legislation as well.

Zimbabwe, a party to the Charter and CEDAW has a Constitution containing provisions that prohibit discrimination on the basis, *inter alia*, of gender or sex. These, however, exclude marriage, divorce and 'the application of African customary law in the case of Africans' from the scope of that provision.¹⁰³ Unfortunately, even with such discriminatory provisions in place, Zimbabwean courts have notoriously preferred to remain conservative failing to practice judicial activism in order to vindicate women's rights. For example, the Supreme court in *Magaya's* case declined to overturn the decision of a Magistrates' court that a woman 'cannot be appointed to her father's estate when there is a man' in a case of interstate succession under customary law. In deciding that the nature of African society dictated that women were not equal to men, and should never be considered adults within the family, Justice Muchetere was prepared to agree and sanction the fact that Zimbabwe's Constitution discriminated against African women in family matters. He further argued that customary law took precedence over statutory law and defended the judgment on the fact that rural communities still practised customary law and their values would be offended by 'any reckless disavowal of customs'¹⁰⁴.

Further, the adoption and application of Shari'a law in some northern states of Nigeria has been an outrage to human rights and gender activists especially, in as much as it has usually singled out women for punishment and thereby proved discriminatory on the grounds of sex. The recent case of a Nigerian woman, Amina Lawal who was convicted of adultery by a Shari'a court and sentenced to death by a painful and decidedly archaic procedure of stoning, gained prominence through out the world. The court was prepared to punish the woman as an individual, setting her 'partner in crime' free on the dubious

¹⁰² 'Good news for Egyptian Women' at >[http://www.golbalfund for women/4news/grantee-news/Egypt-nationality-law.html](http://www.golbalfundforwomen/4news/grantee-news/Egypt-nationality-law.html)< (accessed on 18 October 2003).

¹⁰³ Article 23(3) of the Constitution.

allegation that the case against him had not been sufficiently proved. Although the Supreme Court finally overturned the conviction, it is noteworthy that the dismissal was based on procedural irregularities and not the fact that the conviction (and indeed the law itself) was seriously discriminatory against one sex,¹⁰⁵ and a serious contravention of international conventions advocating against the death penalty, to which Nigeria is party. Sources at the Commission have confirmed that although she followed the case closely, no formal complaint or communiqué by the SRRWA is recorded.

It should be noted however that religious fundamentalism does not exist in Islam alone, but discriminatory trends are present in all major world religions or at least factions within these religions that have proved very hostile to women's human rights.

2.6 Recorded successes and shortcomings of the mandate

The dearth of information on the activities of the SRRWA has naturally overshadowed her successes. However, the most notable achievement has been her pronounced involvement in the preparation and adoption of the Protocol. Commissioner Ondizel-Gnelenga was part of the working group set up by the Commission to draft the Protocol way back in 1995.¹⁰⁶ She thereafter spearheaded efforts to refine several drafts of both the protocol and terms of reference of what was later to become her mandate. In fact, much of the mandate's time has been spent on this one project and may be the reason why very little has been done in respect of her other responsibilities.

Although not very well documented, the SRRWA has fulfilled part of her mandate to follow up implementation of the Charter through the preparation of reports on the situation of violations of women's rights and making recommendations to the Commission. The mandate has presented about ten reports to the Commission since 1998 but owing to technical reasons, they are not contained in the Commission's Activity Reports. However they can be traced at the secretariat¹⁰⁷. The Commission has recorded her visits to Chad and Liberia to gather information and raise awareness. Significantly in Liberia, she tackled the issue of the death penalty taking up a case referred by WILDAF of a Zimbabwean

¹⁰⁴ Magaya v Magaya (1999) 3LRC 35.

¹⁰⁵ Amnesty International press release at ><http://web.amnesty.org/liberty/index/ENG-FRO> (accessed on 18 October 2003).

¹⁰⁶ Final communiqué of the 17th ordinary session.

¹⁰⁷ Information provided by the secretariat (as in n 48) above.

woman facing execution. In her report, the Special Rapporteur declared capital punishment to be a 'grave violation to the right to life and to the right of every individual not to be subjected to cruel, inhuman and degrading treatment'.¹⁰⁸ This statement lent much support to efforts of NGOs campaigning against capital punishment.

Although the failings of the mandate cannot alone account for the dismal record of women's rights on the continent, the fact that only few visits have been made to State Parties means that the promotional mandate is yet to be fulfilled. Also, the protectionist mandate was not fully exploited until the passing of the Protocol. Using the proposed guidelines for state reporting (on women's rights) may enhance this part of the mandate in the future. The problem is compounded by the fact that the Commission has not given reports of the SRRWA serious attention and much of her work appears only as oral submissions at the different sessions of the Commission.¹⁰⁹ This has made the assessment of her work difficult.

It would be unfair not to mention that the SRRWA is working under very serious constraints. The SRRWA has constantly complained of lack of funding and other logistical support.¹¹⁰ The Commission has to date not provided the SRRWA a particular budget and this has affected her ability to fulfil her mandate of liaising with governmental and non governmental organisations, undertaking research and conducting visits to State Parties. Sources at the secretariat have admitted that the assistance extended by the Commission has proved to be insufficient as there is no provision from the AU to support the work of the special procedures within the Commission. The result has been that the SRRWA has been forced to rely heavily on financial and logistical support from different NGOs.

Finally, the insistence of the Commission to appoint a sitting Commissioner to the post of special rapporteur has worked against the mandate. Firstly, it has reduced the control that the Commission has over the mandate. It is naturally more difficult (and may even be impossible) for the Commission to reprimand one of its own. It may be less cautious of doing so if a person outside the Commission, but directly within its control holds the post. Further, the mandate is an extra responsibility on someone who is already overburdened and is in fact working on a part time basis. The SRRWA is usually expected to function in

¹⁰⁸ Report of the Activities of the Special Rapporteur on the Rights of women in Africa, November 1999, DOC/OS(XXXVI) 124, p. 11 in Evans & Murray (n 21 above) 272.

¹⁰⁹ As above at 298.

areas far removed from her country of residence and this will constantly affect her professional and social life.

The synopsis of this chapter is that the Protocol has come as a powerful instrument to protect the rights of women in Africa. Unfortunately the terms of reference of the SRRWA do not appear to be in consonance with its provisions and this will hamper her ability to monitor compliance of the Protocol. Also, the terms have extended the mandate to an unmanageable degree (at least in the short run) thus rendering it substantially ineffective. This may in the long run weaken the focus of the mandate and create a draw back towards the andocentric paradigms voiced in the Charter which the women's movement has for so long struggled to overcome. It is also obvious that support of the Commission is still seriously lacking.

¹¹⁰ See for example 13th Activity Report paragraphs 28 and 29.

CHAPTER THREE.

COMPARATIVE MECHANISMS IN INTERNATIONAL AND REGIONAL HUMAN RIGHTS REGIMES.

3.1 Introduction.

The terms of reference of the SRRWA on women require that she form links between the Commission and intergovernmental organs at regional and international level, in order to harmonize the initiatives on the rights of women. The mandate extends to collaboration with special rapporteurs from the UN and other regional systems. This chapter therefore explores mandates of the Special Rapporteur on Violence Against Women, its Causes and Consequences (hereinafter UN Special Rapporteur), and the Special Rapporteurship on the rights of women in the Inter- American Commission on Human rights (IACHR). These two have been singled out because their mandates are specifically gender based. Current developments in rights mechanisms on Women in the AU will also be examined.

3.2 The UN Special Rapporteur on Violence Against Women, its Causes and Consequences.

3.2.1 Mandate and terms of reference.

The establishment of special rapporteurs as a monitoring procedure is a well-established practice in the UN and, these have been developed in both the Commission on Human Rights (hereinafter UN Commission) and the Economic and Social Council as extra-conventional mechanisms entrusted to independent individuals. Usually, the mandates given to such mechanisms or procedures are either to examine, monitor and publicly report on human rights situations in specific countries or territories (known as country mechanisms or mandates) or on major phenomena of human rights violations worldwide (known as thematic mechanisms or mandates). These procedures are collectively termed as the Special Procedures of the Commission on Human Rights.¹¹¹

¹¹¹ Country and thematic special rapporteurs (extra-conventional mechanisms) at ><http://www.unhcr.ch/html/menu2/xtra-conv.htm>< (accessed on 1 October 2003).

The UN Special Rapporteur was created in 1994 under the UN Commission coming as the first special rapoporteur with a gender specific mandate.¹¹² It is therefore a thematic mechanism with violence against women around the globe as its focus. Ms Yarkin Ertürk of Turkey currently holds the post for a period of three years.¹¹³

In making the appointment, the UN Commission reaffirmed that discrimination is contrary to all major international human rights instruments and its elimination is an integral part in efforts towards the elimination of violence against women. It also confirmed that effective implementation of CEDAW would contribute to the elimination of violence against women and recognized the need to promote and strengthen national and international efforts to improve the status of women in all areas in order to foster the elimination of discrimination and gender violence against women.¹¹⁴

The mandate has three specific terms, which are to be carried out within the framework of the UDHR and all other international human rights instruments specifically CEDAW. Firstly, the UN Special Rapporteur is expected to establish procedures to seek information on violence against women, its causes and consequences in any country from Governments, treaty bodies, specialized agencies, other special rapporteurs, intergovernmental or non governmental organisations and respond effectively to such information. Secondly, the mandate is meant to recommend measures at national, regional and international level to eliminate violence against women and its causes and remedy its consequences. Thirdly, the UN Special Rapporteur is expected to execute its functions in close contact with other special rapporteurs, special representatives, working groups, treaty bodies and independent experts of the UN Commission and other Commissions relevant to its mandate.¹¹⁵ These are likewise expected to include in their reports available information on human rights against women.

At the time of creating the mandate, the UN Commission significantly emphasized the requirement for cooperation. The Secretary General of the UN is therefore required to

¹¹² UN Resolution 1994/45 at ><http://www.unhchr.ch/Huridocda/Huridocda.nsf/2849f408dolec.Dac>< (accessed on 1 October 2003).

¹¹³ UN Resolution 2003/45 at ><http://www.unhcr.ch/htm/menu/2/7/b/tm.htm><(accessed on 1 October 2003).

¹¹⁴ (n 111 above).

¹¹⁵ (n 111 above).

provide the UN Special Rapporteur with all necessary assistance in terms of staff and resources to perform all mandated functions, and in addition, to ensure that the reports of the mandate are brought to the attention of the UN Commission on the Status of Women. Governments are likewise expected to assist the mandate by providing gender-disaggregated data on the *de facto* and *de jure* situation of women. The UN Commission's secretariat is also expected to keep the mandate fully apprised of particular human rights violations suffered by women.

3.2.2 Working methods of the mandate.

The UN Special Rapporteur has devised working methods, which were outlined in her preliminary report to the UN Commission.¹¹⁶ Basically, she divided her mandate into two components; firstly, setting out the elements of the problem, international legal standards and a general survey of incidents and issues as they relate to the many problem areas. Secondly, identifying and investigating factual situations as well as allegations sent by concerned parties. The investigations have taken the form of direct dialogue made during field trips taken after careful selection is made on different geo political regions or on invitation of State Parties. The trips are followed up with comprehensive reports presented to the UN Commission.

The Secretary General has assisted in facilitating the mandate's work by sending formal requests for information touching issues on violence against women to different countries, all relevant UN bodies, treaty bodies, other special rapporteurs responsible for various human rights questions, and intergovernmental and non-governmental organizations, including women's organizations. Such information may be on details of national legislation, relevant court cases, training programmes for judges and lawyers, police practice and training procedures, special policies and institutions concerned with women victims of violence, as well as statistical data. Governments are also required to submit information on national plans of action with regard to violence against women.¹¹⁷ Such procedures ensure that the mandate will receive sufficient information pertaining to her work from different parts of the globe without having to travel there herself.

¹¹⁶ UN Document E/CN.4/1995/42 at ><http://www.unchr.ch/Huridocda.Huridoca.nsf/TestFrame.html>< (accessed on 13 September 2003).

¹¹⁷ This is in line with Article 4 (e) of the Declaration on the Elimination of Violence Against Women (General Assembly Resolution 48/104).

The mandate has in addition made a significant contribution to UN jurisprudence by contributing to resolutions made by the UN Commission¹¹⁸. These have conceptualised violence in all its forms as a global and country specific problem. She has in addition issued several reports in which she comprehensively tackles violence against women as a human rights violation including in one report, existing national legislation on domestic violence and an analysis with which a framework for model legislation on domestic violence has been prepared.¹¹⁹

The UN Special Rapporteur's mandate has extended to Africa particularly on the invitation of the post apartheid Government of South Africa in 1996. This country was chosen as a case study because of the high incidence of rape in the country. The mandate was able to meet with relevant personalities in the government, judiciary, police, NGOs and community based organisations, women victims of violence and other pertinent sectors of society. This gave her a comprehensive picture of the magnitude and the problem of rape in South Africa, which is evident in the report issued subsequent to the visit.¹²⁰

As part of her background to the report, the UN Special Rapporteur makes reference to the life of an epileptic woman who lives on the streets of Durban and is under the threat of siege by 'Tsotsis' (local thugs) every night. She is one of several hundred women in Durban facing the same fate every night. The significance of this background is that it gives a face to the voices of the victims themselves and it is from here that the investigation is built setting forth statistics to show the magnitude and patterns of the crime (taking into account incidence by region, disparity of law enforcement in black and white communities as well as rural and urban areas). The legacy of apartheid as a possible cause of shaping the peculiar patterns of the crime in South Africa was also outlined.

The report also made reference to the Government's response to the problem through appropriate legislation, government policies and strategies, community and NGO participation. With such concrete and diverse investigations, the mandate was able to

¹¹⁸ A total of ten resolutions have been passed on the topic of violence against women since the inception of the mandate. See 'Documents of the Special Rapporteur of the Commission on Human Rights on Violence against women' at ><http://www.unchr.ch/Huridocda/Huridocda.nsf/Framepage/Srwomen%20En?opendocuments> (accessed on 1 October 2003).

¹¹⁹ E/CN.4/1996/53Add .2 at >[unhcr.ch/Huridocda/Huridocda.nsf/TestFrame/0a7aa](http://www.unhcr.ch/Huridocda/Huridocda.nsf/TestFrame/0a7aa)< (accessed on 1 October 2003).

¹²⁰ (n 9 above).

make an informed evaluation of the crime of rape in South Africa and give appropriate recommendations.

The UN Special Rapporteur has also participated in international conferences and meetings highlighting issues concerning her mandate. For example, during September 1995, she convened the panel discussion on 'violence against women, its causes and consequences' during the fourth World Conference in Beijing.¹²¹ She also gave a keynote address on race, gender and violence against women at the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance.¹²²

The UN Special Rapporteur is open to both individuals and NGOs who have information on human rights problems in her area of interest. The latter are even permitted to invite the UN Special Rapporteur for direct discussions when she makes on site visits to their country. The relationship with NGOs have been formalised to the extent that NGO communications to the mandate are included in the mandate's annual report.¹²³

3.3 Special Rapporteurship on the Rights of Women in the Inter-American Commission on Human Rights.

3.3.1 Mandate and terms of reference.

The Special Rapporteurship on the Rights of women in the IACHR (hereinafter Special Rapporteurship) was established by the IACHR in 1994 to renew its commitment of ensuring that the rights of women in the region are fully respected. The IACHR had confirmed that even with progressive pronouncements of equality in constitutions of member States, examination of national legal systems and practices had increasingly revealed the persistence of discrimination based on gender. Commissioner Marta Altolaguirre currently holds the post with the assistance of a principal specialist in the IACHR secretariat.¹²⁴

¹²¹ Women's Watch, 'Special Rapporteur on violence against women' at >[http://: www.un.org/womenwatch/daw/cedaw/protocol/specialr.htm](http://www.un.org/womenwatch/daw/cedaw/protocol/specialr.htm)< (accessed on 2 October 2003).

¹²² A/CONF.189/PC.3/5 27 July 2001 at ><http://www.unhcr.org/Huridocda/Huridocdq.nsf/xenophobia>< (accessed on 2 October 2003).

¹²³ Schuler & Thomas (eds) (1997) 34.

¹²⁴ Rapporteurship on the rights of women in the IACHR at ><http://www.weidhoas/oas.org/women/mandate.htm>< (accessed on 2 October 2003).

The initial mandate of the Special Rapporteurship was broadly worded, requesting her/him to analyse the extent to which member State law and practices that affect the rights of women, comply with the broad obligations of equality and non-discrimination in the two main human rights instruments of the region.¹²⁵ Since then, the work of the mandate has included awareness raising that ensures that women fully exercise their basic rights and, issuing recommendations aimed at enhancing member State compliance with their obligations of equality and non-discrimination.

The Special Rapporteurship also promotes the rights mechanisms available to women in the Inter-American human rights system, conducts specialised studies, prepares reports and assists the IACHR in responding to communications and other reports of violations of rights with gender specific causes and consequences. The mandate has to that end, played a vital role in the work of the IACHR to protect women's rights through the publication of thematic studies and assisting in the development of new jurisprudence in this area within the individual case system. The mandate has in addition attended human rights courses, given public addresses and co-sponsored (with the IACHR) seminars at which issues of women are discussed.¹²⁶

3.3.2 Working methods of the mandate.

The preferred method of this mandate has been to specifically address the situation of women (in her capacity as a member of the IACHR) during on site visits by the IACHR. The rights of women are then dealt with in a specific chapter of its related country reports. However, the mandate has begun carrying out independent on-site visits, the first being taken for the purpose of examining the situation of violations of rights of women in Ciudad Juarez, Mexico.¹²⁷ During her visit, the mandate met with diverse representatives at the state and national level, NGOs and civil society. She also received testimonies from a number of family members of the victims of the alleged violence. The mandate followed up the visit with an informal report to the plenary session of the IACHR and follow-up hearings with representatives of the State and civil society at the IACHR headquarters. This is yet to be followed up with a report of the mandate's findings and recommendations, and once

¹²⁵ Update on the work of the rapporteurship on the rights of women at ><http://www.weidh.oas/women/chap.6c.htm><(accessed on 2 October 2003).

¹²⁶ During June 2001, a seminar on '*the rights of the indigenous woman*', with the office of the defender of indigenous women of Guatemala (as in n 123 above)

¹²⁷ (n 125 above).

approved, will be published, and the measures taken to implement the recommendations will be subject to the follow-up procedures of the IACHR.

3.4 Developments in the African Union.

The AU as the undisputed legal successor of the OAU has continued its relationship with the Commission in promoting and protecting human and people's rights in accordance with the Charter.¹²⁸ Developments in the protection of women's rights in the AU thus have a bearing on the SRRWA.

One of the primary principles of the AU is to promote gender equality¹²⁹. To that end, the AU has set up a Woman, Gender and Development Directorate in the AU Commission (hereinafter the Directorate) with activities that include specialist women's empowerment programmes and gender mainstreaming in the AU Commission. The core functions of the Directorate include gender mainstreaming, coordination, advocacy, policy, performance track monitoring and evaluation, gender training and capacity building, research, communication and network liaison. The Directorate also has the mandate to continue the consolidation of activities previously pursued by the OAU. In undertaking its work, the Directorate places emphasis on partnerships within the Commission and externally with other stakeholders involved in pursuing continental gender initiatives.¹³⁰ The SRRWA is undoubtedly one such stakeholder.

This chapter has shown how developments in, and, experiences of other international and regional bodies may have a direct bearing on, or enhance the activities of the SRRWA. They too have similar mandates and are to some extent faced with problems similar to the African mandate. It is therefore worthwhile for the Special SRRWA to source or interact with them.

¹²⁸ Articles 3(h) and 33 of the Constitutive Act of the African Union 2000.

¹²⁹ Article 4(l) as above.

¹³⁰ 'Women, Gender and Development Directorate' at >http://www.Africa-union.org/structure_of_the_commission/women%20GENDER (assessed on 10 October 2003).

CHAPTER FOUR

WORKING TOWARDS IMPROVEMENT OF THE MANDATE: REINVIGORATING WOMEN'S RIGHTS.

4.1 Introduction.

The success of the promotion and protection of women's rights in Africa lies in a multi-faceted approach. It will require the violations on the basis of gender to be the subject of the thinking, planning, monitoring and implementation of all human rights matters under consideration. In Gaer's opinion,

[G]ender integration of women's rights means breaking the silence, ensuring the visibility of abuses against women, clarifying the norms at issue, and pressing for accountability for those who perpetrate those abuses, and then coordinating action so that the issues are thought about and acted upon in multiple contexts.¹³¹

For that reason, recommendations proposed by this dissertation will cover a whole range of interrelated topics that can together enhance the mandate of the SRRWA in her quest to improve the rights of women in Africa.

4.2 The promotional and monitoring mandate.

This dissertation has shown that the SRRWA is faced with nearly an insurmountable task to promote and protect human rights of women in Africa. For this, the mandate will require to devise systematic and comprehensive working methods that can assist the office to plan the work to be done. Since the terms appear to be rather wide, the working methods can be designed in a manner that will ensure achievable goals within realistic time sets with priority being given to pressing or widespread violations. Significantly, the working methods must have a component calling for the ratification of the Protocol to hasten its coming into force.

The mandate may borrow a leaf from her counterparts in the UN and American system where definite working methods have already been developed and documented. Although not yet well formulated, it appears that the SRRWA has developed methods that gravitate

¹³¹ Gaer (n 2 above) 102.

more towards that of the Special Rapportureship in the IACHR. They have both (although not always) addressed the situation of women in their capacity as members of their respective regional bodies especially during country visits, and in their rapporteurship capacities.

This method which appears to be emerging in the African system could be interposed with that of the UN Special Rapporteur that has the advantage in that it first identifies the problems that women are faced with, sets international legal standards that State Parties must adhere to, and subsequently, tackles factual situations as they occur. This can help in pinpointing countries or regions in which violations are critical and these can be given priority attention. The UN mandate has also avoided haphazard visits, preferring to make careful previous selection on a geo-political basis or on the invitation of State Parties. This ensures that no unreasonable preference is given to any one region or country at the expense of others faced with more pressing problems. This is critical in Africa where violations of women's rights have been systematic and widespread on a more or less similar fashion.

The UN Special Rapporteur and the Special Rapporteurship have augmented their promotional visits with well-researched and detailed reports. This has eased the work of their respective commissions in following up the recommendations proposed. The Special Rapporteurship has issued on site press reports and organised for some of the victims to visit the IACHR and bear out their testimonies. This gives the Commission first hand information on violations taking place and increases the possibilities of making relevant recommendations. In addition, the IACHR approves and publishes all the mandate's reports. Improvement of compiling data, writing and publishing reports in the African regime is therefore very necessary. The report by the UN Special Rapporteur made on her visit to South Africa can serve, as a good example on what form the reports of the Special Rapporteur should take.

It may well be necessary for the SRRWA to adopt clear guidelines before any investigative mission is carried out. Such guidelines would map out the nature of the problem before hand and give an outline of the activities to be undertaken and the calibre and number of respondents to be seen. Serious previous preparation will result into thorough and pertinent investigations and guarantee independence and impartiality during the mission.

The reports from such visits should be timely to ensure that the activities of the mandate do not turn out to be mere empty promises.

Beyond using some of the ideas developed in their working methods, the African mandate could forge links with her counterparts in the UN and American system for technical and financial assistance that they may be prepared to extend. Also, sharing of experiences would certainly enhance the capacity of the SRRWA. So far, there has only been one instance in which the three mandates came together to share matters of mutual interest. On 8 March 2002, International Women's Day, the three mandates released an historic joint declaration. They re-affirmed their commitment to international standards of women's rights as laid down by major international instruments specifically, in as far as they offer protection against gender based violence and discrimination against women by States and non State actors. They called upon State actors to domesticate international standards to eradicate violence against women including law reform, and, stressed the need for coordinated efforts to achieve more effective monitoring.¹³²

Links closer to home, especially with the AU may also prove very useful to the SRRWA. The success of the mandate's work (e.g. state reporting of the rights of women in Africa) will to a great extent depend on the publicity and possibility of sanctions incorporated with it. The AU system offers an opportunity for that publicity and some degree of sanction through its various bodies. Political pressure on non-complying states can be a very essential enforcement mechanism in human rights issues. Although not fully constituted and funded, the Gender Directorate of the AU can be sourced for support through its various activities to boost the promotional mandate of the SRRWA. Some of the core functions of the Directorate e.g. communications, networking, coordination and liaison in the area of gender, are very relevant to the mandate. Again, the mandate could work with the Directorate in following up and consolidating activities previously pursued by the OAU, for example, the Kampala Declaration Plan of Action on the Empowerment of Women Through Functional Literacy and Education of the Girl Child.¹³³

The SRRWA could extend her tentacles further to sub-regional bodies especially those that have already developed their own mechanisms to protect women's rights. For

¹³² Historic meeting of the UN, OAS and AU special rapporteurs at
><http://www.ichrdd.ca/English/commdoc/publications/libertas/LOLmay2002/3Rap>< (accessed on 10 August 2003)

example the Southern African Development Community (SADC) has already passed the SADC Declaration on Gender and Development that calls for the establishment of a policy framework for mainstreaming gender in all SADC activities and, the repealing and reforming of all laws and social practices in the member States that still subject women to discrimination.

The absence of the voices of women at the regional level signifies that the promotional mandate of the SRRWA still needs to be improved. Making promotional visits to almost all African countries is an impossible task especially in view of the financial and logistical constraints that the mandate is currently faced with. For that reason, the mandate will have to be more innovative in soliciting and collecting data on issues of women's rights from State Parties. The UN Special Rapporteur has partly achieved this through the partnership principles devised at that level with many other UN bodies that have a gender theme in their mandates. The African mandate has other bodies within and outside the Commission that can provide useful information on human rights of women within their respective mandates. For example, she could have hinged upon the report of the Special Rapporteur on Prisons to make pronouncements on the rights of African women prisoners. She can also make good use of the information gathered by the Commissioners during country visits.

4.3 The legal framework and guidelines for state reporting

The UN Special Rapporteur and the Special Rapporteurship in the IACHR have executed their mandates within the framework of the main human rights instruments in their areas of jurisdiction. The African mandate should do the same especially now that a specific instrument in her thematic area has been adopted. The terms of reference of the African mandate have made no reference to the Protocol yet and an amendment should be made to call for her to implement both the Charter and Protocol.

The rundown to the adoption of the Protocol has shown that African women had particular concerns attaching to their peculiar situation. They agitated for specific rights, which found their way into the Protocol. These can act as a starting point of reference for drafting guidelines for the examination of State reports on the rights of women in Africa. With the old (or well established) rights, new and emerging rights, the Protocol is pregnant with

¹³³ (n 128 above)

promise and it is therefore imperative that with such a wide array of rights, the guidelines should be couched in such a manner that will facilitate meaningful dialogue between the Commission and the reporting state parties during the examination process. The guidelines should in addition be able to address the important aspects of the rights or even those rights that were completely ignored.

Although it is not the scope of this dissertation to prepare guidelines for state reporting in accordance with the Protocol, a few suggestions that can help future researchers is pertinent.

The guidelines should continue the old tradition of drawing inspiration from existing international instruments that aim at protecting women's rights. These have already set normative standards that have stood the test of time. Apart from CEDAW's comprehensive provisions on women's rights, the CEDAW committee has adopted a range of general recommendations covering most of the CEDAW provisions. As of June 1999, the committee had adopted 24 general recommendations setting out in detail its understanding of CEDAW's provisions and setting out recommendations to State Parties on steps to be taken to fulfil their obligations under the treaty¹³⁴. The general recommendations have developed normative understanding of the treaty, and can assist the SRRWA in extending the parameters of the Protocol. She may in the future develop similar recommendations on the Protocol provisions. However, reference to international instruments should only complement rather than usurp the Protocol provisions.

The guidelines ought to be clear, precise and relatively brief, but with the capacity to elicit the desired information from State Parties in a uniform and systematic manner. They should be designed as a 'double edged sword', on the one hand permitting the Commission to check the progress of State Parties in implementing the Protocol provisions, and on the other hand, assist State Parties to engage in self-examination of their laws, policies and institutions. Judging from the poor reporting record of African countries, a provision calling for regular, punctual and informative reporting should be included.

¹³⁴ E.g. General Recommendation n 19 on Violence Against Women, n 21 on Equality in Marriage and Family Relations etc.

In addition, the guidelines should be able to elicit information on both the *de facto* and *de jure* situation of women. Many of the previous reports overviewed contain lengthy and heavily 'embroidered' Constitutional provisions indicating dedication to protection of women's human rights. The guidelines should therefore have the capacity to check gender-neutral constitutional language, legalistic and theoretical emphasis on non-discrimination and instead concentrate on the widest possible participation of women in the different fields. They should be able to probe institutional frameworks and policies (in addition to legislation) put in place to ensure the respect for and protection of the rights of women. This will require disaggregated data (by sex) from State Parties to show how women are faring in local and national politics, the economy, health, education etc. The guidelines should also make provision for inquiries on the control of non-state actors like multi-national entities whose activities have proved quite detrimental to the social, economic and cultural rights of women around the continent.

The purpose of the Protocol was to recognize gender specific aspects of the civil, political, economic, social and cultural rights of women. It also sought to avoid the 'ghettoization' of women's human rights as had previously been done by the Charter. The guidelines should likewise enable the Commission to examine State Parties on the particular ways in which women are affected by any human rights issue. For example, in the discussion on issues like Aids, there needs to be attention on women specific experiences where problems like sexual violence, harmful traditional practises, war (where rape is used as a tool of war or genocide) and women's limited control over their reproductive rights exacerbate infection rates in women. This is because demonstrating the gender dimensions of issues that are already accepted as human rights opens the door to a broader understanding of all aspects of women's rights as human rights. Further, violations of women's rights in the private sphere should be made an issue of the public domain where state laws, public policies and corrective institutions easily permeate.

The Commission itself should not be spared for its duties as the monitoring body, should be commensurate to the high standards set by the Protocol. A provision for concluding remarks ought to be inserted. These have been widely used in the other systems to give the monitoring bodies a general evaluation of State Party reports and act as an indicator at subsequent examinations on how far a state has for example improved its efforts in rectifying discriminatory tendencies and bringing its laws in line with regional legislation.

Concluding remarks also help in the elaboration of the rights and developing norms and will as a result deepen the normative understanding of the Protocol provisions.

4.4 Reaching out and listening to women's voices.

It is trite to say that no supervisory system, national or international, will work without individuals learning of it, believing in it and making use of it on a regular basis. Medina has made an observation that women around the world have perceived international laws and organizations as '[a]lien, to be at best ignored and at worst distrusted.'¹³⁵ The few who are aware of international mechanisms, do not visualize them as instruments to be used for their particular problems. It is not far fetched to say that many African women are not aware of the existence of a special rapporteur with a mandate of their rights, let alone an instrument that was adopted this year. The challenge therefore is for the SRRWA to educate African women about her mandate and the regional system in general, and present them in a manner that will enable women to use them without great sacrifice. This means not only their existence and possibilities, but it is necessary to make women realize that it benefits them to act in the more general context of human rights and to have violations considered by supervisory organs created at the international level to protect and promote human rights.

Most authors overviewed have noted that most international human rights regimes have had a bias towards the resolution and conceptualisation of political and civil rights as opposed to economic, social and cultural rights. This has created a widespread belief that human rights law is meant for the so-called 'gross violations' like summary executions, torture, arbitrary detention (etc); the type which fall within the formal structures of society and therefore out of the reach of many women. Such misconceptions must be corrected and African women should come to know and understand that the full range of human rights of women and of the girl-child are an inalienable, integral, and indivisible part of the universal human rights, and that their violations are subject to equal inquisition by international bodies.

It may be more practical to use less traditional ways of education. This is because the task is wider than just imparting information on international human rights laws. Ways must be

¹³⁵ Medina 'Do international human rights laws protect women?' (a short paper on file with this researcher).

found to integrate human rights education with other activities. Bunch has suggested that women's political organising is crucial to the success of legal strategies. This is because any change in the laws or policy will only succeed to the extent that women feel that they have access to those instruments, and that seeking to implement them makes sense in their lives. In short, 'the social, political, and economic capacity to use legal channels is what makes laws meaningful to people'.¹³⁶

The SRRWA should insist on women learning the regional laws (especially the Protocol) intimately. This will require governments to translate these instruments into local languages, in a form accessible to women right from the grassroots. Extensive awareness campaigns on the rights of women and international and national laws and mechanisms that protect them should cut across society to include all authorities entrusted in protecting the rights of women throughout all political, social, economic and cultural stratum. Personalities like the judiciary, political and executive entities, national and regional legislators, civil servants, local authorities, the police and other security organs like the army, prison officials, medical personnel, those entrusted with formal education, cultural and religious deities, the media, and civil society in general should be targeted. NGOs in Africa have already begun establishing a network for the sharing of information and technology in human rights education, with emphasis on promoting awareness of the Charter and the Commission activities¹³⁷. These could be sourced for assistance.

The strategy should be to use the media as much as possible for the transmission of information about issues of women's rights. It can also serve as a forum for human rights education for the general public. So far, the Commission has not used this tool adequately leaving it largely to the disposal of NGOs to publicise the Charter and the work of the Commission.¹³⁸ The SRRWA should take advantage to use the media (either on her own or in conjunction with NGOs) to draw attention to her work and images for example, during country visits and on special days that already have international recognition.

The working methods of the SRRWA should have a perception, and make State Parties understand that women are not just victims of human rights abuses but also actors who can define and defend human rights from the perspective of their own lives. The mandate

¹³⁶ Bunch 'Organizing for women's human rights globally' (a short paper on file with this researcher).

¹³⁷ Evans & Murray (n 21 above) 265.

¹³⁸ Motola 'Non Governmental organisations in the African system' in Evans & Murray

should therefore adopt a 'feminist transformation' approach to uplift women's human rights, which Bunch has explained begins with,

*[w]hat women experience as violations of their humanity and then seeks to connect that to human rights discourse, rather than starting with pre-existing human rights concepts (that consist principally of male defined paradigms) and trying to fit women into them.*¹³⁹

Special attention ought to be given to grassroots women who have for long been ignored by both international and national human rights discourse. The experiences of elite, urban and rural women (and in countries like South Africa, between black and white women) is sometimes so diverse that strategies may have to be developed to address peculiar needs of each group. Religious fundamentalism, which poses a major threat to women's rights, should not be treated as a separate 'women' issue but as crucial to the wider realm of human rights observance.

The Protocol has come out strongly to outlaw cultural practices and institutions that inhibit women's rights in Africa and has in addition afforded women the right to a positive cultural context. Judging from the strong (but usually discriminatory) cultural institutions that have been respected in Africa for years, strategies must be carefully designed and executed to confront strong patriarchal personalities and institutions that are not prepared to lose their positions of privilege. Fox has suggested 'cross-cultural moral dialogues' initiated at grassroots to provide opportunities to identify cultural practices which support rights but at the same time allow for ample room and possibility for muted or resistant voices living under severely discriminatory and restrictive customs and traditions. In her view this,

*'[n]ot only highlights the cultural attitudes and practices which are harmful to women, but will also challenge the idea that culture, custom and religion are always barriers to women.'*¹⁴⁰

4.5 Support from Non Governmental Organisations.

NGOs have traditionally lent support to the mandate and this should be maintained. It may be useful for the mandate to include in her work plan the specific areas that require NGO input and the type of assistance to be sought, when and to what level. This will assist

(n 21 above) 256.

¹³⁹ Bunch (n 134 above) emphasis by this researcher.

¹⁴⁰ Fox 'Anthropology and women's rights: Perspectives on relativism and universality' in Fox & Hasci (eds) (1999) 53.

in monitoring NGO support and ensure that NGOs do not misdirect or usurp the powers of the mandate.

NGOs with observer status with the Commission should be encouraged and facilitated to participate more in the state reporting process. The system of shadow reporting in the CEDAW Committee ought to be adopted¹⁴¹. Shadow reports and comments from NGOs present an unbiased and often true picture of women's situation in particular countries and in the process, will assist the Commission in checking dishonest and incomplete State reports. NGOs should also be encouraged to increase vigilance in initiating communications involving the rights of women.

NGO support in the promotional mandate may be invaluable especially as the SRRWA has limited resources and capacity to monitor the human rights situation and, at the same time keep abreast of developments through out the continent. Oloka-Onyango has observed that the African women's human rights movement is currently 'mature, well developed and effective.'¹⁴² It has been involved in initiatives at the national, regional and international level and therefore has the experience and connections to give support on issues of women's rights in Africa. NGOs can thus promote the activities of the mandate, and collect relevant information prior to, or during promotional visits. NGOs can also lend support through organising and funding workshops and seminars at which important issues on women's rights are discussed and developed. For that reason, NGO work in member States should be encouraged and the reporting guidelines designed in such a way as to enable the Commission to know whether the State Parties have put into place a conducive working environment for NGOs and civil society generally.

4.6 Developments at the national level.

The SRRWA should keep a keen 'eye' on enforcement levels in individual State Parties for inconsistencies between the high level standards set by the Protocol and the traditional low level enforcement at the national level. Developments around the continent have

¹⁴¹ A system where NGOs are allowed to present alternative reports on the situation of human rights of women, alongside those presented by State Parties of their respective countries.

¹⁴² Oloka-Onyango 'Modern day missionaries or misguided miscreants? NGOs, the women's movement and the promotion of human rights in Africa' in Benedek, Kisakye & Oberleitner (eds) (2002) 292.

shown that some countries are prepared or have even gone beyond the provisions of the Protocol in enforcing certain rights. It may be worthwhile to work with human rights commissions (where they exist) to keep abreast with human rights observance and for promotional purposes.

The mandate should hinge on, and overtly recognize State Parties that have shown improvement in protecting women's rights, making them an example to others and, publicly reprimand those that are still lagging behind. For example, it would have been very phenomenal and effective for the SRRWA to issue a public communiqué to indicate the Commission's stand on the apparent violation of the rights of Amina Lawal. It was not enough for the mandate to approach the government 'behind closed doors'. This researcher believes that this was not a case, which called for diplomatic methods of reproach. Ironically, it was foreign NGOs, significantly Amnesty International that garnered international support to pressurise the Nigerian Government to intervene and stop the unjustified, discriminatory and internationally unacceptable execution.¹⁴³

Further, positive developments around the continent can be used by the mandate to push for amendments in the Protocol so that as a regional instrument, it exhibits uniform or better provisions for the protection of rights of African women.

4.7 Support and improvements in the Commission.

The success of the mandate will depend heavily on the support it obtains from the appointing body. The Commission is therefore under an obligation to improve on the technical, financial and logistical support to enhance the mandate's activities. This includes the formation of a fund that is adequate and sustained to manage the mandate's activities. The Commission should take a leaf from other regimes. For example, both the UN Commission and the Secretary General of the UN are mandated to support the UN Special Rapporteur and have routinely done so. The Commission should also begin documenting all the mandate's reports in the Annual Activity Reports making them easily accessible to the public.

¹⁴³ During September, 2002 Amnesty International organised demonstrations in London and Brussels and presented a memorandum condemning the execution to the Nigerian embassies in both countries. It also

Evans has argued against the current practice of appointing sitting commissioners as special rapporteurs, stating that it assists in compounding the problems that flow from the lack of clarity of the mandates.¹⁴⁴ This may well be so, for the SRRWA who has to juggle her duties as a commissioner, special rapporteur, and at the same time maintain two jobs in her home country. Although the Commission is seriously considering this problem, it should in the meantime, make provision to lighten the burden of the mandate by setting up a working group or committee of experts to assist the SRRWA. Each member of the committee could be assigned a particular region on the continent and this group could even double as a committee to interpret the Protocol (especially during the state reporting process) as is the case for the African Charter on the Rights and Welfare of the Child.¹⁴⁵

Also, increasing the participation of women in the Commission is critical for gender mainstreaming to succeed at the regional level. Although the presence of women on the Commission will not necessarily guarantee better protection of women's rights, it will at least ensure more equitable gender representation at the decision making level with the result of increasing attention on issues concerning women. The SRRWA will also have more people to work with who are responsive to expanding the focus on women's rights in the regime. The recent appointments to the Commission that brought in two women (making a total of five women Commissioners) are applauded.¹⁴⁶

Finally, the success of the mandate will ultimately depend on the person who holds the office. That individual should be innovative and have the willingness to devote full energy to the task, exhibiting independence even at the risk of State Parties' displeasure.

organised a worldwide campaign to that effect. See <http://www.mertonai.org/amina/?FACTNET-1.3signitures> (accessed on 14 September 2003).

¹⁴⁴ Evans & Murray (n 21 above) 303.

¹⁴⁵ Article 32.

¹⁴⁶ 'Members of the African Commission' see (n 47 above).

CONCLUSION

In her concluding remarks, Karani observed that if a woman's treaty did eventually come into place in Africa, it would

'[b]e necessary to follow it up with an effective method to monitor and "police" the States observance of the obligations to which they will have committed themselves'.¹⁴⁷

Her 'prophecy' has come to pass for both the SRRWA and Protocol are now in place as the Commission's principal 'sword' and 'shield' to champion human rights of women in Africa.

This research has reviewed the subordinate position of African women in all spheres of life and their apparent absence from human rights discourse at the regional level. Unfortunately, the presence of a SRRWA has not yet improved women lives. This is because the mandate has not been adequately equipped and supported in order to execute its functions as enunciated in the terms of reference. However, it is apparent that of all the mechanisms so far devised by the Commission, the SRRWA appears to have the best potential to meet the needs of African women. Therefore, its importance cannot be underestimated or ignored. Further, the Protocol has proved capable of advancing the protection of rights of African women. Therefore, the operations of the SRRWA should be improved to a level that is commensurate to the provisions of this important legislation.

Improvement of the mandate will require the concerted effort of the Commission, as the main monitoring body and author of the mandate, African governments, as the principal 'custodians' of women's rights, and, NGOs and civil society, as the 'other' actors in the African human rights regime. Again, the SRRWA ought to cultivate its own improvement through experiences from other human rights regimes and adopt an approach that would augment international action but foster emphasis on the domestic front.

More importantly, women should remain the focus of any innovations in the mandate of the SRRWA and legislation, and their 'voices' must always have a 'platform' at the regional level. Only then will actual reinvigoration of the rights of women in Africa be achieved.

¹⁴⁷ Karani (2000) 47.

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APPENDIX A

October 2003.

■A few questions for the Special Rapporteur on the rights of Women in Africa or her Assistant.

1. Who was the first woman Commissioner appointed to the African Commission and in what year was she appointed?
2. Who currently holds the position of Special Rapporteur on the rights of women in the African Commission? What are her qualifications and what is her ordinary profession in her home country?
3. The terms of reference of this mandate are contained in the report of the first meeting of the working group set up to draft the Protocol on the rights of women in Africa (Banjul, Jan 26-28, 1998). It appears that (1) the requirement that she spear heads finalizing of the drafting of the Protocol and (2) She gives recommendations to the Commission for the improvement of the situation of women in Africa, did not appear in those terms. They first appear in her preliminary report to the Commission. What is her take on this? Who added them, was it the consensus of the Commission that they be added?
4. How many reports have been compiled by the different people who have held the mandate since its inception in 1998?

5. It appears that only one report of this mandate has appeared in the Commission's Annual Activity Reports. Is this intentional or simply an oversight? Where else can these reports be assessed or are they meant to be confidential documents?
6. Does the mandate have any support staff? Or at least has she ever had any since the inception of the mandate? If so, what exactly do they do and where are they ordinarily based?
7. Is the Protocol open for ratification yet? And if so, are there any recent ratifications by State Parties, if not, why not?
8. What steps has the mandate taken to encourage state parties to ratify the Protocol?
9. Has she met any difficulties in juggling her responsibilities as (1) Special Rapporteur, (2) Commissioner, (3) profession at home and (4) private life? If so, how is she managing?
10. Has there been, or, is there a formal working relationship between the mandate and the other procedures of the Commission, (in particular the other thematic rapporteurs) if so what form has it taken and if not, why not?
11. Does the mandate receive any kind of assistance from the Commission? If so, what type of assistance has been rendered and is it sufficient?
12. What strategies has the special Rapporteur put into place in executing her mandate in particular, with regard to the first four terms of the mandate i.e.
 - a) To carry out a study of the situation of the human rights of women in Africa.
 - b) To draw up guidelines on the drafting and examination of State Parties' reports on the rights of women in Africa.
 - c) Ensure or make a follow up on the implementation of the Charter by State Parties. In this vein, to prepare a report on the situation of violations of women's rights and proposed recommendations to the Commission.

d) To assist African governments in the development and implementation of their policies of promoting women's rights in Africa.

13. Has there been any communiqué from the Special Rapporteur on the Rights of Women in Africa (either as a result of prompting from NGOs or through her own initiative) on the recent Amina Lawal case in Nigeria? If so, what form has it taken and if not, why not?

■ Having failed to secure an interview with the SRRWA, I prepared and administered this questionnaire (through email) to Mr. Robert Ayéda Kotchani a legal officer at the African Commission on Human and Peoples' Rights. He sits at the Secretariat in Banjul and was involved in the drafting of the Protocol. He acts as the assistant to the SRRWA. Mr. Kotchani completed the questionnaire between 18 and 20 October 2003. He can be contacted on the Commission's email address at <legal4@achpr>.

The researcher also had an informal interview with Dr. Maretha de Waal, director of the Institute for Women's and Gender studies of the University of Pretoria during early August 2003.

WORD COUNT: 17,993 (Including footnotes but excluding Table of contents, Bibliography and Appendix A)