

**Challenges women face in trying to access the African human rights protection system.**

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(International Law)**

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## DECLARATION

I, Anita Twinomurinzi declare that the work presented in this dissertation is original.

It has never been presented in any other university or institution. Where other people's work has been used, references have been duly provided.

It is in this regard that I declare that this work is original.

It is hereby submitted in partial fulfilment of the requirements for the award of the LL.M Degree in International Law.

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Date:

## **DEDICATION**

To my husband Dr. Hossana Twinomurinzi and our sons, Shallom Mwine and Shamah Migisha for the great sacrifices of love, encouragement and support and from whom I have learned the value and reward of hard work and persistence.

Thank you so much for walking this road with me, you truly bless my heart.

To the women victims and unheard voices that persistently advocate for a better life for women globally, against all odds, keep up the good work and never give up.

“Behind every dark cloud, there is a silver lining”!!!

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To God my Father, You have brought me thus far. Thank you for your unconditional love, grace and favour. Indeed every good and perfect gift comes from you. In You I live and move and have my being, without you I'm nothing!!!

Your word in Psalm 91 gave me strength to press on. Thank you Lord!!!!

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To my parents Mr. & Mrs. Kahirita, Mrs Nshangano and my Sisters, Brother, in-laws and your families. I would like to thank especially my sister Brenda, your love and support bring tears to my eyes. Thank you all for being pillars of strength may God who sees all your unnoticed deeds, bless you to overflowing and satisfy you with long life.

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## ABBREVIATIONS AND ACRONYMS

ACHPR	African Charter on Human and Peoples' Rights
AIDS	Acquired Immune Deficiency Syndrome
AU	African Union
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
FGM	Female Genital Mutilation
HIV	Humane Immune Virus
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
NEPAD	New Partnership for Africa's Development
NGO	Non-Governmental Organisations
OAU	Organisation of African Unity
REC	Regional Economic Communities
UDHR	Universal Declaration of Human Rights
UN	United Nations

## ABSTRACT

The realization, promotion and protection of human rights are processes that have received both negative and positive reactions globally. The adoption of the Universal Declaration of Human Rights in 1948 by the United Nations General Assembly paved the way for the creation of similar instruments nationally, sub-regionally and regionally. These instruments are specific to issues of human rights in the particular states, sub-regions and regions in which they are adopted. Africa, Europe and America have established regional systems and adopted instruments as well as mechanisms to cater for the needs of their specific regions.

Unlike general human rights, women's rights were not a priority and so their development began as recently as the 1980s.

In Africa, the progress of the rights of women was majorly influenced by the *Convention on the Elimination of Discrimination Against women*, an international instrument adopted in 1979/81. Followed by its Protocol, this instrument specifically addressed the rights of women globally. Consequently, instruments such as the *African Charter on Human and Peoples' Rights*, the *Protocol on the Rights of Women*, the *Solemn Declaration on Gender Equality in Africa* and other mechanisms which include Commissions and Courts were established to address the rights of women in Africa.

This study highlights the composition or make up of the African human rights system and its access to women. The central problem in this study is the question "Why women have not been able to access the system despite the prevalent cases of violation of their rights". This question is emphasized by the fact that so far, no women have take any cases alleging violation of their rights to the African Commission of Human and Peoples' Rights.

The study also critically analyses the obstacles and challenges that hinder women from accessing the system and discusses how these factors eventually limit the prevalence of women's rights.

The study concludes by suggesting possible remedies and reforms both legal and beyond that can be enforced to boost the African human rights system to ensure that women freely enjoy and exercise the rights to which they are entitled.

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## **Challenges women face in trying to access the African human rights protection system.**

### **Chapter one: Research proposal.**

*“How can human rights make a difference in the reality of women's lives? The very notion of human rights implies universal application to both women and men; however, the development of international human rights law has been partial and andocentric, privileging a masculine world view. Therefore, any attempt to address the human rights of women must consider how they can be protected in the context of their own cultures and traditions”. R Cook, Human Rights for Women: National and International Perspectives (1994) University of Pennsylvania Press.*

#### **1.1 Introduction.**

For decades now, women particularly in Africa have and still suffer great difficulty in trying to obtain redress for the violation of their human rights. Common impediments that women face in their pursuit to access the African human rights system are the three interconnected issues of lack of awareness, discrimination and inequality. This has become a universal injustice and thus should be central in efforts to remedy the recurring lack of access to women's rights.

Although some women have gained equality to some extent and some no longer experience discrimination, many women especially in rural areas still live in the midst of untold discrimination in their work places, within their families and communities at large.

Many African governments and judicial systems work hard to uphold and ensure the protection of women's rights by not condoning customs and culture that violate and abuse their rights. In South Africa for example, the Constitution's supremacy over culture based oppression is emphasised.<sup>1</sup> However for many women especially those in rural areas, these laws that exist on paper do not translate into equality and justice.<sup>2</sup>

Much as the past century has seen a transformation in women's legal rights and an expansion in the field of women's legal entitlements, violation of women's rights and lack of redress is a situation that dates way back and is generally a product of the social set up of African communities in terms of customs and traditions which have been translated into binding customary law.

The clash between African culture and tradition with human rights continues to jeopardize effective protection of women's rights. The prevalence of discriminatory and prejudicial laws especially customary laws for example laws pertaining succession and inheritance, domestic violence and many other forms of violation faced by women and

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<sup>1</sup>The Constitution of the Republic of South Africa 108 of 1996, Section 2.

<sup>2</sup>UN Women *The 2011 – 2012 Progress of the World's Women – In Pursuit of Justice* 6 July 2011.

the visible gaps in legal frameworks cause great challenges that hamper the effective protection of women from the abuse of their rights.

Customary law has been given high status in many African states, in South Africa for example, the Constitution<sup>3</sup> provides for the recognition of customary law and the role of traditional leaders. Even though customary law is subject to the provisions of the Constitution, it has such a powerful influence that dealing with the harmful customs and traditions which affect mostly women becomes challenging. These social setups affect the protection of women's rights and give rise to other challenges like institutional and legal barriers which will be discussed in detail.

Despite the violation of women rights for example domestic violence, denial of land, disinheritance and many other violations, there is not even one case at the African Commission pleading the protection of a woman's human right. The challenges pointed out above often mitigate the prevalence of women's rights on the African Commission agenda.

## 1.2 Background to the study

Despite decades of women activism in human rights, legal equality and development, it has proved difficult to entrench concepts and practices that acknowledge women's rights as human rights.<sup>4</sup>

The traditional African society was and still is generally characterised by patriarchal attitudes. The constant use of these attitudes has influenced customary law. As such, women find themselves in social settings that violate their rights, marginalise and discriminate them on grounds of their gender. The social challenges in particular have affected the way decisions and laws governing societies are made. Most social systems exclude women from participation especially with regard to education, resource allocation and participation in the political sphere. Due to the fact that this was the status quo of women over a long period of time, it became necessary to ensure that mechanisms for the protection of their rights were in place.

Achieving an equitable and effective human rights system in Africa has been an evidently lengthy and arduous one. Though still far from being achieved some commendable progress in this regard had been registered. Studies on human rights show that until recently, women's rights have been ignored and taken lightly.

The 1963 *Charter of the Organization of African Unity* for example, made no mention of women's rights.

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<sup>3</sup>See n 1, Section 211 and 212

<sup>4</sup> M Mukhopadhyay and S Quintero *Gender and access to justice in sub-Saharan Africa* Report of the conference held 29-30 October 2008 in Johannesburg, South Africa. Amsterdam: KIT and CALS (2008) 1.

Even though African nations together designed the region's primary human rights document to rectify the above deficiency, the African Charter of 1981 was not exhaustive in this regard. It made reference to women only twice; In Article 2 where it includes sex in a broad non-discrimination clause and Article 18(3) which prohibits discrimination against women and provides for the protection of the rights of the woman and the child as provided for in other international declarations and conventions. Rather than remedying the position of women in terms of gender inequality, women's rights were categorized as rights related to family protection.<sup>5</sup>

Nevertheless, due to the obstacles women in Africa face in accessing the African Human Rights System, the *Protocol to the African Charter on Human and People's Rights on the Rights of Women* and later the *Protocol on the Establishment of an African Court on Human and People's Rights* were established.

The AU Heads of State and Government adopted two additional instruments tailor made to address the challenges African Women face, mostly as a result of discrimination and inequality:

*The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa* (the African Women's Protocol) adopted in 2003 in Maputo. This Protocol comprehensively condemns harmful practices against women (including the girl child, widows and the elderly), unequal rights in marriage, unequal treatment of women in land distribution and their exclusion from decision-making among other issues. It dictates that Member States should periodically report on their efforts to address harmful traditional practices.

A second instrument adopted in this regard was the, Solemn Declaration on Gender Equality in Africa (SDGEA) adopted in Addis Ababa in July 2004. It requires States to respect existing normative standards on women's human rights by expanding and promoting the gender parity principle, the implementation of legislation to guarantee women's land, property and inheritance rights as well as their rights to housing.

However, as briefly mentioned above, and as this dissertation will reflect, the efforts towards women empowerment have not given the desired effects. Despite an impressive array of rights advocating for equality, non-discrimination, increased participation and gender sensitivity, women remain persistently unequal partners in their homes, communities, countries and worldwide.<sup>6</sup>

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<sup>5</sup>CH Heyns *The African Regional Human Rights System: The African Charter* (2004) Harvard Human Rights Journal 687 - 88 (arguing that "the lumping together of women and children" perpetuates outdated stereotypes").

<sup>6</sup>SB Keetharuth 'Major African legal instruments' in A Bosl and J Diescho *Human Rights in Africa: Legal perspectives on their protection and promotion* (2009) 187.

### **1.3 Statement of the problem**

The recurring challenges regarding women's access to the African human rights system are largely a result of continued gender inequality and discrimination.

Although institutions and individuals have voiced their concerns and taken various measures to curb the challenges preventing women from accessing the system, the African State is notorious for human rights violations. This immediately brings to light concerns on the region's ability to create and maintain an effective and efficient human rights system. It is for instance, a matter of concern that no woman victim of family-based discrimination or other human rights violation of women has consciously approached the African Commission to seek protection since the operational phase of the Commission thirty years ago.

In addition to regional human rights instruments, the majority of African states have ratified a range of international and sub-regional human rights instruments. However, the ratification of these human rights instruments has not mitigated the discrimination and harmful practices facing women in Africa.<sup>7</sup> What is most intriguing though is that at the domestic level of most legal systems, scores of women complain or petition the legal system with all sorts of problems but come the regional and global system, they shy away completely.

This dissertation therefore critically analyses the issue that despite the challenges women in Africa face such as inequality and discrimination from which many other challenges stem, women victims of human rights violations have not taken any complaints to the African human rights protection system.

For many women both globally and in this case Africa, access to the system still remains unattainable.

### **1.4 Research questions**

1. How can women use the African human rights protection system mechanism to seek redress for the violation of their rights?
2. Why have women not been able to access the African human rights system, and in other words enjoy the rights to which they are entitled?
3. What remedies and reforms should be enforced within and beyond the legal realm, to ensure that women's rights and entitlements are freely accessed and enforced?

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<sup>7</sup> African Union *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, 11 July 2003.

## 1.5 Methodology

This research will comprise library based research. A wide range of primary and secondary literature will be utilised to build and consolidate the study. Primary sources such as Human Rights Instruments and case law as well as secondary sources including books, journal articles, discussions and country reports will be consulted. In addition, reliable internet websites that are well recognized in the International law field will be used.

## 1.6 Literature review

A vast wealth of literature on the African human rights system exists. Authors within and outside Africa have published on various aspects of the human rights system making specific reference to a number of human rights aspects, regional and sub-regional human rights instruments. Examples of discussed subjects include; the African human rights system, the right to health, the right to employment, the rights of the child and the rights of women specifically the challenges they face in trying to access the African human rights system. This is especially so in cases where their rights have been violated or have not been protected as much as other human rights which is the main focus of this dissertation.

The UN Women's Report 2011 highlights that in many contexts, in rich and poor countries alike, the infrastructure of justice which is the police, the courts and the judiciary is failing women. This is reflected through poor services and hostile attitudes from the very people whose duty it is to ensure the protection of women's rights.<sup>8</sup>

Although many constitutions guarantee equality between men and women, inadequate laws and loopholes in the legislative frameworks, poor enforcement and implementation gaps make these guarantees hollow promises with limited impact on the day to day lives of women.<sup>9</sup>

In his discussion of the Women's Protocol, Frans Viljoen asserts that the problem of lack of utilization of the available system by women or on their behalf is apparent. He demonstrates that not much has been done to explore the possibility of the individual communications procedure in respect of women. He argues that the normative and institutional potential of the existing system should be used to its fullest before other instruments are introduced into the human rights system.<sup>10</sup>

George Mukundi Wachira in assessing the high expectations people have of the African human rights system, questions the difference the Court will make to the prevalent

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<sup>8</sup>UN Women (n 2 above) 8.

<sup>9</sup>UN Women *Analysis of data from World Bank 2010C* Data as of January 2011.

<sup>10</sup> F Viljoen, *An Introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women* (2009) 18-19.

culture of impunity and the often deplorable state of human rights on the continent. He recommends that to achieve an environment that would do away with such culture, regard should be given to attempts by women who too are rightful holders of human rights to breakthrough and participate in decision making and day to day aspects that affect them.<sup>11</sup>

Furthermore, Sheila B Keetharuth provides a brief descriptive study of the major Legal Instruments making up the African human rights system and the jurisprudence of the African Commission. She argues that addressing the effectiveness of the system rather than increasing the number of instruments in the system is the solution to the crisis.<sup>12</sup> Looking at the instruments meant for human rights protection for instance the African Charter on Human and People's Rights which is the main instrument recognising and protecting human rights in Africa, it is evident that very seldom are women's rights regulated by these instruments and in cases where they are for example in Article 18 of the Charter, provisions are general and do not highlight specific provisions towards the protection of women's rights.

Insufficiency of the Charter is further mirrored by the fact that it defines human rights violations in the public realm yet most violations of women's rights exist in the private sphere. As such the real challenges remain unattended to, a clear indication of the fact that these legal instruments merely scratch the surface of women's problems and fail to deal with deep seated issues.

It is believed that the creation of the African Women's Protocol was majorly to bridge the gaps that existed in the African human rights system in terms of protection of women's rights. Many authors applaud the way in which this instrument has boosted the protection of women in Africa.

Roselyn Musa, Faiza Mohammad and Firoze Manji discuss the great work of the African Protocol on the Rights of Women and express their disappointment at its ignored position in Africa. They therefore recommend the implementation of the protocol's provisions and suggest strategies to attract more ratification.<sup>13</sup>

The question is that if this legislation has such a positive effect on the rights of women, why have many states not ratified it and why must there be aggressive campaign to persuade states to ratify the protocol?

In contrast to the above, a publication by D Chirwa highlights that although it is acclaimed for addressing specific hindrances to women's rights, the African Women's

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<sup>11</sup>GM Wachira *African Court on Human and Peoples' Rights: Ten Years and still no Justice* (2008) 4.

<sup>12</sup> SB Keetharuth (n 6 above) 224-226.

<sup>13</sup> R Musa et al; *Breathing Life into the African Union Protocol on Women's Rights in Africa* (2006) 19-25.

Protocol is not flawless. It has been distinctively criticized especially for failing to ingrain African values into the discourse of women's rights.<sup>14</sup>

Lastly, in addition to the academic publications on the subject matter, reputable institutions and civil society organizations that promote women's rights have contributed significantly to the recognition and protection of the awareness and implementation of women's rights. This they have done by publishing on the subject and by active participation in projects to champion this cause. More specifically, civil society organisations have held awareness campaigns, organized seminars and workshops and participated in various other activities to enlighten women about their rights and entitlements. Their publications will be used to illustrate their role in the field.

### **1.7 Chapterisation**

The dissertation comprises five chapters. The first chapter gives an introduction and general background of the study with the view of introducing the readers to its context. It also includes a summary of the problem at hand, the research questions and lastly a brief review of available literature.

Chapter two which is the crux of this study critically analyses the challenges women face in accessing the African human rights system. Social, cultural and institutional barriers such as discrimination and gender inequality will be evaluated as impediments women face in accessing the African human rights system. The substantive and procedural mechanisms of protection will be thoroughly discussed to explain how the loopholes in the legal system have fuelled the challenges women face accessing the system.

Chapter three gives a brief review on the human rights of women in Africa. It analyses the substantive protection of women's rights in Africa. In this chapter general provision for the protection of women's rights by way of African human rights instruments like the *African Charter on Human and People's Rights* herein after the African Charter and specific protection under which the *Protocol to the African Charter on Human and Peoples' Rights in Africa*, herein after the Maputo or Women's protocol are discussed. In addition, the chapter gives reference to the Solemn Declaration on Gender Equality in Africa as an example of soft law mechanisms on the subject.

Chapter four then discusses the procedural mechanism of protecting the rights of women in Africa. It sets out the provisions and procedures of the African Commission and the African Court in terms of women's rights.

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<sup>14</sup> DM Chirwa *Reclaiming (WO) Manity: The Merits and Demerits of the African Protocol on Women's Rights* (2006) 95.

Lastly, chapter five provides recommendations on how effective implementation of the African human rights system can be enforced. Effective implementation will assist in transforming the rights of African women from a myth, which is currently the widespread perception into an achievable reality. Recommendations will include the active use of legal pluralism, gender-sensitive law reforms and many others as will be discussed. Concluding remarks are drawn in this chapter as well.

## **Chapter two: Barriers/challenges hindering women's access to the African Human Rights system.**

### **2.1 Introduction**

Africa for over five centuries has been plagued by human rights violations. The people of Africa like those elsewhere continue to struggle for better conditions of life and accountable societies.

Moreover the challenges African women face in accessing African human rights are diverse and extensive. Ambiguity exists in the wording of the provisions that regulate the rights of women. This ambiguity is particularly visible pertaining to the methods in which mechanisms are instituted as well as the political will and circumstances of the different African states. Nevertheless, the African human rights system is still perceived as a ray of hope for victims of human rights violations.

Despite numerous international and regional women's rights treaties ratified by African states and the various commitments to eliminate all forms of discrimination and harmful practices against women, women's rights continue to be violated.

Women are often denied their rights due to the lesser status ascribed to them by tradition and custom.<sup>15</sup>

This chapter provides a detailed discussion on the numerous barriers preventing women from accessing their rights through the African human rights system. The chapter analyses selected social, cultural, institutional and legal barriers. Due to the extensive nature of obstacles women face, the discussion does not exhaustively address the challenges.

## 2.2 Gender discrimination and inequality

**Gender discrimination** refers to the systematic, unfavorable treatment of individuals on the basis of their gender roles. On the basis of gender, individuals are denied their rights as well as access to opportunities and resources.<sup>16</sup>

**Gender equality** denotes women having equal access to social, economic, political and cultural opportunities as men. It does not recognize women and men as the same, but rather that their similarities and differences are acknowledged and equally valued.<sup>17</sup>

The Principles of non-discrimination and equality are upheld globally as expressed in Article 1 of the Universal Declaration of Human Rights which provides that all human beings are born free and equal in dignity and rights. This has set a standard within various human rights instruments. In Africa particularly, *the African Charter on Human and Peoples' Rights* contains provisions promoting the elimination of discrimination against women and advocating equal protection for all.

Article 2<sup>18</sup> and Article 3<sup>19</sup> of the African Charter explicitly provide for non-discrimination and equality, Article 28<sup>20</sup> further emphasises non-discrimination. Despite these

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<sup>15</sup>Manisuli Ssenyonjo. 'Culture and the Human Rights of Women in Africa: Between Light and Shadow' *Journal of African Law* Vol 51 No 1(2007).

<sup>16</sup>The African Development Forum (ADF VI) *Achieving gender equality and women's empowerment in Africa, Progress Report* 19-21 November 2008.

<sup>17</sup> As above

provisions women continue to suffer discrimination and inequality. For example, although Article 28 of the Charter condemns discrimination, it has been interpreted by many as one that entrenches oppressive family structures. Thus, the Charter is perceived to marginalise women from participating in various spheres outside the home.<sup>21</sup> The contradictory nature of the Charter is problematic and has led to the argument that the Charter allows for gender discrimination of women in marriage, property ownership, inheritance and many other areas.

Issues of inequality and discrimination against women are prevalent not only generally in Africa; local judgements in domestic courts clearly indicate that these issues are of concern from state level. Endeavours to curb this problem are evident in domestic cases like **Botswana: Attorney-General v Unity Dow**.<sup>22</sup> Unity Dow, a citizen, born and raised in Botswana married a foreigner. According to law in Botswana because she was married to a foreigner, their two children required resident permits and were thus denied their rights as citizens. Dow challenged the government saying that “The time that women were treated as chattels or were there to obey the whims and wishes of males is long past”. The court held that Unity Dow’s right to liberty, right not to be expelled from Botswana, right not to be subjected to degrading treatment and right not to be discriminated against on the basis of sex had indeed been infringed upon by the provision. The court confirmed that the guarantee to equality under the constitution applied to citizenship rights.

As previously mentioned, the principles of non-discrimination, equality and lack of awareness are common challenges in the African human rights system. Therefore they will not be discussed further presently but in depth as the other challenges are discussed.

## 2.3 Social Barriers

### 2.3.1 Cultural and African values

**Culture** is the distinctive patterns of ideas, beliefs, and norms which characterize the way of life and relations of a society or groups within a society. These patterns also

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<sup>18</sup> African Charter on Human and Peoples’ Rights, Article 2 provides that Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

<sup>19</sup> See above, Article 3 provides that 1. Every individual shall be equal before the law. 2. Every individual shall be entitled to equal protection of the law.

<sup>20</sup> Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safe-guarding and reinforcing mutual respect and tolerance.

<sup>21</sup> Makau Mutua. Virginia Journal of International Law. Winter, 1995. p.339

<sup>22</sup> *The Attorney General of the Republic of Botswana v Unity Dow* (2001) AHRLR 99 (BWCA 1992)

include customs and traditions. Culturally determined gender ideologies define rights and responsibilities and what is 'appropriate' behavior for women and men. They also influence access to and control over resources, and participation in decision-making. These gender ideologies often reinforce male power and the idea of women's inferiority, as for example customary laws that dictate that only men can own land. Culture is sometimes assumed to be natural and unchangeable; however it is fluid and historically determined.<sup>23</sup>

A large proportion of women in Africa belong to an inferior position in society due to the derogatory practices meted out to them by culture and tradition. These practices include childhood/forced marriages, female genital mutilation, widow inheritance, being stripped of the right to choose to have children, lack of property rights, nutritional taboos and a whole array of practices.<sup>24</sup> Due to the extensive nature of these practices they will not all be discussed in this forum, but referred to briefly.

Although the African Charter clearly prohibits discrimination, it makes no provision for the elimination of harmful cultural and traditional practices. The African Women's Protocol though, specifically provides for the elimination of harmful practices in Article 5.<sup>25</sup> Unfortunately much as this is the case, the Women's Protocol does not expressly disallow reservations of declarations. The limitation in this Protocol gives states the option of making reservations or declarations that are contrary to the purpose of the instrument.

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<sup>23</sup>See n 16 at v

<sup>24</sup>Franciska Issaka et al Realizing women's Equality Rights in Africa, The delicate balance between culture and universality of rights at 5. Early/forced marriages, *Human Rights Watch* ISBN: 1-56432-9976 "This Old Man can feed us, you will marry" Child and forced marriage in Sudan, March 2013. Property Rights, Aili Mari Tripp, *WOMEN'S MOVEMENTS, CUSTOMARY LAW, AND LAND RIGHTS IN AFRICA: THE CASE OF UGANDA*, *African Studies Quarterly*, the online journal for African studies, Vol. 7, issue 4, Spring 2004). Widow Inheritance Mail&Guardian, Widows fight social stigmatization in Cameroon, 05 July 2013. Female Genital Mutilation, World Health Organization, Fact Sheet No. 241, Feb 2013. Nutritional Taboo, OHCHR, Fact Sheet No. 23, Harmful Traditional Practices affecting Health of Women and Children, 1(E)

<sup>25</sup>Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Article 5 States Parties shall prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards. States Parties shall take all necessary legislative and other measures to eliminate such practices, including:

- a) creation of public awareness in all sectors of society regarding harmful practices through information, formal and informal education and outreach programmes;
- b) prohibition, through legislative measures backed by sanctions, of all forms of female genital mutilation, scarification, medicalisation and Para-medicalisation of female genital mutilation and all other practices in order to eradicate them;
- c) provision of necessary support to victims of harmful practices through basic services such as health services, legal and judicial support, emotional and psychological counselling as well as vocational training to make them self-supporting;
- d) protection of women who are at risk of being subjected to harmful practices or all other forms of violence, abuse and intolerance.

Due to the acceptance of customary practices, many African countries have implemented customary law and adopted pluralistic legal systems.<sup>26</sup> Customary laws, which are a product of culture and tradition, are often detrimental to the promotion of women's rights in Africa. However customary law has great potential to complement measures towards the protection of women's rights in Africa.<sup>27</sup>

An example of a harmful cultural and traditional practice that eventually hinders women from accessing the African human rights system is a case of Childhood/Forced marriages. Forcing young girls into early marriages reflects that women are excluded from participating in major decisions about their lives. Instances of forced marriages underscore that women's freedom to choose their partner is often ignored. More so, forced marriages often pose serious health hazards to young girls in that they are exposed to early pregnancies and are physiologically more vulnerable to infectious diseases like HIV/AIDS. Risks such as these are propagated by gender-based inequalities.<sup>28</sup>

Early marriages also contribute to the low literacy rates common among women and girls since marriage presents new responsibilities for them. Upon marriage, young girls are confronted with the realities of becoming the primary care givers in the family. In fulfilling this role, many have to drop out of school. Low literacy rates among girls create further challenges for them. Firstly, women who are unable to read and write are more likely to give birth to children who will die before the age of five due to ignorance on the children's health such as immunizations. Secondly, women who are unable to read and write are less likely to give birth to children who will be literate. As such, low literacy perpetuates the cycle of extreme poverty and increases the levels of child mortality.<sup>29</sup> The drawback of early and or forced marriages illustrate why the rights and welfare of the individual should be taken into consideration in deciding on traditional customs.

Much as culture should not be discarded when dealing with human rights, it must not be accorded a superior status to the rights of women.<sup>30</sup>

### **2.3.2 Societal Patriarchal attitudes/dependence on males**

According to the Oxford dictionary Patriarchy refers to a system, society or government in which the father or eldest male is the head of the family and descent is reckoned

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<sup>26</sup>Trokosi, Woryokwe, Culture and Individual Rights: A case study of Women's Empowerment and Community Rights in Ghana, August 22, 2000. Other countries that have implemented Customary Law and adopted pluralistic Legal Systems include: Swaziland, Uganda, South Africa, Togo, Benin Cote d'voire and Nigeria.

<sup>27</sup>See n 16 above

<sup>28</sup>Human Rights Watch Reports on Gender-Related Abuses and AIDS in Africa, *A call for Action on HIV/AIDS-Related Human Rights Abuses Against Women and Girls in Africa*, 2002

<sup>29</sup>Susanna Mikhali, Child Marriage and Child prostitution, GENDER < TRAFFICKING AND SLAVERY (2002) 43

<sup>30</sup>P Alston The Best Interests of the Child: Reconciling Culture and Human Rights (1994) 20

through the male line. It can also mean a system of society or government in which men hold the power and women are largely excluded from it.

With the above definition of patriarchy and looking at African culture generally, it is evident that the majority of society is patriarchal in nature. The persistence in patriarchal attitudes within society dictates the marginalized role of women and limits the full implementation of their rights.

One area that vividly highlights the level of patriarchy in African societies is ownership of property particularly ownership of land. Customarily in Africa, women do not own or inherit land. This is a result of discrimination and inequality as well as the value attached to women. This is because, women are normally subordinates of their fathers, husbands and brothers. They are often considered part of a community's wealth, thus property themselves.<sup>31</sup> A study on gender-based violence by Human Rights Watch indicated that the sentiments of some communities were that 'property' cannot own property. This is a clear indication of the disadvantaged position of women in Africa and proof that discrimination is not in the past but is still evident. Under patrilineal systems women do not usually inherit their husband's land, the system works in such a way that land passes through the male bloodline from fathers to sons and is considered property of the husband's family, tribe or clan.<sup>32</sup>

Land is widely used as collateral or security in Africa and this scenario is usually the case when securing bank loans for instance. Due to their patriarchal environments, women are in a disadvantaged position in that they cannot obtain these bank loans or other property for which presentation of such collateral is a prerequisite. In Uganda for example a woman who approached the bank to secure a loan to start a small scale business, would be asked if she possessed land. If she did not have, she had to present the bank with written consent from her husband who often declined to furnish her with this consent. She eventually could not obtain the loan, due to the odds being against her. The same man, if he later went to the same bank to secure a loan would obtain it without any hassle at all. Also in Eritrea for instance, the requirement for eligibility for access to land and other economic resources is participation in the National Service. However, because women are exempt from the National Service on grounds of marriage, they automatically lose eligibility for land and other services.<sup>33</sup>

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<sup>31</sup> P Kameri-Mbote, Land Rights for African Development, From knowledge to Action: Gender issues in Land Tenure Under Customary Law 2005 See [www.capri.cgiar.org/wp/..%5cpdf%5cbrief\\_land-05.pdf](http://www.capri.cgiar.org/wp/..%5cpdf%5cbrief_land-05.pdf)

<sup>32</sup>RS Knight, Statutory Recognition of Customary Land Rights in Africa: An Investigation into best practices for law making and implementation. Food and Agricultural Organization of the United Nations Rome 2010 at 31

<sup>33</sup>CEDAW Concluding Observations: Eritrea CEDAW/C/ERI/CO/3 (3 February 2006) at Para 14

Another example is in the case of *Bhe and Others v Khayelitsha Magistrate and Others*.<sup>34</sup> This case involves, two minor girls from Khayelitsha aged nine and two years. Ms. Bhe their mother challenged the rule that in the absence of a will they could not inherit their deceased father's estate on grounds that they were female. The girls had been living in the estate in question with their parents till their father died in 2002. Although their parents had been cohabiting for twelve years, they had never been married and thus the mother had no legal claims to the house. The house was therefore deemed to be the property of the oldest male relative of the children's father in terms of customary law. This then highlights the point of contestation, does the fact these children's parents were not married though cohabiting deny the widow the right to inherit? Although it is common practice in the west and in African cities for a man and woman to live together as partners and enjoy the benefits that flow from such a union, traditional Africa does not recognise such unions. This complicates matters relating to inheritance of deceased assets when one of the partners dies, although domestic legislation considers such practices unconstitutional and discriminatory. It is scenarios like these that confirm that though known to be discriminatory, customary laws to a large extent are engraved in the African system and thus affect or slow down endeavours to shift from harmful to better practices in traditional Africa.

This is the norm when it comes to women in Africa, the inequality and discriminatory practices have put them in a position in which their rights have been violated due to adoption of culture and tradition.

Patriarchal attitudes are not only predominant in the area of property ownership but are obstacles to women in many other areas for instance healthcare, employment, economic development and education. For example, as mentioned earlier, lack of education for girls, results in poverty and restricts their economic autonomy thus economic dependence on men and to a large extent adversely affects their reproductive health.<sup>35</sup>

Women's rights are often influenced by their role in the family and society. Due to this linkage, the quest for their rights is seen as a direct attack to the existing cultural values. Transition to observing women's rights is often met with resistance due to the threat it poses to patriarchy.<sup>36</sup>

### **Dependence on male relatives for assistance and resources**

Flowing from the above challenges of patriarchy is the situation where women become dependents in the family. Women are made to depend entirely on male relatives especially wives on their husbands for resources and financial support. The majority of

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<sup>34</sup>*Bhe and Others v Khayelitsha Magistrate and Others* (2004) AHRLR 212 (SACC 2004)

<sup>35</sup>Susanna Mikhail *Child Marriage and Child Prostitution*, in *GENDER, TRAFFICKING, AND SLAVERY* (2002) 43.

<sup>36</sup>Oloka-Onyango & S Tamale 'The Personal is Political? Or why Women's Rights are Indeed Human Rights: AN African Perspective on International Feminism' (1995) 17 *Human Rights Quarterly* 715.

domestic violence cases, issues of inheritance and succession are more often than not against family members on whom women rely for financial support. This creates a challenge when women try to seek redress for the violation of their human rights from the African human rights system in that it works against them to seek redress against their financial providers and family members. Therefore the lack of finances and resources as well as the costs of pursuing a case in the absence of free legal aid becomes prohibitive.<sup>37</sup> In Uganda for example, it is reported that women reporting cases of domestic violence to the police will be asked to provide money for transport to arrest the suspect.<sup>38</sup> The plight of women in Africa in terms of the protection and promotion of their rights is totally appalling.

### **2.3.3 Threat of sanction or stigma**

In addition to the above challenge is the barrier of stigma and sanction that comes with women reporting cases of violence inflicted on them especially by family members. In cases of sexual violence for example, female victims are usually more stigmatized than male perpetrators. Women who report such crimes are often in danger of being shunned by their families and communities. In a survey in Morocco, 68% of women who had experienced domestic violence expressed that they preferred to solve the problem within the family and those whose option was to seek justice preferred to approach family courts for divorce rather than go to police and initiate proceedings.<sup>39</sup> The stigma and threat of sanctions associated with reporting such crimes traumatizes women hence their reluctance to access the formal justice systems available to them.

Reporting such crimes can attract the label of someone who lets out family matters for public knowledge or in other words spreads the family's "dirty linen" in public. This label can potentially render a woman who is financially dependent on her family, financially helpless in the future. The dignity of such a woman also suffers as her family and or community are likely to relate negatively with her.

### **2.3.4 Lack of awareness/ignorance**

As noted above, most of the social challenges that women face are intertwined and flow into each other. Illiteracy and poverty are some of the main causes of lack of awareness. Due to the sizeable numbers of uneducated women (both formal and informal education) in Africa, ignorance of their rights is a common situation. Many women are oblivious of their rights leave alone the justice system at their disposal. For instance, a woman in a rural area in Botswana, Uganda or Kenya is usually unaware of

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<sup>37</sup>United Nations Women, see n 2 at 52

<sup>38</sup>As above, also see Amnesty International 2007b. *Uganda: Doubly Traumatized: The lack of access to justice for female victims of sexual and gender-based violence in Northern Uganda*. London: Amnesty International.

<sup>39</sup>As above, also see Benradi, M. and A. Ounnir. 2010. "L'accès des Femmes Victimes de Violences à la Justice." Background paper for *Progress of the World's Women 2011–2012*. UN Women, New York.

the existence a Human Rights Court, a Human Rights Commission or any legislation protecting the rights of women specifically.

This challenge like many others does not only affect women's access to the human rights system in Africa but has fatal effects like poor health that sometimes result in the death of many women. Many women are ignorant about the culture they practice, they live in societies that practiced these cultures before from way back in history and due to illiteracy and ignorance have no idea that these practices are harmful and their practice can be challenged. Female Genital Mutilation is one of the most harmful practices in Africa, the use of unhygienic instruments in the process of mutilation as well as over bleeding not only cause disease but the death of many women subjected to this practice. Diseases like HIV/Aids are easily transferred since these practices are carried out as rituals and involve masses of women on whom the ritual is performed at the same time or in other words in one ceremony. In Eastern Uganda for example this practice is still actively practiced despite efforts to enlighten these communities of the dangers on the practice. To these communities, their culture is being preserved no matter the negative implications.

Lack of knowledge and illiteracy curtail efforts to redress traditional practices. Where illiteracy levels are high, women tend to be more vulnerable and thus succumb easily to such practices.<sup>40</sup> Lack of awareness is an obstacle to accessing the African human rights system. A persistent challenge to the work of the Africa Commission on Human and Peoples' Rights is a general lack of awareness of its existence and its mandate amongst the African people.<sup>41</sup>

In conclusion, women face a multitude of social obstacles in accessing the African human rights system. Although mechanisms have been put in place to protect the violation of their rights and to promote their human rights, substantial effort has to be applied to change the pervasive attitudes. Harmful traditional practices, the prejudicial effects of discrimination and inequality and the many social obstacles discussed above are some of the issues that plague women hindering them from accessing the system available for them.

## **2.4 Institutional Barriers**

### **2.4.1 Lack of capacity and inadequate resources**

The majority of judicial institutions in Africa do not respond to women's needs due to a dire lack of capacity. A shortage of court rooms, trained judicial officers, forensic staff and the police exacerbate the problem. The few courtrooms available are booked to

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<sup>40</sup>Franciska Issaka et al, See n 24 at 12

<sup>41</sup>E Ankumah The African Commission on Human and Peoples' Rights: Practice and Procedures The Hague: Martinus Nijhoff (1996) See also Constitutive Act of the African Union Article 5

capacity to hear other issues, deemed more crucial. Thus finding a court room where women's matters are heard would be considered a luxury.

Pursuing formal justice entails high financial and psychological costs. For women who are devoid of these resources as discussed under social barriers, this barrier is substantial. A World Bank study for example stipulated that in Kenya, a formal claim for land in an inheritance case can involve up to 17 different legal steps that would cost up to \$780 in lawyers' fees and administration.<sup>42</sup> In addition, over the years, the African Commission's concern has been the inadequacy of resources made available by the African Union for the execution of its expansive mandate.<sup>43</sup> For so long, the Commission has depended on extra budgetary funding from donors. Even then, limited and inadequate funds continue to be a challenge considering its vast mandate.<sup>44</sup> The implication of this is that the Commission's handicap affects its accessibility to women in Africa who would otherwise approach the Commission for redress.

#### **2.4.2 Inaccessibility of courts and delayed court processes**

Courts are often distant and difficult to access especially for rural women. For example a woman living in a village in Namibia suffering constant domestic violence, will find it difficult to know about the existence of the African Court on Human and Peoples' Rights let alone have access to it. The African human rights system is not only out of reach but very costly for many women who have limited resources at their disposal if any. Although most local or domestic courts generally have no problem of access for women, most of them are plagued with patriarchal attitudes. Women in most African countries are actually the main complainants against their husbands, however for cases of more complex nature that require higher authority, access especially for rural women becomes costly and in some instances impossible. Case backlogs and overburdened courts, further exacerbate the crisis in domestic courts as this often gives rise to adjournments and ruling delays. The plight of local courts is further compounded by the shortcomings of unqualified staff, limited budgets, inadequate infrastructure and a shortage of logistical support.<sup>45</sup> For instance, the family section of Tangier court in Morocco produces 20,000 judgments per year but has one bailiff, which implies that

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<sup>42</sup>United Nations Women see n 2 above at 53, see also Harrington, A. and T. Chopra. 2010. "Arguing Traditions: Denying Kenya's Women Access to Land Rights." Justice for the Poor Research Report No. 2. World Bank, Washington, DC.

<sup>43</sup>Interview with Commissioner Angela Melo during the 42<sup>nd</sup> Ordinary Session of the African Commission, Congo Brazzaville, 16 November 2007.

<sup>44</sup>GM Wachira *African Court on Human and Peoples' Rights: Ten Years and still no Justice* (2008) 10.

<sup>45</sup>Judicial Service of Ghana, "The Role of the Judiciary in Promoting Gender Justice in Africa." *Report of the Partners for Gender Justice Conference hosted by the Judicial Service of Ghana*. 19–21 November 2008, Accra, Ghana.

divorced women are often left without the financial support they have been awarded, since one bailiff can hardly ensure that the court's judgments are effectively enforced.<sup>46</sup>

Delayed processes are not only experienced in courts but in other institutions like the African Commission. The length of resolving matters is too long and this is usually coupled with unnecessary postponements. Women seeking redress often cannot afford such delays due to their limited resources and time away from their families. It must be conceded that commissioners only meet twice a year for 15 days per session. With overwhelming workload therefore, the demand surpasses supply posing a challenge to the Commission and eventually the women seeking redress. Considering the fact that times and dates of hearings are uncertain, victims, potential witnesses and their counsels waste time lingering around the Commission not sure when or if their cases will be heard. These circumstances limit the suitability of the African Commission especially for poor women, who have limited resources to travel distances to the Commission.<sup>47</sup>

### **2.4.3 Lack of independence of Commissioners**

Governments second Commissioners to the African Commission on Human and Peoples' Rights. Because nominations to the Commission are often by political appointment, pressure is exerted on the Commissioners to protect the interests of the governments that placed them in office. As such, pressure from governments who expect the nominated Commissioners to advance their interests interferes with the Commissioner's duties. More so, the lack of autonomy of Commissioners hinders the skill and capability of the Commission due to the fact that the Commissioners are appointed on the basis of their loyalty to Government, and not their ability to serve in the Office.

It is important to note that presently the African Commission comprises more women than men which was not the case before. The African Commission now comprises seven (7) women out of the eleven (11) members of the Commission and the chair and vice chairpersons are women. This development positive as it does not exempt these women commissioners from the pressures mentioned above. The "acceptable" position of women in many African societies is that women must take orders and be submissive to their male counterparts. In effect women face much more pressure in trying to balance the promotion and protection of their fellow women's rights on the one hand and the expectations of those who nominated them to office as commissioners on the other hand. Hansungule refers to this matter in recommendation 6 of his Entebbe

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<sup>46</sup>In response to this, in 2010, the Government of Morocco passed a new law establishing a family assistance fund for indigent women divorcees and their children. Benradi and Ounnir 2010.

<sup>47</sup>Conversation with Judy Oder, at the INTERIGHTS offices, London, 10 December 2007.

proposals.<sup>48</sup> These circumstances make it difficult for Commissioners to implicate states when individuals bring matters to them.

Although making slow progress, the appointment of women in key positions of responsibility is an achievement that is being realized worldwide and should not be ignored. For example, the recent appointment of Dr Nkosazana Dlamini Zuma as the new African Union chairperson is considered a significant achievement regarding the status of women in Africa. In a News24 report dated 07.08.2012, the African National Congress Women's League representative in South Africa commented that, Dr Dlamini's appointment is a landmark victory not only to the women of South Africa but for Africa's women and that it speaks volumes for gain made in fighting patriarchy. Such development is important even when it is slow because platforms such as these make possible effective implementation of policies that promote and protect the rights of women.

#### **2.4.4 Lack of enforcement, implementation and formal follow up mechanisms**

The past state of affairs with regard to the implementation of the Commission's recommendations put women in a place where they made conclusions concerning the system not working for them even before taking complaints to the Commission. Victims of human rights violations often express frustration about the failure of states to implement and enforce the African Commission's recommendations. States do not enforce these recommendations mainly because they are not binding. They are merely persuasive and serve more or less as guidelines on how a violation can be remedied.

In the case of *Civil Liberties Organization V Nigeria*<sup>49</sup> Sani Abacha's military dictatorship suspended the application of the African Charter on Human and Peoples' Rights in Nigeria. The African Commission found that Nigeria violated its human rights obligations. This finding caused protests from the Nigerian Government which argued that the African Commission lacked judicial capacity to make such recommendations.<sup>50</sup> This exemplifies the manner in which African States consider the Commission's recommendations.

Due to the limited access disadvantaged groups of people and individuals, in this case women have to domestic courts; they have to sell or barter their possessions for cash or even ask for it from their male relatives since most of them are dependents to be able to

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<sup>48</sup>M Hansungule Towards a more effective African System of Human Rights: "Entebbe Proposals" at 10

<sup>49</sup>*Civil Liberties Organization v. Nigeria* (2000) AHRLR 188 (ACHPR 1995) para. 20.

<sup>50</sup>African Commission on Human and Peoples' Rights, Account of Internal Legislation and the Dispositions of the African Charter on Human and Peoples' Rights, doc. II/ES/ ACHPR/4.

attain redress. If this is the situation domestically then how much more do they have to hustle to get to the African Commission in The Gambia?

Besides, in the event that they manage to go to the Gambia and are even fortunate to win the case, there is no guarantee that the recommendations made by the African commission will be respected especially considering that there are no follow up mechanisms in place. To the violated, this is a futile process and one that exhausts their meager resources and that is also stressful. It could easily be viewed as a process to be rather ignored than pursued. Follow up is especially a challenge because Commissioners work on part time basis and in addition to this meet twice a year, so for them to carry out their mandate effectively is realistically a “tall order”.

#### **2.4.5 Discriminatory Practices**

Besides the discriminatory practices discussed under the social barriers particularly under cultural and traditional practices, court personnel, commissioners and the police themselves sometimes reflect discriminatory attitudes of the societies from which they come. In most cases, they are unaware of the law or obligation to serve women. For example many legal officers, mediators and the police included regard domestic violence as a private matter to be discussed in the family domain. Furthermore, in some countries women’s testimonies carry half the weight of men’s and the implication of this is biased decisions.

In most African counties, in Uganda for example, despite government’s commitment towards reducing women’s challenges with regard to discrimination as evidenced in the 1995 Constitution,<sup>51</sup> National Gender Policy,<sup>52</sup> Land Act<sup>53</sup> and many other documents, gender disparities remain an impediment in implementing responsive policies.<sup>54</sup> Courts, the police and other institutions are male dominated; this complicates seeking justice by women due to the ingrained traditional attitudes of men as well as the illiteracy and poverty of women. Therefore despite policies in place, implementation becomes a challenge and in some cases impossible due to the deep rooted barriers and in particular discriminatory practices mentioned above.

### **2.5 Legal Barriers**

#### **2.5.1 Provisions of Legislation**

General opinions, norms and beliefs that start from the family unit are accepted in the household and the community in other words from a social origin, culminate into politically accepted norms which affect decisions made by governments in form of law

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<sup>51</sup>The 1995 Constitution of the Republic of Uganda, Adopted and Enacted on September 22 1995

<sup>52</sup>Uganda National Gender Policy, 2007.

<sup>53</sup>Uganda Land Act, 1998, Date of commencement 2 July 1998.

<sup>54</sup>Mugambe Mpiima David, Gender Policies in Uganda: the thorny road to gender equality, Department of Women and Gender studies, Makerere University June 2007.

eventually. In Nigeria for example, the Penal Code permits the use of physical means by husbands to chastise their wives as long as it does not result in “grievous harm”. Grievous harm is defined as, loss of sight, hearing, power of speech and facial disfigurement or life threatening injuries.<sup>55</sup>

Domestic legislation in this way becomes an obstacle women face in that the laws that govern women as citizens of states are abusive in themselves and hinder them access to an even higher forum.

The African Women’s Protocol, Article 1(f) condemns all forms of discrimination against women, however its substantive provisions do not impose any direct obligation to protect women from discrimination on non-state actors but impose such duties on States Parties only. This is a loophole in the provisions of the Charter because non-state actors are equally key players as far as discriminating against women in Africa is concerned. This is well illustrated in a Zambian case *Longwe v Intercontinental Hotels*,<sup>56</sup> which involved a non-state actor, the Intercontinental Hotel. The hotel had a policy of refusing women entry, unless they were accompanied by a male escort and justified the policy as a necessary measure against prostitution. The security guard stopped Longwe when she tried to get in to pick her children who were attending a party at the hotel and on another occasion refused her admittance when she had arranged to meet a group of women activists in the hotel’s bar. She took the matter to the Zambia High Court claiming that her right to freedom from discrimination had been violated. The court held that Zambia being a party to international treaties such as the ACHPR must respect and conform to the notion of gender equality and further held that the Hotel had violated the plaintiff’s fundamental equality rights and women’s rights. However, later a similar case concerning a Miss Zambia took a different twist. The facts of *Elizabeth Mwanza V Holiday Inn Hotel*<sup>57</sup> are similar to the Longwe case. In this case, the hotel security denied Mwanza entry into the hotel and cited policy which restricted unaccompanied women from accessing specific parts of the hotel. Judge Chitengi found restriction of unaccompanied women reasonable and constitutional. The fact that these two analogous cases were decided differently indicates that in some cases where discrimination against women has been highlighted, due attention has not been given. In this case an earlier precedent was not followed and because both these cases were decided by the High court, the rulings did not bind other courts.

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<sup>55</sup>Manisuli Ssenyonjo. ‘Culture and the Human Rights of Women in Africa: Between Light and Shadow’ *Journal of African Law* Vol 51 No 1(2007) at 51, also see US Department of State Country Reports on Human Rights Practices – 2005, Nigeria (8 March 2006, released by the Bureau of Democracy, Human Rights, and Labor, available at, <http://www.state.gov/g/drl/rls/hrrpt/2005/61586.htm>

<sup>56</sup>Sara H. Longwe *v Intercontinental Hotels* 1992/HP/765 (1993) 4 LRC 221 (High Court of Zambia). For the discussion, see T Kankasa-Mabula “The enforcement of human rights of Zambian women: Sara Longwe *v Intercontinental Hotel revisited*” (1989–1992) 21– 24 *Zambia Law Journal* 30.

<sup>57</sup>*Elizabeth Mwanza v Holiday Inn Hotel*, 1997/HP/2054(unreported)

Claw-back clauses constitute further challenges that legislation causes. The African Charter enshrines individual civil and political rights as well as economic, social and cultural rights to which States Parties have committed to observe, respect, promote and fulfill. However these rights especially the civil and political rights carry limitations or claw-back clauses which allow suspension or violation of enunciated rights based on public order in accordance to domestic legislation.<sup>58</sup> States Parties violate rights and justify their actions by claiming that they are acting in conformity with laws laid down by domestic legislation. In so doing, States Parties get away with violation of the very rights they committed themselves to protect and promote.

In addition to the claw-back clauses, the African Charter lacks expression on derogation. Derogations stipulate limits of state actions towards their nationals during state of emergency. Unlike other human rights instruments, the African Charter does not allow States Parties to derogate from their treaty obligations during emergency situations.<sup>59</sup>

This creates a lot of uncertainty for states in times of emergency. In the case of *International Pen v Chad*,<sup>60</sup> the Commission decided that the African Charter unlike any other human rights instruments does not allow for states Parties to derogate from their treaty obligations during emergency situations. In this particular case, Chad could not use even war as an excuse to violate or permit violations of the guaranteed rights in the African Charter. Women in this case are disadvantaged in that by the Charter's failure to specify on derogations, individual subjects do not receive assistance on the manner in which to defend their rights in situation of emergency.

Although the African Charter is silent on the issue of derogation, a number of domestic legal instruments and African Constitutions for example the Constitutions of Ethiopia and Mozambique contain emergency clauses during which derogation is permitted. They also include a list stipulating non-derogatory rights. In addition, international instruments for instance the International Covenant on Civil and Political Rights to which 51 African states are party provides for derogation in Article 4. Women could use these avenues to defend their rights if they were not ignorant about them.

Furthermore, because Article 47-54 of the African Charter covers only communications from states and not individuals, provisions of legislation serve as an obstacle to women accessing the African human rights system. Article 55 does not provide for individual communications but rather communications other than those of states parties. Individual communications would therefore have to be read into this article to include women as individuals whose rights are constantly violated. It must also be noted that, although

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<sup>58</sup>Hansungule M The African Charter on Human and Peoples' Rights at 424, also see Makau Mutua n 21 at 7-8

<sup>59</sup>As above at 426-428

<sup>60</sup>*International Pen v Chad*, Communication No.55/91, 7<sup>th</sup> Annual Activity Report: 1993-1994

women can influence states to bring inter-state complaints against other state parties on their behalf, history shows that states rarely bring complaints or cases of any nature against each other to the African human rights system or any other forum for redress. States have a “silent understanding” to protect each other.

Despite the possibility of reading in communications by women as individual communications into Article 55, there is the problem of ignorance, many women and their representatives are ignorant of the fact that they possess access by the option of reading in women as individuals or as a group of marginalized people. In addition, Article 56 imposes a number of unrealistic hurdles. Article 56(3) provides that for a petitioner to be heard by the African Commission, they must not write in disparaging or insulting language directed against the state concerned and its institutions or to the Organization of African Unity. Although as they complain women should not insult, in expressing themselves as victims of these violations, it is possible for them to use language that may easily be interpreted as insulting especially considering that most of these women are not actually literate and are ignorant on how to proceed in such matters.

Another unrealistic hurdle is Article 56(5) which provides that the petitioner must have exhausted local remedies before approaching the Commission. It must be conceded that states to a large extent influence institutions of their government for example the police and judiciary, it would be unrealistic to expect a petitioner to use the very same object of violation for the redress of their injustice. Realistically, separation of powers is not absolute in Africa, undue influence by those in higher offices on their subordinates is a common occurrence in various spheres of state. Also some violations against women are of gross nature and deserve direct access to the African System but due to the condition of exhausting local remedies have to go through a process of justification. In addition, it must be recalled as discussed earlier that obstacles do not exist only insofar as access to the African human rights system is concerned but also access to the domestic system due to factors like discrimination, lack of resources and others. This indicates that even exhausting local remedies in itself is a challenge to women.

This was clearly analysed in the *Shirin Aumeeruddy-Cziffra and 19 Other Mauritian women v. Mauritius*, Communication No.35/1978. In this case, claiming they had exhausted all local remedies, twenty women submitted a communication constituting discrimination on grounds of sex by Mauritian legislation, in this case, the Immigration and Deportation Amendment Acts. They alleged that this discrimination violated Articles 2, 3, 17, 23 and 26 on the International Covenant on Civil and Political Rights. Although the Human Rights Committee found that seventeen of the complainants were not affected by the legislation, it concluded that in future this law could possibly cause interference with family life of the remaining victims by the state. The Committee recommended that Mauritius adjust the provisions of the legislation in question so as to

implement state's obligation under the Covenant to prevent discrimination on grounds of sex in its laws.

The Protocol on the African Charter on the Establishment of an African Court on Human and Peoples' Rights Article 5(3) provides that Non-Government Organizations with observer status before the Banjul Commission and individuals can institute cases directly before the court, if the state party they are complaining against has made the declaration under Article 34(6)<sup>61</sup> of the Protocol allowing such application. However the Non-Government Organization or individual must have exhausted local remedies.<sup>62</sup> The Court's reputation is tainted before individual Africans since arguably NGOs and individuals would be the beneficiaries and users of the court.<sup>63</sup> Due to the mandatory condition that a declaration must be made, potential aggrieved individuals such as women are barred from accessing the African human rights system where a violation is of gross nature and the women is from a state that has not made the needful declaration.

### **2.5.2 Non – Submission of State Reports**

The Maputo Protocol was not adopted to replace the African Charter but because despite states ratifying the African Charter, women in Africa still suffer challenges of unequal treatment as well as harmful practices.<sup>64</sup> In other words, states were not seen to implement the norms or provisions of the African Charter, thus the creation of the Women's Protocol.

According to Article 62 of the African Charter, states have an obligation to submit reports to the African Commission every two years<sup>65</sup> and periodic state reports under Article 26(1) of the Maputo Protocol for examination. It is suggested that state parties that are party to both the Charter and Protocol, submit one report in two parts; one part dealing with the Charter on the measures a state has taken to give effect to the rights under the Charter and the other part for inspection on a state's observance of the African Women's Protocol.

The problem of non-reporting or late submission is one of concern in the African human rights system. In the past, in some instances, there existed situations where the African

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<sup>61</sup>Protocol on the African Charter on the Establishment of an African Court on Human and Peoples' Rights Article 34(6) provides that "At the time of ratification of this Protocol or anytime thereafter, the state shall make a declaration accepting the competence of the court to receive cases under Article 5(3) of this Protocol. The Court shall not receive any petition under Article 5(3) involving a state which has not made such a declaration.

<sup>62</sup>Lecture on Protection of Human Right in Africa by the President of African Court on Human and Peoples' Rights Honorable Prof Gerald Niyunyko at Tumaini University Arusha Tanzania, 8 June 2012

<sup>63</sup>Makau Mutua see n 21 at 28

<sup>64</sup> Protocol to the African Charter on Human and Peoples' Rights, Preamble.

<sup>65</sup> African Charter on Human and Peoples' Rights (27 June 1981, OAU DOC. CAB/LEG/67 /3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct.21, 1986

Commission was held responsible for undermining the effectiveness of the state reporting procedure due to its failure to adopt and publicize the observations.<sup>66</sup> Also in the past the Commission's practice when examining state reports was to leave questions on women to the Special Rapporteur. Although the Special Rapporteur on the Rights of Women in Africa played a great role in the elaboration and adoption of guidelines for state reporting under the Women's Protocol, challenges such as delays in adoption and their dissemination,<sup>67</sup> financial, technical and administrative constraints, insufficient funds and a vast host of other obstacles contribute to the dismal standard of states reporting by African states. This being as it is, the irresponsibility, reluctance and ignorance of states on the importance of this matter is a challenge.

Some reports even when submitted by states do not report on women, states are increasingly weak on castigating cultures which are harmful to women and do not address the challenges that women face domestically. When states report, some of them are selective in the content of their reports.

Non-reporting, late reporting and selective reporting therefore has major repercussions on the protection and promotions of women's rights. It becomes difficult for the Commission to access states on how they are implementing their obligations and the status of women without reports on this subject matter. They cannot ensure compliance by states and ultimately will hardly recommend improvements or any changes in regard to the protection and enforcement of the mechanism in place for women.

Below is the status of submission of state party reports at the 48<sup>th</sup> Ordinary session of the African Commission in 2010.<sup>68</sup>

- 9 States had submitted and presented all their report; these include Uganda and Ethiopia.
- 8 States were late by one report; these include Kenya and Sudan.
- 5 States were late by two reports; these include South Africa and Mauritania.
- 5 States were late by three reports; these include Senegal and Togo.
- 12 States were late by more than three reports; these include Gambia and Angola.
- 12 States have never submitted any report; these include Malawi and Gabon.

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<sup>66</sup>F Viljoen, An introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa" (2009) 16 Washington & Lee Journal of Civil Rights & Social Justice 17.

<sup>67</sup>F Viljoen (2007) *International human rights law in Africa* Oxford: Oxford University Press 177-229.

<sup>68</sup>Report of the 48th ordinary session of the African Commission on Human and Peoples' Rights (10 - 24 November 2010, Banjul, The Gambia)

- 2 States were going to present their reports at the 48<sup>th</sup> Ordinary Session; these were DRC and Libya.

From the above status on reporting, late and non-reporting by states, it is clear that many African states do not take state reporting seriously. When critically analyzed it is evident that the status of women in those states where no or limited reporting is done is really challenging. The Commission can not recommend on what they do not know and so the situation of women in these states remains the same if the Commission does not forcefully inquire or visit these states. The status of women's right in states where reporting is a priority, reflects progress and development in terms of protection and promotion of the rights of women.

### **2.5.3 The relationship between the African Commission and the African Court on Human and Peoples' Rights**

The African Court's mandate is to complement the mandate of the African Commission. It is imperative that the two institutions deliberate and discuss how to harmonize their mandates to avoid conflict and overlap that would in turn affect those who approach them for redress. In the past, many scholars and academics in the human rights field argued that it was useless to have a court when the African Commission was in existence. Many were of the opinion that the significance and power of the Commission should rather be emphasized rather than have a court. Others were of the opinion that since the judgments of the Commission were merely persuasive and not binding, the establishment of an African Court was indeed in order.

Presently, the above situation has changed and the two institutions are collaborating fairly well.

Furthermore the many mushrooming sub-regional courts,<sup>69</sup> such as the Court of Justice of Economic Community of Western African States (ECOWAS), the East African Court of Justice (EACJ) and the Tribunal of the South African Development Community (SADAC) have not indicated any jurisdictional overlaps or conflict with the Commission as would have been feared. Rather, these courts have taken on a complementary role and ease the workload otherwise caused by the massive number of complaints to the Commission. The Commission has embraced these courts and this support is well illustrated in the SADC Tribunal suspension matter of 2010.

In this matter, SADC leaders agreed to suspend the Tribunal. The African Commission expressed its support by agreeing to hear a formal complaint against the SADC leaders.

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<sup>69</sup> GM Wachira, (ed.), *Regional and Sub-regional Platforms for Vindicating Human Rights in Africa, 6 Judiciary Watch Report*, Nairobi, Kenyan Section of International Commission of Jurists, 2007.

The Commission's opinion was that the Tribunal's suspension goes against the African Charter and what Africa believes in terms of rule of law.<sup>70</sup>

On 19 May 2011 the Council took in effect decisions which were subsequently indorsed by the summit at its extraordinary meeting on 20 May in Windhoek Namibia which decisions included: the dissolution of the Tribunal, non re-appointment and replacement of members of the Tribunal and the establishment of a new Tribunal with a different jurisdiction and membership.<sup>71</sup>

This decision undermines the protection and promotion of human rights in African in that it highlights the decision making by state leaders to the exclusion of individuals. In terms of the matter at hand, support by the African Commission in this matter confirms the unity and complementary principle that the Commission enjoys and offers other institutions.

Though not exhaustive, the above are some of the numerous challenges that women face in accessing the African human rights system. Many of them overlap which has both merits and demerits in that one problem causes many others but solving one would remedy many other obstacles like the saying goes "killing many birds with one stone".

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<sup>70</sup>Richard Lee, African Commission to hear SADC Tribunal case, Open Society Initiative for Southern Africa(OSISA) 22 November 2012.

<sup>71</sup>Ariranga G. Pillay, Former President of SADC Tribunal, SADC Tribunal dissolved by unanimous decision of SADC leaders.

## Chapter three: Does the African Human Rights system have a substantive protection system specifically for women?

### 3.1 Introduction

Before discussing the substantive protection mechanisms of the African human rights system for women, a brief review on the rights of women in Africa will be highlighted.

#### 3.1.1 The rights of women in Africa in a nutshell

The development of women's rights can be traced as far back as the 1980s.<sup>72</sup> Prior to that, women's rights were not a priority but were generalized within the human rights framework in international instruments such as the *United Nations Declaration of Human Rights*,<sup>73</sup> the *International Convention on Civil and Political Rights*<sup>74</sup> and the *International Convention on Economic, Social and Cultural Rights*.<sup>75</sup>

In terms of women specifically, the *Convention on the Elimination of Discrimination Against Women* was the first instrument to be adopted in 1979/81 followed later by its protocol to specifically address the needs of women globally.<sup>76</sup> In 1995 -2000, the Beijing Platform for Action and Millennium Development Goals highlighted the importance of addressing inequality and other discrimination issues.

These international instruments greatly influenced similar instruments at sub-regional and regional level for instance the *African Charter on Human and Peoples' Rights and the Protocol on the Rights of Women*. The African instruments have in turn influenced national legislation and thus the expectation to provide strong protection for the rights of women and girls in Africa.

Human rights law has not been applied effectively in addressing the disadvantages and injustices women experience by virtue of them being women and in this way it can rightly be said that human rights are not universal.<sup>77</sup>

However, despite the legislative progress with regard to women's human rights, African women still occupy inferior positions and their situations contrast vastly from the legal protections in place for them.

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<sup>72</sup>Franciska Issaka et al Realising women's Equality Rights in Africa, The delicate balance between culture and universality of rights

<sup>73</sup>Universal Declaration of Human Rights (December 10th 1948)

<sup>74</sup>The International Convention on Civil and Political Rights (Dec 1966 but came into force 23 March 1976)

<sup>75</sup>The International Covenant on Economic, Social and Cultural Rights (December 16th 1966 but came into force 3 January 1976)

<sup>76</sup>Convention on the Elimination of Discrimination Against Women (December 16th 1979 but came into force September 1981)

<sup>77</sup>R J Cook Human Rights of Women: National and International Perspectives. University of Pennsylvania press 1994

With all the regional human rights conventions and all the other mechanisms available for women, rampant violation of women's rights is still evident and women victims are not making use of these mechanisms. According to the then Special Rapporteur on the rights for women in Africa then who later moved to join UNESCO, Angela Melo: *"So far there have been no cases alleging violations of women's rights that have been brought by women to the African Commission on Human and Peoples' Rights"*.<sup>78</sup>

A discussion of key mechanisms that make up the African human rights system and how they affect the rights of women in Africa will follow.

### **3.2 Substantive Protection Mechanisms of the African Human Rights System for Women.**

#### **3.2.1 Introduction**

This part of the study discusses the substantive protection mechanisms that comprise general, specific and a few aspects of soft law mechanisms.

The African human rights system in this particular study refers to the regional system of laws, norms and institutions that enforce women's rights in Africa. When the African human rights system is referred to, there is a tendency to restrict the focus to the African Charter and the African Commission. However the study will reflect that the African human rights system is comprised of much more than just the African Charter and Commission.

Although women globally to a greater or lesser extent face similar challenges with regard to accessing redress for the violence of their rights, some studies have shown that women in Africa face more challenges than women in western countries due to the discriminatory harmful practices. This study will focus on the African region. Some authors have expressed the need to deal human rights issues from a regional as opposed to a global perspective. The reasons highlighted by these authors will now be briefly highlighted.

*Hansungule*<sup>79</sup> points out that:

Regional systems are particularly important for the opportunity to reflect local values that cannot be reflected under the international system in being preoccupied with the values of the universe as such. The preoccupation with universal values, though important, can lead to a de-emphasis of certain peculiarities that are nonetheless basic

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<sup>78</sup> 'Discussion with Commissioner Angela Melo during the seminar on the rights of ethnic, linguistic and religious minorities in Africa' organized by MRG, 10-12 March 2008, Pretoria South Africa.

<sup>79</sup> Hansungule M. 'Protection of Human Rights Under the Inter-American System: An Outsider's Reflection' in Gudmudur A. et al. (eds.) *International Human Rights Monitoring Mechanisms Essays in Honour of Jakob Th. Möller* (The Hague: Martinus Nijhoff Publishers, 2001) 679, 684.

to some societies. In a regional system, States have the opportunity of recalling their values for inclusion in the system in addition to what can be borrowed from other systems. This is why regional systems have been found necessary in Africa, Americas and Europe.

*Anyangwe*<sup>80</sup> states that:

Regional systems are critical to contemporary human rights development. They play an important complementary role in reinforcing international standards and machinery. They provide the means by which human rights concerns can be addressed within the particular social, historical and political context of the region. Moreover, when it comes to human rights implementation, the universal human rights system relies heavily on regional human rights agreements.

In addition to the above *Heyns* and *Viljoen*,<sup>81</sup> concur and express that:

While international systems for the protection of human rights generally lack the benefit of direct enforcement, which domestic systems have, regional systems for the protection of human rights arguably have some advantages over the global or UN system. They can give more authentic expression to the values and historical peculiarities of the people of a particular region, resulting in more spontaneous compliance, and, due to the geographical proximity of the states involved, regional systems, under the right conditions, have the potential of stronger pressure being exerted against neighbours in cases of violations. Peer pressure is easier to exert in a smaller circle of friends. An effective regional system can consequently supplement the global system in important ways.

Similarly *Mugwanya*<sup>82</sup> explains that:

Regional systems have served as both institutional and normative building blocks and instruments for the realization of human rights at the grassroots. Over the years, regional systems, particularly those established in Europe and America, have provided the necessary intermediation between state domestic institutions which violate or fail to enforce human rights, and the global human rights system which alone cannot provide redress to all individual victims of human rights violations. Regional systems have served to fill gaps in the global system's mechanisms. They have successfully

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<sup>80</sup>Anyangwe C. 'Obligations of States to the African Charter on Human and Peoples' Rights' (1998) 10 *Revue Africaine de Droit International et Comparé*625.

<sup>81</sup>Heyns C. and Viljoen F. 'Regional Protection of Human Rights in Africa: An Overview and Evaluation' in Zeleza P.T. and McConaughay P.J. (eds.) *Human Rights, The Rule of Law and Development in Africa* (Philadelphia: University of Pennsylvania Press, 2004) 129, 131.

<sup>82</sup>Mugwanya G.W. 'Realizing Universal Human Rights Norms through Regional Human Mechanisms: Reinvigorating the African System (1999) 10 (1) *Indiana International and Comparative Law Review* 40-41.

complemented the global system by impacting on and influencing domestic human rights practice in member states. Regional systems are flexible and have the ability to change as conditions around them change, and sometimes quickly.

Lastly, *Shelton*<sup>83</sup> emphasizes that:

Regional systems are indispensable to achieving effective compliance with international human rights, performing as they do a necessary intermediary function between State domestic institutions that violate or fail to enforce human rights and the global system which is so far incapable of providing redress to individual victims of human rights violations. They have the necessary ability and flexibility to change as conditions around them change, yet are applied in response to regionally-specific problems; they achieve equilibrium between uniform enforcement of global norms and regional diversity.

### 3.2.2 Substantive Protection - General provision

#### **African Charter on Human and Peoples' Rights and the rights of women in Africa.**

*The African Charter on Human and Peoples' Rights (hereinafter the Charter or the Banjul Charter)*<sup>84</sup> which entered into force on October 21, 1986, upon ratification by a simple majority of member states of the OAU<sup>85</sup> is the principle instrument that regulates the regional African human rights system for the promotion and protection of human and peoples' rights.

As Van Boven puts it, the Charter is a human rights instrument specifically designed to respond to African concerns, traditions and conditions.<sup>86</sup>

Although it makes notable contribution to the body of human rights as a whole, the Banjul Charter has been greatly criticized in as far as creating an effective enforcement system for human right in Africa is concerned.

Despite the Charter's success in codifying the three generation of rights, including the innovative concept of peoples' rights and the imposition of duties on individuals,<sup>87</sup> many commentators have pointed out its various flaws of.

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<sup>83</sup>Shelton D. 'The Promise of Regional Human Rights Systems' in Weston B. and Marks S. (eds.) *The Future of International Human Rights* (1999) 351, 353-398.

<sup>84</sup>The African Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3/Rev.5 (1981), reprinted in 21 I.L.M. 59 (1982).

<sup>85</sup>The African Charter was adopted in 1981 by the 18th Assembly of Heads of State and Government of the OAU, the official body of African states. It is also known as the Banjul Charter because a final draft of it was produced in Banjul, the capital of the Gambia.

<sup>86</sup>T Van Boven 'The relations between peoples' rights and human rights in the African Charter' 7 Human Rights Law Journal (1986) 186. Also cited in Ankumah 1996: 1. (1996).

For example, Kenyan academic Makau Wa Mutua observed that, critics of the African Charter base their argument in this regard on the fact that the Charter departs from the narrow formulations of other regional and international human rights instruments.<sup>88</sup>

Some of the Charter's weaknesses include, the "claw-back clauses,"<sup>89</sup> the potential abuse of language of duties and the absence of an effective protection mandate for the African Commission.<sup>90</sup>

On the aspect of women's rights in Africa, the commitment of the African Charter is questionable and raises concerns that it does not adequately protect or its shortfalls could allow for this abuse to persist.<sup>91</sup>

The African Charter in its capacity as the primary source of regional human rights in Africa automatically becomes the main and first point of reference in cases of protection and promotion of human rights and women's rights.

Unfortunately, out of the 68 articles the Charter consists of, it contains only four main provisions relating to the protection and promotion of women's rights. The four provisions deal with protecting women against discrimination.

The first provision is a general non-discrimination clause contained in article 2 of the Charter.<sup>92</sup> The second provision is reinforced in article 3,<sup>93</sup> calling for equal protection of

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<sup>87</sup>On duties on the individual, see arts. 27-29, African Charter. For a discussion of the concept of duties in human rights discourse and the African Charter, see Makau wa Mutua, "The Banjul Charter and the African Cultural Fingerprint: an Evaluation of the Language of Duties," 35 Va. J. Int'l L. 339 (1995).

<sup>88</sup>Makau Mutua. *Virginia Journal of International Law*. Winter, 1995. p.339

<sup>89</sup> Makau WaMutua, "The African Human Rights System in a Comparative Perspective," 3 Rev. Afr. Comm. Hum.& Peoples' Rts. 7 (1993). See also A.A. Yusuf& F. Ougergouz (eds.), *The African Union: Legal and Institutional Framework. A manual on the Pan- African Organisation*,424-426

<sup>90</sup>For discussions of these problems, see Richard Gittleman, "The African Charter on Human and Peoples' Rights: a Legal Analysis," 22 Va. J. Int'l L. 667 (1982); Richard Gittleman, "The African Commission on Human and Peoples' Rights: Prospects and Procedures," in *Guide to International Human Rights Practice* 153 (Hurst Hannum, ed., 1984); Cees Flinterman& Evelyn Ankumah, "The African Charter on Human and Peoples' Rights," in *Guide to International Human Rights Practice* 159 (Hurst Hannum, ed., 1992).

<sup>91</sup>Claude E. Welch, Jr., "Human Rights and African Women: a Comparison of Protection under Two Major Treaties," 15 Hum. Rts. Q. 548 (1993); Florence Butegwa, "Using the African Charter on Human and Peoples' Rights to Secure Women's Access to Land in Africa," in *Human Rights of Women: National and International Perspectives* 495 (Rebecca Cook, ed., 1994); Chaloka Beyani, "Towards a More Effective Guarantee of Women's Rights in the African Human Rights System," in *Human Rights of Women: National and International Perspectives* 285 (Rebecca Cook, ed., 1994); Joe Oloka-Onyango, "The Plight of the Larger Half: Human Rights, Gender Violence and the Legal Status of Refugee and Internally Displaced Women in Africa," 24 *Denver J. Int'l L. & Pol.* 349, 371-74 (1996).

<sup>92</sup>African (Banjul) Charter on Human and Peoples' Rights "Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status".

<sup>93</sup>African (Banjul) Charter on Human and Peoples' Rights "1. Every individual shall be equal before the law.  
2. Every individual shall be entitled to equal protection of the law".

the law. Article 18(3)<sup>94</sup> is the third provision that protects women's rights through the Charter's protection of the family. Lastly, article 60<sup>95</sup> which mandates the African Commission on Human and Peoples' Rights to draw inspiration from international human rights instruments for example the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW).

Considering the language of the provisions highlighted above, it is evident that the Charter has given women very limited and in some instances, no direct attention at all. A number of critics are in support of this opinion.

In her article,<sup>96</sup>Bience Gawanas asserts that women drew the OAU and AU's attention to the position of women in society. By their participation in liberation struggles, women themselves brought gender inequality issues to the Africa agenda. In spite of this, the Charter omitted women's rights in its provisions and where they were mentioned little or no direct reference is recorded.

According to Makau Wa Mutua, the family provisions in Article 18 of the Charter have been perceived to condone and support repressive and retrogressive structures. In addition, the practice of social and political ranking is perceived to be permissible within these family provisions. These articles are resultantly viewed as an entrenchment of oppressive family structures which marginalise and exclude women from participation in many spheres.<sup>97</sup> Similarly, Ssenyonjo emphasizes that the Charter's provisions do not adequately address the human rights of women in Africa and sights Article 18 which only prohibits discrimination against women in the context of the family.<sup>98</sup>

It has been argued that the above inadequacy could be the main reason why no specific complaint dealing with women's rights was ever forwarded to the African Commission for consideration under the individual complains procedure.<sup>99</sup>

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<sup>94</sup>African (Banjul) Charter on Human and Peoples' Rights "The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions".

<sup>95</sup>African (Banjul) Charter on Human and Peoples' Rights "The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members".

<sup>96</sup>B. Gawanas 'The African Union: Concepts and implementation mechanisms relating to human rights' in A Bosl and J Diescho *Human Rights in Africa: Legal perspectives on their protection and promotion* (2009) 187.

<sup>97</sup>Makau wa Mutua See note 21 above (2000)9

<sup>98</sup>Manisuli Ssenyonjo. 'Culture and the Human Rights of Women in Africa: Between Light and Shadow' *Journal of African Law* Vol 51 No 1(2007).

<sup>99</sup>SB Keetharuth (n 6 above) 180

Traditional values in Africa are a serious challenge to the effective implementation of the African Charter. The Charter acknowledges the differential roles of women and men. This in turn causes a clash between equality in a strict legal sense and the sociological fact of real issues of inequality made manifest in the areas of marriage, property and ownership to mention but a few.<sup>100</sup> Numerous vital provisions for example guaranteeing the right of consent to marriage and equality of spouses during and after marriage have been omitted from the Charter due to emphasis placed on traditional African values and traditions and as a result there is great concern that many customary practices such as forced marriages and female genital mutilation are harmful or life threatening to women.<sup>101</sup>

Although the Charter is the main instrument that regulates the protection and promotion of human rights in Africa, and its commitment to the rights of women in Africa leaves a lot to be desired, women in Africa can still use it as a mechanism for redress where their human rights have been infringed.

Analysing the Banjul Charter's Preamble and Article 2, it is evident that the drafters envisaged discrimination as an impediment to the full enjoyment human rights and in case the rights of women as human beings.

Specifically, much as Article 18 addresses the family in general, it directs states to ensure that they eliminate all existing forms of discrimination against women especially in the family context.

The Charter's mandate on states to ensure the elimination of every form of discrimination protects women from the challenges they otherwise face such as unequal access to education, health and economic resources due to unequal treatment. In cases where the right to non-discrimination is infringed, women can utilise the above provisions even though general to complain and attain redress.

### **3.2.3 Substantive Protection - Specific provisions**

#### **Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa**

The *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (hereinafter the Maputo Protocol) was adopted by the AU on 11 July 2003 and entered into force on November 2005 having received the required 15

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<sup>100</sup> E. Welch Jr. 'Human Rights and African Women: A Comparison of Protection under Two Major Treaties' 15 Human Rts Q 555: 1993.

<sup>101</sup> Manisuli Ssenyonjo (See n 15 above).

ratifications. Three months after adoption, in February 2006 only 17 (out of 53) African states had ratified the Protocol.<sup>102</sup>

Article 18(3) of the Charter had proven that it was capable of only marginally protecting the rights of women. This fact was further emphasized by the Charter's failure to address other issues affecting the rights of women for example female genital mutilation (FGM), inheritance by women and forced marriages.<sup>103</sup> As a result of this pivotal shortcoming a strong need to have a Protocol to the African Charter was apparent.

In 1995,<sup>104</sup> the African Commission on Human and Peoples' Rights together with Women in Law and Development in Africa (WILDAF) organized a seminar on women's rights. It was decided at this seminar that an additional Protocol to the African Charter be drawn up to address women's rights specifically.

As a result of the incapability of the Charter regarding women's rights, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa was born.<sup>105</sup>

The Maputo Protocol consists of a preamble and 32 articles. The preamble calls on instruments and agreements designed to eliminate all forms of discrimination and for the promotion of equality between women and men. It expresses concern that despite these commitments, women in Africa continue to be victims of discrimination and harmful practices.<sup>106</sup>

The Protocol is comprehensive with its inclusion of civil and political rights, economic, social and cultural rights, group rights and, for the first time in an international treaty, health and reproductive rights.

It contains a number of 'firsts', for example, for the first time in an international human rights instrument there is a provision that explicitly calls for the prohibition of harmful practices like FGM which has destroyed the lives of many young African women.<sup>107</sup> The Protocol for the first time explicitly resolves the controversial issue of monogamy versus polygamy by indicating that monogamy is the preferred form of marriage. It calls for the

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<sup>102</sup>These were Benin, Cape Verde, Comoros, Djibouti, Gambia, Libya, Lesotho, Mali, Malawi, Mozambique, Mauritania, Namibia, Nigeria, Rwanda, South Africa, Senegal and Togo.

<sup>103</sup> L Kois Article 18 of the African Charter on Human and Peoples' Rights: A Progressive Approach to Women's Human Rights (1997)3 East African Journal of Peace and Human Rights 92 94-5

<sup>104</sup> Seminar held in March in Lome , Togo

<sup>105</sup> SB Keetharuth (n 6 above) 181

<sup>106</sup> A.A. Yusuf& F. Ouguergouz (eds.), The African Union: Legal and Institutional framework: A Manual on the Pan-African Organization, 445-476.

<sup>107</sup>Centre for Reproductive Rights 'The Protocol on the Rights of Women in Africa\_ An Instrument for Advancing Reproductive and Sexual Rights' (Feb 2006) available at [www.reproductiverights.org](http://www.reproductiverights.org)

promotion and protection of the rights of women in polygamous marital relationships.<sup>108</sup> Also for the first time in a human rights instrument, women's rights in the context of HIV and AIDS are specifically highlighted. These and many others that will be referred to below are first time provisions in a human rights instrument.

The Protocol revolves around the principles of equality between sexes, the elimination of discrimination against women and their participation in all spheres of life. These fundamental principles follow through like a thread throughout the Protocol.<sup>109</sup>

The specific rights protected under the Protocol broadly are, the rights to: non-discrimination (article 2); dignity (article 3); life, Integrity and security of the person (article 4); equal right in a marriage, separation, divorce or annulment of marriage (articles 6–7); access to justice and equal protection before the law (article 8); participation in the political and decision-making process (article 9); peace (article 10); protection of women in armed conflicts (article 11); education and training (article 12); economic and social welfare rights (article 13); health and reproductive rights including a woman's right to have "medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the foetus" (article 14); food security (article 15); adequate housing (article 16); to live in a "positive cultural context" (article 17); a healthy and sustainable environment (article 18); sustainable development (article 19); widows' rights (article 20); inheritance (article 21); the special protection of elderly women (article 22), women with disabilities (article 23), and women in distress (article 24).

Article 26 of the Protocol states the obligations of the state parties<sup>110</sup> while Article 5 obliges states parties to take all "necessary legislative" and "other measures" to eliminate harmful practices which negatively affect the human rights of women and which are contrary to recognized international standards, as laid out from Article 5(a-d) of the Protocol.<sup>111</sup>

Generally, the Maputo Protocol in itself for the first time, comprehensively addresses the rights and freedoms owed to African women. It outlines measures for their promotion and protection and additionally highlights the need for expeditious action to be taken in the quest to end the violation of the human rights and fundamental freedoms of African women.<sup>112</sup>

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<sup>108</sup> Maputo Protocol, Article 6(C).

<sup>109</sup> SB Keetharuth (n 6 above)

<sup>110</sup> Protocol to the African Charter on Human and Peoples' Right on the Rights of Women in Africa Article 26(1) and Article 26(2)

<sup>111</sup> Manisuli Ssenyonjo (see n 15 above) 46

<sup>112</sup> See n 108 above.

Furthermore, the Protocol brings to light the challenges facing African States in discharging their obligation to enforce respect for human and peoples' rights. This is emphasized by demonstrating the complex relationship between the long upheld African traditions, culture and human rights. In addition, the Protocol exposes the weaknesses in governance structures that barely act against negative traditions and culture which foster the violation of women's rights.<sup>113</sup>

African women are no longer accepting the persistent discrimination and violation of their rights and freedom. They now participate actively in holding states accountable for the promotion and protection of their human rights.

As of March 2010, 27 countries had ratified the Protocol<sup>114</sup> and by 21 October 2011, 30 countries had ratified the Protocol. For proper efficiency of the protection and promotion of women's rights in Africa, a lot has to be done to emphasize the need for states to ratify this Protocol. For the states that have ratified the Protocol, the challenge then becomes domestication, implementation and rights realization which is a more workable form of enforcement.<sup>115</sup>

The Protocol is said to be supplementary to the African Charter in that it attempts to underline the rights for women enumerated in the Charter as well as elaborate their relevance. However, it does not systematically engage with the Charter and thus it leaves an eclectic impression, to resonate the opinion of Frans Viljoen.<sup>116</sup>

In addition to the above it may be argued that unlike some treaties, the Protocol does not expressly prohibit reservations or declarations.<sup>117</sup> Though this stance was adopted to facilitate more ratifications of the Protocol by African states, it is feared that the outcome could be similar to the reservations made by various African states to CEDAW, for example, the reservation made by Egypt, the Libyan Arab Jamahiriya, Mauritania and Morocco concerning the traditional male-centred interpretations of Islamic law (shari'a) provisions.<sup>118</sup>

To conclude on the Protocol's overview, it is noteworthy to point out that like other human rights instruments, the Maputo Protocol has some shortcomings as briefly

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<sup>113</sup>As above.

<sup>114</sup> Angola, Benin, Burkina Faso, Cape Verde, Comoros, Djibouti, Democratic Republic of Congo, Gambia, Ghana, Guinea-Bissau, Libya, Lesotho, Liberia, Mali, Malawi, Mozambique, Mauritania, Namibia, Nigeria, Rwanda, South Africa, Senegal, Seychelles, Tanzania, Togo, Zambia, Zimbabwe.

<sup>115</sup>[www.pambazuka.org](http://www.pambazuka.org) The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: From Ratification to Realization of African Women's Human Rights.

<sup>116</sup> See n 10 at 19 ("[T]he Protocol wavers between being an interpretation of the ACHPR for women on the one hand, and a collection (not a comprehensive one) of some existing international standards on the other. It ends up falling short of both these objectives.").

<sup>117</sup> M Ssenyonjo (see n 15) 47

<sup>118</sup> For specific reservations by states, see <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm>

highlighted above. On the other hand, the Protocol provides hope for the rights and freedoms of women in Africa.

The Protocol, although indirectly, has created a new frame through which national law relevant to women should be viewed, interpreted and adjusted.

Since it is more specific than the Banjul Charter, the Maputo Protocol is a more useful mechanism in regard to its use by women for the protection of their rights. To mention a few provisions, Article 14 on health and reproductive rights explicitly stipulates women's rights to for example have an abortion in cases where pregnancy results from sexual assault, incest or rape, cases where the pregnancy is a risk to the life or health of the pregnant woman or would cause foetal defects incompatible with life.<sup>119</sup> Other examples that women can use when complaining are Articles 1(g) and 5(b) which call for the prohibition of harmful practices for instance FGM/C. The Protocol's specific nature gives it a better advantage for use in comparison to the Charter.

Success of the Protocol to a large extent depends on the knowledge and awareness of its contents and the possibilities of its use in advocacy, legal reform and litigation.<sup>120</sup> Integration of the Protocols provisions into domestic laws and the enforcing of the complementary attributes of different instruments and specific laws would open up the untapped potential of solutions to women's human rights challenges.<sup>121</sup>

Despite its imperfections, the Maputo Protocol if well harnessed could serve to empower African women through their potential contribution to their societies and beyond.

### **3.2.4 Soft Law Mechanism**

#### **Solemn Declaration on Gender Equality in Africa**

The Solemn Declaration on Gender Equality in Africa (herein after the Declaration) SDGEA was adopted at the Third Ordinary Session of the African Union (AU) Assembly of Heads of State and Government in Addis Ababa, Ethiopia in July 2004.

The Declaration personalizes the issue of gender equality and is a vital instrument for the promotion of the gender equality agenda and further keeps the issue alive at the highest political level in Africa.<sup>122</sup>

Two specific issues that feature in the Declaration are the establishment of the AIDS Watch Africa and the African Trust Fund for Women for the purpose of building the

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<sup>119</sup>Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Article 14(2)(c)

<sup>120</sup>F Viljoen Washington and Lee *Journal of Civil Rights and Social Justice, An Introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women Vol. 16 No.1* (Fall 2009) 46

<sup>121</sup>As above.

<sup>122</sup>The African Gender and Development Index 2011, Promoting gender equality in Africa.

capacity of women in Africa.<sup>123</sup> The Declaration prioritizes combating of the HIV/AIDS pandemic, malaria, tuberculosis and other infectious diseases, promoting participation of women in peace processes and the protection of all human rights for women and children. Other important areas of protection include; education of girls and the literacy of women, women's land and inheritance rights.<sup>124</sup>

In addition to the above, through the Declaration, governments have agreed to expand and promote the gender parity principle. Governments have undertaken to sign and ratify *the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* and have generally reaffirmed their commitment to treaties such as CEDAW and the UN Security Council Resolution 1325 (2000).<sup>125</sup>

The Declaration urges African countries to regularly report on the progress made in implementing the Declaration's provisions. In order to assist member states in their reporting responsibility, the ministers responsible for Women's Affairs and Gender, at their first AU Conference in Dakar, Senegal in October 2005 adopted two documents, namely: the Implementation Framework for the Solemn Declaration on Gender Equality in Africa (SDGEA) and the Guidelines for Monitoring and Reporting on the SDGEA.<sup>126</sup>

Thirty four per cent of member states which indicates that 18<sup>127</sup> African countries out of 53 have honoured their commitment to report on the progress in implementation of the Declaration as required under Article 12 of the Declaration.<sup>128</sup>

The Declaration is not legally binding but has been referred to in various subsequent decisions and policy plans. There is no sanction imposed on those who fail to submit reports neither is there a table or list of those states produced by the AU.<sup>129</sup> This makes it easy for states not to report since this has neither implication nor exposure by way of shaming on violating states.

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<sup>123</sup> As above.

<sup>124</sup> As above.

<sup>125</sup> The African Development Forum (ADF VI) *Achieving gender equality and women's empowerment in Africa, Progress Report 19-21 November 2008*

<sup>126</sup> <http://pambazuka.org/en/category/aumonitor/37905>

<sup>127</sup> These are Algeria, Burkina Faso, Burundi, Cameroon, Cote d'Ivoire, Ethiopia, Ghana, Lesotho, Mali, Mauritius, Namibia, Nigeria, Niger, Rwanda, Senegal, South Africa, Tunisia and Zimbabwe. Only one, Senegal, has submitted a second report: see Concept Paper, AU Experts meeting on the Status of Reporting and Implementation of the SDGEA and on African Women's Decade (2010-2020), 6-8 May 2009, Banjul, The Gambia.

<sup>128</sup> <http://www.pambazuka.org/aumonitor/comments/2613/>

<sup>129</sup> R Murray *Women's Human Rights in Regional Human Rights Systems: A review of experiences from Africa United Nations Development Fund for Women, June 2010.*

A number of treaties, decisions, declarations and documents have been adopted by the African Union to protect and promote the rights of women in Africa and especially foster gender equality.

The Solemn Declaration on Gender Equality in Africa is probably the most important one although subsequent to it other treaties and documents have found a place in the regional gender equality campaign. Examples of these include the Gender Policy,<sup>130</sup> the Maputo Plan of Action on Sexual and Reproductive Health<sup>131</sup> and the African Social Policy Framework<sup>132</sup> to mention but a few.

In conclusion, much as these decisions, declarations and documents are embedded with meaningful provisions that would go a long way in rectifying the imbalances that exist in terms of gender, they are only persuasive and can be used as models since non implementation bears no sanctions. States are not obliged to adopt them and so more often than not they are rendered useless or of limited worth.

Frequent use of these declarations, decisions and documents however has yielded positive results and in some cases has been considered as binding law for example where certain provisions are incorporated into domestic law.

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<sup>130</sup>Decision on the African Union Gender Policy, EX.CL/Dec.487 (XIV), Para. 3.

<sup>131</sup>Adopted 2007.

<sup>132</sup>Adopted 2008.

## Chapter four: What procedural mechanisms are available to women under the African Human Rights system?

### 4.1 Procedural Mechanisms

#### 4.1.1 African Commission on Human and Peoples' Rights.

The African Commission on Human and Peoples' Rights (hereinafter the Commission) was established by the African Charter on 2 November 1987 in Addis Ababa, Ethiopia. The Commission's Secretariat is located in Banjul, The Gambia.<sup>133</sup> Like Hansungule puts it, the Commission has been described as 'a regional human rights organization still under construction, caught between hard realities and the soft African Charter on Human and Peoples' Rights'.<sup>134</sup>

The Commission comprises of 11 members elected by the African Union Assembly and are experts nominated by the states parties to the charter. The African Union considers geographical and gender representation. The commissioners serve a 6 year term, are eligible for re-election and serve in their personal capacities. The Chair and Vice Chairperson serve a 2 year term and are eligible for re-election once.<sup>135</sup>

The mandate of the Commission is laid out in Article 45 of the African Charter. The Commission shall according to the provision of the Charter promote human and people's rights by sensitizing the public, collecting documents, undertaking studies and research on African problems related to human rights and disseminating information. In addition, the Commission is to make recommendations to governments, formulate and lay down principles and rules to solve human rights related problems if need be, as well as co-operate with the promotion and protection of human and peoples' rights.<sup>136</sup> It should be noted that there are no guidelines on how the Commission should deal with giving its views or making recommendations to governments since the Commission has not laid down any such principles or rules. This is a serious shortcoming of the Commission's mandate.<sup>137</sup>

The Commission shall ensure the protection of human rights through its communication procedure, friendly settlement of disputes, state reporting, working groups, special rapporteurs and other means under the conditions laid down by the Charter.<sup>138</sup> Much as the Commission has been in existence over a decade, its contribution to the protection

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<sup>133</sup> Celebrating the African Charter at 30: A Guide to the African Human Rights System Pretoria University Law Press (PULP)© 2011

<sup>134</sup> Inger Osterdahl, 'Implementing Human Rights in Africa – The African Commission on Human and Peoples' Rights and Individual Communications' Swedish Institute of International Law .Uppsala: Justus Fordag, 2002, p 9

<sup>135</sup> See n 83 above.

<sup>136</sup> African Charter on Human and Peoples' Rights Chapter II Article 45(1) a-c

<sup>137</sup> M Hansungule Towards a more effective African System of Human Rights: "Entebbe Proposals".

<sup>138</sup> See n 86 above Article 45(2)

of human rights in Africa cannot be said to be significant. Its enforcement, power and remedial authority structures leave a lot to be desired. In addition, public access to and awareness of the Commission's work is non-existent due to the confidentiality clauses.<sup>139</sup>

The Commission is mandated to interpret the Charter at the request of a state, organ of the AU or individual. No AU organ has requested an interpretation although some NGO's have.<sup>140</sup>

Lastly, the Commission shall perform any other task which may be entrusted to it by the Assembly of Heads of State and Government.<sup>141</sup>

Article 62 provides that, the Commission has the mandate to examine state reports submitted to them by states every two years and through it complaints by states.<sup>142</sup>

Much as the Commission is the key institution vested majorly with the promotional and protective functions of the African Charter under the African human rights system, like and other institutions it lacks a credible enforceable mechanism.<sup>143</sup> Some of the Commission's structural and normative challenges will be briefly discussed below.

One main challenge is that, the conditions laid down in the Charter restrict the ability of individuals to seek recourse to the Commission since the Charter lays down conditions dealing with states not individuals.<sup>144</sup>

More so, the Commission usually deals with communications between states three months after such a complaint and only if the issue has not been bilaterally settled through negotiations or any other peaceful methods.<sup>145</sup> If the complaint is sent to the Commission directly, it has to ensure that all local remedies have been exhausted.<sup>146</sup> In cases of intervention, the Commission's objective is to provide a solution for the states involved not the aggrieved individual. In this case, access to the Commission by individuals is almost impossible.

Another challenge the Commission faces which is an outcome of the challenge above is matters concerning individual complaints. As far as complaints are concerned, there is no provision for individual victims. Article 55 of the Charter merely refers to 'other communications' meaning that individual communications have to be read into this

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<sup>139</sup>See n 87 above

<sup>140</sup> As above Article 45(3)

<sup>141</sup> As above Article 45(4)

<sup>142</sup> African Charter on Human and Peoples' Rights Article 62

<sup>143</sup> Makau Mutua, see n 15 at 12

<sup>144</sup> M Hansungule, see n 87

<sup>145</sup> African Charter on Human and Peoples' Rights Article 48

<sup>146</sup> As above, Article 50

provision. The Charter basically suggests that a state party cannot be guilty of violating the rights of its people.<sup>147</sup> This misconception is aggravated by the fact that the members of the Commission are nominees of their national governments<sup>148</sup> which subjects them to political pressure or influence. In instances where the Commission has to entertain an individual petition, Article 56 of the Charter presents stumbling blocks which make it difficult for individuals to get redress.

The Charter appears to hinder redress through some of its provisions. Article 56(3) of the Charter requires that one should not write in disparaging or insulting language directed against the state concerned and its institutions. Similarly Article 56(5) requires that before one seeks redress from the Commission, they must have exhausted local remedies are examples of the unrealistic hurdles presented by Article 56. These prerequisites hinder individual victims seeking redress especially if the state is the violator of these human rights which is usually the case.

Furthermore, provisions like Article 55(2) of the Charter allow the Commission to consider a communication only if a simple majority of its members so decide. The effect of this is that victims are often turned away without a remedy or explanation. This poses certain questions for instance “why seek redress from a body that itself violates one’s rights without just explanation?”

Unfortunately, the Commission which is meant to exclusively promote and protect human rights by enforcing the provisions of the Charter cannot award damages, restitution or reparations, is not sufficiently empowered to condemn an offending state. Because it can merely make recommendations to parties, its power is persuasive but not binding and thus disregarded by member states. This scenario is unfortunately the state of the African Commission. The Commission is, like the saying goes; “a barking dog that does not bite”.

#### **4.1.2 The African Commission on Human and Peoples’ Rights and the rights of women in Africa.**

Some effort on the rights of women in Africa has been carried out by the Commission in their work. Although not significant some commendable work is evident especially on gender mainstreaming as well as on the limited access by women to social, economic and cultural resources.

One way in which the *African Union Constitutive Act* differs from the *Organization of African Union Charter* is in its promotion of gender equality as one of its foundational

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<sup>147</sup> M Hansungule See n 87

<sup>148</sup> African Charter Article 33

principles.<sup>149</sup> Gender mainstreaming became an important issue in the AU and the Assembly decided that the election of AU Commission members in the future should be based on a 50/50 parity principle.<sup>150</sup> The election of the African Commission's members now reflects the parity principle for example in 2008/2009; the Commission's Chairperson (Justice Sanji Monageng, presently the First Vice President of the International Criminal Court), Vice-Chairperson (Angelo Melo), and Secretary (Dr. Mary Maboreke) were all female.<sup>151</sup>

Presently the African Commission comprises of seven female commissioners out of the eleven members of the Commission. The chair (Honourable Catherine Dupe Atoki) and Vice chairpersons (Honourable Zainabo Sylvie Kaitesi) are women.

Institutionally in advancing the position of women's rights in Africa, the AU Commission established a Women and Gender Development Directorate within the Office of the Chairperson of the AU Commission. The Directorate is mandated to build the capacity of AU organs, RECs and member states to understand gender, develop skills for achieving gender mainstreaming targets and practices in all policy and programme processes and actions by 2010.<sup>152</sup>

As mentioned above, like every other substantive and procedural mechanism in the African Human Rights System, the Commission has a number of shortcomings. Due to an absence of guidelines to assist states in the reporting process, the practice of the Commission during the examination of state reports has been to leave questions about women's rights to the Special Rapporteur on the Rights of Women. The Special Rapporteur in turn usually poses a series of questions about women's rights without specific reference to the Women's Protocol. Eventually women's rights are considered part of the report under Article 18(3) of the Charter.<sup>153</sup> As discussed above, the inclusion of women's rights under the general family provision proves that women's rights are not afforded their rightful importance and are given limited or no attention at all.

Although it is evident that issues on women's rights could form the basis of complaints to the African Commission, these complaints have seldom been afforded access and

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<sup>149</sup> Constitutive Act Article 4(1) (The Constitutive Act was adopted on 11 July 2000 in Lome, Togo and entered into force on 26 May 2001. By 2003, all 53 OAU members became members of the AU.

<sup>150</sup> African Development Forum, see n 75 at 4

<sup>151</sup> See n 70 at 14

<sup>152</sup> AU Gender Policy at 4. See also R Murray, *Human Rights in Africa: From the OAU to the AU*, 155-156 (2004) Discussing the structures related to women within the AU.

<sup>153</sup> See n 70 at 36

where access to the Commission has been provided these complaints are auxiliary to other more prominent allegations.<sup>154</sup>

The fact that the Commission's advice and recommendations are only persuasive causes victims of human rights abuses like women to be reluctant to approach it.

Evelyn Ankumah, Executive director of Africa legal Aid and a leading commentator on the African Human Rights system comments that, the African Commission's effectiveness has been hampered by lack of publicity regarding its existence and mandate.<sup>155</sup> The work of the Commission and the seriousness of communications should be emphasized. The Commission's case *SERAC & Another v Nigeria*<sup>156</sup> is a notable precedent in which communication the Commission read in some rights missing in the African Charter and found the respondent (Nigeria) guilty of violating these rights. Once women are aware of such judgments, they will approach the African Human rights system frequently and with confidence. Creating awareness among women of their human rights and the institutions and mechanisms in place for them cannot be emphasized enough. Rectifying this situation would definitely solve the many dangers associated with ignorance whose ramification has been poverty, disease, inequality and a whole lot of disadvantages in the lives of many women in Africa.

## 4.2 African Court on Human and Peoples' Rights

The African Court on Human and Peoples' Rights<sup>157</sup> (herein after the Court) is a regional court that was established under Article 1 of the Protocol to the African Charter Establishing an African Court on Human and Peoples' Rights (Protocol to the African Charter)

During the 1990s, human rights activists and victims of human rights abuses in Africa advocated for the establishment of a judicial institution that would address the protection of human and peoples' rights in Africa. These efforts were realised when the Protocol to the African Charter was finally adopted in 1998

The Court which came into being on 25 January 2004 after ratification by 15 member states of the Protocol<sup>158</sup> was established in 2006 and is located in Arusha, United Republic of Tanzania.<sup>159</sup> Today, 26 states have ratified the Protocol.<sup>160</sup>

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<sup>147</sup>R Murray Women's Rights and the Organization of African Unity and African Union: The Protocol on the Rights of Women in Africa, in *International law: MORDERN FEMINIST APPROACHES* 253, 262 (Doris Buss & Ambreena Manji eds., 2005), at 257 (stating that the cases brought before the CEDAW, none specifically related to women's rights and only a few addressed women's rights as a secondary issue).

<sup>155</sup>GM Wachira *African Court on Human and Peoples' Rights: Ten Years and still no Justice* (2008) 11

<sup>156</sup>*Communication No. 155/2001 SERAC & Another v Nigeria* (2001), 15th Annual Activity Report: 2000–2002.

<sup>157</sup>Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Article 1

<sup>158</sup>As above

<sup>159</sup>[www.africa-court.org/en/](http://www.africa-court.org/en/)

Judges are elected for a six year term and can be re-elected once while the President and Vice-President are elected for a two year term and can be re-elected once.<sup>161</sup>

On 02 July 2006, 11 Judges of the African Court on Human and Peoples' Rights were sworn in before African leaders attending a summit meeting in Banjul, the Gambia.<sup>162</sup>

The main functions of the African Court are to complement the protective mandate of the African Commission which is the quasi-judicial implementation body of the African Charter<sup>163</sup> and to strengthen human rights protection in Africa. It became apparent to establish an institution whose decisions were legally binding while the African Commission on Human and Peoples' Rights made declarations and recommendations,<sup>164</sup> considering the criticisms and general outcry on the Commission's performance.

Article 5 of the Protocol to the African Charter Establishing an African Court on Human and Peoples' Rights and Rule 33 of the Rules of Court<sup>165</sup> provide that the Court may receive complaints and/or applications submitted to it either by the African Commission or state parties to the Protocol or African Inter-governmental organisations. Non-governmental organisations with observer status before the African Commission and individuals from states which have made a declaration accepting the jurisdiction of the court can also institute cases directly before the court. As of April 2012, five countries had made such a declaration.<sup>166</sup>

As recently as August 2010, the African Court had only handed down judgment in one case. On 15 December 2009 the Court delivered its judgement in *Yogogombaye v Senegal*.<sup>167</sup> The Court declined to exercise jurisdiction in the case as it was submitted against a state that did not allow for the submission of individual complaints directly to the Court.<sup>168</sup>

Access to the Court is possible in two ways only: automatic access which is enjoyed by the African Commission, state parties and African Inter-government Organisations and

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<sup>160</sup>Algeria, Burkina Faso, Burundi, Cote d'Ivoire, Comoros, Congo, Gabon, Gambia, Ghana, Kenya, Libya, Lesotho, Mali, Malawi, Mozambique, Mauritania, Mauritius, Nigeria, Niger, Rwanda, South Africa, Senegal, Tanzania, Togo, Tunisia and Uganda.

<sup>161</sup>See n 109

<sup>162</sup>S Lyons The American Society of International Law ASIL Insights - The African Court on Human and Peoples' Rights Volume 10, Issue 24, September 19, 2006

<sup>163</sup>F Viljoen A Human Rights Court for Africa and Africans.....

<sup>164</sup>EG Nalbandian 'The Challenges Facing African Court of Human and Peoples' Rights' (2007) 1 *Mizan Law Review* 75

<sup>165</sup> [www.africa-court.org](http://www.africa-court.org)

<sup>166</sup> Burkina Faso, Ghana, Malawi, Mali and Tanzania

<sup>167</sup>*Yogogombaye v Senegal* Application 1/2008

<sup>168</sup>Protocol to the African charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights Article 34(6)

Optional access enjoyed by individuals and Non-government Organisations but subject to two conditions; a) The Court has discretion to grant or deny such access.<sup>169</sup> b) The concerned state must have made a declaration accepting jurisdiction of the court to hear the matter.<sup>170</sup>

Considering the above fact, the Court like the rest of the African Human Rights System has serious shortcomings especially in the context of women's access to it.

The Court's limited access to individuals and Non-governmental organisations by the Protocol is problematic and reflects negatively on the court's standing and reputation to most Africans. This is especially so considering that individuals and NGOs are the primary beneficiaries and users of the Court.<sup>171</sup>

Because individuals are the typical consumers of human rights courts they should be rendered unfettered access.<sup>172</sup> It is also evident that NGOs have been big role players in the human rights system. This becomes apparent when analysing the individual complaints that have been lodged to the African Commission, most of which have been an initiative of these organisations.<sup>173</sup>

Access by women to the Court would be considered individual access and thus women would face the above challenge in seeking redress. The fact that a human rights court's primary purpose is to protect citizens against the state and other state agencies means that the African Court is failing to fulfil its primary obligation. As a result, the Court is in danger of having a futile existence.

No case has been taken to the Court by women. In the case of the Commission, state parties or inter-governmental organisation, limited referral to the Court has been registered.

Critics and supporters of human rights have argued that it does not make sense creating an institute which duplicates the weaknesses of the Commission. They further assert that a human rights court will only be useful if it genuinely seeks to correct the shortcomings of the African system. Addressing these shortfalls involves, but is not

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<sup>169</sup>As above, Article 5(3)

<sup>170</sup>As above, Article 34(6)

<sup>171</sup>Makau Mutua see n 15 at 28

<sup>172</sup>Dan Juma Access to the African Court on Human and Peoples' Rights: A case of Poacher turned Gamekeeper at 5. See also M. Mutua, 'The African Human Rights Court: A Two Legged Stool?' (1999) 21 *Human Rights Quarterly* 342 at 357-362 and also F. Viljoen, 'A Human Rights Court for Africa, and Africans,' (2004) 30 *Brooklyn Journal of International Law* 1 at 14-22

<sup>173</sup>C. E. Welch (ed.) *Protecting Human Rights in Africa: Roles and Strategies of Non-governmental organizations* (Philadelphia: University of Pennsylvania Press, 1995) and A. Motala, 'Non-governmental organizations in the African Court on Human and Peoples' Rights, M. Evans and R. Murray (eds.), *The African Charter on Human and Peoples' Rights: The System in Practice, 1986 – 2000*(Cambridge: Cambridge University Press, 2002) at 319, 320, at 257.

limited to providing victims of human rights violations with a tangible and accessible forum to further their basic rights. This differs from the current institution that promises little and delivers nothing.<sup>174</sup>

Complaints by individuals and NGOs relating to for instance, limited access to the Court and inadequate logistics for the maintenance of various human rights mechanisms, led to subsequent discussions on the drafting of a new protocol that would merge the African Court on Human and Peoples' Rights with the African Court of Justice. In July 2008, the AU Assembly of Heads of States adopted the *Protocol on the Statute of the African Court of Justice and Human Rights*.<sup>175</sup> The Protocol replaces the two *Protocols on the African Court of Human and Peoples' Rights* and on the *Court of Justice*.<sup>176</sup>

The African Court of Justice and Human Rights will comprise of two sections; a general affairs section handling all cases and a human rights division handling human rights related matters.

The new Court will comprise of 16 judges, three from each geographical region except West Africa which will be represented by four judges.<sup>177</sup> Gender representation will be a vital requirement in the nomination and election process.<sup>178</sup>

In conclusion, the African Court and the new merged Court's involvement and participation in women's rights issue will largely depend on the cases submitted to them.<sup>179</sup> Available access especially for individuals including women would be a fundamental achievement. It would represent the advancement towards the improvement of human rights protection and promotion on the African continent and globally.

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<sup>174</sup> Makau Mutua, n 15 at 31

<sup>175</sup> *Women's Human Rights in Regional Human Rights Systems: A review of experiences from Africa* Copyright © United Nations Development Fund for Women, June 2010 at 5

<sup>176</sup> Article 1 of the Protocol on the Statute of the African Court of Justice and Human Rights.

<sup>177</sup> As above, Article 3

<sup>178</sup> As above, Article 5 and 7(5)

<sup>179</sup> Sonya Sceats Africa's New Human Rights Court: Whistling in the Wind?

## Chapter five: Recommendations and Conclusions

### 5.1 Introduction

The existence of several human rights instruments and institutions prohibiting discrimination against women, mandating equality and emphasizing the dangers of negative cultural practices has not produced extra ordinary progress in the lives of women in Africa. The irony of this is that women themselves are in a position where they have accepted their plight by maintaining discriminatory tradition and customs and eventually passing on this attitude to the next generations.<sup>180</sup>

It is unrealistic to expect that the history and present situation of women in Africa would be addressed in a snap-shot by the African Charter, African Commission, African Court and all the other mechanisms of the African Human Rights Systems available to women.

### 5.2 Recommendations

- Regional and national civil society organizations like women Non-governmental organizations should lobby and advocate for the ratification as well as domestication of the African Women's Protocol by demanding and pressurizing their governments to do so since their position has been ignored for long enough.
- Government officials must be enlightened on their international obligation to domesticate once they have ratified and do away with the fear that once you domesticate, what you domesticated comes back to bite you.
- Law drafters should be trained to draw bills in which treaties can easily be domesticated.
- Promoting ratification, domestication and transparent reporting ensures that those states that do not protect and promote women's rights are easily identified and held accountable and furthermore, women would be more exposed and have access to mechanism like the African Women's Protocol tailor made to address redress in cases of violation of their rights.
- Laws and policies should be reviewed to ensure an alignment between provisions of the Women's protocol and national legislation as well as identify discrepancies therein for purposes of incorporation and domestication.
- In cases of discrepancy like discriminatory legislation, this kind of legislation should inspire women to take their stand against laws that marginalize them knowing that they are contrary to the provisions in the treaties and mechanism drafted to protect them.
- Programs and funding should be strategically aligned with the African human rights system. For example, women themselves and personnel involved in ensuring the

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<sup>180</sup> Keynote Address by HE Mrs Julia Dolly Joiner, commissioner for political affairs, Commission of the African Union, Symposium on the African Union's Protocol on the Rights of Women in Africa (21 January 2006, Khartoum)

protection and promotion of women's rights should be given sufficient knowledge of the mechanisms polices and laws in place for the protection of their rights. Demonstrating the process of implementation of the various mechanisms and procedures of the system would provide clear guidance on how women can actively make use of the system.

- Adequate and sustained funding of the African human rights system as a whole is one sure way by which laws and mechanisms will be enforced and their implementation monitored. Financial resources make possible and foster the smooth running of systems and processes for instance training, victim protection and free legal aid to needy women. Misappropriation of funds should be dealt with seriously and available resources evenly and strategically allocated.
- Knowledge of the mechanisms and processes of the African human rights system should motivate advocates of women's rights like women NGOs to bring cases of gross violation of women's rights for instance the Penal Code of Nigeria which allows husbands to chastise their wives to the African Commission without the requirement to exhaust local remedies. In these kinds of cases access to the system is direct.
- In addition to the above recommendation, women NGOs can bring situations where non state actors are perpetrators under Article 45 of the African Charter to the African Commission for interpretation and pronouncement as inconsistent with the Charter.
- Promotion of positive traditional and cultural practices by policy and law makers collaborating with community traditional leaders to highlight the fact that it is not generally tradition and culture that is being eliminated but the harmful practices that must be stamped out. Concerted effort would go a long way in eliminating harmful practices like FGM/C that women practice especially due to ignorance and them being long standing norms.
- Educate women especially the girl-child of their rights as early in primary school, sensitize women on their rights, laws protecting them, procedures available to them and the course of action they are entitled to in cases where their rights are abused for example that they can demand the government to forward reports on the promotion and protection of women's rights in their states. In this way civil society in this case women work at ensuring that governments are held accountable for providing transparent reports on the AFRICAN Women's Protocol.
- Teaching and training non legal practitioners involved in the system by which women seek redress for example the police force, forensic and health personnel as a measure towards effective professional service. Emphasis should be pointed towards training female personnel to make it easier for women to report and open up more freely.
- Training health workers in other disciplines alongside medical training is vital especially where they have to deal in cases of sexual violence for example. These health workers can be instrumental in collecting evidence, providing health care, emergency treatment, counseling as well as referring women to other necessary services which are cost effective and vital to them.

- Cost effective services tailor made for women should be employed. Setting up one stop shops with legal aid and which integrate various services would save women the lengthy and expensive process they encounter in seeking redress. In this way they would not have to travel far and incur high expenses in search of services they are entitled to but have been denied since they are aware of them and have them all in one place.
- Establishment of mobile courts especially in remote areas would complement the African human rights system in terms of accessibility to women. These courts are convenient and cost effective most especially when addressing recurring matters such as sexual violence. Having mobile courts strategically located in these areas of various communities would be an advantage to affording women redress for the violation of their rights.
- Legal pluralism comes highly recommended and is a widely used system in both developed and developing countries. Legal pluralism refers to the use of more than one legal order in addition to the formal justice order by a group or community. Looking to justice systems outside the formal system for faster, more effective and legitimate solutions where the available legal systems are weak is becoming a popular option worldwide.<sup>181</sup>
- Legal pluralism generally enhances choices and access by women to places of redress for the violation of their human rights. It is important for women to decide under which system their right is better claimable. These legal orders should not be perceived as opposing one another but rather as systems that complement each other especially where one legal order is weak or inconsistent with constitutional principles of equality and non-discrimination. All legal systems should function at the highest common denominator for women's rights.

Proper organization and putting systems that work in place is a sure way of ensuring the effective and smooth running of the African human rights system.

### **5.3 Conclusion**

Despite the challenges women face in accessing the African human rights system for example the discriminatory laws and gaps in the legal frameworks, impressive progress has been made towards the promotion and protection of women's rights in Africa. Although not significant, there is evidence that the African human rights system, some governments and civil society have united in reforming laws and mechanisms to monitor enforcement and implementation of women's rights. Women themselves play an instrumental role in their quest for change as lawyers, judges, legislators and women's rights activists. The effective functioning of the African human rights system is a project

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<sup>181</sup>See n 2 at 66

that both those that offer redress of human rights violations and the victims of these violations have embarked on perfecting.

The challenges women face are not lack of human rights instrument and mechanisms because the system comprises a number of these, but the lack of political will or commitment by states and lack of commitment from human rights institutions to effectively implement human rights provisions at national and regional level. The obstacles that hinder women access to the system create a difficult road that must be trodden to improve the status of women in Africa.

One significant opinion that critics and supporters of human rights have argued is that, it does not make sense creating new institutions and adopting legislation that duplicates the weaknesses of the system already in existence. Rather perfect the mechanisms of the existing system which in turn saves time, resources and produces faster and practical remedies. It would be more viable to rectify the shortcomings of the system in existence by providing women victims of human rights violations, real accessible forum to vindicate their basic rights.<sup>182</sup>

Indeed the African human rights system has put in place enough mechanisms but judging from the snail pace and stagnation of the development in women's rights, it is evident that implementation of the mechanisms has been and still is a challenge.<sup>183</sup>

The African human rights system has great potential to implement positive change for women in Africa. Once the recommendations suggested in this work and the valuable opinions of various advocates of women's rights are considered, commendable progress would be experienced by those whose voices have gone unheard in the past. These recommendations are not complex but are achievable and once placed in the rights context would go a long way in improving the status of women whose challenges to access the system, though considered common knowledge, has received fairly minimal attention.

The African human rights system is the anchor of hope for victims of human rights violations especially those marginalized in society. Giving up on the system therefore would be a great discouragement to those who entirely depend on it for the protection and promotion of their human rights.

It is not only right but paramount therefore to ensure that governments, non-government bodies that promote human rights and established human rights institutions work together to effectively establish a strong and working system of human rights in Africa. One that not only addresses problems brought to it but goes the extra mile to prevent

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<sup>182</sup>See n 124

<sup>183</sup> R Musa Women's Equality and the African human rights system, 2007, Issue 328 See also <http://pambazuka.org/en/category/comment/44415>

these problems from occurring. Like the saying goes “Prevention is better than cure”. In this way the system will prove wrong its negative critics that refer to it as a “dog that barks but cannot bite”. Indeed as mentioned above there is still hope, it is not too late to affect change, the people of Africa, in this case the women have their lives riding on the success of this system, it should perform. Challenging as it may be, change for progress is possible.

Notwithstanding the several imperfections of the African human rights system, all hope is not gone. The system still has immense potential to change its reputation from the “toothless watchdog” it is said to be, to an efficient system that meets the needs of those who approach it.

## BIBLIOGRAPHY

### BOOKS

A.A. Yusuf & F. Ouguergouz (eds.), *The African Union: Legal and Institutional framework: A Manual on the Pan-African Organization*. Martinus Nijhoff 2012

*Celebrating the African Charter at 30: A Guide to the African Human Rights System*  
Pretoria University Law Press (PULP) © 2011

C. E. Welch (ed.) *Protecting Human Rights in Africa: Roles and Strategies of Non-governmental organizations* (Philadelphia: University of Pennsylvania Press, 1995)

E Ankumah, *The African Commission on Human and Peoples' Rights: Practice and Procedures*, The Hague: Martinus Nijhoff (1996)

F Viljoen (2007) *International human rights law in Africa* Oxford: University of Oxford Press.

*P Alston (ed.) (1994) The Best Interests of the Child: Reconciling Culture and Human Rights. Oxford: Clarendon Press.*

R J Cook *Human Rights of Women: National and International Perspectives*. University of Pennsylvania press 1994

*R Murray, Women's Human Rights in Regional Human Rights Systems: A review of experiences from Africa* Copyright © United Nations Development Fund for Women, June 2010

R Murray, *Human Rights in Africa: From the OAU to the AU, Discussing the structures related to women within the AU*. Cambridge University Press 2004

*Roselyn Musa, Faiza Jama Mohammed and Firoze Manji (eds) (2006) Breathing Life into the African Union Protocol on Women's Rights in Africa. Oxford, Nairobi and Addis Ababa: Fahamu, SOAWR and the African Union Commission Directorate of Women, Gender and Development. ISBN: 978-1-9-4855-66-8*

### CHAPTERS IN BOOKS

B. Gawanas 'The African Union: Concepts and implementation mechanisms relating to human rights' in A Bosl and J Diescho *Human Rights in Africa: Legal perspectives on their protection and promotion* (2009) 187.

Cees Flinterman & Evelyn Ankumah, "The African Charter on Human and Peoples' Rights," in *Guide to International Human Rights Practice* 159 (Hurst Hannum, ed., 1992).

Chaloka Beyani, "Towards a More Effective Guarantee of Women's Rights in the African Human Rights System," in *Human Rights of Women: National and International Perspectives* 285 (Rebecca Cook, ed., 1994)

C Heyns and F Viljoen, 'The Regional Protection of Human Rights in Africa. An Overview and Evaluation' in Zelela, P.T., and McConaughay, P.J., *Human Rights, the Rule of Law, and Development in Africa* (University of Pennsylvania Press, 2004) 129,131

Florence Butegwa, "Using the African Charter on Human and Peoples' Rights to Secure Women's Access to Land in Africa," in *Human Rights of Women: National and International Perspectives* 495 (Rebecca Cook, ed., 1994)

R Murray, *Women's Human Rights in Regional Human Rights Systems: A review of experiences from Africa United Nations Development Fund for Women, June 2010.*

Shelton D. 'The Promise of Regional Human Rights Systems' in Weston B. and Marks S. (eds.) *The Future of International Human Rights* (1999) 351, 353-398.

SB Keetharuth 'Major African legal instruments' in A Bosl and J Diescho *Human Rights in Africa: Legal perspectives on their protection and promotion* (2009) 187

Susanna Mikhail, *Child Marriage and Child Prostitution, in GENDER, TRAFFICKING, AND SLAVERY* (2002) 43.

## **HUMAN RIGHTS INSTRUMENTS**

African Charter on Human and Peoples' Rights (1981/1986)

Constitutive Act of the African Union (2000)

Convention on the Elimination of Discrimination Against Women (1979/1981)

International Convention on Civil and Political Rights (1966/1976)

International Covenant on Economic, Social and Cultural Rights (1966/1976)

Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998)

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003)

Protocol on the Rights of Women in Africa\_ An Instrument for Advancing Reproductive and Sexual Rights' (Feb 2006) Centre for Reproductive Rights

Rules of Procedure of the African Commission on Human and Peoples' Rights (1995)

Solemn Declaration on Gender Equality in Africa (2004)

Universal Declaration of Human Rights (1948)

### **OTHER DOCUMENTS**

African Commission on Human and Peoples' Rights, Account of Internal Legislation and the Dispositions of the African Charter on Human and Peoples' Rights, doc. II/ES/ACHPR/4.

CEDAW Concluding Observations: Eritrea CEDAW/C/ERI/CO/3 (3 February 2006) at para 14

Decision on the African Union Gender Policy, EX.CL/Dec.487 (XIV), Para. 3.

### **CASE LAW**

*Bhe and Others v Khayelitsha Magistrate and Others* (2004) AHRLR 212 (SACC 2004)

*Civil Liberties Organization v. Nigeria* (2000) AHRLR 188 (ACHPR 1995)

*Elizabeth Mwanza v Holiday Inn Hotel*, 1997/HP/2054(unreported)

*Ephrahim v Pastory* (2001) AHRLR 236 (TzHC 1990)

*International Pen v Chad*, Communication No.55/91, 7<sup>th</sup> Annual Activity Report: 1993-1994

*Sara H. Longwe v Intercontinental Hotels* 1992/HP/765 (1993) 4 LRC 221 (High Court of Zambia)

*SERAC & Another v Nigeria* (2001), *Communication No. 155/2001*, 15th Annual Activity Report: 2000–2002.

*The Attorney General of the Republic of Botswana v Unity Dow* (2001) AHRLR 99 (BwCA 1992)

*Yogogombaye v Senegal* Application 1/2008

## **ARTICLES & PAPERS**

A. Motala, 'Non-governmental organizations in the African Court on Human and Peoples' Rights,' in M. Evans and R. Murray, *The African Charter on Human and Peoples' Rights: The System in Practice 1986-2000* (Cambridge: Cambridge University Press, 2002)

C Anyangwe 'Obligations of States to the African Charter on Human and Peoples' Rights' (1998) 10 *African Journal of International and Comparative Law* 625.

CH Heyns, *The African Regional Human Rights System: The African Charter* (2004) *Harvard Human Rights Journal* 687 – 88

DM Chirwa, Reclaiming (WO)manity: The merits and demerits of the African Protocol on Women's Rights" (2006) 53 *Netherlands International Law Review* 95

E. Claude, Welch, Jr., "Human Rights and African Women: A Comparison of Protection under Two Major Treaties," 15 *Hum. Rts. Q.* 548, 555 (1993)

EG Nalbandian 'The Challenges Facing African Court of Human and Peoples' Rights' (2007) 1 *Mizan Law Review* 75

Franciska Issaka et al, Realising women's Equality Rights in Africa, The delicate balance between culture and universality of rights

F. Viljoen, 'A Human Rights Court for Africa, and Africans,' (2004) 30 *Brooklyn Journal of International Law* 1 at 14-22

F Viljoen, An introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa" (2009) 16 *Washington & Lee Journal of Civil Rights & Social Justice* 17

G.W. Mugwanya 'Realizing Universal Human Rights Norms through Regional Human Mechanisms: Reinvigorating the African System (1999) 10 (1) *Indiana International and Comparative Law Review* 40-41.

Inger Osterdahl, 'Implementing Human Rights in Africa – The African Commission on Human and Peoples' Rights and Individual Communications' Swedish Institute of International Law. Uppsala: Justus Fordag, 2002, p 9

Joe Oloka-Onyango, "The Plight of the Larger Half: Human Rights, Gender Violence and the Legal Status of Refugee and Internally Displaced Women in Africa," 24 *Denver J. Int'l L. & Pol.* 349, 371-74 (1996)

L Kois Article 18 of the African Charter on Human and Peoples' Rights: A Progressive Approach to Women's Human Rights (1997)3 East African Journal of Peace and Human Rights 92 94-5

M Hansungule Towards a more effective African System of Human Rights: "Entebbe Proposals" presented at the First International Conference on: The Application of the Death Penalty in Commonwealth Africa organized by the British Institute of International and Comparative Law held on 10th to 11th May 2004 at Entebbe, Uganda.

Manisuli Ssenyonjo 'Culture and the Human Rights of Women in Africa: Between Light and Shadow' Journal of African Law Vol 51 No 1(2007).

M Mutua, The African Human Rights Court: A Two-Legged Stool, 21 Human Rights Quarterly 342-363 (1999).

M Mutua, The African Human Rights System in a Comparative Perspective, "3 Review of the African Commission on Human and Peoples' Rights 5-11 (1993).

M Mutau, The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties, 35 Virginia Journal of International Law 339-380 (1995).

Odinkalu, C.A., 'Complementarity, competition or contradiction: the relationship between the African Court on Human and Peoples' Rights and regional economic courts in East and Southern Africa', presentation to Conference of East and Southern African States on the Protocol Establishing the African Court on Human and Peoples' Rights, Gaborone, Botswana, 9–10 December 2003

Oloka-Onyango & S Tamale 'The Personal is Political? Or why Women's Rights are Indeed

Human Rights: AN African Perspective on International Feminism '(1995) 17 *Human Rights Quarterly* 715.

P Kameri-Mbote, Gender issues in Land Tenure Under Customary Law: E Mwangi (ed.) Land Rights for African Development: From Knowledge to Action (2005)

Richard Gittleman, "The African Charter on Human and Peoples' Rights: a Legal Analysis," 22 Va. J. Int'l L. 667 (1982)

R Murray, Women's Rights and the Organization of African Unity and African Union: The Protocol on the Rights of Women in Africa" in Doris Buss and A. Manji, *International Law: Modern Feminist Approaches* (Oxford: Hart Publication, 2005)

R Musa Women's Equality and the African human rights system, 2007, Pambazuka News328: Special Issue: Africa's long road to rights

RS Knight, Statutory Recognition of Customary Land Rights in Africa: An Investigation into best practices for law making and implementation. Food and Agricultural Organization of the United Nations Rome 2010 at 31

S Lyons, The African Court on Human and Peoples' Rights The American Society of International Law ASIL Insights Volume 10, Issue 24, September 19, 2006

Sonya Sceats Africa's New Human Rights Court: Whistling in the Wind? IL BP 09/01 2009

T Kankasa-Mabula "The enforcement of human rights of Zambian women: Sara Longwe v Intercontinental Hotel revisited" (1989–1992) 21–24 Zambia Law Journal 30.

T Van Boven 'The relations between peoples' rights and human rights in the African Charter' 7 Human Rights Law Journal (1986)

VO Nmehielle, "Development of the African Human Rights System in the Last Decade." Human Rights Brief 11, no. 3 (2004): 6-11.

## **REPORTS**

Amnesty International 2007b. *Uganda: Doubly Traumatized: The lack of access to justice for female victims of sexual and gender-based violence in Northern Uganda*. London: Amnesty International.

A Harrington and T Chopra. 2010. "Arguing Traditions: Denying Kenya's Women Access to Land Rights." Justice for the Poor Research Report No. 2. World Bank, Washington, DC

GM Wachira, (ed.), *Regional and Sub-regional Platforms for Vindicating Human Rights in Africa, 6 Judiciary Watch Report*, Nairobi, Kenyan Section of International Commission of Jurists, 2007.

GM Wachira *African Court on Human and Peoples' Rights: Ten Years and still no Justice* (London: Minority Rights Group International, 2008) 4

Human Rights Watch Reports on Gender-Related Abuses and AIDS in Africa, *A call for Action on HIV/AIDS-Related Human Rights Abuses Against Women and Girls in Africa, 2002*.

Judicial Service of Ghana, "The Role of the Judiciary in Promoting Gender Justice in Africa." *Report of the Partners for Gender Justice Conference hosted by the Judicial Service of Ghana*. 19–21 November 2008, Accra, Ghana.

M Mutua, *The African Human Rights System: A Critical Evaluation*, (Human Development Report 2000 Background Papers)

M Mukhopadhyay and S Quintero *Gender and access to justice in sub-Saharan Africa* Report of the conference held 29-30 October 2008 in Johannesburg, South Africa. Amsterdam: KIT and CALS (2008)

The African Development Forum (ADF VI) *Achieving gender equality and women's empowerment in Africa, Progress Report* 19-21 November 2008

The African Gender and Development Index 2011, Promoting gender equality in Africa.

UN Women *The 2011 – 2012 Progress of the World's Women – In Pursuit of Justice* 6 July 2011

UN Women *Analysis of data from World Bank 2010C* Data as of January 2011

US Department of State Country Reports on Human Rights Practices – 2005, Nigeria (8 March 2006, released by the Bureau of Democracy, Human Rights, and Labor.

## **DISCUSSIONS**

Conversation with Judy Oder, at the INTERIGHTS offices, London, 10 December 2007

Discussion with Commissioner Angela Melo during the seminar on the rights of ethnic, linguistic and religious minorities in Africa' organized by MRG, 10-12 March 2008, Pretoria South Africa.

Discussion with Commissioner Angela Melo during the 42<sup>nd</sup> Ordinary Session of the African Commission, Congo Brazzaville, 16 November 2007.

Keynote Address by HE Mrs Julia Dolly Joiner, commissioner for political affairs, Commission of the African Union, Symposium on the African Union's Protocol on the Rights of Women in Africa (21 January 2006, Khartoum)

Lecture on Protection of Human Right in Africa by the President of African Court on Human and Peoples' Rights Honorable Prof Gerald Niyunyko at Tumaini University Arusha Tanzania, 8 June 2012

## **INTERNET SOURCES**

[www.africa-court.org](http://www.africa-court.org)

[http://www.africancourtcoalition.org/content\\_files/files/ChidionComplementarity.doc](http://www.africancourtcoalition.org/content_files/files/ChidionComplementarity.doc)

[www.capri.cgiar.org/wp/..%5cpdf%5cbrief\\_land-05.pdf](http://www.capri.cgiar.org/wp/..%5cpdf%5cbrief_land-05.pdf)

[www.ohchr.org](http://www.ohchr.org)

[www.ohchr.org/en/issues/pages/whatareHumanRights.aspx](http://www.ohchr.org/en/issues/pages/whatareHumanRights.aspx)

<http://pambazuka.org/en/category/aumonitor/37905>

<http://www.pambazuka.org/aumonitor/comments/2613/>

<http://pambazuka.org/en/category/comment/44415>

[www.reproductiverights.org](http://www.reproductiverights.org)

<http://www.state.gov/g/drl/rls/hrrpt/2005/61586.htm>

<http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm>